



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURT AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO 303 OF 2015

CHARLES LUTTA KASAMANI.....1ST PETITIONER

VERSUS

CONCORD INSURANCE CO. LTD1ST RESPONDENT

DEPUTY REGISTRAR MILIMANI HIGH COURT

COMMERCIAL AND ADMIRALTY DIVISION.....2ND RESPONDENT

JUDGMENT

Introduction

1. The Petitioner, **Charles Lutta Kasmani** is an Advocate of the High Court of Kenya. He was indebted to **Concord Insurance Company Limited** the respondent an amount he did not pay. The respondent instituted proceedings in the Civil Division of this Court being HCCC No 241 of 2007 and obtained a decree dated 13th July 2007 for Kenya shillings 3,806,676 with costs and interest. Although the petitioner promised to pay the decretal sum, he did not do so for reasons he attributed to his inability to practice law between 2007 and 2013.

2. In order to enforce the decree, the respondent took out execution proceedings and a notice to show cause was served on the petitioner calling upon him to show cause why he could not be committed to civil jail for non-payment of the decretal sum. The Notice to show cause was set for 15th November 2013 but the petitioner did not attend. A warrant of arrest and committal to civil jail was later issued against the petitioner who was arrested at the Court precincts on 16th July 2015 and presented before the Deputy Registrar and upon failure to show cause, he was committed to civil jail.

The Petition

3. In a Petition dated 17th July 2015 and filed in court on the same day, supported by an affidavit of the petitioner, he challenged the action of the Deputy Registrar committing him to civil jail. In his petition and depositions the petitioner averred that he did not refuse to pay the decretal sum but did not have and possess means to pay the debts, that he does not own any property that he could use to pay the civil debt, that the committal to civil jail is a punishment to those who refuse to pay civil debts but not for those who are genuinely unable to pay and that the committal to civil jail for the sole reason of inability to pay a

civil debt is unconstitutional and inhuman treatment according to the ***International Convention of Civil and Political Rights (ICCPR)*** which is part of the laws of Kenya by virtue of Article 2(6) of the Constitution.

4. The petitioner averred that his basic constitutional rights had been infringed through the act of the Deputy Registrar and therefore he was seeking protection of his fundamental rights in terms of Articles 20(1), (2), (3) 22(1), 23(1) and (3) of the Constitution. He averred that the respondents had also violated his constitutional rights guaranteed under Article 28, 29, 39, 47 and 51 of the Constitution. He asked this court to find that the order of committal to civil jail for inability to pay a civil debt is unconstitutional and quash the same

1st Respondent's Response

5. The 1st respondent, ***Concord Insurance Company Limited***, filed grounds of opposition dated 26th June 2016 and filed in Court on 28th June 2016. The 1st respondent contended that ***Article 11 of ICCPR*** does not rank in paripasu with the Constitution hence it cannot oust the application of section 40 of the Civil Procedure Act, that the Court has previously held that the provisions of sections 38, 40 and 42 of Civil Procedure Rules (sic) are not inconsistent with the Constitution and that the Civil Procedure Act and rules provide sufficient due process guidelines essentially making a limitation on the petitioner's right to liberty.

6. It was contended that when the Court heard the petitioner on the Notice to Show Cause on 26th March 2013, the petitioner agreed to liquidate the decretal amount by monthly installments of Ksh100,000 and in default execution would issue. The 1st respondent further contended that there cannot be a cause of action founded on a lawful exercise of the right of execution since it would be a serious contradiction to suggest that creditors who are enforcing their rights under private law would be stopped doing so because of allegations of constitutional violations by the state.

7. The 1st respondent stated that the decretal sum related to professional undertaking by the petitioner and that the petitioner owns property and means to pay the decretal sum but was refusing to do so. The 1st respondent argued that the petition is an abuse of the court process.

2nd Respondent Response

8. The 2nd respondent filed Grounds of Opposition through the Attorney General dated 12th April 2017 and filed in court on 26th April 2017. It was contended that the petitioner had not demonstrated how his rights had been violated by the respondents, that fundamental rights and freedoms under the Bill of Rights are not absolute save those protected under Article 25 of the Constitution and that these proceedings are misconceived and an abuse of the court process since they violate section 34 of the Civil Procedure Act.

