



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & TAX DIVISION**  
**HIGH COURT CIVIL CASE NUMBER 358 OF 2017**

**KENNEDY MILTON.....RESPONDENT/DECREE HOLDER**

**-VERSUS-**

**HITEN SHANTILAL SHAH.....1<sup>ST</sup> APPLICANT/JUDGMENT DEBTOR**

**SHANTILAL SHAH.....2<sup>ND</sup> APPLICANT/JUDGMENT DEBTOR**

**ATULA SHANTILAL SHAH.....3<sup>RD</sup> APPLICANT/JUDGMENT DEBTOR**

**RULING**

**BACKGROUND**

Pursuant to this Court's Ruling on Preliminary Objection of 7<sup>th</sup> October 2019, this Court found that procedurally, the application of 11<sup>th</sup> June 2019 was incompetent save for application for leave to lodge an appeal.

Further, this Court noted that **Section 43 of Civil Procedure Act** is a standalone provision employed to be utilized on application before the Committing Court or the High Court. For good order the same ought to start from the Committing Court.

**PROCEEDINGS**

This Court has been in conduct of these proceedings from June 2019 and perused the Court file on the proceedings before this Court took over the same.

On 24<sup>th</sup> June 2019 heard an application on legal representation and Ruling was delivered on 26<sup>th</sup> June 2019

On 22<sup>nd</sup> July 2019 the Court adjourned the matter to allow close of pleadings.

On 29<sup>th</sup> July 2019, an application regarding **Section 43 of Civil Procedure Act** was made; it was contested whether as part of the execution process it ought to be before the High Court or committing Court. As it was almost recess/vacation, this Court ordered the same be placed before Duty Court during vacation.

An application was filed under certificate of urgency on 9<sup>th</sup> September 2019 and was to be heard on 17<sup>th</sup> September 2019.

Another application was filed and mentioned on 10<sup>th</sup> September 2019.

On 12<sup>th</sup> September 2019 another application was filed under certificate of urgency and scheduled to be mentioned on 19<sup>th</sup> September 2019.

On 17<sup>th</sup> September 2019 it was agreed written submissions to the application of 6<sup>th</sup> September 2019 be filed and exchanged.

The Application of 11<sup>th</sup> July 2019 was to proceed on 25<sup>th</sup> September 2019.

On 25<sup>th</sup> September 2019 the Court's attention was drawn to the **Preliminary Objection** and was slated to be heard on 30<sup>th</sup> September 2019.

On 30<sup>th</sup> September 2019, the Preliminary Objection application was heard *interpartes* and Ruling delivered on 7<sup>th</sup> October 2019.

On 15<sup>th</sup> October 2019, an application under certificate of urgency was filed and where the Witness Summons for Medical/Health in charge of Prisons were to be issued so that he/she would attend today. This court granted this order.

On 23<sup>rd</sup> October 2019, the parties through Counsel informed Court that the 2<sup>nd</sup> & 3<sup>rd</sup> Defendant's Counsel served submissions for the slated application of 6<sup>th</sup> September 2019 to be heard could not proceed. The Decree Holder's Counsel sought more time for filing and serving submissions before the instant application is heard.

At that point this Court on its own motion decided to address the pertinent issue of the medical condition of the 2<sup>nd</sup> judgment debtor under **Section 43 of the Civil Procedure Act. This Court relied on the mandate/jurisdiction donated by Section 1A(1), 1B 1(a) 3A & Article 26 (1) & (3), 159 1(a) (b) & (d) Constitution of Kenya 2010**

### **COURT RECORD**

The record shows the following with regard to 2<sup>nd</sup> judgment debtor's medical history and condition.

On 5<sup>th</sup> June 2018 while the NTSC proceedings were conducted; the 2<sup>nd</sup> judgment debtor stated;

***"I am not directly dealing with the Plaintiff, I am not in any business I am retired....I had a plot in Thika and a gave a copy of title deed to get a buyer...that is how I came in this case.***

The 3<sup>rd</sup> judgment debtor stated;

***"My father is 83 years old. He is diabetic and has high blood pressure he has prostrate and heart condition.....he is on medication insulin injection"***

On 3<sup>rd</sup> August 2018, Mr Muriuki for the 2<sup>nd</sup> judgment debtor told the Court that he had cancer and had developed high blood pressure, Respondent's Counsel sought medical report.

**On 27<sup>th</sup> May 2019 the 2<sup>nd</sup> judgment debtor told the Court;**

***"I am a sick man I have nothing to say. The Decree-holder did not give me any money. I have medicine I am taking. I have not borrowed any money. I only promised I will pay something on behalf of my son."***

**On 24<sup>th</sup> June 2019, the 2<sup>nd</sup> judgment debtor told the Court;**

I am not well. My insulin has to be in the refrigerator.

### **APPLICATIONS**

The dismissed application of 11<sup>th</sup> July 2019 ay paragraph 6 of the 2<sup>nd</sup> judgment debtor medical condition and reference is made to medical reports presented in Court on 24<sup>th</sup> June 2019.

The supporting affidavit to the application of 6<sup>th</sup> September 2019 pending for hearing and determination also lays out the 2<sup>nd</sup> Judgment debtor's medical condition.

The application filed under certificate of urgency of 11<sup>th</sup> October 2019 was for Witness summons to issue to Health/Medical incharge to attend Court today, the Court order was extracted and Witness Summons drawn . No evidence of service of receipt or Summons is shown and no explanation was provided to this Court.

