



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**HIGH COURT CIVIL APPEAL NO 16 OF 2017**

**SMG**

**CNM.....APPELLANT**

**Versus**

**JMM.....RESPONDENT**

(Being an Appeal of the Orders and Ruling of the Resident Magistrate’s court at Wang’uru (The Honourable D. Nyaboke R.M. Dated 10<sup>th</sup> April, 2017 in Wang’uru Resident Magistrate Court case No. 53 of 2016

**BETWEEN**

**DMM ( suing as the next Friend of JMM (Minor).....RESPONDENT**

**VERSUS**

**SMG**

**CNM as the Next friend for DMM ( Minor) .....RESPONDENT**

**JUDGMENT**

1. This appeal arises from the Ruling by the Trial Magistrate delivered in PMCC’s at **Wanguru Civil Case No. 53 of 2016** dated 10<sup>th</sup> of April, 2017. The ruling committed the Appellants on behalf of their child to Civil Jail for 30 days.
2. The Appellants were dissatisfied with the Ruling and filed a memorandum of appeal dated 26<sup>th</sup> April, 2017 based on the following grounds;
  - i. The Learned Magistrate erred in law in disregarding the clear and mandatory provisions of Section 38 of the Civil Procedure Act and Arbitrary deprived the appellant of his right to liberty.**
  - ii. The Learned Magistrate misdirected himself in law when he purportedly committed the appellant to civil jail.**
  - iii. The Learned Magistrate erred in Law in failing to appreciate the proviso to Section 38**
3. The appellants pray that the orders committing the appellants to Civil jail be set aside and they be awarded costs of the appeal. The appeal was disposed off by way of written submissions for the appellants, Submissions were filed by R.M. Kimani & Company advocates.
4. They submit that the trial magistrate committed the appellant to civil jail without following the procedure enshrined under the proviso to **Section 38 of the Civil Procedure Act**. The decree herein was for payment of money and no reasons were recorded.
5. There was also no likelihood of the Appellants obstructing execution of the decree or absconding from the local limits of the courts jurisdiction, and there was also no evidence raised before the trial court that the appellant had means to pay and had refused to do so. She relies on; JEDIDA CHEPKOECH MUTAI ( Suing as the legal representative of the estate of **Julius**

**Kipkorir Mutai (deceased) -vs- Cheron Beatrice (2018) eKLR** where it was held as I understand it the general provision in Law is that the arrest contemplated **Under Section 38 & 40 of Civil Procedure Act** is not unconstitutional.

6. All that is required in proceedings under the two provisions is that there has to be strict adherence to the Law.

HE has also relied on the case of; **JANE WANGUI GACHOKA -vs- KENYA COMMERCIAL BANK LIMITED (2013) eKLR** where the court stated

**“ the deprivation of liberty sanctioned by Sections 37 & 40 of CPA is Permissible and is not in violation of either the Constitution or ICCPR.**

**The caveat however which have been emphasized in all the cases above is that; Before a person can be committed to Civil jail for non payment of a debt there must be strict adherence to the procedure laid down in the CP A and CPR which provides the due process safeguard, essential to making the right to liberty permitted in this case acceptable in a free and democratic society. “**

See also; **MARY NDUKU NDUNDA -vs- ATTORNEY GENERAL & 4 OTHERS (2016) eKLR**. she has also relied on the case of : **BRAEBURN LIMITED -VS- GACHOKA & ANOTHER** which was quoted in the case of; **INNOCENT G. ONDIEKI -VS- JULIUS NAKAYA KABOLE (2019) eKLR**.

7. The court stated as follows; **Section 38 & 40 of Civil Procedure Act** are neither inconsistent with the Provisions of the Constitution and International Bills of Rights.

8. I am persuaded to agree with the findings. However, for a judgment debtor to be committed to prison, the court must ensure that the conditions for committal to prison on account of a money decree are strictly followed.

9. A Judgment debtor will not be committed to prison for inability to pay or to fulfil contractual obligation. There must be additional reasons and the court been satisfied after the debtor has been given Notice to show cause and give reasons in writing as provided **Under Section 38 of the Civil Procedure Act and Order 22 Rule 31 (1) of Civil Procedure Rules.**”

10. He submits that it is evident that the procedure for committing the appellant to Civil jail was not followed in accordance to the Law and he prays that the appeal be allowed with costs.