9. The 2nd respondent contended that execution of the decree by way of committal to civil jail is not unconstitutional hence the petition has no juridical foundation under the Constitution. It was contended that if the petitioner was dissatisfied with the decision of the 2nd respondent acting as Deputy Registrar, he should have appealed against the decision and therefore filing this petition was intended to frustrate the 1st respondent's right to realize a lawfully obtained decree.

10. It was further contended that judicial officers are protected under Article 160(5) of the constitution and section 6 of the judicature Act from civil and criminal liability for actions taken in lawful execution of their duties and that judicial intervention should be limited to acts that are manifestly in breach of the law.

Petitioners' Submissions

11. ***Mr. Muchai***, learned counsel for the petitioner, submitted highlighting their written submission, that

the petition hinged on the constitutionality of committing the petitioner to civil jail due to inability to pay a civil debt. Learned counsel conceded that there is default judgement and decree obtained in HCCC No 241 of 2007. It was submitted that during the notice to show cause, the petitioner pointed out that he had not refused to pay and proposed to dispose of his properties either in Kisumu or Kakamega valued at Ksh27m and 35m respectively with a view to settling the debt and therefore, needed time to do so, but the 2nd respondent issued a warrant of arrest and committed which was executed.

12. Learned Counsel submitted that section 40 of the Civil Procedure Act is not only contrary to international law but also offends constitutional provisions. He contended that while implementing sections 38 and 40 of the Civil Procedure Act, 1st and 2nd respondents breached, infringed and or violated the petitioner's rights and fundamental freedoms.

13. Learned Counsel argued that the Constitution is the supreme law of the Republic and that by virtue of Article 2(4) any law that is inconsistent with the constitution is invalid to the extent of the inconsistency. In that regard, learned counsel submitted that Article 2(6) of the Constitution recognizes any treaty or convention ratified by Kenya to form part of the law of Kenya. It was submitted that Kenya having ratified the ICCPR on the 1st March 1972 it forms part of the laws of Kenya. Referring to Article 11 of ICCPR, it was submitted that no person should be imprisoned merely because of inability to fulfill a contractual obligation.

14. It was argued that section 38 of the Civil Procedure Act gives arrest and detention in prison as one of the means through which a decree holder may execute a decree but only after giving the judgment debtor an opportunity to be heard and on the court being satisfied that the judgment debtor is obstructing or delaying execution of the decree.

15. The petitioner relied on the decision in the case of *Zipporah Wambui Mathara [2010]eKLR* for the submissions that provisions of Article 11 of ICCPR make prominence to the promotion and protection of human rights and recognize that individuals are entitled to basic freedom to seek ways and means of battering themselves, hence a party who is deprived of their basic freedoms by way of enforcement of a civil debt through imprisonment, their ability to move and even seek ways and means of repaying the debt is curtailed.

16. It was therefore submitted that the petitioner's committal to civil jail was meant to punish, humiliate and subject him to shame and indignity due to failure to pay a debt. It was also contended that committing the petitioner to civil jail infringed his basic human rights and fundamental freedoms under Articles 28 and 29 of the Constitution. Further submissions was to the effect that the aim of sections 38 and 40 of the Civil Procedure Act is to provide a mechanism for enforcement of judgments and decrees which is a legitimate and reasonable objective. It was however contended that the means to achieve that goal must be reasonable and justifiable as required under Article 24(1) of the constitution.

17. The petitioner relied on the South Africa case of *Farieda Gaetace v The Government of the Republic of South Africa CCT 19/94* which held that the legislation for committal to civil jail was overboard since committing someone to prison involves a severe curtailment of the person's freedom and security and such infringement cannot be justified in an open and democratic society based on human dignity.

18. It was therefore contended that the only reason the petitioner was committed to civil jail was because he had failed to prove that he was unable to pay the decretal sum. It was contended that the petitioner needed time to dispose of property to pay. Reliance was again placed in the case of *Roans Plauda Moi v Philip Kipchirchir Moi Divorce Case No 154 of 2008* where the court stated that no one should be sent to civil jail for inability to pay a debt since it would be morally wrong to do so and would amount to discrimination against the have-nots thus it made no sense to send to civil jail a person who is unable to pay.

