REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 109 OF 2011

COMMERCIAL BANK OF AFRICA LIMITED…….....PLAINTIFF

VERSUS

LALJI KARSAN RABADIA.....1ST DEFENDANT

CHANDRAKANT LALJI RABADIA…….....….2ND DEFENDANT

PRAVIN JADVA RABADIA…….....….3RD DEFENDANT

JUDGMENT

1. The matter for determination before me is an appeal from the decision of the Learned Deputy Registrar, Mr. R. Nyakundi, which was made on 18th September 2013. The said appeal is premised on the following grounds, which are spelt out on the Memorandum of Appeal dated 23rd September 2013;

> *"1. The Deputy Registrar erred in holding that the defendants/Judgment debtors were not required to attend in person to show cause.*
>
> *2. The Deputy Registrar erred in holding that the defendants/Judgment debtors could show cause through their advocates and/or affidavits which were not subject to cross-examination.*
>
> *3. The Deputy Registrar erred in holding that the burden of proof on a notice to show cause issued under Order 22 Rules 18, 31 and 34 (1) of the Civil Procedure Rules, 2010 is on the Decree holder.*
>
> *4. The Deputy Registrar erred in failing to appreciate the difference between the procedure, process and burden of proof between the hearing of the notice to show cause and the decision whether to commit a judgment debtor to civil jail.*
>
> *5. The Deputy Registrar should have held that the defendants/Judgment debtors had failed to show cause why a warrant of arrest should not issue against them.*
>
> *6. The Deputy Regi*strar erred in dismissing the applications".

2. Mr. Ken Fraser, the learned advocate for the appellant, submitted that when the appellant had applied to the court for the issuance of a Notice To Show Cause, it did so using Appendix D, Form 5 in the old

Civil Procedure Rules. It did so because the Civil Procedure Rules, 2010 did not contain the relevant Forms, for use in making applications for execution.

3. As the relevant Forms had been omitted from the current Rules, the appellant pointed out that parties and the courts had therefore continued utilizing the old forms.

4. For that reason, the appellant's application was for the execution of the Decree;

> *"By notice to show cause why the judgment debtor should not be arrested and committed to civil jail in default of payment"*.

5. However, when the court issued the Notice To Show Cause, the said Notice indicated to the Judgment – Debtor as follows;

> *"Your are to appear before this Court…. in person or by an advocate or by agent duly authorized and instructed to show cause, if any, why execution should not issue"*.

6. In response to that Notice, the Judgment – debtor instructed his lawyers, Wasuna & Company Advocates, who proceeded to file an Affidavit sworn by the 1st Defendant, LALJI KARSAN RABADIA.

7. Thereafter, when the application came up for hearing, the defendants did not personally attend court. Instead, they sent their lawyer, Mr. Wasuna Advocate.

8. According to the appellant, it was now appealing against the decision by the Deputy Registrar, to the effect that there was no need for the judgment – debtors to appear in person, on the Notice To Show Cause.

9. It is correct to state, as the appellant has done, that in the prescribed Form, at Appendix D the following words are used;

> *"Whereas…. had made application to this court for execution of the decree in Suit No. ….. of 19…..,… this is to give you notice that you are to appear before this court on the…..… day of ……..… 19…..… to show cause why execution should not be granted"*.

10. The respondents do not dispute that fact. However, they contend that the appellant must be deemed to have read and noted that the Notices To Show Cause which the court issued expressly told the respondents that they could appear before the court;

> *"….in person or by an advocate or agent duly authorized and instructed to show cause if any…."*

11. After the court issued those Notices To Show Cause, the appellant caused them to be served upon the respondents.

12. Therefore, because the Notices To Show Cause actually gave express authority to the respondents to choose the manner in which they would appear before the court, the respondents contend that they duly complied with the requisite Notices when they sent their advocate to attend court on their behalf.

13. It is significant to note that when the execution application first came up for hearing on 29th August 2013, Mr. Fraser Advocate said;

> *"The Notice To Show Cause for the three judgment – debtors was duly filed on 22/8/2013. The affidavits are as set out in the file. I will wish to cross-examine the defendants on the affidavit herein. They are not present"*.

14. Mr. Wasuna Advocate responded by pointing out that;

"The Notice To Show Cause indicated that the defendants can appear vide agent or legal representative".

15. He went on to add that although the respondents were not present in person, they had shown cause why execution should not be granted. They were said to have shown cause through the Affidavit of Lalji Karsan Rabadia.

16. The respondents also asserted that although the court had the discretion whether or not to allow a deponent to be cross-examined, the appellant herein had not shown sufficient cause to justify the proposed cross-examination.

