



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

MISC. APPLN NO.E133 OF 2018

GEORGE WAINAINA.....APPLICANT/JUDGMENT DEBTOR

- VERSUS -

CLEMENT ABOGE.....RESPONDENT/DECREE HOLDER

R U L I N G

1. Before Court is the judgment debtor's ("applicant's) Motion on Notice dated 12/2/2021 brought, *inter-alia*, under **Order 45, Order 51 and Order 9 rule 9(a) of the Civil Procedure Rules 2010**. It sought 5 orders, 3 of which are spent. The remaining 2 are that the warrants of arrest issued on 19/11/2020 be set aside and the costs be in the cause.
2. The grounds for the application are set out in its body and the supporting and supplementary affidavits of the applicant sworn on 12/2/2021 and 11/5/2021, respectively. They include that; on 19/11/2020, the court issued warrants for his arrest as he was unable to pay the respondent/decree holder ("the respondent") the sum of **Ksh. 113,005,365.75**; that his inability to pay the decretal sum was due to financial difficulties occasioned by the Covid 19 pandemic.
3. He contended that if he is committed to civil jail, the effort he was making towards his business recovery after the effects of the ongoing Covid-19 pandemic will be affected and he will be unable to meet any of his obligations. That he had been unwell and that the monies he had set aside to repay the respondent had been depleted by his hospital bills as well as his father's who unfortunately had passed on. He was negotiating with the respondent on how to settle the amount and was in the process of selling his properties known as **Kijabe/Kijabe Block 1/6929,6930,6932 & 6933** whose proceeds thereof will be applied towards offsetting the decretal amount.
4. In opposition, the respondent filed a replying and further affidavits sworn on 16/3/2021 and 3/5/2021, respectively. He averred that the application is incompetent as it is brought under **Order 45 of the Civil Procedure Rules**, but the grounds upon which it is based are not recognized under the said order.
5. That the application was an evasive tactic aimed at delaying the settlement of decretal amount as the applicant had ample time since the arbitral award was published on 14/12/2017 and recognized on 6/2/2019 to make payment or proposals for reducing the decretal amount but has failed to do so.
6. He further contended that in his application, the applicant has not offered any down payment nor concrete plan for the settlement of the decretal sum. That the ownership of the properties known as **Kijabe/Kijabe Block 1/6929, 6930, 6931, 6932 & 6933** which the applicant claims to be in the process of selling were registered in the name of Ndeiya Farm Limited which is a stranger to the respondent.
7. Additionally, in April 2019, he had sought to execute the decree by way of attachment and sale of the applicant's property but objection proceedings were instituted by Grawa Holdings Limited which claimed that the property did not belong to the applicant.
8. The respondent concluded that based on the conduct of the applicant over the years, he has no intention of settling the decretal sum. He was only jolted into action on the pain of arrest. That he had issued cheques that were dishonored.
9. The issue for determination is **whether the court should set aside the warrants of arrest issued on 19/11/2020**.
10. The applicant submitted that he has been unable to make payment towards settling the decretal sum due to financial difficulties brought about by covid-19 pandemic and medical expenses.
11. On the other hand the respondent submitted that the warrants of arrest were issued on 11/11/2020 after the applicant had failed to show cause why he should not be committed to civil jail for failing to settle the decretal amount. That the applicant had had sufficient time since

the Arbitral award was issued on 14/12/2017 and recognized on 6/2/2019 to make payment or make proposals for payment but has never done so.

12. **Section 38 Civil Procedure Act** provides for the execution of a decree by arrest and detention in prison of any person after he has been given an opportunity of showing cause why he should not be committed to prison.

13. The arbitral award from which the decretal amount arise, was made on 14/12/2017 and recognized on 6/2/2019. The Notice to Show Cause was held on 4/9/2019 and the applicant failed to appear. These dates were all before the covid-19 pandemic hit the country and the world at large. The applicant did not tell the Court what effort he had made between December, 2017 and March, 2020, when Covid-19 hit the country, to settle the decretal amount.

14. In view of the foregoing, it cannot lie in the mouth of the applicant that his financial position had been affected by Covid-19. The applicant has come to Court seeking the exercise of the Court's discretion. The Court's discretion is not to be exercised to assist a recalcitrant party. Such a party must show good faith.

15. Despite the decree being over two years old now, in his application, the applicant did not make any proposals on how he intends to settle the decretal amount. He issued cheques which were dishonored. The allegation that the funds thereof were applied towards medical bills and funeral expenses for his father were not proved. There was no evidence of the payments made in respect thereof.

16. The proposal that he intended to sell some properties to offset the decree was likewise disproved. The properties were said to belong to a 3rd party who did not file any affidavit to show that it had agreed to offer its properties as alleged by the applicant.

17. In **Innocent G. Ondieki v Julius Nakaya Kabole [2019] Eklr**, it was held: -

“As stated above, the only viable ground of setting aside an order for committal to civil jail, is when the respondent challenges the mode or manner in which the said orders were attained”.

18. In **Solomon Muriithi Gitandu & Another vs. Jared Maingi Mburu [2017] Eklr**, the court cited with approval the observation made in **Braeburn Limited -V- Gachoka and another (2007)**; that: -

“Section 38 of the Civil Procedure Act however, provides a limitation of the courts' power to order execution of a decree by way of detention in prison. The section prohibits the court from making an order of execution of any decree for the payment of money unless the judgment-debtor has first been given an opportunity of showing cause why he should not be committed to prison and even where the judgment debtor has been given such notice to show cause, the court must itself be satisfied and give reasons in writing for that.

These limitations are further re-stated under Order 22 rule 31 (1) Civil Procedure Rules. A notice to show cause may be issued requiring the judgment debtor to show cause and where he fails to appear a warrant of arrest is issued”.

19. In the present case, neither the mode nor manner in which the order for warrants was issued has been challenged. The applicant should have appeared in court to show cause.

20. Based on the foregoing, the court does not find any reason to set aside the warrants of arrest against the applicant. The warrants do not in any way violate the rights of the applicant as the legal procedure was followed. The respondent as the decree holder has a right to execute the decree in any manner provided for by the law.

21. In the premises, the application dated 12/2/2021 is without merit and is dismissed with costs to the respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF AUGUST, 2021.

A. MABEYA, FCI Arb

JUDGE