19. It was contended that there was no strict adherence to procedures laid down in sections 38 and 40 of the civil procedure Act placing reliance on the case of *Jane Wangui Gachoka v Kenya Commercial Bank of Kenya Ltd Petition No 51 of 2010* . It was also submitted that committal to civil jail amounted

to inhuman treatment contrary to Article 25 of the Constitution.

1st Respondent's Submissions

20. **Mr. Mugisha**, learned Counsel for the 1st respondent, submitted highlighting their written submissions, that there was nothing unconstitutional about the orders of committal and that there was no infringement of the petitioner's rights, that the 1st respondent has a judgment and decree by a court of competent jurisdiction, that the petitioner attended court on 20th march 2013 and made a proposal to pay by instalment but failed to do so and that the petition is misconceived.

21. It was submitted that sections 38 and 40 of the Civil Procedure Act are constitutional and made reference to the case of **Beatrice Wanjiku & another v Attorney General & another [2012]eKLR** for the submissions international instruments ratified by Kenya are not Superior to local legislation and that they should not take precedence over laws enacted by people's representatives. Further reference was made to the decision in the case of **Diamond Trust Ltd v Daniel Mwema Mulwa [2010]eKLR** for the proposition that the Civil Procedure Act is an Act of parliament which provides for procedure in civil courts and section 40 thereof makes provision for the arrest and detention of judgment debtors, that though apparently in conflict with Article 11 of ICCPR, Article 11 cannot rank in Pauripasu with the Constitution but ranks equal to an Act of parliament hence cannot oust section 40 of the Civil Procedure Act.

22. It was further submitted that the procedure for committal to civil jail was followed and the petitioner given an opportunity to be heard, that he admitted that he had properties which he was willing to sell and that the petitioner had ability to pay the civil debt which the 2nd respondent appreciated in her ruling while committing the petitioner to civil jail.

23. On the basis of the fore going, the 1st respondent contended that there was no violation of constitutional rights for committing the petitioner to civil jail for failure to pay decree because the court followed the procedure for committal. The 1st respondent relied on the decision in the case of **Republic v Permanent Secretary office of the President, Ministry of Internal Security & another Ex parte Nassir Mwaidihi[2014]eKLR** for the submission that as long as the safeguards under the relevant provisions of the Civil Procedure Act and Rules are complied with an objection on the constitutionality of the procedure would not be upheld.

24. It was further submitted that there cannot be a cause of action based on a lawful exercise of the right of execution and relied on the decision in the case of **Braeburn Limited v Gachoka & another[2007]2EA67** which held that sections 38 and 40 of the Civil Procedure Act and order 21 rules 32 and 35 of the rules were neither inconsistent with the provisions of sections 77(1) and 77(7) of the retired constitution provided the procedure under these rules (32 and 35 of order 21) is followed in the manner outlined therein.

2nd Respondent Submissions

25. **Miss Chibole**, learned counsel for the 2nd respondent, submitted that Article 160(5) of the Constitution and section 6 of the judicata Act protects judicial officers to safeguard them from civil and criminal prosecution while in the performance of their duties. It was submitted that the 2nd respondent's conduct did not amount to a violation or contravention of the petitioner's fundamental rights and freedoms. It was contended that the petitioner had not stated and properly identified with precision the rights infringed and how they had been infringed or violated in terms of the principles in the case of **Anarita Karimi Njeru v republic [1979]KLR 154**

26. With regard to submissions that judicial offices have immunity from prosecution reliance was placed on the case of **Maina Gitonga v Catherine Nyawiira Maina & Another [2015]eKLR** for the submission that a judicial officer is immune from a criminal prosecution or civil suit arising from acts taken within or even in excess of his jurisdiction It was submitted, therefore, that there was no valid constitutional issue

raised in this petition hence the present petition is misconceived and an abuse of the court process.

27. Regarding section 34 of the Civil Procedure Act, it was submitted that the section provides clearly that all questions arising between parties to the suit in which the decree was passed or their representatives and relating to the execution, discharge or satisfaction of the decree, should be determined by the executing court and not by separate suit.