17. At that stage, the respondents told the learned Deputy Registrar that they wished to have an opportunity to make submissions on points of law, regarding the Notice To Show Cause.

18. The appellant responded by pointing out that the matter which was before the court, at that stage, was one that was in relation to whether or not the respondents would show cause why execution should not proceed against them.

19. After the appellant's said response, the learned Deputy Registrar informed the parties that he would deliver his Ruling on 3rd September 2013.

20. The Ruling was delivered as scheduled. In the said Ruling the learned Deputy Registrar, Mr. Reuben Nyakundi expressed himself thus;

"The court is at liberty in the course or before a final order, upon considering materials placed before it and applicable to order, or direct personal attendance of a party to clarify or be cross-examined. The said discretion would be to ensure justice of the parties to application fulfill the tenests of fairness.
The advocates before me representing both parties have a right to make submissions why orders sought should/should not issue. In the event a need arises in the course and before a final order, court can exercise judicial discretion within the rules to require personal attendance of judgment debtors. However, at this stage, that need has not arisen, as duty of the parties to demonstrate the merits and demerits of the order sought on execution".

21. Having made that Ruling, Mr. Nyakundi directed the parties to make submissions on the Notice To Show Cause, on 5th September 2013. But the parties thereafter persuaded the court to proceed with the Notice To Show Cause on 3rd September 2013.

22. Mr. Wasuna proceeded to address the court on the reasons why the respondents ought not to be committed to civil jail.

23. He explained that the respondents were directors of Kajulu Holdings, but that they had lost their said positions when Receivers were appointed over the assets and liabilities of the company.

24. In the light of the fact that the Receivers were still in control over the company, the respondents said that they had no source of earning any income.

25. The Receivers were also said to have sold the assets of the company, earning Kshs. 240,000,000/-.

26. Following the sale of the company's assets, the respondents submitted that they were unable to repay the balance of the decretal amount. They emphasized that theirs was not a case of a refusal to meet their obligations, but one of inability.

27. In answer to those submissions, the appellant reiterated that, at that stage;

"My position is to have them appear and show cause. I have not asked them to be committed but

to show cause. The only matter in issue is for the judgment – debtor to appear and show cause. There is no right to file an affidavit, but it is for them to appear and demonstrate the same if we look at the affidavits".

28. The appellant asserted that the respondents had concealed a great deal of information on how they survive. Therefore, the appellant's view was that the respondents;

"Have not shown cause on the matter before court".

29. Senior Counsel, Mr. Fraser concluded his remarks by urging the court to order for the arrest of the respondents, so that they could thereafter be called upon to show cause why they should not be committed to civil jail. In effect, the appellant was still urging the court to compel the respondents to appear before the court.

30. After those submissions, the court delivered its Ruling on 18th September 2013.

31. In that Ruling, the learned Deputy Registrar observed as follows, regarding the absence of the respondents from court at the hearing of the application for Notice To Show Cause why they should not be arrested and committed to civil jail;

"That issue of their absence became contentious, culminating in this court issuing directions that their presence be done away (with) pending submissions to be made by appointed advocates".

32. In my understanding of the Ruling delivered on 3rd September 2013, the Deputy Registrar did not reject the appellant's request that the respondents should be available in court, for cross-examination. On that date, the learned Deputy Registrar left open the issue as to whether or not the respondents would be summoned to court before the court could make its final orders on the application for execution.

33. The only definitive direction given on 3rd September 2013 was that the respondents did not need to be in court from the outset of the hearing of the application for execution.

34. That direction for execution was at variance with the appellant's understanding, which was that before the application could commence, and in order to enable the application for execution to proceed, the judgment – debtors had to first be present in court.

35. Ultimately, the Deputy Registrar concluded thus;

"The application on Notice to Show Cause as presented to court and served upon the respondents provides for an option of an advocate or duly appointed agent. His/her personal presence can be dispensed with till such a time when a substantive order requiring personal execution has been made by the court. There is no mandatory requirement that a debtor be present in court before an order for imprisonment is made".

36. Had not that holding been made by the learned Deputy Registrar in his Ruling dated 18th September 2013, I would have accepted the respondents' contention that it would not have been open to the appellant to revisit, in this appeal, an issue which had been determined on 5th September 2013.

37. In this case, the Deputy Registrar made a finding in his Ruling dated 18th September 2013, answering the question as to whether or not it was mandatory for a judgment – debtor to be present in court before the court could proceed with an application for execution by way of the arrest and committal of the said judgment – debtor to civil jail.

38. As the appellant is of the view that that decision is erroneous, it was open for the appellant to challenge that decision through this appeal.

