



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**CIVIL APPEAL NO. E015 OF 2021**

**CORAM: R. E. ABURILI - J.**

**BENSON OGINA OGALLO.....APPELLANT**

**VERSUS**

**SAMSON OMUOMBO ODIDO.....RESPONDENT**

***(Appeal from the Ruling and Order of Hon. J.P. Nandi, Principal Magistrate at Bondo Law Courts in Bondo PMCC No. 24 of 2018 made on 27.5.2021)***

**RULING**

1. Before this court for determination is the Notice of Motion dated 26<sup>th</sup> May 2021 filed by the Appellant/Applicant Benson Ogina Ogallo through his counsel Mr. Okello. The application is supported by the affidavit sworn by the applicant Benson Ogina Ogallo on 28<sup>th</sup> May 2021 and annexures thereto.

2. The application is brought under the provisions of Order 42 Rule 6 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act. The applicant seeks the following orders:

***(1) spent***

***(2) That there be suspension of the orders for the committal to civil jail and consequential orders of the Principal Magistrate against the appellant;***

***(3) That the honourable court be pleased to make such orders as it deems just and expedient to award under the circumstances.***

***(4) That the costs of this application be borne by the defendant (sic).***

3. The Notice of motion is based on the grounds that:

***(1) the applicant has an arguable appeal and has high chances of success;***

***(b) the appellant is presently in civil jail and stands to suffer substantial loss unless stay is granted.***

***(c) the appellant is willing to provide reasonable security.***

4. In the supporting affidavit, the applicant deposes, inter alia, that on 19/3/2021, the trial court issued an order that the appellant liquidates decretal sum of Kshs. 103,999/= by paying Kshs. 20,000/= before close of business on 19/3/2021 and subsequently, monthly installment of Kshs. 10,000/=.

5. That upon leaving the court premises on 19/3/2021, the applicant realized the initial down payment of Kshs. 20,000/= but did not have the contacts of the Respondent to make the said payment and that no account was given by the court on where to deposit the said sums of money so he contacted his counsel with a view to sending him the money but his counsel insisted that the money be send to the decree holder and promised to get the contacts from the court.

6. That upon counsel calling Bondo Law Courts Civil Registry to get the decree holder's contacts, the Head of Civil Registry only got the

said contacts on 7/4/2021 and forwarded to counsel at 7.24a.m. through phone number 0773xxxxxxx as per annexed copy of conversation.

7. That the advocate forwarded the said contacts to the judgment debtor/applicant herein on the same day upon which the applicant paid Kshs. 20,000/= via Mpesa Code No. PD765XCC at 4.43 pm on 7/4/2021.

8. That the applicant has also continued to comply with the monthly instalment of Kshs. 10,000/= and remitted the same to the Respondent decree holder.

9. That the applicant was shocked when he was arrested from his place of work in Nairobi vide a warrant of arrest and brought to court and committed to civil jail for one month despite an affidavit sworn and filed by his advocate on the payments made.

10. That the warrant of arrest was executed without adherence to the law and despite him complying with the order of the court.

11. In the annexures, the applicant has annexed copy of mobile phone messages communicated between Mr. Okello advocate and Mr. Dick Court staff at Bondo Law Courts, an affidavit sworn by Mr. Okello advocate on 15/4/2021 explaining why there was delay in remitting the initial down payment of Kshs. 20,000/= as ordered by the court, proceedings at Siaya PM's court for 26/5/2021 and Ruling of 27/5/202, subject of this appeal.

12. Opposing the Notice of motion, the Respondent Samson Omuombo Odido who is the decree holder and who appears in person swore a Replying affidavit on 9<sup>th</sup> June 2021 deposing that on 27/5/2021 the applicant/appellant herein was committed to civil jail after failing to obey the lower court order to pay decretal sum as ordered by the Magistrate's court on 19.3.2021.

13. He further deposes that the applicant was lawfully committed to civil jail. Further, that the applicant was blatantly lying to this court by alleging that he did not have the contacts for the Respondent yet he had been calling the Respondent all along and hence he willfully disobeyed the court orders with the intention of denying the Respondent the fruits of his litigation.

14. That in any event, the applicant should have deposited the said amount into court in case he felt that he did not have contacts for the Respondent.

15. That the applicant having been present in court on 19.3.2021 knew that the order for payment of Kshs. 20,000/= by close of the day of 19.3.2021 and in default, a warrant of arrest was to issue hence, the warrant of arrest was properly issued as there was no application for review or stay of the orders of 19.3.2021.

