



**Mukhamari v Mukhongo & another (Civil Appeal 58 of 2020)
[2022] KEHC 12085 (KLR) (29 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 12085 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL 58 OF 2020
SN RIECHI, J
JUNE 29, 2022**

BETWEEN

MOSES WAMALWA MUKHAMARI APPELLANT

AND

RITA MUKHONGO 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

*(Being an appeal from the judgement and Decree of Hon. E.N Mwenda
S.R.M in Bungoma CMCC No. 349/2018 delivered on 18/5/2020)*

JUDGMENT

1. The appellant (plaintiff in the subordinate court) sued the respondents vide plaint dated October 19, 2010 seeking general damages against the respondents for arrest and detention pursuant to a warrant of arrest issued by the court in Civil Case No 702 of 2002. The respondents filed their respective statements of defence stating that the arrest and the subsequent detention was lawful and regular since the same was done in execution of a warrant of arrest issued by a court of competent jurisdiction.
2. In the ensuing trial, the appellant testified as PW-1. He stated that he was a judgement debtor in Civil Suit No 602 of 2002 where the court issued a warrant of arrest in the case on January 30, 2009 without a justifiable cause and executed on August 11, 2009 when he was arrested at the instance of the 1st respondent and committed to civil jail for 30 days from August 11, 2009 to September 9, 2009 and released after his wife paid Kshs 40,000/- in partial settlement and a consent recorded to that effect.
3. For the respondents, the 1st respondent testified as DW-1. It was her testimony that she represented the decree holder, one John Mutali in the aforesaid matter. The court had ordered the appellant to pay the decree holder Kshs 207,577/- where on April 22, 2010, the appellant was brought before court under arrest to show cause why he should not be committed to civil jail for failure to pay the decretal sum.



4. That upon failure to advance a proposal on settling the debt, he was committed to civil jail for 30 days and released after a consent was recorded. That she had no personal interest in the matter other than having represented the decree holder in the matter.
5. In the judgement of that court, the appellant's suit was dismissed for failure to prove it to the required standards thus the instant appeal anchored on the following home-made grounds;
 1. The trial magistrate was biased and prejudiced in her judgement against the appellant.
 2. The trial magistrate was biased in misdirecting herself in finding that the respondent acted rightly by using the already executed warrants which was supported by the committal warrant showing that the plaintiff was admitted at GK Prison Bungoma August 11, 2009 to September 9, 2009.
 3. That this was a miscarriage of justice because the respondents never gave evidence to prove that their actions were right in law.
 4. The magistrate was wrong in using framed up story to arrive at her judgement.
 5. The judgement was doctored to defend the respondents while no evidence was given to rebut the appellants' evidence in chief.
 6. That from September 9, 2009 to April 22, 2010 when the appellant was arrested by the 2nd defendant's officers, the warrant of arrest had already been executed and was not valid to be used by the 1st respondent as an advocate.
 7. The trial magistrate erred in believing that the 2nd respondent's officers rightly arrested the appellant on the already executed warrant of arrest used on August 11, 2009.
 8. That miscarriage of justice was occasioned to the appellant in dismissing his suit and awarding costs to the respondents while his case was proved beyond reasonable doubt.
 9. Any prudent person cannot agree with the trial magistrate's findings and judgement in favour of the respondents.
 10. This is a miscarriage of justice shown by a judicial officer who is supposed to be impartial and give true judgement based on evidence given by the parties to determine the cause of action.
 11. All persons are equal before the law regardless of their class or standards and status in life.
 12. The bond issued on September 10, 2009 was to show the mode of payment after the appellant was wrongly detained by the prison authority and brought to court to hide circumstances why the appellant was not released on September 9, 2009 as per the committal warrant after serving 30=days detention at Bungoma prison as shown by the appellant's complaint letter to the commissioner for prisons dated September 28, 2009.
 13. The appellant arrived at a decision to sue the respondents in HCC 122 of 2010 and later CMCC 349 of 2018 after recommendations from the Advocates Complaints Commission which proved that inter alia the 1st respondent was supposed to be charged with a criminal case which the 2nd respondent's officers refused and or ignored the same.
 14. Therefore the judgement delivered on May 18, 2020 is void of facts and reasons to arrive at such judgement defending the wrong doers instead of punishing them to meet damages caused by their mischief.



15. Consequently, this is a total conspiracy to defeat the course of justice albeit upholding it by a judicial officer as the presiding magistrate.
6. By directions of the court, the appeal was disposed of by way of written submissions. Only the appellant complied with the order.
7. He submits that the trial magistrate erred finding that the appellant was arrested pursuant to a warrant of arrest issued when in fact, no notice to show cause had been taken out and or applied for by the 1st respondent.
8. He submits that the 1st respondent acted beyond what is expected of her by the civil procedure rules for she had personal interests by pointing out the appellant to police officers at the court premises.
9. This being a first appeal, this court is guided by the principles set in *Oluoch Eric Gogo v Universal Corporation Limited* [2015] eKLR, where it was held;

“As a first appellate court, the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of *Selle & another v Associated Motor Boat Co Ltd & another* [1968] EA 123, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect.....”

