



Maswili t/a Rehoboth Agrovot v Empire Feeds Limited (Civil Suit E034 of 2022) [2023] KEHC 18081 (KLR) (25 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18081 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL SUIT E034 OF 2022
GMA DULU, J
MAY 25, 2023**

BETWEEN

BENARD MASWILI T/A REHOBOTH AGROVOT APPELLANT

AND

EMPIRE FEEDS LIMITED RESPONDENT

RULING

1. Before me is notice of motion dated July 8, 2022 filed by the appellant through counsel M/s Muumbi & Company Advocates under section 1A, 1B, 3A, 42 of the [Civil Procedure Act](#) and order 42 rule 6 and order 51 of the [Civil Procedure Rules](#) with four (4) prayers as follows:-
 1. (Spent).
 2. (Spent).
 3. That pending the hearing and determination of the appellant's intended appeal, the respondent be restrained from committing the applicant to civil jail for as long as the applicant does pay the respondent the sum of Kshs 50,000/= and continues settling the balance in monthly instalments of Kshs 15,000/=
 4. The costs of the application be in the cause.
2. The application has grounds on the face of the notice of motion that the applicant had been committed to civil jail by Hon Otieno, J (RM) in a ruling dated July 7, 2022 for failure to settle the decretal sums, that the orders were issued despite the applicant's application dated July 6, 2022 explaining the applicants inability to settle the amount and proposing a structured payment which was wrongly dismissed by the magistrate summarily, that committal to civil jail should not be used for vendetta purposes but to secure payments, and that the appellant's appeal has overwhelming chances of success.



3. The application was filed with a supporting affidavit sworn by the applicant Bernard Maswili on July 8, 2022 which amplifies the grounds of the application.
4. In the affidavit, the applicant/appellant proposed to pay Kshs 50,000/= then Kshs 15,000/= per month to settle the decretal amount, as he had been injured in a traffic accident and was not presently capable of earning money to settle the decretal amount in whole at once.
5. The application is opposed through a replying affidavit sworn on July 19, 2022 by Brian Mwangemi Mwaruruma the Credit Controller of Empire Feeds Ltd the respondent, in which it was deponed that after entry of judgment a notice to show cause was issued on the applicant/appellant who on March 31, 2022 made a proposal to pay Kshs 200,000/= within 30 days and the balance of the decretal amount by June 30, 2022, but failed to honour the commitment for payment, thus necessitating issuance of warrant of arrest.
6. That the offer of Kshs 15,000/= was unacceptable as payment would stretch to 30 months, and that in the meantime the respondent had already incurred costs of Kshs 30,000/= in executing warrants against the applicant who has not offered to pay those costs.
7. The application was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Muumbi & Company Advocates for the appellant/applicant, as well as the submissions filed by Ndumu Kimani & Company Advocates for the respondents.
8. This is an application for temporary injunction against the civil arrest and imprisonment of the applicant Bernard Maswili for failure to settle the decretal amount herein as earlier proposed by him.
9. The considerations to be taken by the court in such application hinges on the provisions of order 42 rule 6(6) of the [Civil Procedure Rules 2010](#) which states as follows:-

‘6(6) Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from subordinate courts or tribunal has been complied with’.
10. There is no allegation or contention here that the procedure for filing an appeal herein to the High Court from the decision of the subordinate court, has not been complied with. The applicant has infact stated that he has filed an appeal, with good chances of success. I thus find that the procedure for filing an appeal has been complied with. This in my view disposes of the first consideration by a court in an application for temporary injunction like the present one.
11. The other considerations in determining such an application for interlocutory injunction were clearly stated in the case of [Patricia Njeri & 3 others v National Museums of Kenya](#) (2004) eKLR, wherein Visram, J (as he then was) stated as follows:-
 - a. An order of injunction pending appeal is discretionary power which will be exercised against an applicant whose appeal is frivolous.
 - b. The discretion should be refused where it would inflict greater hardship than it would avoid.
 - c. The applicant must show that to refuse the injunction would render the appeal nugatory.
 - d. The court should also be guided by the principles in *Giella v Cassman Brown* [1973] EA 358.
12. Having said as above, the request for interlocutory injunction herein does not relate directly to the subject matter of the litigation herein, which is a money decree. It relates instead to the party to



litigation the applicant/appellant Bernard Maswili, who had been put in civil jail for failure to pay the decretal amount in full as earlier proposed by him.

13. This court has already at preliminary stage, allowed the appellant/applicant to be released from prison custody if he pays Kshs 50,000/= as part of the decretal amount. He had proposed in this application to pay monthly instalments of Kshs 15,000/= which has not been agreed to by the respondent, and this court has not made any orders on the same. The respondent has also complained to this court that though they have already spent about Kshs 30,000/= as costs of execution, the appellant/applicant has not made any commitment to settle such expenditure.
14. I have seen and perused the memorandum of appeal herein filed by the applicants dated July 8, 2022. It is only an appeal against the ruling of the trial court on commitment of the applicant to civil jail. I have not been told of any Memorandum of Appeal filed in respect of the judgment wherein emanates the decretal amount.
15. In my view, considering the parameters in the case of *Patricia Njeri v National Museums of Kenya (supra)*, denying the temporary injunction orders sought herein would render the appeal of the applicant filed against the ruling on committal to civil jail nugatory, as the applicant might immediately be put in civil jail. However, the appellant/applicant knows fully well that he has an obligation to pay the decretal amount. I will thus exercise this court's discretion grant temporary injunctive orders, but for a limited period only and subject to the conditions hereinafter given.
16. I thus allow the application and I order as follows:-
 - i. That pending the hearing and determination of the appellant's appeal herein, the respondent be and is hereby restrained from committing the appellant/applicant to civil jail provided the applicant will by the date of this ruling have paid the respondent Kshs 50,000/=; and also pays Kshs 150,000/= to the respondent as part of the decretal amount within forty five (45) days from the date of this ruling.
 - ii. The temporary injunction orders issued herein against committal of the appellant/applicant to civil jail, will be effective only up to December 31, 2023 which means that the applicant will fix the appeal for hearing before December 31, 2023.
 - iii. The costs of the application and costs of execution will follow the determination of appeal herein.

DATED, SIGNED AND DELIVERED THIS 25TH DAY OF MAY, 2023 VIRTUALLY AT VOI.

GEORGE DULU

JUDGE

In the presence of:-

Ms. Kellen for the applicant

No appearance for the respondent

Mr. Otolo court assistant