#### **FOR THE RESPONDENTS:**

The record of Appeal before an Appellate court is the foundation of the appeal.

11. A look at the Submissions by the counsel for the Appellant. The supporting authorities clearly states that, committal to civil jail is not unconstitutional. However, there must be strict adherence to the Law and procedure provided therein.

12. He submits that a perusal of the record shows that the ruling of 10<sup>th</sup> April, 2017 appealed against does not form part of the record of appeal.

13. That the appellants have not satisfied the decree of Kshs; 186,900/= since September 2016. That the delay in prosecuting this appeal is intent to delay in satisfying the Judgment of the lower court thus prejudicing the appellant. He prays that the Appeal be dismissed with costs. I have considered the appeal and the submissions;

14. From the record of the court, the issue raised by the respondent that the Ruling appealed against did not form part of the Record of Appeal was addressed by this court ( Githua J.) on 12<sup>th</sup> September, 2019 and the appellants were granted leave to file and serve a Supplementary record of appeal within 14 days to include the Ruling appealed against, and the Supplementary record was filed on 26<sup>th</sup> September, 2019.

#### **THE ISSUE WHICH ARISES FOR DETERMINATION IS;**

- Committal to Civil Jail.

15. Brief background of this case is that the Appellants who were the defendants in the Magistrate’s court had been sued by the respondents as per a plaint dated 4<sup>th</sup> of April, 2016. In **Wanguru CR. CASE No. 568 of 2015** wherein the accused was found guilty and placed on six months’ Probation for assaulting the plaintiff.

The respondents had filed the Civil case claiming both general and special damages.

16. In the Judgment of the trial magistrate dated 19<sup>th</sup> September, 2016 Judgment was entered for the respondents against the appellant who was held 100% liable and ordered to pay General damages of Kshs; 100,000 and special damages of Kshs; 32,700/=. The respondent sought to enforce the Judgment and filed a bill of costs, and costs were assessed at Kshs; 52,000/=.

17. A decree was extracted and the Appellants’ were issued a Notice to show cause why they should not be committed to prison

in execution of the decree then standing at **Kshs; 186,900/=**. The appellants' appeared before the trial magistrate for Notice to show cause.

18. It is then the trial magistrate made the impugned Ruling committing the Appellants to Civil jail for thirty days.

**19. Under Section 38 of The Civil Procedure Act** the procedure to be followed when committing a Judgment debtor to Civil Jail in execution of a money decree is set out. **The Proviso thereto states:**

**“Provided that where the decree is for the 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, or**

**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 for which the judgement debtor was bound in a fiduciary capacity to account”**

20. The SECTION allows the arrest and detention of a debtor in prison on the basis of conditions set out **Under Section 40** titled arrest and detention and sets out the process for the arrest and detention in jail of a debtor.

21. The proviso to the Section is couched in Mandatory terms and requires that the court puts down in writing the reasons for believing that the Judgment debtor with intention to delay the execution of a decree is likely to abscond or live the local limits of the jurisdiction of the court has since passing of the decree had the means to pay the amount or substantial part thereof and refuses and neglects to pay.

22. The Provision does not amount to the violation of the rights of the Judgment debtor but The Law has to be strictly complied with. I am persuaded by the decisions relied on above by the applicants.

23. I need not belabor, the point in this proceedings the trial magistrate totally failed to adhere to the procedure set **Under Section 38 of Civil Procedure Rules.**

What the magistrate stated is as follows;

**“1<sup>st</sup> and 2<sup>nd</sup> defendant on behalf of their child are hereby committed to Civil jail for 30 days, mention on 8<sup>th</sup> May, 2017 Production order for the date to issue.”**

24. There was failure by the Trial Magistrate to follow the procedure, there is nothing on record to show that the appellant was given an opportunity to show cause and on her part the trial magistrate did not give reasons for committing the appellants to Civil jail.

25. I agree that the procedure of committing the appellants to Civil jail was not followed as provided under the Law. I therefore find that the appeal has merits.

26. I allow the Appeal and order that the order committing the Appellants to Civil jail is set aside.

27. I make no order as to costs. The file will be referred back to the Trial Magistrate

**Dated, signed at Kerugoya this 29th day of May 2020.**

**L.W. GITARI**

**JUDGE**