16. The Respondent further deposes that the applicant is before court with unclean hands as he has not claimed that he deleted the Respondent's contacts from his phonebook.

17. According to the Respondent, the decretal sum was still outstanding hence the applicant herein was not wrongly arrested and therefore the application before court does not meet the threshold for grant of the orders sought

18. It was further deposed that the application before court is fatally and incurably defective and that there is no prima facie case with overwhelming chances of success to warrant granting of the orders sought.

19. Further, that no prejudice will be occasioned on the applicant if the orders sought are not granted.

20. The respondent further deposes that the application is misconceived, bad in law and an abuse of the process of this court. The Respondent urged this court to dismiss the applicant's application in the interest of justice, with costs.

## **ORAL SUBMISSIONS**

21. The application was argued orally with Mr. Okello advocate submitting on behalf of the appellant/appellant, wholly relying on the grounds and supporting affidavit and annexures while the Respondent submitted in person wholly relying on his replying affidavit.

22. In addition, Mr. Okello submitted that the applicant had complied with orders issued on 19.3.2021 for payment by installment and that there was no Notice to Show Cause issued against him.

23. The Respondent, in addition to his Replying affidavit maintained that the applicant was a liar as he had telephone contacts for the Respondent hence the question of where to deposit the first installment as directed by the court did not arise. He submitted that on 4.4.2021, he send an SMS to his debtor which SMS was received. Further, that he did not want to receive the decretal sum by installments as he wanted to use the money for his business.

24. He submitted that when the debtor was arrested, the latter's boss looked for the Respondent and urged him to withdraw the case from court as the entire decretal sum plus costs would be paid and this is evidenced by the affidavit of withdrawal dated 28<sup>th</sup> May 2021sworn by the Respondent.

25. He further complained that the applicant declined to serve him with an original order issued by Kisumu High Court and instead, served him with only an amended order. He submitted that justice should not be overridden with impunity because the applicant disobeyed court orders hence justice should prevail.

## DETERMINATION

26. This application is in an appeal. Basically, it seeks for stay of enforcement of the order for committal of the applicant herein Benson Ogina Ogallo to civil jail for a period of one month for failure to comply with the court order of 19.3.2021 issued by Hon. J.P. Nandi, Principal Magistrate Bondo Law Courts; which orders were to the effect that the applicant liquidates the decretal amount by depositing an initial sum of Kshs. 20,000/= by close of day on 19.3.2021 and monthly installments of Kshs. 10,000/= payable on or before the 20<sup>th</sup> of each succeeding month until payment in full and in default, he would be arrested and committed to civil jail.

27. The lower court record as per the ruling of 27/5/2021 is clear that the applicant judgment debtor defaulted to comply with the order. He did not pay Kshs. 20,000/= by close of business on 19/3/2021. He paid it on 7/4/2021. In addition, he did not pay the 1<sup>st</sup> instalment of Kshs 10,000 by 20<sup>th</sup> April 2021. Instead, he paid it on 21<sup>st</sup> April 2021. As a consequence, the respondent obtained a warrant of arrest against the applicant and the applicant was arrested and arraigned on 26/5/2021 when his advocate Mr. Okello applied for withholding (sic) of the warrants of arrest as he had filed an affidavit indicating that the judgment debtor had complied with the court order issued on 19/3/2021. In the said affidavit, annexed, Mr. Okello deposed that the judgment debtor did not have phone contacts of the applicant decree holder and that upon obtaining the same from court staff, the money was sent to the Respondent through Phone No. 072275622(sic) on 7.4.2021 long after the expiry date and that despite the decree holder receiving payments, he still had the warrants of arrest executed against the judgment debtor/applicant herein in order to settle personal scores.

28. According to the applicant's counsel, owing to bad blood between the applicant and the decree holder/Respondent, he (applicant) deleted phone contacts of the decree holder from his phone hence the delay in obtaining the same caused the delay in paying up the first installment as ordered by the trial court on 19.3.2021.

29. In response before the trial court as per proceedings of 26/5/2021, the Respondent submitted that the judgment debtor called the decree holder and told him that he was sending Kshs. 20,000/= but the decree holder told him not send the money and on 21/4/2021, the judgment debtor send the money to the decree holder. The decree holder was then disgusted by the judgment debtor sending the money in disobedience of the court order so he (decree holder) told the judgment debtor that he (decree holder) shall go to effect an arrest of the judgment debtor herein. He claimed that the judgment debtor got wind of an impending arrest and went underground until the decree holder laid an ambush and had him arrested. He claimed for the entire decretal sum and further costs of Kshs. 60,000/=.

