REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

ELECTION PETITION NO. 2 OF 2017

MICHAEL GICHURU..PETITIONER/APPLICANT

VERSUS

HON. RIGATHI GACHAGUA...1ST RESPONDENT

KAHURA KANUA JOHN..2ND RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION........3RD RESPONDENT

RULING

The applicant's election petition against the respondents was dismissed with costs on the 2nd day of February, 2018. The 1st respondent subsequently filed a party-to-party bill of costs dated 14 April, 2018 for taxation of his costs. The bill was scheduled to be taxed on 28 May, 2018; on the material date, neither the applicant nor his advocates appeared in court. The record before Hon. P Mutua, Deputy Registrar, whom the bill was placed for taxation shows that on the material date, Mr Gikonyo, the learned counsel for the 1st respondent, informed the court that the bill had been drawn to scale and asked the Deputy Registrar to have it taxed as drawn. In his ruling delivered on 8 June, 2018, the Deputy Registrar ruled that the bill had been drawn to scale and allowed it as drawn. The bill was therefore taxed at Kshs. 10,018,522.00 which is the amount the 1st respondent had sought.

On 21 January, 2019, counsel for the 1st respondent applied to execute the decree by committal of the applicant to civil jail in default of settlement of the full decretal sum. Consequently, the applicant was served with a notice to appear in court on 18 March, 2018 and show cause why execution should not issue in the manner sought by the applicant.

The record shows that the applicant appeared before the Deputy Registrar, Hon. Damacline Bosibori, as directed; the proceedings went as follows:

> **Mr. Wahome**
>
> **NTSC dated 3/2019(sic). The sum due is Kshs. 9,518,972 arising from the election petition. We pray that the JD be committed to civil jail unless the said sum is paid. The DH is ready to pay JD's subsistence.**
>
> **JD**
>
> **The matter proceeded without my knowledge. I was served with NTSC on 12/3/2019. I will pay in 6 months' time.**
>
> **Court:**
>
> **The JD is committed to civil jail for 30 days having not given any proposal on how he will make good the amount owing. The DH to pay for his subsistence. Mn on 16/4/2019.**

And with that the applicant was immediately committed to civil jail where he has remained to date.

By an application dated 22 March, 2019 and filed in court on 25 March, 2019, Messrs. Oange & Associates, a firm of advocates, moved this Honourable Court seeking to come on record for the applicant in place of his previous advocates; they also sought to have the order committing the applicant to civil jail suspended, initially pending the hearing and determination of the present application and, ultimately,

pending the hearing and determination of an appeal he has lodged against the committal order. The applicant also sought for enlargement of time to file an objection and a reference against the order of the taxing master awarding the applicant the sum of Kshs. 10,018,522/- as costs.

The prayer to come on record is now spent since by a letter of consent dated 21 March, 2019, Messrs Rachier Amollo Advocates LLP, the applicant's previous counsel ceded their brief to Messrs. Oange & Associates, who subsequently filed a notice of change of advocates on 25 March, 2019.

The motion was supported by the applicant's own affidavit in which he deposed that his advocates were never served with the bill of costs and that the taxing master allowed the bill as drawn without any reasons. Again, he has complained that his advocates were never served with the ruling on the taxation and the application for execution.

The applicant has also deposed that, being dissatisfied with the committal order, he appealed against it in accordance with Order 49 rule 7(2) & (3) of the Civil Procedure Rules, 2010. The appeal, so he has deposed, if it succeeds, will be rendered nugatory unless a stay of execution is granted.

The applicant has further confessed in his affidavit that he will not be able to raise the amount sought; as a matter of fact, he could not pay his previous advocates and this explains why they could not continue representing him. He also swore that it was up to the decree-holder to demonstrate that he has means to pay but had declined to do so before he could be committed to civil jail.

He pleaded with the court to allow him execute a personal bond to secure his release because he is unable to deposit any security in court.

The 1st respondent's counsel filed grounds of objection to the applicant's application; he stated that the application is misconceived and incompetent; it is bad in law and an abuse of the court process; that it is fatally and incurably defective; and that it is frivolous and vexatious.

