



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J) CIVIL APPEAL NO. E033 OF 2020

BETWEEN

MOHAMED HUSSEIN BARRE.....1ST APPLICANT

ABDI MOHAMMED HURIO.....2ND APPLICANT

AND

MOHAMMED TUFWO ROBLE.....RESPONDENT

RULING

1. By a notice of motion dated 15th December, 2020 and filed on 16th December, 2020, the Applicants seek orders

That:

1) The Honourable Court be pleased to order the release of the Applicant from civil jail pending the hearing and determination of the appeal

2) The Honourable Court be pleased to make any other orders as may meet the ends of justice

3) Costs of this application be paid by the Applicant

2. The application is based on the grounds among others

That:

a) The 1st Applicant has been committed to civil jail on a decree he objects to and on a claim he denies

b) The Applicants did not participate in the hearing as their advocate who had been struck of the roll of Advocates did not inform them of the hearing date

c) The 1st Applicant learnt of the judgment when he was arrested

d) Applicant is likely to suffer irreparable damage if he is not released

e) The Applicants desire to defend the suit

3. The application is supported by the affidavit sworn by the 1st Applicant on 15th December, 2020 in which he reiterates the grounds on the face of the application.

Annexed to the affidavit is a copy of the memorandum of appeal.

4. The application is opposed by way of a replying affidavit sworn by the Respondent on 22nd December, 2020. Respondent avers that the Applicants were represented by G.G. Mugambi advocate who filed a notice of appointment and defence on 14th March, 2018 and 16th May, 2018 respectively but did not attend the hearing despite having been served with hearing notices.

Analysis and Determination

5. I have considered the application in the light of the affidavits on record and annexures thereto and the oral submissions made on 23rd December, 2020 by counsels on record.

6. Section 38 of the Procedure Act which provides for Powers of Court to Enforce Execution provides as follows:

Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree-holder, order execution of the decree—

- a) by delivery of any property specifically decreed;=
- b) by attachment and sale, or by sale without attachment, of any property;
- c) by attachment of debts;
- d) by arrest and detention in prison of any person;
- e) by appointing a receiver; or
- f) in such other manner as the nature of the relief granted may require:

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 judgment-debtor was bound in a fiduciary capacity to account.

7. It has been held severally that no person should be sent to prison for inability to pay a debt. In Zippora Wambui Muthara – Milimani BC Cause 19/2010 (unreported) Justice Koome (as she then was) observed as follows:

1) “There are several methods of enforcing a civil debt such as attachment of property. The respondent’s claim that the debtor has money in the bank, that money can also be garnished. An order of imprisonment in civil jail is meant to punish, humiliate and subject the debtor to shame and indignity due to failure to pay a civil debt. That goes against the international covenant on civil and political rights that guarantees parties’ basic freedoms of movement and of pursuing economic cultural development”

2) It is incumbent on the party seeking to execute a civil debt by way of committal to civil prison to adhere to the legislative safeguards before a party can be committed to civil jail. In the case of Braeburn supra and Jane Wangui Gachoka -V- Kenya Commercial Bank Petition 51/2010 it was held that Section 38 and 40 of the Civil Procedure Act are neither inconsistent with the provisions of the relevant provisions of the Constitution and International Bills of Human Rights. 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. A judgment debtor will not be committed to prison for inability to pay or to fulfill contractual obligation. There must be additional reasons and the court being satisfied after the debtor has been given notice to show cause and give reasons in writing as provided under

Section 38 of Civil Procedure Act and Order 22 rule 31

(1) Civil Procedure Rules. There is also a requirement that the debtor be served with notice of entry of judgment under Order 22 rule 20. This gives the debtor opportunity to pay before the decree holder starts the execution process.’

8. Execution by way of arrest and committal to prison deprives the debtor his liberty. Before committing a judgment Debtor to civil jail, a trial court ought to ensure strict compliance with Section 38 of the Civil Procedure Act, Cap 21, Laws of Kenya and Order 22 rule 31 (1) to determine the Judgment Debtor’s ability to pay.

9. A perusal of the proceedings of the trial court on 10th December, 2020 discloses that Mr. Mose advocate for the Respondent submitted as follows:

We seek to proceed with the NTSC. There is no agreement. We apply that the JD be committed to civil jail for one month. We are ready to pay for subsistence. He was aware of the judgment but has refused to comply. He is a man of means and he can afford but he has refused. He is fit to be committed to civil jail.

10. The record additionally discloses that Applicants' counsel's attempt to have the court first determine the Applicants' application to set aside the judgment was rejected and the court proceeded to commit the 1st Applicant to civil jail for one month.

11. From the trial court's proceedings, I am persuaded that due inquiry and satisfaction of the Court by the decree holder as to the judgment debtor's ability to pay did not meet the threshold of Section 38 (*above*) and Order 22 rule 31 (1).

12. From the foregoing analysis, the notice of motion dated 15th December, 2020 and filed on 16th December, 2020 is allowed in the following terms:

1) It is hereby ordered that the 1st Applicant be released from civil jail pending the hearing and determination of the appeal upon execution of a Personal Bond of Kshs. 200,000/- with surety of like sum

2) Mention on 08th February, 2021 to confirm filing of the record of appeal and for further orders

3) Costs shall be costs in the Appeal

DATED IN MERU THIS 24TH DAY OF DECEMBER 2020

T.W. CHERERE

JUDGE

For the Applicants - Mr. Kimathi for L.Kimathi Kiara & Co. Advocates

For the Respondent – Mr. Ngunjiri for Ngunjiri Michael & Co. Advocates