28. It was contended that the petitioner being dissatisfied with the ruling by the 2nd respondent, ought to have filed an appeal against that ruling but not mount a separate suit in the form of a constitutional petitioner so long as the court followed the safeguards laid down in the Civil Procedure Act and rules before committing to civil jail. Reliance was placed on the case of Jayne Wangui Gachoka v Kenya Commercial Bank Ltd [2013]eKLR (paragraph 31 – 33) Counsel submitted that limitation of liberty is permissible under the Civil Procedure Act.

Determination

29. I have considered this petition, the responses, submissions by counsel for the parties and the authorities relied on. This petition raises one issue for determination, that is; whether committal of the petitioner to civil jail violated his rights and fundamental freedoms.

30. The facts of this petition are not in dispute. The 1st respondent sued the petitioner in Civil Suit No 241 of 2007 and obtained a judgment and decree in the sum of Kshs, 308,676. The petitioner was called upon to show cause why execution could not proceed against him and he promised to pay a monthly installment of Ksh100, 000/- which he did not do. The 1st respondent sought to have the petitioner committed to civil jail and after hearing the parties, the 2nd respondent ruled that the petitioner had not shown the willingness to pay and therefore committed him to civil jail. The petitioner challenged his committal to civil jail in this petition contending that it is a violation of his rights and fundamental freedoms guaranteed by the Constitution.

31. Both respondents contended that there was no violation of the Constitution or rights and fundamental freedoms. They argued that the 2nd respondent was right in law to commit the petitioner to civil jail because the 2nd respondent was applying the law and that the 2nd respondent is immune by virtue of Article 160(5) of the Constitution and section (6) of the judicature Act from civil or criminal prosecution for anything faithfully done in the course of performing judicial duties.

32. There is no dispute that the 1st respondent is a beneficiary of a decree of a Court of competent jurisdiction. Section 38 of the Civil Procedure Act empowers the Court upon application by a decree holder, to order execution and one of the means of execution is to order arrest and detention of a person in prison.

33. The section has a proviso that where the decree is for payment of money, execution by detention in prison should 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; (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; or (c) that the decree is for a sum for which the judgment debtor was bound in a fiduciary capacity to account. Section 40 of the Act provides for the manner in which the judgment debtor may be arrested and thereafter dealt with.

34. The petitioner has contended that his arrest and committal to civil jail violated his rights and fundamental freedoms and that it did not only violate the Constitution but also Article 11 of **ICCPR**. Article 11 of **ICCPR** provides that **no one should be imprisoned merely on the ground of inability to fulfil a contractual obligation**. The petitioner's contention was that by virtue of Article 2(6) of the Constitution, **ICCPR** is part of the law of Kenya hence his arrest and committal to civil jail is contrary to law.

35. It is true that **ICCPR** is one of the International Conventions that were ratified by Kenya and by virtue of Article 2(6) of the Constitution it is part of the laws of Kenya. What must however be clear is that the fact of being part of the law of Kenya by virtue of Article 2(6) of the Constitution, **ICCPR** or any of its Articles does not however, sit above other Acts or statutes enacted by Parliament. It cannot be the case either that **ICCPR** should be elevated above other statutes. It can only rank in pari passu with them. It is neither equal to Articles in the Constitution. In that regard, I agree with the Court's observation in ***Beatrice Wanjiku & another V Attorney General & another [2012]eKLR*** that:

“ [24]The Civil Procedure Act and the Rules provide a legal regime for arrest and committal as a means of enforcement of a judgment debt. Article 11 of the Convention states that “No one shall be imprisoned merely on the grounds of inability to fulfill a contractual obligation.” I read the merely as used above to mean that one cannot be imprisoned for the sole reason of inability to fulfill a contractual obligation. It means that additional reasons other than inability to pay should exist for one to be imprisoned. Article 11 recognizes that in fact there may be instances where imprisonment for inability to fulfill a contractual obligation may be permitted. As there is no inconsistency between Article 11 of the Convention and the general tenor of the committal regime under Civil Procedure Act and the Rules, the provisions of Article 11 of the Convention are at best an interpretive aid.”

