REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISCELLANEOUS APPLICATION NUMBER 50A OF 2020

JAGJIT SINGH SAUND.....APPLICANT

VERSUS

JESVIR SINGH REHAL....RESPONDENT

RULING

1. The matter before this Honourable Court is the applicant/judgment debtor's application dated the 10th day of March, 2020 seeking the following orders;

a) Spent

b) Spent

c) That pending hearing and determination of this application inter partes this Honourable Court be pleased to issue orders setting aside and/or lifting the order issued on 6th March, 2020 committing the applicant to civil jail and all consequential orders issued therein.

d) That this Honourable Court be pleased to set aside and/or lifting the execution and the entire order issued on 6th March, 2020 committing the applicant to civil jail and all consequential orders issued therein.

e) That the Honourable Court be pleased to issue such further orders as it may deem fit in the interests of justice.

f) That the costs of this application be provided for.

2. It is supported by the affidavit is Jagjit Singh Saund sworn on 10th March 2020.

3. He depones in **the affidavit**

THAT the rent arrears being sought by the Respondent from the notice to show cause arise from L. R. NAKURU MUNICIPALITY BLOCK 5/202 **whose ownership is the subject matter in Nakuru Succession Cause No. 286 of 1999 which matter is yet to be determined.** The same is coming up for judgment on 23rd July 2020 (attached copy of summons for revocation of grant) (emphasis mine)

and

THAT the matter came up for mention on 6th March, 2020 before Hon. B. Limo the learned magistrate ordered that*;*

a. The applicant is in arrears. He is committed to civil jail for 60 days.

b. That the committal warrant shall stand discharged once a sum of Kshs. 1,368,650/= is paid by close of business the same day.

c. The respondent to take inventory of goods and distress for rent by 7/3/2020.

d. The landlord to take vacant possession of premises Nakuru Municipality Block 5/202.

e. That the OCS. Nakuru Police Station to enforce the order. Annexed hereto and marked "JSS v" is a true copy of the said order)

4. The application is opposed vide the Replying Affidavit of Jesvir Singh Rehal sworn on 28th July 2020 where he lays the background to the application and the orders sought by the application.

5. From the affidavits of the two (2) parties it is not in dispute that the applicant filed **Nakuru CMCC No. 413 of 2014 Jadgit Singh Saund vs Jesvir Sing Rehal & another** which suit the court found in favour of the defendant/respondent. An application for stay of execution in that matter was dismissed in 2017 and a further application in 2019 for stay of execution in the Environment and Land Court was dismissed by *Ohungo J.* The Judge reiterated the orders of the learned trial Magistrate in **CMCC 413 of 2014** whereby the applicant was required to pay rent of Kshs. 10,000/= per month with effect from January 2012 which sum the learned judge found had never been paid.

6. No appeal was filed against the Hon Judge *Ohungo's* Ruling of 17th July 2019.

7. It is evident that the current application proceeds from the respondent's move to commence execution proceedings against the applicant for failing to pay rent as ordered by the learned magistrate and confirmed by the Hon *Ohungo J.*

8. In addition to this the Succession Cause referred to by the appellant, in which he has filed Summons for Revocation of Grant was determined and at **paragraph 17,** the Hon. *Lady Justice Mulwa* states;

> "17. It is important to state that the deceased's will has not been challenged at all and therefore stands valid.
>
> **The mere fact of residing in the deceased's premises does not in itself give rise to legal interest thereto**. If the deceased wished to bequeath the said property to his daughter or the applicant he would have done so. It has not been stated that the applicant was a dependant of the deceased."