It is not in dispute that arrest and detention of a judgment debtor is one of the means specified in section 38 of the Civil Procedure Act, cap 21 through which a decree may be executed; there are several other means listed in that section which are not of immediate concern to the present application but if it will help appreciate where the decree holder is coming from, it is necessary to highlight the entire section 38 of the Act; it states as follows:

> **38. Powers of court to enforce execution**
>
> **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.**

In committing the judgment debtor committed to civil jail the court must have applied section 38 (d) of the Act. But the power to arrest and commit a judgment debtor to prison is subject to the proviso to that section which sets out certain conditions any of which must be demonstrated to exist before a committal order is made. At the very minimum, the judgment debtor must have been given an opportunity to

show cause why he should not be committed to civil jail; no doubt this was done because there is evidence, and the applicant has admitted as much, that he was not only summoned to appear before the Deputy Registrar but that he also dutifully appeared as directed in the notice.

Once that stage was set, the Deputy Registrar could only make the committal order if she was satisfied, first, that the judgment debtor was bent on obstructing or delaying the execution of the decree.

What amounts to 'delay or obstruction' of execution of the decree is not left to speculation; the Act explains this sort of conduct to mean a likelihood on the part of the judgment debtor to abscond or leave the local limits of the jurisdiction of the court or, a dishonest transfer, concealment or removal of any part of his property after the institution of the suit in which the decree was passed, or any other act of bad faith on the judgment debtor's part in relation to his property.

Secondly, the Deputy Registrar ought to have satisfied herself that the judgment debtor has, since the date of the decree, had the means to settle the entire decretal amount or a substantial part thereof but has, for some reason, refused or neglected to pay the same.

The third and final condition which is that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account does not apply in the present circumstances.

The simple and what, in my humble view, is a straight forward question whose answer should unravel the outcome of the applicant's application, at least in part, is whether any of the first two conditions were considered before the Deputy Registrar committed the applicant to civil jail.

For the obvious reason that the applicant has filed an appeal which cannot be determined on an interlocutory application, I will be hesitant to make conclusive remarks on this question at this stage; I hasten to add, however, that based on the material before me, and strictly for purposes of determination of the present application, it appears that these conditions were not considered to any degree. The excerpts of the court record which I have reproduced above attest to this fact.

Worse still, looking at those excerpts, I am unable to reconcile the deputy registrar's conclusion that the judgment debtor had not given any proposal of how he intended to settle the decretal sum when it is apparent from her own record that the applicant had proposed to settle his debt within six months.

To this extent, I agree with the applicant's counsel that it is highly likely that the committal order may have, in these circumstances, been prematurely made or was unlawful altogether.

For these reasons I am satisfied that though the applicant has served a substantial period of his prison term, a strong case has been made on his behalf for stay of the committal order pending the hearing and determination of his appeal.

On the question of extension of time within which an objection to the decision on taxation ought to have been made, it is true that under regulation 11 of the Advocates Remuneration Order, the notice to the Deputy Registrar ought to have been filed within fourteen days of the date of the Deputy Registrar's decision; the ruling, as noted, was delivered on 8 June, 2018 and so the applicant ought to have duly notified the deputy registrar of his objection to the items he was objecting to by 22 June, 2018. This, however, was not done and the reason proffered is that the applicant was not aware of the court's ruling.

Indeed, neither the applicant nor his counsel could have been aware of the date when the ruling was delivered because none of them was present when that date was given; they were not notified of that date either. It was no surprise, therefore, that they did not attend court when the ruling was delivered. And even after the delivery of the ruling, none of them was informed of this development.

But if the applicant or his counsel were diligent enough, they need not have waited to be informed of the outcome of the taxation of the 1st respondent's bill of costs. The moment the applicant's counsel were notified that the 1st respondent's bill of costs would be taxed on a specific date, they were presumed to be fully aware that, everything else being constant, the taxation proceeded as scheduled and, as a matter of course, the execution process would be activated after such taxation unless it was stayed for one reason or another.

