REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CIVIL MISC. NO. E004 OF 2021

MN ....GUARDIAN/APPLICANT

VERSUS

AM .....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Soita Wafula Advocate for the Guardian/Applicant

Mwaure & Mwaure Waihiga Advocates for the Respondent

R U L I N G

The applicant is challenging the Ruling emanating from the Principal Magistrate Court at Mpeketoni which made the following orders:

(1). Varying the original maintenance order of Kshs.15,000/= to Kshs.10,000/= against the respondent.

(2). Failure to provide an avenue for enforcement of the order in the event of default of payments.

In support of the application, applicant relied on the grounds deposed in her affidavit dated 28.6.2021.

Determination

Present matters raised important and interesting issues of Law with regard to the paramount importance of the children's best interest espoused in Article 53 (4) of the Constitution and Section 4 of the Childrens Act. It is pertinent to mention that the present interlocutory application on revision has been filed when the main suit appears not to have been fully settled. The prayers sought by the applicant are in respect of the construction and interpretation of Section 38 of the Civil Procedure Act as internalized and construed by the Learned trial Magistrate.

The applicant's application hinges entirely on the legality, propriety, correctness and the justness of the decisions subject to the express provisions of Section 38 of the Civil Procedure Act which provides measures on enforcement of decrees and the residual relief of arrest and detention in prison of the Judgment debtor.

As a matter of abundant precaution, Section 38 clarifies the threshold bar and the Court's approach with regard to the decree-holder who applies under that Section to execute the decree by way of an order of an arrest and detention to Civil jail of a Judgment debtor.

I may observe and think the enquiry is first, whether the Judgment debtor with the object or effect has conducted himself or herself in a manner of obstructing or delaying the execution of the decree, it is likely to abscond or leave, the local limits of the jurisdiction of the Court or after institution of the suit dishonestly transferred, concealed or removed any of the subject matter to property likely to satisfy the decree from the jurisdiction of the Court.

In my view, the word arrest as used in the Act is quintessentially a seizure of the physical person. In this context, arrest will mean the act of taking a Judgment debtor into custody under the authority of the Law or by compulsion of another, herein the decree holder and includes the period from the moment an application is made and an order for restraint to be committed to prison custody.

In adherence to the provisions of Section 38 of the Civil Procedure Act, any such orders of arrest and detention, should bear in mind the

fundamental Law that contains the right to liberty and freedom under Articles 28 and 29 of the Constitution. It provides that no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by Law. Therefore, the judicial authority in giving effect to the provisions of Section 38 of the act shall ensure respect for this principle under the Childrens stipulated by Law. Incidentally Section 38 tends to be more explicit and precise in defining the situations very justify an arrest and detention of a Judgment debtor in prison. In execution of a civil decree, the nature and existence of the outstanding debt itself may not be a factor in determining whether or not an arrest and committal to Civil jail should be made.

In addition to that decree, the Section sets out the prerequisites that may require to be met and existence of circumstances which justify the need to place a Judgment debtor into Civil jail.

In a persuasive jurisprudence from South Africa – in the case of **Coetzee v Government of South Africa {1995} 4 SA 631** the Constitutional Court observed on the provisions of Section 30 which has similar language with Section 38 (1) (f) of our Civil Procedure Act that:

> **"The Law seems to contemplate that imprisonment should be ordered only where the debtor has the means to pay the debt, but is unwilling to do so."**

My reading of the aforesaid provisions of Section 38 does make adequate distinctions of the category of debtors to be committed to Civil Jail. For the Court to rule otherwise would be tantamount to an act of deprivation of the right to liberty and freedom clearly guaranteed by the Constitution. One key fundamental factors in execution proceedings, the executing Court has to ascertain the assets and income of the Judgment debtor to determine the quantum, whether the Judgment debtor has the means to satisfy the money-decree. The growth in, incarceration of individual debtors for failure to satisfy a money-decree without first satisfying the test/enquiry in the aforesaid Section is a threat to the fundamental rights and freedom under the Bill of Rights.

The way I see it, a simple default to discharge the decree is not enough to call for detention of the Judgment debtor into prison custody. There must be some element of bad faith, beyond mere indifference to pay, some deliberate or recusal disposition in the past or alternatively current means to pay the decree or a substantial part of it. Consideration of the debtors other pressing basic needs and straitened circumstances, will play out prominently before an order of arrest and committal to Civil jail is made by the enforcement and execution of Court.

I hold a strong view that to cast a Judgment debtor in prison because of his or her poverty and consequent inability to meet his or her legal or contractual obligations is appalling. It is not a crime to be poor and therefore recovery debts/money decrees by the procedure which deprives one the right to liberty, dignity and freedom is flagrantly violative of Article 27, 28 and 29 of the Constitution, unless there is proof of the minimum conditions outlined under Section 38 of the Civil Procedure Act.

From the record, and the earlier adjudication by the Learned trial Magistrate, I find no error, mistake, misapprehension, excess of jurisdiction in so far as the impugned Ruling is concerned to warrant interference by this Court. As a consequence, I direct the executing Court to adjudicate over the matter taking into account the best interest of the children without compromising the right to life, liberty, dignity and freedom of the Judgment debtor, being human rights constitutionally protected and guaranteed. Any derogation from any of these rights must meet the threshold criterion.

The application for review be and is hereby dismissed with costs.

DATED, SIGNED AND DISPATCHED AT GARSEN VIA EMAIL ON 27TH DAY OF OCTOBER, 2021

.....

R. NYAKUNDI

JUDGE

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