36. Where provisions in two statutes appear to contradict each other it is a general principle of statutory interpretation that as much as possible, the statutes should be read and interpreted in a manner that brings harmony. To my mind, therefore, I see no apparent contradiction or conflict between sections 38 and 40 of the Civil Procedure Act and Article 11 of **ICCPR**. A proper reading of section 38 details circumstances under which a person can be committed to civil jail. The section is clear that it is not because someone is unable to pay but rather where one though able, refuses to pay or discharge his obligations under the decree.

37. Even under sections 38 and 40 of the Civil Procedure Act, no one should be committed to civil jail because of his or her inability to pay. In the case of an application for committal, the determining factor is always the ability to pay. Inability should be taken to mean that the judgment debtor has completely no means of settling the decree even if he was given how much time to do so. He has completely no means of paying. He is simply unable and cannot pay.

38. Article 11 of **ICCPR** and section 38 of the Civil Procedure Act protect the dignity of those who are unable to pay but should not be taken as a blanket cover for even those who have the means but refuse to pay and instead seek refuge under Article 11 of **ICCPR**. Giving a different interpretation to Article 11, would render execution process under the Civil Procedure Act and Rules meaningless in so far as committal to civil jail as a means of recovering money awarded in a decree is concerned.

39. The petitioner also contended that his committal to civil jail violated his rights and fundamental freedoms and in particular the right to liberty and dignity. It was argued that the committal limited his right in contravention of Article 24(1) of the Constitution. Article 28 of the Constitution provides that ***every person has inherent dignity and the right to have that dignity respected and protected***. Article 29 on the other hand guarantees freedom and security of the person including the right not to be deprived of his freedom arbitrarily, not to be subjected to violence, not to be detained without trial and not to be treated or punished in a cruel, inhuman or degrading manner.

40. These rights though granted by the Constitution, are not absolute. The Constitution itself states in Article 24(1) that rights under the Constitution may be limited by law where the limitation is reasonable and justifiable in an open and democratic society. The limitation is by law namely sections 38 and 40 of the Civil Procedure Act and Rules under Order 21. The limitation is also reasonable, in my view, because it is meant to enforce Court decrees where a party, though with means, refuses to meet his obligations under the decree. This limitation, in my respectful view, is also justifiable and permissible in a society guided by democratic principles and the rule of law.

41. Without enforcing Court decrees through committal to civil jail where one has the means but has

refused to pay, would infringe on the rights of those who have successfully gone through legal processes and obtained decrees, which they cannot enforce because judgment debtors who have refused to pay would rush to court and obtain declarations of violation of fundamental rights and freedoms once they are committed to civil jail.

42. In that regard therefore, where a party goes through legal process and obtains a decree from a competent Court, s/he has a right that has crystalized in his favour and that right is recognized in law. It can only be realized through execution including committal to civil jail which is a known legal process for enforcing that right. Such a right should not easily be defeated because a judgment debtor who though able to pay, cannot be committed to civil jail and nothing can be done about him. That would be a contradiction in the enforcement of rights where one right would be deemed superior to another. The law should be read as only protecting those who cannot genuinely pay and not otherwise.

43. I agree with the Court's holding in Jayne Wangui Gachoka v Kenya Commercial Bank Limited [2013]eKLR that-

“[33] The deprivation of liberty sanctioned by sections 38 and 40 of the Civil Procedure Act is permissible and is not in violation of either the Constitution or ICCPR. The caveat, however, which has been emphasized in all the cases set out 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 procedures laid down in the Civil procedure Act and Rules, which provide the due process safeguards essential to making limitation of the right to liberty permitted in this case acceptable in a free and democratic society.”

44. It is my finding therefore, that there is nothing unconstitutional in sections 38 and 40 of the Civil Procedure Act. It is also my finding that committal to civil jail of one who is able to pay but has refused to do so is lawful and does not amount to violation of rights and fundamental freedoms in the Bill of Rights.

45. The only question that I must now address is whether the procedure was followed, and the petitioner can be said to be one who was unable to pay the decrial sum and therefore, who could not be committed to civil jail. I have perused the petition and the affidavits in support sworn by the petitioner. The petitioner admits that he was served with a notice to show cause on 7th October 2013 which was due for hearing on 15th November 2013, the petitioner did not however attend court to show cause. He stated that he was arrested on 16th July 2015 while attending a matter in Court at Milimani and taken before the Deputy Registrar.