### **MEDICAL REPORTS**

The medical report dated 25<sup>th</sup> September 2019 from the Medical Incharge Nairobi Remand on the 2<sup>nd</sup> judgment debtor's condition reads in part as follows;

***"It was noted the client has been undergoing coronary heart disease, gastro esophageal reflux disease, diabetes mellitus and prostatic hyper trophy under Dr Shariff [and was/is on medication.]***

***On local examination and objective assessment, he was diagnosed with syncopal attack, reactive pulmonary hypertension and epididymitis with blood pressure....***

***He again manifested with more complications of tight chest, fainting episodes, productive cough and nausea then Rocephine***

*1000mg was administered.*

*Lack of positive response to the basic management at inmates Medical Centre prompted his referral to Kenyatta National Hospital where analytical workups.... and interventions commenced.*

*On 18<sup>th</sup> August 2019, he collapsed and then was rushed to inmates medical centre where tartmans solution was given to boost low blood pressure.*

*He is currently housed in cell block A1 ( sick bay) for close observation as the above conditions are perpetuated by any psycho physiologic systemic reaction coupled with age advancement complicating already compromised organ failures.*

There is medical report of 29th June 2019 by Dr Eric Munene Muriuki on examination of the 2<sup>nd</sup> judgment debtor which in part shows;

*“Patient reported that he has been on management of diabetes and hypertension since 1994 He has a benign prostrate hypertrophy for a period of 10 years treated by Dr Thakkar. The patient availed some reports from Dr Paresh*

*Patel indicating the patient had a cardiac intervention done but no actual report from India was done.*

*Patient reports to have fallen twice while in Court last one being on 10<sup>th</sup> June and reported to have been taken to Kenyatta Hospital.*

*Mr Shantilal has availed medical reports scans tests that were done long ago. He can still undergo medical care and treatment in any hospital whether private or public and does not require hospitalization.*

#### **DETERMINATION**

This Court is guided by provisions of Section 43 of Civil Procedure Act that provides;

*“Release on ground of illness*

- 1) At any time after a warrant for the arrest of a judgment – debtor has been issued, the court may cancel it on the ground of his serious illness.*
- 2) Were a judgment-debtor has been arrested, the court may release him if in its opinion he is not in a fit state of health to be detained in prison.*
- 3) Where a judgment-debtor has been committed to prison, he may be released therefrom-”*
  - a) By the superintendent of the prison in which he is confined on grounds of the existence of any infectious or contagious disease; or*
  - b) By the committing court or the High Court on the ground of his suffering from any serious illness.*
- 4) A judgment – debtor release under this section may be rearrested, but the period of his detention in prison shall not in the aggregate exceed that prescribed by section 42 of this Act.*

The Court record as excerpts outlined above confirm that throughout the proceedings the 2<sup>nd</sup> judgment debtor has been ailing. The 2<sup>nd</sup> judgment debtor is at advanced age 84 years old and all applications and medical reports on record identify the judgment debtor’s condition to include management of blood pressure, prostrate cancer, diabetes mellitus among other minor ailments.

The reports only differ in terms of degree or severity of the said ailments.

The Medical report from prison where the 2<sup>nd</sup> judgment debtor is held confirms isolation of the 2<sup>nd</sup> judgment debtor to sick bay for observation, instances of lapse and severity of the 2<sup>nd</sup> judgment debtor’s ailments to necessitate immediate and urgent management of the same.

This Court is satisfied from the Court record that the reports, proceedings cumulatively disclose that the 2<sup>nd</sup> judgment debtor’s medical condition requires medical attention and management outside prison.

**This Court has relied on the case of;**

**Hccc 2086 Of 1997 Lango Odhiambo vs Wilson Ndolo Ayah & 3 Others** where the Court stayed the warrants for committal to civil jail on account of judgment-debtor’s advanced age and exercised discretion for conditional stay.

The Court notes with concern the delay in prosecuting the applications related to 2<sup>nd</sup> judgment debtor's state of health and implementation of court orders of 12<sup>th</sup> September 2019 and 15<sup>th</sup> October 2019 which proof of service of the witness summons to the Medical Health incharge was produced. This has necessitated the Court to grant these orders on release of committal of the 2<sup>nd</sup> Judgment debtor's state of health on the following conditions;

**a) The Officer in charge Nairobi Remand to release the 2<sup>nd</sup> judgment Debtor Mr. Shantilal Shah to Ms Alpha Shantilal Shah ID. No.13059179 and Ms Deepa Shantilal Shan ID No.20703013.**

**b) The 2<sup>nd</sup> Judgment Debtor Mr. Shantilal Shah to execute bond of Ksh 500,000/- with 1(one) surety of similar amount with the Court on release from prison immediately.**

**c) The 2<sup>nd</sup> judgment debtor Mr. Shantilal Shah to deposit passport(s) with the Court.**

**d) The judgment debtor Mr. Shantilal Shah is to report every successive Monday at CID Headquarters till further orders of the Court. If he is admitted in hospital his advocate Mr. Thomas N. Maosa of ID No. 5540284 to present current medical document to the Court and CID HQs designated office.**

**e) The 2<sup>nd</sup> Judgment Debtor Mr. Shantilal Shah on release shall be first immediately taken to hospital for treatment and comprehensive current medical report be filed with the Court.**

**f) Further mention for compliance shall be on 31<sup>st</sup> October 2019.**

**g) The 3 persons above named persons/advocates shall be held responsible for the 2<sup>nd</sup> judgment debtor Mr. Shantilal Shah attendance in court.**

**DELIVERED SIGNED & DATED IN OPEN COURT ON 23<sup>RD</sup> OCTOBER 2019.**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF;**

**MR. MUTUKU FOR THE PLAINTIFF**

**MR. MBACHU FOR THE 2<sup>ND</sup> & 3<sup>RD</sup> JUDGMENT DEBTORS**

**MR. MOASA FOR THE 1<sup>ST</sup> DEFENDANT**

**MS JASMINE – COURT ASSISTANT**