



Winam Chemist (K) Limited v Saicare Enterprises Limited (Civil Appeal E005 of 2022) [2022] KEHC 16538 (KLR) (19 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16538 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E005 OF 2022
RE ABURILI, J
DECEMBER 19, 2022**

BETWEEN

WINAM CHEMIST (K) LIMITED APPELLANT

AND

SAICARE ENTERPRISES LIMITED RESPONDENT

(An Appeal arising from Judgment and decree of Hon. Winfrida Onkunya in Kisumu Chief Magistrate's Court Civil Case No. 3 of 2020)

RULING

1. This appeal was filed by Winam Chemist (K) Limited against Saicare Enterprises Limited on 1/2/2022. The appeal arises from the judgment and decree in Kisumu CMCC No 3 of 2020.
2. On 13/4/2022, when the interlocutory application dated 1/2/2022 came up before FA Ochieng J, (as he then was), Mr Kimani Wachira counsel for the applicant informed the court that the respondent had made some concessions thus the notice of motion dated February 1, 2022 is allowed as prayed.
3. Miss Nganyi counsel for the respondent holding brief for Mr Brian Khaemba confirmed the position and submitted that “effectively, the appeal will be disposed of and the warrants of arrest be set aside. That in the event of default, the warrants of arrest shall be reissued.”
4. The court then recorded the following order, by consent of both parties’ counsel:

“By consent;

- (1) The application dated February 1, 2022 is allowed in terms of praters 1 to 5.
- (2) Effectively, this disposes of the appeal, as well



(3) In the event of default by the appellant, in the payment of the agreed instalments, warrants will be re-issued for the arrest of the appellant's Director, Dr Jeconia Kisera Awino

(4) The first installment falls due on May 20, 2022.

Signed.

FA Ochieng

13/4/2022.”

5. From that point, the court continued fixing this appeal before the Deputy Registrar on 14/6/2022 and on 29/6/2022, the matter was mentioned before the Deputy Registrar hon L Akoth with Ms Ngany counsel for the respondent praying that the file be placed before the Judge for clarification on the terms of the consent.
6. As it happened, hon Justice F A Ochieng was away awaiting for his interview and subsequent appointment as Judge of the Court of Appeal hence the matter had to be placed before hon Lady Justice Kamau J who had unfortunately recused herself from hearing this matter on 1/3/2022 hence the learned Judge on November 29, 2022 placed the file before me for consideration on December 13, 2022. Both parties' counsel appeared before me and counsel submitted on why they were before me on the latter date.
7. Mr Wachira counsel for the appellant submitted that the issue was whether the execution of the consent recorded on 13/4/2022 should be carried out in the lower court or High Court. He submitted that this court had jurisdiction to execute the orders and that his client only prayed that when execution does take place, summons, do issue to the Judgment debtor to appear and show cause first.
8. Mr Khaemba counsel for the respondent submitted that the warrant of arrest issued in the lower court be reissued for execution and that they had no issue with the notice to show cause but which court should enforce the default clause.
9. Although the lower court record is not available for perusal, I have perused the application dated 1/2/2022, the grounds thereof and the supporting affidavit.
10. It is that application that was allowed by consent by Justice Ochieng on 13/4/2022.
11. Among the grounds relied on by the appellant herein in support of its application were that the warrant of arrest was issued against the appellant's Director by the trial court on 3/12/2021 yet on the stated date, no notice had been issued to the appellant's director or to his Advocate requiring them to attend court.
12. In my understanding, the trial court issued the said warrant of arrest on account that the appellant's director had failed to attend court to show cause why he should not be committed to civil jail for nonpayment of the decretal sum following several consents that had been entered into between the parties, to accord the appellant the opportunity to settle the decretal sum.
13. In my humble view, even if the appellant's Director had been arrested, he would still have been taken to the same court and given the opportunity to show cause why he should not be committed to civil jail. He could not have been arrested and send to prison without being accorded a hearing.
14. Apprehensive of his being arrested yet he was not made aware by way of notice to attend court and show cause, he filed this appeal to forestall the impending arrest, which appeal I find, was unnecessary as the appellant had the opportunity to first exhaust the avenues available in the lower court including



the setting aside of the warrant of arrest which were allegedly issued without first giving him notice to attend court and show cause on the date when the matter was fixed for mention for notice to show cause.

15. In the consent recorded before Justice Ochieng, in my humble view, and going by order No 2, this appeal was effectively compromised and spent such that no other proceedings were expected to be undertaken herein.
16. What remained for the parties was to go back to the drawing board in the lower court and continue with the execution process and in the event that the appellant's director defaulted in terms of order (3) then a warrant of arrest would be reissued for the arrest of the said Director.
17. The question is, what is the purpose of arresting a judgment debtor? The consent did not say arrest and commit him to civil jail. It said, "a warrant of arrest to reissue in the event of default in the payment of agreed instalments. The agreed instalments was as per the consent recorded before the lower court and not before this court.
18. A warrant of arrest in civil proceedings is normally issued against a person who has been served with Notice or summons to attend court and show cause but the person has kept himself away from the court.
19. This court does not fathom a situation where one has been ordered to appear before the court but before that date reaches, or while he is on his way to court, he is accosted by the police and handcuffed and presented before court in the name of an arrest.
20. That in my view would be scandalous and abuse of court process and an action merely intended to embarrass a Judgment Debtor.
21. Failure to pay a Judgment debt is not a criminal conduct. It remains a matter that must be dealt with in a civil manner while according the Judgment debtor the dignity that is inherently deserved or guaranteed.
22. There is an established procedure under section 38 of the *Civil Procedure Act* for committing a judgment debtor to civil jail in execution of a money decree. The section provides as follows, material to this case:

“Subject to such conditions and limitations as may be prescribed, the court may, on the application 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.”