10. The issue in this appeal is whether the appellant was rightfully arrested by the 2nd respondent’s officers and, or whether the appellant proved his case to the required standards in the subordinate court.
11. It is admitted by the appellant that he was the judgement debtor in Civil Suit No 602 of 2002. The 1st respondent represented the decree holder in that matter where judgement had been passed against the appellant to pay the sum of Kshs 207, 577/- which the appellant failed to pay leading to the issue of warrants of arrest against him. Upon arrest, the appellant was committed to civil jail and released when his wife negotiated settlement.
12. Having perused the proceedings in the aforesaid suit, the record shows that on May 28, 2009, the matter was fixed for NTSC on June 9, 2009 and subsequently deferred until July 7, 2009 when the court issued a warrant of arrest against the appellant. The appellant was subsequently arrested on July 21, 2009 while in court and committed to jail for 30 days. On August 18, 2009, the parties recorded consent on how the appellant was to settle the decretal sum. He was subsequently released on Kshs 50,000/= bond.
13. Given the above, as correctly held by the trial magistrate, section 38 of the *Civil Procedure Act* provides for modes of execution of judgement. The section provides;

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)
- (b)
- (c)
- (d) by arrest and detention in prison of any person;”



14. The proviso to the above section states;

“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;”

15. Further to these, section 40 provides;

“A judgment-debtor may be arrested in execution of a decree at any hour and on any day, and shall as soon as practicable be brought before the court, and his detention may be in any prison of the district in which the court ordering the detention is situate, or, if such prison does not afford suitable accommodation, in any other place which the Minister may appoint for the detention of persons ordered by the courts of such district to be detained:

16. In the instant case, the appellant was arrested while in court after failing to satisfactorily explain how he intended to liquidate the decretal sum. As regards how he was released from civil prison, section 40 (iv) states;

“where the decree in execution of which a judgment-debtor is arrested is a decree for the payment of money and the judgment-debtor pays the amount of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him.”

17. The above therefore clearly show that the law provides for arrest and detention in execution of decrees. After all, it is not disputed that the appellant was the judgement-debtor who had failed to pay the decretal sum.

18. The procedure for such committal is contained in order 22 rules 7, 31, 32 and 35 of the [Civil Procedure Rules](#) which provide;

"7.

- (1) Where a decree is for the payment of money the court may on the oral application of the decree-holder at the time of the passing of the decree, order immediate execution thereof by the arrest of the judgment-debtor, prior to the preparation of a warrant, if he is within the precincts of the court.

31.

- (1) Notwithstanding anything in these [Rules](#), where an application is for the execution of a decree for the payment of money by the arrest and detention in prison of a judgment-debtor who is liable to be arrested in pursuance of the application, the court may, instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the court on a day to be specified in the notice and show cause why he should not be committed to prison.
- (2) Where appearance is not made in obedience to the notice, the court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor.

32. Every warrant for the arrest of a judgment-debtor shall direct the officer entrusted with its execution to bring him before the court with all convenient speed, unless the amount which



he has been ordered to pay, together with the interest thereon and the costs (if any) to which he is liable, be sooner paid.

34.

- (1) Where a judgment-debtor appears before the court in obedience issued under rule 31, or is brought before the court after being arrested in execution of a decree for the payment of money, and it appears to the court that the judgment-debtor is unable, from poverty or other sufficient cause, to pay the amount of the decree, or, if that amount is payable by instalments, the amount of any instalment thereof, the court may, upon such terms as it thinks fit, make an order disallowing the application for his arrest and detention or directing his release, as the case may be.
- (2) Before making an order for the committal of the judgment- debtor to prison, the court, for reasons to be recorded in writing, shall be satisfied —
 - (a)
 - (b)
 - (c)
- (3) While any of the matters mentioned in Subrule (2) are being considered, the court may, in its discretion, order the judgment-debtor to be detained in prison, or leave him in the custody of an officer of the court, or release him on his furnishing security, to the satisfaction of the court, for his appearance when required by the court.
- (4)
- (5) Where the court does not make an order under subrule (1), it shall cause the judgment-debtor to be arrested, if he has not already been arrested, and, subject to the provisions of this Act, commit him to prison."

19. These provisions were discussed in *Beatrice Wanjiku & another v Attorney General & another* [2012] eKLR where it was held;

"The objective and intendment of the *Civil Procedure Act* and the *Rules* is to provide the mechanism for the enforcement of judgment debts which is a legitimate and reasonable state objective and arrest and committal is one of enforcing court judgments. What is to be kept in mind whether the means adopted distinguished those who can pay but are merely refusing to pay those who cannot....."

20. Having perused the record, I am satisfied that the appellant's committal to civil jail was in execution of a valid court order after the appellant had been given sufficient notice to liquidate the decretal sum to no avail. I find no impropriety of procedure by the trial court. There similarly is no evidence of personal interest by the respondents in the manner in which the notice to show cause was taken out.

21. I find no merit in this appeal which is hereby dismissed with costs to the first respondents.

DATED AT BUNGOMA THIS 29TH DAY OF JUNE, 2022

SN RIECHI

JUDGE

