REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 4 OF 2013

ESTATE OF PHILOMENA CHEPEITUI represented by

JOSEPH MARIACH.....PLAINTIFF

VERSUS

MIRIAM CHEMAIN.....DEFENDANT

R U L I N G

1. The applicant in the application dated 21/9/2017 seeks orders that the warrant of arrest issued against her on 21/9/2017 and all consequential orders arising therefrom and that the notice to show cause be heard *inter partes* as had been stated before the warrants of arrest were issued upon an *ex parte* sitting of the suit.

2. On 25/9/2017 this court granted a stay of the execution of the warrants of arrest and the status quo has been maintained ever since. This court also granted prayer No. 4 which sought that Prof. Tom Ojienda Associates Advocates do formally come on record on behalf of the applicant. On 19/10/2017 the court directed that the application herein be canvassed by way of written submissions. The respondent filed written submission on 7/11/2017. The applicant filed a supplementary affidavit on 3/11/2017 but he did not file submissions as ordered.

3. In the application, the grounds relied on are that the applicant was not afforded a hearing; that the warrants were issued inadvertently; that when the matter came up for hearing the issue of representation was raised; that there was need for consent from the outgoing advocates to the incoming counsel; that the consent has been obtained; that the subject matter runs the risk of being sold in execution; that irreparable harm would be occasioned to the applicant if that happened; that it is necessary to have the applicant heard on merits as she has an arguable response to the notice to show cause.

4. In support of the application is an affidavit sworn by counsel for the applicant. He states that on the morning of 21/9/2017 he was ready to proceed with the notice to show cause when the issue of representation came up. He states that the court then placed the file aside for thirty minutes or so for the formalities on representation to be actualized. He further states that he went out to seek consent and only obtained it from the outgoing counsel at about 11.20 am and that the impugned order was made at 11.15 am. When he had finished with the formalities of filing the consent, he found the order impugned had already been made at 11.15 am.

5. The application is opposed. The respondent filed a replying affidavit sworn by himself on 9/10/2017 stating as follows: that this court dismissed an earlier application for stay of execution pending appeal on

15/2/2016; that the issue of stay of execution pending appeal is *res judicata*; that the appeal was heard and determined on 9/1/2016 and by consent costs herein were taxed at Kshs.250,000/= and a 30 days stay granted by consent; that it is only after failure to pay the taxed costs that execution proceedings commenced; that though the judgment debtor was summoned to attend, she never attended court on 21/9/2017; that the counsel now appearing for the respondent was present in court and when the issue of representation came up, he was granted time, up to 10.30 am to regularize his appearance in court; that by 11.00 am, the counsel had not come back to court and consequently, the impugned orders were made. It is also contended that no prejudice would be occasioned to the judgment debtor as she has had sufficient time to pay the taxed costs but she has deliberately declined to do so.

6. I have considered the application and the reply. I find that the issue herein is simply whether the applicant was granted a hearing or not. The issue of representation appears to have gotten into the way of disposal of the notice to show cause on its merits. The counsel who was representing the applicant was present. Though it is not denied, the respondent avers that the applicant failed to attend court. There is evidence that delay in executing the formalities of representation led to the current situation where counsel for the applicant only galvanized himself into activities that would later lead to his being formally on record only after the court session had started. These formalities are well known and should have been undertaken before. I am also of the view that a litigant has liberty to choose, and has a right to be represented by, an advocate in proceedings that concern him. It has not been demonstrated yet that the applicant abused the process for any gain with regard to causing her representative to be on the record by the day on which the notice to show cause was scheduled to proceed. If there is any mistake, blame must lie elsewhere. This court must therefore be lenient upon the applicant, whose right to natural justice is to be inherently protected by this court. With respect to the submission by counsel for the respondent, the subject herein is not stay of execution. That was dealt with earlier. I am persuaded that, the applicant still deserves to be accorded the right to be heard on the merit on the notice to show cause, whatever the decision of the court after the *inter partes* hearing may be.

7. I will therefore grant the application dated 21/9/2017 which was commendably brought without any unnecessary delay. However, the applicant will, within 21 days of this order, pay the costs of this application and the costs of the proceedings of 21/9/2017 before being heard, in default of which the notice to show cause may be listed and heard and determined in her absence or that of her representative.

It is so ordered.

Dated, signed and delivered at Kitale on this **20th** day of **December, 2017.**

MWANGI NJOROGE

JUDGE

20/12/2017

Before – Mwangi Njoroge Judge

Court Assistant – Isabellah

Ms. Mufutu holding brief for Kiarie for respondent

N/A for Applicant

Ruling read in open court.

MWANGI NJOROGE

JUDGE

20/12/2017