REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

Coram: D. K. Kemei - J

PETITION NO. E2 OF 2020

IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 28, 29 AND 39 (1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ARTICLES 3, 10, 12(1), 20(1), (2), 24 & 50 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ARTICLE 11 OF THE UNITED NATIONS INTERNATIONAL CONVENTION OF CIVIL AND POLITICAL RIGHTS

WILSON MUNGUTI.....PETITIONER

VERSUS

RAPHAEL KASUKI MUTISO.....1ST RESPONDENT

SYOKIMAU BRIGHT HOMES.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. The petitioner filed this application vide notice of motion dated 17.9.2020 that was brought under Articles 22, 23 and 159(2)(d) of the Constitution, sections 1A, 1B, 3A & 63(e) of the Civil Procedure Act CAP 21 Laws of Kenya and Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and Order 51 Rules 1 and 4 of the Civil Procedure Rules, 2010. The following orders are sought;

a) Spent;

b) Spent;

c) That pending the determination of this petition, this Honourable Court be pleased to review, suspend, lift or stay the order for committal to civil jail against the petitioner/applicant in satisfaction of the judgement issued by the court in ***Machakos Chief Magistrate Court Civil Case No. 602 of 2014 Raphael Kasuki Mutiso v Syokimau Bright Homes Ltd*** *and* ***Civil Case No 538 of 2014 Mbithi Vundi v Syokimau Bright Homes Ltd*** *in the same court;*

d) That this honourable court be pleased to issue such further order(s) as may deem fit;

e) That the costs of this application be awarded to the petitioner.

2. The grounds of the application as gleaned from the face of the notice of motion as well as the supporting affidavit of Wilson Munguti dated 17.9.2020 are that the 1st respondent filed a suit against the 2nd respondent for a civil debt of Kshs 75,500/- and that judgement was passed in Machakos CMCC 602 of 2014 as well as Civil case 538 of 2014 in favour of the plaintiff/1st respondent as against the defendant/2nd respondent. The deponent pointed out that a warrant of arrest had been issued against him in execution of the decree issued by the trial court. The deponent maintained that he did not participate in the main suit as he was not privy to the same; he lamented that the proceedings were never brought to his attention and that the defendant company was represented in court hence it ought to have been brought to the attention of the court that there was a change of directorship of the company. The deponent averred that he had never been served with a notice of entry of judgement nor was he personally served with a notice to show cause.

3. It was pointed out that he resigned from directorship of the Defendant company three years earlier hence he was not represented in court; that the trial court hurried to make a decision to commit him to civil jail without following due process and that the said jailing under Order 22 Rule 7 of the Civil Procedure Rules was unconstitutional as well as contrary to international laws that Kenya is a signatory.

4. In reply the 1st respondent averred that the orders being sought are not the subject of this court and therefore this court lacks jurisdiction to hear and determine the matter. It was averred that due process of the law was followed during the trial of **Machakos CMCC 602 of 2014** as well as Civil case 538 of 2014 and that the petitioner being a director of the 2nd respondent participated in all the proceedings before the trial court. It was averred that the notice to show cause was issued and served on the petitioner who was arrested on 21.7.2020 in execution of the said warrant of arrest. It was pointed out to the court that the petitioner had filed an application dated 4.9.2020 in the trial court and which is pending ruling and that the application raises the same issues as the application dated 20.8.2020. According to the deponent, the applicant had not met the threshold to warrant review of the decision of the lower court and that the decision of the trial magistrate ought to have been challenged on appeal. It was maintained that committal to civil jail is part of our law and that the statute had not been repealed hence the court was urged to dismiss the application.

5. There is no indication of any reply by the 2nd and 3rd respondents.

6. The application was canvassed vide oral submissions. Mrs Nyaata for the applicant pointed out to the court that the petitioner was the former director of the 2nd respondent and that at the time of delivery of the judgement in the trial court, he was no longer the director hence had no duty to meet the judgement against the 2nd respondent. Counsel placed reliance on the case of **Beatrice Wanjiku & Another v A.G (2012) eKLR** and submitted that the said court found that Order 22 Rule 7(1) of the Civil Procedure Rules is unconstitutional.

7. In reply, Mr Kamanda for the 1st respondent pointed out to the court that the trial court had lifted the corporate veil and that the petitioner was given an opportunity to appear for cross examination and that at that point he was represented by counsel; that the court issued a warrant and the petitioner was arrested. It was pointed out that the petitioner made an undertaking to pay the decretal amount and he was released; that he ought to have filed an application to set aside the proceedings. It was submitted that the petitioner did not present new evidence regarding the status of the 2nd respondent hence as it is, he is still a director. Counsel submitted that committal to civil jail was not unconstitutional and reliance was placed on the case of **Adriano Anyinka & 2 Others v Julius Kabole (2019) eKLR** and **Beatrice Wanjiku & Another v A.G. (2012) eKLR.**

8. In rejoinder, counsel for the applicant submitted that no undertaking was made by the petitioner; that this court has jurisdiction to entertain the matter. It was reiterated that the application be allowed.