30. From the court record, it is undisputed that the applicant through his boss engaged the respondent to have the dispute settled and as a result, the respondent swore and filed in court on 11/6/2021 an affidavit of withdrawal [sic] upon payment of an amount of Kshs 186,348. That money was never paid to enable settlement of the matter to take effect as per the affidavit in question.

31. In his ruling delivered on 27/5/2021, Hon. J.P. Nandi, Principal Magistrate found that the applicant having failed to comply with the conditions for payment of instalments as ordered on 19.3.2021 and especially the initial amount of Kshs. 20,000/= and second installment which should have been paid by 20/4/2021 and instead, paid the same on 7.4.2021 and 21/4/2021 respectively, instead of close of business on 19.3.2021 and by 20<sup>th</sup> of each succeeding months in the case of 1<sup>st</sup> installment of Kshs. 10,000/= per month, the judgment debtor had disobeyed court order which cannot be condoned hence the decree holder was entitled to receive the whole amount. The learned magistrate proceeded to commit the judgment debtor/applicant herein to civil jail for one month.

32. I have considered all the above circumstances giving rise to this appeal and application and the arguments for and against the application for suspension of warrant committing the applicant decree holder to civil jail for thirty days for disobeying the court orders of 19/3/2021.

33. In my humble view, the main issue for determination is whether the applicant deserves the orders sought. What is not in doubt, from the trial court record and submissions and depositions before this court is that the applicant is the judgment debtor who, on 19.3.2021 was ordered to pay the decretal sum by installments of Kshs. 10,000/= monthly on or before 20<sup>th</sup> and that before close of day on 19.3.2021, he should have paid an initial sum of Kshs. 20,000/=.

34. The applicant has given an explanation why he did not pay Kshs. 20,000 on 19.3.2021 claiming that he did not have the contacts of the Respondent, and asked his advocate to look for the same from court.

35. Whereas there is no indication of where the said money was to be paid, in my humble view, the applicant and his counsel knew that the order had to be obeyed by close of the day and therefore before getting phone contacts of the Respondent, they should have deposited the money in court for compliance to take effect.

36. The applicant should not have waited until 7.4.2021 to get phone contacts of the Respondent to comply with court orders as the order did not call on him to send the money via Mpesa in compliance.

37. Furthermore, instead of paying the 1<sup>st</sup> instalment on 20/4/2021 as ordered by the court, the applicant paid on 21/4/2021 which again was in total breach of the court order.

38. It is true that the applicant was arrested after he had paid the installments but the payments were time bound and therefore the applicant did not enjoy any discretion to choose when to comply with the said court orders. If the terms of the orders of 19.3.2021 were too tough for him or incapable of enforcement, for whatever reasons, the applicant should have approached the trial court that issued the said orders and sought for review of the orders of 19.3.2021 and not assume that since he had eventually paid the instalments albeit outside the timeliness given by the court, then he could not be arrested or punished.

39. In my humble view, the applicant casually treated the court order of 19/3/2021 as a mere suggestion or opinion. Albeit it is not clear whether the proceedings were for contempt of court orders, any breach of court orders no doubt borders on contemptuous conduct of court

processes.

40. In **Teacher's Service Commission vs. Kenya National Union of Teachers & 2 Others** Petition No. 23 of 2013 it was held:

***“The reason why courts will punish for contempt of court is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt of court proceedings. It is about preserving and safeguarding the rule of law. A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed. A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option.”***

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41. I am in agreement with the Respondent that the applicant is before the court with unclean hands. He does not deserve the discretion of the court as he flagrantly disobeyed court orders and wants to ride on the same disobedience to benefit from the unfettered discretion of this court, to pay the decretal sums due at will without adhering to conditions attached by the court and without even seeking for review of the said orders.

42. In **B vs. Attorney General** [2004] 1 KLR 431 Ojwang J.B ( as he then was) held that:

***“The Court does not, and ought not to be seen to make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.”***

43. Stay pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules which stipulates that:

***“6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.***

***(2) No order for stay of execution shall be made under subrule (1) unless—***

***(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and***

***(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.***

***(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.***

44. The question is whether the applicant has fulfilled all or any of the conditions for stay stipulated in sub rule 2 above. The application for stay was made timeously and simultaneous with the appeal on 28<sup>th</sup> May 2021 a day after the applicant was committed to civil jail. As this court was on leave, the file was transmitted to Kisumu High Court under certificate of urgency for consideration of the application and interim orders of stay suspending the committal warrants was issued by Hon Justice Fred Ochieng.