9. In dismissing the summons the Judge said at **paragraph 29 and 30**

> "*29.* On the matter of transfer of the two properties by the executor (Respondent) to himself, the testator was clear in his will as to the fate of the properties and other movable and immovable assets that he left behind - paragraph 5 and 6 of the will. That after payment of just debts, and dowry for wedding of his daughter -applicant's wife, **the remainder of the estate was bequeathed to the Respondent, to belong to him absolutely.**
>
> 30. Following the above, **it is within the Respondents' rights under the will to transfer by transmission, the two properties to himself, which he did**. There is no reason whatsoever to persuade the court to allow the applicant's prayer 2, for cancellation of the respondent's names from the titles, and order the same to revert to the estate of the deceased for distribution to the rightful beneficiaries. None of the rightful beneficiaries has complained." (Emphasis mine)

10. The respondent filed submissions through counsel *Raydon Mwangi & Associates*. I did not see any from *Frank Mwangi & Co. Advocates* for the applicant despite them asking for more time to file the same.

The Respondent relied on;

> **1. Jayne Wangui Gachoka vs Kenya Commercial Bank [2013] eKLR**
>
> **2. Samuel Njenga vs Augustino Onanda & Another [2015] eKLR**
>
> **3. Paul Ojigo Omanga vs Japheth Angila [2011] eKLR**

11. From the foregoing the issue is whether the prayers sought by the applicant are tenable.

12. It is noteworthy that the orders of 6th March 2020 flow from a list of applications, all of which the applicant lost in trying to stop the inevitable tide of his payment of what is due to the respondent/his eviction from the said property. This is loudly evident from the Ruling of *Justice Ohungo* which clearly pointed out in **NAKURU ELC HC MISC. CIVIL APPEAL No. 143 OF 2018 JAGJIT SINGH SAUND VERSUS JESVIR SINGH REHAL & ANOTHER**

> "I have considered the application, the affidavits filed and the submissions. The applicant seeks stay of execution of the judgment and order made on 22nd September 2017 by Hon. J. Omido (Principal Magistrate) in **Nakuru CMCC No. 413 of 2014 Jadgit Singh Saund vs Jesvir Sing Rehal & another** pending hearing and determination of the applicant's appeal, being Nakuru HCCA No. 136 of 2017. From the material on record, it is apparent that the appeal was filed separately on 17th October 2017. I have perused the appeal file and I note that it is still pending in the High Court. No step appears to have been taken in the file other than the filing of the appeal. Parties may need to appropriately move the court for transfer owing to similar jurisdictional concerns as those that led to the transfer of the present application to this court…"

…I note that the appellant initially filed an application dated 19th October 2017 seeking stay from the subordinate court. The application was heard inter partes and was dismissed in a ruling delivered on 25th May 2018. Prior to the filing of the said application, the subordinate court had granted 30 days stay pending filing of a formal application for stay. Needless to state this court can consider this new application for stay under **Order 42 rule 6** of the **civil Procedure Rules**. In the circumstances, I am satisfied that an appeal exists and that the application has been brought without unreasonable delay...

…The applicant must satisfy the court that substantial loss may result to him unless the order is made. The applicant contends that if stay is not granted, execution of the decree will proceed, he may be evicted and the suit property may be disposed of thus causing him substantial loss. Execution of a lawful decree does not per se amount to substantial loss. After all, the respondents are successful litigants and the natural consequence of such success is that they be able to enforce the judgment. The judgment itself required the applicant to pay to the 1st respondent rent of KShs 10,000 per month with effect from January 2012. The applicant has not tendered any evidence to show payment or even deposit in court. Equally, the applicant has not demonstrated that he is unable to pay the rent. In the circumstances, I am not persuaded that substantial loss will result to the applicant unless stay is granted. That alone is sufficient ground for dismissing the application…

13. The question then is, in the foregoing circumstances was the learned Magistrate wrong in issuing the orders it did on 6th March 2020to warrant the orders sought?