The point is, failure to file an objection to the deputy registrar's taxation within the prescribed time cannot be attributed to the 1st respondent but was a problem of the applicant's and his counsel's own making. My assessment of their conduct is that they chose to give a rather casual approach to the 1st respondent's bill of costs and the applicant was only jolted into action when he realised that the matter had spiraled to a level where he now faced a jail term. Unfortunately for him, this realisation came a little bit late in the day because when he finally appeared before the deputy registrar in response to the notice to show cause why execution against him should not issue, he did not have much time to take whatever steps he would have taken to correct what in his view was wrong with the bill of costs and its subsequent taxation before he was hurled into civil jail.

On the face of it, one is bound to conclude that there is no sufficient reason given for this court to exercise its discretion in favour of the applicant and extend time within which he ought to have challenged the deputy registrar's decision on taxation of the 1st respondent's bill of costs. But there is another angle to his application which has caught my attention; it is apparent from the record that the applicant's counsel literally abandoned him due to what the applicant himself has suggested to be his inability to cater for their fees.

While counsel had every right to withhold their services to the applicant, for whatever reason, they could not do so by simply failing to appear in court whenever they were required to. **Order 9 Rule 13** of the **Civil Procedure Rules, 2010** enjoined them to make an application by way of summons in chambers for an order that they had ceased acting for the applicant; it is only after that order had been made that they would then be considered to have ceased acting for the applicant. When they crudely walked away from their client but still continued accepting process on his behalf, they not only exposed him to the kind of calamity that the applicant has found himself in but they also

deprived him of the opportunity to take his destiny in his own hands. What I mean is that while the applicant was always under the impression that his counsel were in control of his case and perhaps his active participation in the matter was unnecessary unless advised to the contrary, his counsel, on the other hand, turned out to have overlooked or simply neglected their brief. The inevitable result of their laxity was to lead the applicant to where he is at the moment.

Nevertheless, in the absence of any notice on the part of the applicant to act in person; or a notice of change of advocates; or as noted, an order by this Court relieving the applicant's counsel of their brief, the applicant was entitled to assume that, despite his inability to cater for his advocates' fees, they still represented him. I suppose it is for this reason that the advocates accepted the notice of taxation that was duly served upon them on 16 May, 2018.

The applicant now has new advocates on record who have urged that the deliberate mistakes by the applicant's previous counsel should not be visited upon him. I am inclined to accept counsel's prayer for extension of time to file the requisite objection not necessarily because the applicant's counsel's mistakes should not be visited upon him (for I believe that if he is convinced that his advocates were negligent or unprofessional in any way, his remedy lies elsewhere) but because it would not prejudice the 1st respondent if this court is given the opportunity to satisfy itself that the taxation of the bill by the taxing master was in order, and in any event, according to the scale; this, of course, is on the assumption that the applicant may not be satisfied with the reasons that are bound to be given by the taxing master for his decision and, for that reason, he will escalate the matter to this court. If he will be satisfied the matter will end there.

I would therefore, allow the applicant's application seeking leave of this court to extend time within which he is required to give notice of his objection to the taxing master's decision, and if need be, file the necessary summons in chambers for consideration by this Honourable Court in accordance with regulation 11(1) and (2) of the Advocates Remuneration Order. For avoidance of doubt, time is extended and the applicant shall have a further 14 days from date of this ruling to take the appropriate steps in accordance with regulations.

This order for enlargement of time is, no doubt, propped by regulation 11(4) of the Advocates Remuneration Order that clothes this Court with the power to exercise its discretion in favour of an applicant and extend time for taking action against an impugned ruling on taxation by the taxing master.

Except for the order that each party shall bear its own costs, the applicant's motion dated 22 March, 2019 is allowed in terms set forth in this ruling; that is, that the applicant shall be released from civil jail pending the hearing and determination of his appeal against the committal order; and that, the time within which the applicant is to take any action against the taxing master's decision of 8 June, 2018 in accordance with regulation 11(1) and (2) of the Advocates Remuneration Order is hereby enlarged and extended for 14 days from the date of this ruling. It is so ordered.

Signed, dated and delivered in open court this 12th April, 2019

Ngaah Jairus

JUDGE