9. I have carefully considered the Applicants application together with the affidavit evidence, submissions of counsel and authorities cited. The nature of the Applicant's application is primarily an application to set aside execution of a decree issued by the trial court. The question of the constitutionality of the mode of execution seems be hinged on the determination of the primary question which is whether the committal to civil jail in execution of the decree of the trial court was constitutional.

10. As it is, I have not been availed with the records of proceedings before the trial court that passed the decree and the position of the law is that questions pertaining to execution can only be determined by the court that passed the judgment/decree. I must emphasize that there is no need for other proceedings leading to a decision or adjudication other than what happened in court. There cannot be two judgments on the same matter.

11. It suffices to cite the provisions of section **34 of the Civil Procedure Act that provides that** *(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit*. This means that the trial court and not this court has jurisdiction to handle the bulk of the instant matter as the same is still before it regarding the aspect of execution of the decree.

12. If I were to abrogate jurisdiction to this court, I disagree with the interpretation of the applicant's counsel on the case of **Beatrice Wanjiku & Another v A.G (2012) eKLR**. In **Jedida Chepkoech Mutai (Suing as The Legal Representative of the Estate of Julius Kipkorir Mutai (Deceased) v Cherono Beatrice [2018] eKLR,** it was stated that -

> *'As I understand it, the general position in law is that the arrest contemplated under section 38 and 40 of the Civil Procedure Act is not unconstitutional. All that is required in proceeding under the two provisions is that there has to be strict adherence to the law*.

13. Detention in civil prison is permitted in law for failure to pay monetary awards, fines or contempt of court and for wilful failure to perform a decree that orders specific performance (*a decree ad factum praestandum*) where court is satisfied that the non-performance is wilful. One wonders why the applicant opted to take the constitutional petition route and yet there is adequate provision in the law to handle his concerns. The 1st respondent filed a comprehensive replying affidavit in which he gave a chronology of the events leading to the petitioner's arrest and committal to civil jail. It is surprising that the petitioner for unexplained reasons failed to rebut those averments vide a further affidavit and hence the 1st respondent's averments remain unchallenged. The gist of the 1st respondent's case was that the petitioner

duly participated in the trial proceedings after the corporate veil of the 2nd respondent was lifted and that upon the show cause being issued the petitioner duly made an undertaking to settle the amounts within a period of thirty days but then reneged and was thus committed to jail. The 1st respondent also maintains that the petitioner has also filed an application dated 4.9.2020 which is pending ruling before the trial court and which raises similar issues. It would appear therefore that the petitioner has been economical with the truth by failing to disclose all the pertinent issues in the matter more particularly the quest for conservatory relief yet the matter is pending ruling before the trial court. I find that to be improper and akin to playing lottery.

14. I would therefore associate myself with the dictum by the Court of Appeal in the case of **Francis Gathungu v Kenyatta University [2018] eKLR**, where the learned justices observed that "*We think, with respect, that a willy-nilly attempt at constitutionalizing every common dispute must be discovered, named and rebuffed. This is by no means a manifestation of hostility towards upholding the Bill of Rights or fundamental of freedoms but rather a pragmatic approach to adjudication. The courts must be vigilant to confine constitutional determination to disputes that raise and invoke authentic and genuine constitutional questions*."

15. The petitioner herein seeks conservatory relief pending determination of the petition. Basically, he seeks for an order that he be released from civil jail pending determination of the petition. It is settled law that an applicant seeking for conservatory relief pursuant to a constitutional violation is under obligation to show and demonstrate a prima facie case with a likelihood of success and should go ahead to show that he or she will suffer prejudice as a result of the violation or threatened violation of the constitution. (See the case of **Centre for Rights Awareness (CREAW) & 7 Others V Attorney General Nbi Hc Petition No. 16 of 2011**) It is noted from the pleadings that the petitioner did participate in the proceedings in the trial court and even went ahead to provide an undertaking which curiously he does not dispute and as such his claim that his rights have been violated might not turn out to be convincing during the determination of the petition. Hence, I am not satisfied that a prima facie case has been established by the petitioner to warrant the grant of conservatory relief at this stage. There is already a ruling pending before the trial court and that nobody knows which way it might take. It was appropriate for the petitioner to have waited for that ruling by the trial court before approaching this court since he had filed the application dated 4.9.2020 before that court. Without going into the merits of the petition, these factors lead me to come to the finding that the petition might not have a prima facie chances or likelihood of success. I also find that the failure by this court to grant interim orders at this stage does not unduly prejudice the petitioner as there is a prayer for compensation for violation of rights in the petition to be canvassed.

16. In the result, it is my finding that the petitioner's application dated 17.9.2020 lacks merit. The same is dismissed with no order as to costs.

It is so ordered.

Dated and delivered at Machakos this 30th day of September,2020.

D. K. Kemei

Judge