14. To begin with, the applicant did not attach the proceedings leading to the said order to demonstrate that there was indeed any failure on the part of the learned trail magistrate. Hence on the face of it, there is nothing wrong with the order. In **Jayne Wangui Gachoka** *(above)* the Judge cited the case of **Beatrice Wanjiku & Others vs the AG & Others, High Court Petition Number 190 of 2011** where ***Majanja J*** rendered himself thus:

"30. In the case of **Beatrice Wanjiku & Others –vs- The Attorney General & Others High Court Petition No. 190 of 2011** Majanja J, after considering various cases, among them the cases set out above on the issue of Section 38 and 40 of the Civil Procedure Act, observed as follows:

> **'The Civil Procedure Act and the Rules provide a legal regime for arrest and committal as a means of enforcement of a judgment debt. Article 11 of the Convention states that, "No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation." [Emphasis mine] I read the merely as used above to mean that one cannot be imprisoned for the sole reason of inability to fulfill a contractual obligation. It means that additional reasons other than inability to pay should exist for one to be imprisoned. Article 11 recognises that in fact there may be instances where imprisonment for inability to fulfill a contractual obligation may be permitted.'**

31. As the court also observed in the case of **Beatrice Wanjiku & Others -vs- The Attorney General & Others (supra),** committal of a debtor to civil jail does amount to a limitation of fundamental rights and freedoms, in this case the right to liberty. However, such limitation is permissible in accordance with the provisions of Article 24 of the Constitution, more so because there are legislative safeguards before a party can be committed to civil jail for non-payment of a debt. As Majanja J also observed in the said case:

> **'The manner of depriving a person of liberty is prescribed by section 38 of the Civil Procedure Act as set out above. In cases where the decree is for payment of money, the person or judgment debtor will not be committed to detention in prison unless he is first given an opportunity of showing cause why he should not be committed to prison. The procedure for giving the judgment-debtor an opportunity to show cause why he should not be committed to detention in prison is prescribed by Order 22 rules 7, 31, 32 and 35 of the Civil Procedure Rules'**

32. Majanja J went on to observe as follows:

> **Where the Court however finds that the judgment debtor should be committed to detention in prison it must satisfy itself that the conditions for committal to prison in respect of a money decree are strictly fulfilled, and the court must take a record in writing of its findings before such committal. These conditions are set out in the proviso to section 38 of the Civil Procedure Act, and are repeated in Order 22 rule 34 (2).**
>
> **Section 40 of the Civil Procedure Act is not to be read in isolation. It is a consequence of section 38. It regulates the manner in which arrest and committal is effected in accordance with section 38 and Order 22 of the Rules. Thus the reference to "a judgment-debtor may be arrested" does not refer to the court's power or judgment-creditor to effect arrest at anytime but rather that the power of arrest is consequent upon the court following the procedure prescribed by section 38 and the rules promulgated for that purpose.**

15. From the foregoing it is evident that it is only from the proceedings before the learned magistrate that this court would have known whether or not the proper procedure as set out in the Civil Procedure Code was followed or not. By merely citing the order that was not sufficient to elicit any wrong doing on the part of the learned magistrate.

I join my voice to that of the Hon Lady *Justice Mumbi Ngugi* where the judge says at:

> **"33. I agree fully with the sentiments expressed by my brother and sister judges in the above matters. The deprivation of liberty sanctioned by Sections 38 and 40 of the Civil Procedure Act is permissible and is not in violation of either the Constitution or the ICCPR. The caveat, however, which has been emphasized in all the cases set out above, is that before a**

person can be committed to civil jail for non-payment of debt, there must be strict adherence to the procedures laid down in the Civil Procedure Act and Rules, which provide the due process safeguards essential to making the limitation of the right to liberty permitted in this case acceptable in a free and democratic society."

16. Having said that I find that the applicant is turning out to be a vexatious litigant, every single application he has brought since the judgment and decree of the *Hon. J. Omido (Principal Magistrate) in* ***Nakuru CMCC No. 413 of 2014 Jadgit Singh Saund vs Jesvir Sing Rehal & another*** he has lost, including the only matter that would have given him any locus to continue with this charade, the Summons for Revocation Grant in Succession Cause 286 of 1999.

17. His application before me has no merit and is dismissed with costs to the respondents.

Dated this 11th January, 2021.

Mumbua T Matheka

Judge

Signed and delivered virtually this 15th day of February, 2021.

Mumbua T Matheka

Judge

In the presence of:
Court Assistant: Edna

Frank, Mwangi & Co. Advocates for applicant

Raydon Mwangi & Associates for respondent