23. It follows from the above section that a decree can be executed by arrest and detention. However, a judgment debtor must be accorded the opportunity to show cause why he/she should not be committed to prison.

24. In *Grand Creek LLC & Another v Nathan Chesang Moson* [2015]eKLR, the court held that:

“In all cases where order 22 rule 18(1) of the *Civil Procedure Rules* applies, a notice must be served upon the person against whom execution is applied requiring him to show cause, on a date to be fixed, why the decree should not be executed against.”

25. It should be noted, however, that there must have been an application for execution of a decree for payment of money by arrest and detention in prison of a judgment-debtor before such a process can be undertaken for arrest and committal to prison for nonpayment.

26. Order 22 rule 31 of the *Civil Procedure Rules* will then come into play where the court, instead of issuing a warrant of arrest, decides to issue a notice calling upon the judgment-debtor to appear before the court on a day to be specified in the notice to show cause why he should not be committed in prison but where the judgment-debtor does not appear as directed in the notice, the court will issue a warrant for his arrest. This rule follows after section 38 and 40 of the *Civil Procedure Act*. The warrant of arrest is to bring the judgment-debtor to court and it is not an automatic committal to prison because the court will still be required to satisfy itself of all the requirements of order 22 rules 33 and 34 of the *Civil Procedure Rules*. This is because the proceedings under order 22 rule 34 act as the safeguard against denial of liberty in execution of a decree without due process.

27. Courts have comprehensively pronounced themselves on the constitutionality of the procedure of arrest and committal to jail in execution of a decree in not one case. See the cases of *Solomon Muriithi Gitandu & Another v Jared Maingi Mburu* [2017] eKLR; *Braeburn Limited v Gachoka and another* [2007] eKLR; *Jedida Chepkoech Mutai (Suing as The Legal Representative of the Estate of Julius Kipkorir Mutai (Deceased) v Cheron Beatrice* [2018] eKLR; *Mary Nduku Ndunda v Attorney General & 4 Others* [2016] eKLR; *Anne Wangui Gachoka v Kenya Commercial Bank* Petition 51/2010; *Zippora Wambui Muthara Milimani BC Cause 19/2010* (unreported).



28. This point is settled that arrest and committal to prison in execution of a decree under the *Civil Procedure Act* and *Rules* is not unconstitutional as long as all the safeguards provided in law are afforded to the judgment debtor. I so hold in this matter.
29. For example, in Zippora Wambui Muthara Milimani BC Cause 19/2010 (unreported) Koome J (as she then was) observed as follows:
- “There are several methods of enforcing a civil debt such as attachment of property. The respondent’s claim that the debtor has money in the bank, that money can also be garnished. An order of imprisonment in civil jail is meant to punish, humiliate and subject the debtor to shame and indignity due to failure to pay a civil debt. That goes against the international covenant on civil and political rights that guarantees parties’ basic freedoms of movement and of pursuing economic cultural development”
- It is incumbent on the party seeking to execute a civil debt by way of committal to civil prison to adhere to the legislative safeguards before a party can be committed to civil jail. In the case of Braeburn supra and *Jane Wangui Gachoka V Kenya Commercial Bank Petition* 51/2010 it was held that section 38 and 40 of the *Civil Procedure Act* are neither inconsistent with the provisions of the relevant provisions of the *Constitution* and International Bills of Human Rights. I am persuaded to agree with the findings. However, for a judgment debtor to be committed to prison, the court must ensure that the conditions for committal to prison on account of a money decree are strictly followed. A judgment debtor will not be committed to prison for inability to pay or to fulfill contractual obligation. There must be additional reasons and the court being satisfied after the debtor has been given notice to show cause and give reasons in writing as provided under section 38 of *Civil Procedure Act* and Order 22 rule 31 (1) *Civil Procedure Rules*. There is also a requirement that the debtor be served with notice of entry of judgment under order 22 rule 20. This gives the debtor opportunity to pay before the decree holder starts the execution process.”
30. Having said all the above, it is clear to me that the court that is vested with the jurisdiction to enforce the consent of 13/4/2022 recorded in this court, which consent referred to the “agreed installments”, and which “agreed installments” order was made in the lower court, is the lower court itself.
31. Secondly, that albeit the consent stated that in default of the “agreed installments”, a warrant of arrest would ‘reissue’, the re-issuance of the warrant of arrest will only follow lawful process stipulated in section 38 as read with order 22 of the *Civil Procedure Rules* and as interpreted by the courts in the above cited decisions such that the Director of the appellant company must be served with notice to appear and show cause and only if and when he does not appear in court that a warrant of arrest would issue.
32. I believe that my clarification of the consent recorded on 13/4/2022 settles the issues raised by the parties’ counsel.
33. Accordingly, parties to appear before the trial court for appropriate proceedings in execution of decree.
34. No proceedings shall be conducted in this appeal.
35. File closed.
36. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 19TH DAY OF DECEMBER, 2022



R.E. ABURILI
JUDGE