46. In the affidavit in support of the petition, the petitioner stated that he had not been able to practice for some time hence he could not pay. The petitioner was served with the Notice to show cause in Court in 2013 which means he was practicing. He deposed that he was arrested in 2016 again in court while representing a client, an admission that he was indeed practicing. Legal practice is an engagement through which the petitioner earns a leaving but he had not paid anything even as at the time of hearing this petition.

47. I have perused the petitioner's supplemental affidavit sworn on 19th August 2016 to which he attached copies of proceedings in HCC 241 of 2017. From the record, the notice to show cause first came up for hearing on 26th March 2013. The petitioner was present and he informed the Deputy Registrar that they were trying to reach a settlement and requested for time. The notice to show cause was stood over to 25th April 2012.

48. On that date the petitioner was present but no agreement had been reached. Both the petitioner and counsel for the decree holder agreed to have the notice to show cause stood over to 7th June 2012 when again the matter was adjourned to 15th July 2012 because counsel for the decree holder was held upon elsewhere. However, there is no record for proceeding for that day, On 12th March 2013 the notice to show cause came up again for hearing and the judgment debtor was represented by counsel who informed

the Court that the petitioner was not ready to proceed. A last adjournment was granted to the petitioner and the notice to show cause was set for hearing on 26th March 2013.

49. On 26th March 2013 parties recorded consent to the effect that the petitioner would liquidate the decretal sum by monthly installments of Ksh100,000 with effect from 30th April 2013 and in default execution would issue. The petitioner appears to have defaulted and the notice to show cause once again came up for hearing on 4th February 2014. The petitioner was again represented by counsel who sought an adjournment which was opposed by counsel for the decree holder because the petitioner had gone back on the consent earlier recorded in court. The court issued warrants of arrest.

50. The petitioner was presented to Court under warrant on 16th July 2015 and was given an opportunity to show cause and indicated that he had properties he could dispose of and requested for time to do so which was opposed. The Court considered the parties' arguments but was not persuaded by the petitioner's explanation. The petitioner was therefore committed to civil jail.

51. It is clear from the record that the petitioner was given an opportunity to show cause why he could not be committed to civil jail. He agreed to liquidate the decree by installments but defaulted without paying a single installment. In their own submissions, they stated that the petitioner had properties which he could dispose of to settle the decree. This is an admission that the petitioner has ability to pay but has not met his obligations.

52. That being the case, I do not think the petitioner fits in the category of persons who can seek refuge under section 38 of the Civil Procedure Act as read with Article 11 of **ICCPR** as a person who is unable to pay. What I gather from the petitioner is that he requires time to pay. If that be the petitioner's desire, he can make an application before the Judge in the Civil Division for review of the Deputy Registrar's decision, or engage the 1st respondent to accommodate him.

53. Finally, it was contended that no proceedings could be sustained against the 2nd respondent as a judicial officer. This petition was brought against **Concord Insurance Company Limited** and the **Deputy Registrar of this Court** who committed the petitioner to civil jail as the 1st and 2nd respondents respectively. The Deputy Registrar was acting in his/her official capacity as the officer responsible for ensuring that the decree was executed and was the one to commit the petitioner where there was default. He/she was therefore performing judicial functions.

54. **Article 160 (5)** of the Constitution insulates judicial officers from suits arising from performance of their official duties. It provides that (5) "**A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function.**" Section 45 of the **Judicial Service Act** (No. 1) of 2011 also shields judicial officers from any civil action or suit for or in respect of any matter or thing done or omitted to be done in good faith by him/her as a judicial officer. That being the law, I find that the inclusion of the **Deputy Registrar** as a respondent in this petition for performing official functions, violated clear provisions of the Constitution and statute.

55. In the circumstances therefore, I find no merit in the petition dated 17th July 2015. The same is declined and dismissed with costs

Dated Signed and Delivered at Nairobi this 16th Day of February 2018

E C MWITA

JUDGE