39. The learned Deputy Registrar also held as follows;

"The applicant's application before this court was not to examine the respondents in relation to their means; assets/ liabilities; their income; real or potential list of dependants, but for them to Show Cause why they should not be committed to prison. The basis being that they have failed to satisfy the decree against them".

40. Whilst it is correct to say that the substantive formal application filed by the appellant was a Notice requiring the respondents to Show Cause why they should not be arrested and committed to civil jail, it would be inaccurate to say that the appellant did not apply to examine the respondents about their assets and liabilities.

41. As early as 29th August 2013, Mr. Fraser Advocate had told the court that the appellant wished to cross-examine the defendants on the affidavit which the 1st respondent had filed in court.

42. The explanation advanced by the appellant for the desire to cross-examine the respondents was that the respondents were concealing a great deal of information on how they survive.

43. By its very nature an application requiring a judgment – debtor to Show Cause why execution should not issue against him, places the onus on the judgment – debtor to Show Cause. That burden cannot shift to the Decree – Holder.

44. In this case, the respondents were given options on how to answer to the Notice To Show Cause. The respondents cannot therefore be faulted for choosing one of the options which were offered to them.

45. The Judiciary may wish to ascertain the origin of the Form which was used in this case. The reasons why that Form was used and whether or not such use was in compliance with the law is, in my considered opinion, beyond the scope of the appeal.

46. I say so because the respondents and the learned Deputy Registrar cannot be said to have reached an erroneous decision when the respondents exercised an election within the scope expressly provided for by the Court. Thereafter, the Deputy Registrar upheld the respondents' right to make the choice to be represented by an advocate.

47. However, after the advocate had come to court, the respondent asked the Deputy Registrar to direct the respondents to attend court for cross-examination.

48. Whilst it is true to state, as did the Deputy Registrar, that a court of law has discretion on whether or not to direct that a judgment – debtor do appear in court for cross-examination, I hold the considered view that the learned Deputy Registrar erred by rejecting the appellant's request for an opportunity to cross-examine the respondents'.

49. I say so because the appellant had already made the bold assertion, that the respondents were concealing a great deal concerning how they were surviving. That implied that although the respondents had filed an affidavit to try and explain why they had no means which they could use to pay the balance of the decretal amount, the appellant believed that the contents of the affidavits did not reveal the true picture about the respondents' assets and abilities.

50. Of course, it would then be upon the appellant to demonstrate, through the proposed cross-examination, whether or not the respondents had concealed a great deal of information.

51. The only way that the appellant would be accorded the opportunity to demonstrate to the court that the respondents were concealing a lot of information, would be through cross-examination.

52. I therefore find and hold that the rejection of the appellant's request that the respondents do attend court, for purposes of cross-examination, was erroneous.

53. According, I now set aside that order, and replace it with an order directing each and every one of

the three (3) respondents to attend court in person, for purposes of cross-examination by the appellant.

54. After the cross-examination and later the re-examination of the respondents, the Deputy Registrar would be in a position to make an informed decision as to whether or not the respondents or any of them had Shown Cause why execution should not be levied against them through the process of arrest and detention in civil jail.

55. As it is not known what will be the outcome of the cross-examination and re-examination, it would be speculative for this court to delve into the constitutionality of an order for the committal of a judgment – debtor into civil jail.

56. If the learned Deputy Registrar came to the conclusion that the respondents had not Shown Cause, and that they or any of them should be arrested and committed to civil jail, there might arise a reason to concern ourselves with the questions of constitutionality, if the same were to be raised.

57. The learned Deputy Registrar appeared to appreciate the fact that some questions had not yet arisen, hence his comments;

> *"At the tail end of this application, if I had to make a final determination on the relief sought, I would have weighed the materials, circumstances of the case, the background of the commercial obligation between the parties. The question I could have endeavoured to answer....."*

58. As the learned Deputy Registrar expressly acknowledged that he had not yet been called upon to make a final determination on the relief sought, it is not clear to me why he then proceeded to dismiss the petition on the grounds that it lacked merit. But, perhaps, he was dealing with the appellant's application for an order that the respondents should come to court personally, so that they could be cross-examined. If that be the position, then, as I have already held, there was sufficient reason to warrant the personal appearance of the respondents for cross-examination.

59. Accordingly, the appeal is allowed. The respondents should attend court in person, for purposes of cross-examination by the appellants.

60. The costs of the appeal are awarded to the appellant.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **4th day** of **November** 2014.

FRED A. OCHIENG

JUDGE

<u>Judgment read in open court in the presence of</u>

……..…..... for the Plaintiff.

……..... for the 1st Defendant.

…….….. for the 2nd Defendant.

……..for the 3rd Defendant.

Odhiambo.