45. On substantial loss, the committal of a debtor to civil jail especially at this time of Covid -19 is not a simple affair. One can easily contract the virus from prison which damage is irreparable. Further, the applicant is employed and being in jail could mean losing his job permanently in these times when jobs are scarce in our country and globally. The loss would be substantial and unquantifiable to the extent that no amount of costs or damages would be adequate to compensate the applicant should he become a victim of C-19 in the process of serving civil jail term at this point in time.

46. On the question of security for the due performance of decree, as the applicant was already paying the debt, though outside the stipulated timelines and terms of the order of 19/3/2021, it would not be of any value to order for security as the challenge is on the committal to civil jail.

47. I agree that committal to civil jail should be the last resort although it is a legal mode of dealing with difficult judgment debtors. However, as submitted by Mr. Okello Advocate, the judgment debtor being employed means that the decree holder could as well have

applied for Notice to Show Cause why his salary should not be attached to liquidate the claim, as stipulated under Order 22 Rule 42 of the Civil Procedure Rules. There was no evidence that the applicant judgment debtor was about to leave the jurisdiction of the court and avoid paying the debt although it has taken long to settle the said decree; or that the applicant had no attachable movable property or had disposed of or transferred his property to third parties to avoid settling decree passed by the court.

48. All said and done, it is undisputable fact that the applicant/Judgment debtor violated the terms of the orders of 19/3/2021 and therefore the trial Magistrate's Court having given conditional orders for liquidation of the decretal sum, was entitled to ensure those orders were obeyed to the letter. However, this court does not have the benefit of the entire court file in the lower court and therefore it is not in a position to establish whether the proceedings that led to the orders of 19/3/2021 were Notice to Show Cause why the applicant should not be committed to civil jail or were contempt proceedings. I say so because execution of decree and the committal of a judgment debtor to civil jail whether under section 38 of the Civil Procedure Act or for contempt of court order has its own procedure stipulated under section 38 of the Civil Procedure Act. Order 22 of the Civil Procedure Rules and the contempt of court Act as well as the Magistrate's Court Act and the High Court Organization and Administration Act.

49. Under section 38 of the Civil Procedure Act:

***“Subject to such conditions and limitations as may be prescribed, the Court may, on application of 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 relief granted may require.***

***Provided that where the decree is for 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.***

***(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 of money which the judgment debtor was bound in a fiduciary capacity to account.” Emphasis added.***

50. Thus, the section cited above makes provision for committal to civil jail only where certain conditions are fulfilled and the onus lies on the decree holder to prove that those conditions exist.

51. As earlier stated, this court does not have the benefit of the proceedings leading to what transpired on 19/3/2021. I am therefore entitled to give the applicant the benefit of doubt on whether the matter before the trial court was due for Notice to Show Cause why the applicant should not be committed to civil jail on 19/3/2021. To that extend, I find that the applicant has shown that his appeal is arguable only as far as committal to civil jail is concerned.

52. However, as it is trite clear that the applicant had disobeyed the court orders of 19/3/2021, the trial court was right in recalling its orders of 19/3/2021 for payment in instalments and in ordering that the decree holder was entitled to receive his whole amount since the applicant had as I have stated earlier, defaulted and had not given any plausible explanation for the default. That finding and order has not been challenged, not even in this application. The applicant cannot rely on the orders of 19/3/2021 for payment by instalments since he flouted the same orders.

53. Accordingly, I make the following orders to serve the interests of justice as the decree is monetary and the applicant through his boss had caused the respondent to sign an affidavit of withdrawal of suit which suit had been determined on merit even on appeal:

***a. The applicant/appellant to liquidate the entire balance of decretal sum within the next seven (7) days from the date of this***

*ruling and in default, the applicant is at liberty to revert to court and enforce the judgment as stipulated in the law on execution of decrees, with attendant costs incidental thereto being borne by the applicant/appellant;*

*b. The warrant of committal to civil jail issued against the applicant/appellant on 27/5/2021 is hereby suspended until this appeal, if prosecuted to the end, is determined, and or withdrawn;*

*c. The respondent shall be paid costs of this application.*

54. I so order.

**Dated, signed and Delivered at Siaya virtually and physically this 22<sup>nd</sup> Day of July, 2021**

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

Mr. John Ogutu Advocate h/b for Mr. Okello for the applicant/appellant [virtually]

The Respondent Mr. Samson Omuombo Odido in person [physically]

CA: Modestar and Mboya