



**Cheptum t/a Kamur Agro Stores v Bungoma Chemist Limited & another (Civil Appeal E12 of 2024) [2024] KEHC 10698 (KLR) (9 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10698 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL E12 OF 2024  
REA OUGO, J  
AUGUST 9, 2024**

**BETWEEN**

**NANCY CHEPTUM T/A KAMUR AGRO STORES ..... APPELLANT**

**AND**

**BUNGOMA CHEMIST LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**JONATHAN CHERUIYOT ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Vide a Motion dated 27.7.2024, Nancy Cheptum the appellant/ applicant, (hereinafter referred to as the applicant) seeks the following orders that; upon hearing and determination of the application herein, this Hon Court be pleased to order the temporary release of the applicant from prison on such reasonable terms as the court may direct. Upon hearing and determination of the application herein, this Hon Court be pleased to confirm the release order of the applicant while pending the hearing and determination of the appeal.
2. The motion is brought under sections 3,3A and 63 ( e) of the *Civil Procedure Act* ( the CPA) and Order 52 ( 1) of the Civil Procedure Rules ( the CPR) 2012. The application is supported by the applicant's supporting affidavit dated 27.7.2024. The application was opposed by the 1<sup>st</sup> respondent. The 2<sup>nd</sup> respondent did not respond. Amin Ali Sheikh ( Amin) a director of the 1<sup>st</sup> respondent filed a replying affidavit of 33 paragraphs dated the 31<sup>st</sup> July 2024.
3. The applicant avers in the grounds on the face of the application that; on the 17. 7 2024 she was committed to civil jail for 30 days. She has preferred to challenge the legality of the committal to civil jail. The committal order was summarily done without any reason and without evidence whatsoever that the applicant had the means to pay the debt but she refused to pay the debt. The provisions of section 38 of the C.P. A were not considered before making the committal order. She will likely serve the 30-day committal period before the application and appeal are heard and determined. The lower court



may still extend the committal period while the committal order is under challenge. In her supporting affidavit she avers that she is 43 years old and has a medical condition that has put her under constant medication for the last five years. Together with her husband, they are judgment debtors in Bungoma CMCC No. 414 of 2017. They were supplied with products by the respondent worth more than 40 million over a period of years but unfortunately, the business collapsed and judgment was entered in the sum of Kshs.13,861,639.40 with cost and interest. On account of interest, the debt now stands at Kshs.23,538,566/- notwithstanding what they have paid after judgment. They are both unemployed and have no income. On 17.7.2024 she was arrested and taken to court and summarily committed to civil jail for 30 days and she is now serving a jail term. She has no means to pay at this time and there was no demonstration by the respondent that she has any means but has refused to pay. The lower court failed to address itself to the provisions of Order 38. She is likely to serve all 30 days and possibly even more if the committal order gets extended just because of being poor and without any income to pay the debt. The prison term will cause her health condition to deteriorate and thus she seeks to be released on bond.

4. The 1<sup>st</sup> respondent, Mr. Amin in his 33-paragraph replying affidavit sets out the background of the matter. I have carefully read the said affidavit. On facts that led to the committal of 17.7. 2024 it is averred that after being in court at various times over the debt the court ordered the arrest of the applicant on 17.5.2022 after the applicant and the 2<sup>nd</sup> respondent failed to heed the court orders of notice to show cause. The court thereafter issued a warrant of arrest for the applicant on 29.11.2022. They looked for the 2 but all was in vain until 17.7.2024 when the applicant was arrested and presented in court to show cause why she should not be committed to civil jail for failure to liquidate the decretal sums plus costs. The court after perusing the court record and understanding the history and not getting any satisfactory proposal and or willingness from the applicant to pay the decretal sum from the sum judgment delivered in 2018. The applicant was committed to civil jail as per the law. From the objection proceedings, AAS-11 the applicant and 2<sup>nd</sup> respondent have transferred the business to a 3<sup>rd</sup> third and they are out to defeat the execution of the decree. The issue of the applicant's ill health is an afterthought as the same was not mentioned in court executing the decree and the documents annexed ( NC-1) were obtained after the applicant was committed to civil prison and thus the same was obtained to hoodwink the court in granting the orders sought. The applicant has not made any proposal towards liquidation of the decretal sum which is now over 22,000,000/-. No appeal has been preferred against the judgment delivered in January 2018. No substantial loss will be occasioned if the stay order and or release order is not granted for the sole reason that there is an admission of the debt and or knowledge of the judgment delivered on 18.1.2018. Execution towards the realization of a judgment cannot be deemed to cause a substantial loss. The respondent seeks a dismissal of the application for lack of merit.
5. Parties canvassed the application by way of oral submissions. Mr. Kiarie the applicant reiterated the contents of the applicant's affidavit and emphasized that the Chief Magistrate did not write why he was committing the applicant, he did not give any reasons nor did he comply with the provisions of section 38 of the *Civil Procedure Act*. The conditions are listed in section 38 of the Act. The applicant informed the court that it was her husband who was handling the matter and thereafter she was committed. That it was a denial of her liberty when she was committed to civil jail. The requirements of section 38 were not met therefore the order was irregular and against the law. The respondent did not suggest that the applicant has the means to pay. The application has merit. Reliance was made on 2 Cases Kerugoya Hcca No.1 6 Of 2017 [2017] EKLK and Kakamega Hc Misc Civil Appl No. 13 Of 2018[2019] EKLK.
6. Mr Anwar for the 1<sup>st</sup> respondent, too reiterated the contents of the director of the 1<sup>st</sup> respondent adding that when the applicant was presented in court she informed the court that it was her husband who was dealing with the matter and thus the court had no other option save to commit her to civil jail.



