



REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

CIVIL CASE NO 28 OF 2003

WILLIAM MUKUI NYAGA.....PLAINTIFF/RESPONDENT

VERSUS

JOSEPH KIMEMIA MUTHONDU.....1ST DEFENDANT

THE ATTORNEY GENERAL.....2ND DEFENDANT

EPAPHRUS MUTURI KIGORO.....3RD DEFENDANT/APPLICANT

RULING

A. Introduction

1. This ruling pertains to the application dated 2nd September 2019 in which the applicant seeks orders that the costs of the suit amounting to Kshs. 348,024.27 be borne by all the defendants equally as per the judgement delivered on the 12/07/2007. The applicant also prays for costs of the instant application.
2. It is the applicant's case that he has been compelled to pay the entire decretal amount whereas the judgement of the court stipulated that the three (3) defendants pay costs to the plaintiff but he was ordered to pay the entire decretal sum in instalments of Kshs. 30,000/= by the 5th each month in default of which warrant of arrest would issue.
3. The applicant further states that each defendant ought to pay Kshs. 116,008.09 and that he has already made some payments to the tune of Kshs. 102,000/= and as such stands to suffer prejudice if the orders sought are not granted.
4. The applicant further states that he is ailing and requires constant medical attention and thus subjecting him to civil jail would amount to a gross injustice and violation of his constitutional rights.
5. In rejoinder, the respondent stated that as judgement was entered against the defendants jointly and severally, the same can similarly be recovered either from the defendants together or from the 3rd defendant only. It is further stated that the law has a clear remedy for the 3rd defendant against his co-defendants and he should explore the same upon his settlement of the costs.
6. The respondent further states that the applicant who had deposited Kshs. 80,000/= in court as security of costs falsely wrote to the court claiming that he had settled all the costs owed to the respondent and was thus entitled to a refund of the security and as such this dishonesty disentitles him to the orders sought.
7. The parties were to file submissions to dispose of the application. Only the respondent has filed.

B. Respondent's Submissions

8. It is submitted that his recovery of the costs from all or any of the defendants is within the law considering he was awarded costs against the defendants jointly and severally. It is further submitted that the applicant's hands are not clean and his application is not in good faith as he had falsely claimed to have settled all costs due to the respondent as he applied for a refund of the amount of Kshs. 80,000/= that he deposited as security for costs.

C. Analysis & Determination

9. The only issue for determination in this application is whether the applicant should be released from paying the whole of the decretal sum by the payment of Kshs 116,008.09 instead of Kshs. 348,024.27.

10. It is not disputed that judgement was entered jointly and severally against the defendants in the suit whose decree gave rise to these proceedings. It is therefore important to understand the meaning and effect of a “joint and several” judgement or liability. In **Dubai Electronics v Total Kenya & 2 Others High Court (Milimani Commercial and Admiralty Division) Civil Case No. 870 of 1998** after considering past decisions on the issue it was stated:

Clearly therefore where you have joint liability all the tortfeasors are and each one of them is liable to settle the full liability. However, in a purely several liability each tortfeasor is only liable to settle the sum due to the tune of his liability. Where, however, the liability is joint and/or several the plaintiff has the option of either directing his claim against any one of the tortfeasors or making his claim against each one of the tortfeasors according to their individual liability. Either way he cannot recover more than the total sum decreed. However, the defendants are entitled to reimbursement from the co-defendants in the event that the plaintiff only opts to recover from one of them. That is my understanding of joint and several liability. In the case of Kenya Airways Limited vs. Mwaniki Gichohi (supra) Ringera, J (as he then was) stated as follows:

“The concept of joint and several liability comprehends one judgement and decree against two or more persons who are liable collectively and individually to the full extent of such decree; however double compensation is not allowed and accordingly whatever portion of the decree is recovered against one of such defendant cannot be recovered from the other defendant(s).”

11. Therefore, unless subsequent to the judgement there existed circumstances which amounted to accord and satisfaction, the defendants are liable to settle the judgement as joint and several judgement debtors.

12. As held in the **Dubai Electronics** (supra) case, the plaintiff has the option of recovering costs from any of the defendants according to their ability. The defendant who pays the full decretal amount or costs in a case where there is joint and several liability, has the remedy of recovering from the other defendants their part of the liability.

13. I find that this application lacks merit and it is hereby dismissed.

14. Each party to meet their own costs.

15. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 28TH DAY OF JANUARY, 2020.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Muriuki for Okwaro for Defendant/Respondent