



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CIVIL APPEAL NO.1 OF 2018

GERALD IHA THOYA.....APPELLANT/PLAINTIFF

VERSUS

THE REGISTRAR OF LANDS KILIFI

THE ATTORNEY GENERAL

WERU GROUP.....RESPONDENTS

RULING

1. By a Notice of Motion application dated and filed herein on 17th April 2018, the Appellant Gerald Iha Thoya prays for orders that:-

2. The Court is pleased to issue an injunction initially for 14 days and thereafter for as long as the Court may order, or parties agree, to stop and bar the Deputy Registrar of this Court from further continuing with the hearing of the Notice to show cause dated 31/1/2018 with the result that Gerald Iha Thoya is discharged from prison, until this application is heard inter-partes and the appeal herein is heard and determined;

3. In the alternative, the Court suspends or stays the execution of, and injuncts the further implementation of the order of appellant's committal to civil jail in execution of a decree made on 16/4/2018, pending the hearing and determination of this application inter-partes, and ultimately the appeal hearing.

2. The application which is supported by an affidavit sworn by the Appellant's Advocate Stephen (AKA Suleiman) Macharia Kimani is premised on the grounds inter alia that:-

i) The Plaintiff in Malindi HCCC No. 106/2012(OS) had its Complaint struck out on 12th December 2017 after it failed to amend the Statement of claim with costs awarded to the 3rd Respondent;

ii) The successful party never applied for costs but proceeded to lodge and tax a bill of costs which was allowed at Ksh 18,029.863/;

iii) On 31st January 2018, a notice to show cause was issued to the Appellant requiring him to show cause why he should not be committed to civil jail. On 16th April 2018, he was committed to civil jail for an indefinite period;

iv) That no order for payment of costs had ever been made against the Appellant prior to that time and the resultant committal is illegal, irregular and a complete nullity;

v) That the said committal is capricious and contrary to law as the Judgment-debtor was not examined as required by rule 34 of Order 22 of the Civil Procedure Rules.

3. In a Replying Affidavit sworn by the 3rd Respondent's secretary one Francis Kalume and filed herein on 2nd May 2018, the 3rd Respondent characterizes the Appellant's application as being misconceived, made in utmost bad faith and an abuse of the Court process.

4. It is the 3rd Respondent's case that the Deputy Registrar of this Court was by all means acting within the purview of the law and hence the application ought to be dismissed with costs.

5. The 1st and 2nd Respondents did not oppose the application.

6. I have considered both the application and the response thereto. I have equally considered the oral submissions as made before me by Mr. Kimani, Learned Counsel for the Appellant on the one side and Mr. Gitonga, Learned Counsel for the 3rd Respondent on the other.

7. It was the Appellant's case that the Plaintiff in Malindi HCCC No. 106 of 2012(OS) was an entity known as Muungano was Wakulima. The said entity of which the Appellant was the Chair, had its suit filed against the Respondent herein struck out on 12th December 2012. The costs of the suit were awarded by the trial Court to the 3rd Respondent herein.

8. A perusal of the file in the said Malindi HCCC No. 106 of 2012(OS) reveals that shortly after the suit was struck out, the 3rd Respondent filed a Bill of Costs which was later on on 28th July 2017 taxed at Kshs 18,029,863/-. Subsequently on 31st January 2018, a notice to show cause was issued requiring the Appellant herein to show cause why he should not be committed to civil jail for failure to pay the outstanding costs.

9. Upon being served with the Notice to Show Cause, the Appellant filed an Affidavit in Court on 12th February 2018 disputing the fact that the cost had been taxed and/or agreed upon. Subsequently, on 16th April 2018, the parties including the Appellant appeared before the Hon J.N Wandia, Deputy Registrar who after hearing objections as to the propriety of the Notice to Show Cause and the fact that the matter was before the Court of Appeal gave a brief Ruling as follows:-

“Court

The right of the Judgment debtor is not in any way interfered with in terms of appeal in the Court of Appeal. Further no orders to stay have been issued to warrant this Court to allow the Judgment debtor not to pay the Judgment Creditor his Judgment debt. All the issues traversed here are for the Court of Appeal to decide. The execution will proceed. Mr. Thoya is hereby placed in custody until he pays the Judgment Creditor.

10. As it were, Order 22 Rule 34 of the Civil Procedure Rules provides as follows when a Judgment debtor appears in Court in obedience to notice or after arrest:-

“(2) Before making an order for the committal to prison, the Court, for reasons to be recorded in writing, shall be satisfied-

a) That the Judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree-

i) Is likely to abscond or leave the local limits of the jurisdiction of the Court; or

ii) Has after the institution of the suit in which the decree was passed, dishonestly transferred, concealed or removed any part of his property, or committed any other act of bad faith in relation to his property; of

b) That the Judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree, or some substantial part thereof, and refused or neglected, to pay the same, but in calculating such means there shall be left out of account any property which is exempt from attachment in execution of the decree.....”

11. A perusal of the proceedings before the Honourable Deputy Registrar do not reveal whether or not the Court satisfied itself as to those requirements before committing the Judgment-debtor to prison. There was no record of any inquiry made by the Court in that regard and the sentence imposed upon the Judgment debtor to stay in custody “until he can pay the Judgment-Creditor” was in my mind indefinite and irregular.

12. Accordingly I did not find it necessary to deal with the other matters raised by the Appellant at this stage. Suffice it to say that I did find merit in the application dated 17th April 2018.

13. On 17th April 2018 when the application was placed before me under Certificate of Urgency, I had granted orders discharging the Appellant from prison as sought under Prayer No. 2 of the said application. As a result, I shall now allow the application in terms of the alternative Prayer No. 3 pending the hearing and determination of the Appeal filed herein.

14. The costs of this application shall be in the cause.

Dated, signed and delivered at Malindi this 29th day of May, 2019.

J.O. OLOLA

JUDGE