The debt has been pending for 6 years 5 and only one million has been paid. The only way to make them pay is to commit them to civil jail. In case the court is to release her let them deposit a sum of Kshs. 10 million. The 1<sup>st</sup> respondent relied on 3 cases namely; Hussein Marshallo Guracha vs. Marshallo Guracho & Another (2021) eKLR , MN vs. AM ( 2021) eKLR and Moses Wamalwa Mukhamari vs. Rita Mukhongo & Attorney General ( 2022) KEHC 12085 (KLR)

7. In response Mr Kiarie submitted that 10 million can only be paid if one has the business. There is no demonstration that there is a business. The property was transferred to pay the debt and if God is gracious they will get income. They have not refused to pay. There is a need to release her as the court had no reason to commit her to civil jail.
8. I have considered the oral submissions and affidavits filed by the parties and the law and the authorities cited. It is not in dispute that the applicant and her husband owe the 1<sup>st</sup> respondent monies to the tune of Kshs. 22 million plus. The summary given by the 1<sup>st</sup> respondent demonstrates all the efforts made to have the applicant and the 2<sup>nd</sup> respondent pay the debt. The applicant claims that they have no means to pay the debt and that they are both unemployed. Counsel for the applicant is seeking her release r from civil jail for two reasons; that the trial court failed to give the reason for her committal and that she has a medical condition. The applicant is challenging the mode or manner in which the orders were obtained. She claims that she was arrested taken to court and summarily committed to civil jail. That the trial court failed to comply with the provisions of section 38 of the Civil Procedure Act. The said section provides as follows;

Powers of court to enforce execution

“Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree-holder, order execution of the decree—

- a. by delivery of any property specifically decreed;
- b. by attachment and sale, or by sale without attachment, of any property;
- c. by attachment of debts;
- d. by arrest and detention in prison of any person;
- e. by appointing a receiver;

or (f) in such other manner as the nature of the relief granted may require:

Provided that where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the court, for reasons to be recorded in writing, is 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;

or (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 refuses or neglects, or has refused or neglected, to pay the same, but in calculating such means there shall be left out of account any property which, by or under any law, or custom having the force of law, for the time being in force, is exempt from attachment in execution of the decree; or (c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.

9. I have perused the court record the applicant was presented before Hon. C. M Maundu on 17.7.2024. Mr. Okaka who was holding brief for Mr. Anwar informed the court that the 2nd defendant/ judgment debtor ( JD), the applicant, had been brought under a warrant of arrest issued on 11.7.2024. The outstanding amount is Kshs. 23,538,566/- which includes accrued interest and costs. The amount has not been paid today. No proposal has been received towards defraying the sums. He had instructions to have the JD committed to civil jail for 30 days. They believe she is capable of paying. The 2<sup>nd</sup> defendant made a response as follows; “ It is my husband who has been dealing with this case. I have no plans on how to pay”. The trial magistrate thereafter made the following order; “ 2<sup>nd</sup> defendant is committed to civil jail for a period of one month. Mention on 13.8.2024. Decree holder to pay for her subsistence”.
10. Section 38 has a proviso as follows; Provided that where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the court, for reasons to be recorded in writing, is satisfied—
11. In the case Solomon Muriithi Gitandi and Another versus Jared Maingi Mburu ( suing as the next friend for Joseph Maingi Maingi) the court held as follows;  

“ As execution by way of arrest and committal to prison deprives the debtor his liberty, the trial court ought to have ensured strict compliance with Section 38 supra and Order 22 rule 31 (1) supra to determine the appellants’ ability to pay. The Court had a duty to ensure constitutional safeguards as to due process by ensuring the notice of intended execution by way of committal was personally served and a due inquiry and satisfaction of the Court by the decree holder as to the judgment debtor’s ability to pay. It is only then that the Court would rightly commit him to prison”.
12. From the court record it is clear that the trial magistrate did not record the reasons for the committal of a JD. The decree is a money decree and the provisions of section 38 are mandatory that after the JD is given a chance to show cause why he or she should not be committed to prison, the court for reasons to be recorded in writing, will then proceed to commit the JD. No reasons were recorded by the trial Magistrate. In my view, the trial magistrate erred in committing the JD without giving reasons. A debt is owed but before one is committed to civil jail the provisions of the law must be adhered to. The court failed to consider the provisions of section 38 and for this reason, only I order the release of the applicant from civil jail forthwith. There shall be no orders as to costs.

**DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 9<sup>TH</sup> DAY OF AUGUST 2024.**

**R.E.OUGO**

**JUDGE**

In the presence of;

Miss Masai h/b for Mr. Kiarie -For the Applicant

Mr Anwar - For the 1st Respondent



2nd Respondent - Absent

Wilkister - C/A

