



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**MISC CIVIL APPL. NO. 20 OF 2018**

**PETER MUTIA MWEVALA.....APPLICANT**

**VERSUS**

**KANGWELE MUTINDA.....RESPONDENT**

**RULING**

1. The Applicant, **Peter Mutia Mwevala** approached this court by way of Notice of Motion seeking an order for stay and suspension of a committal made on the **7/2/2018** committing him to civil jail pending determination of the Appeal.

2. The Application is premised on grounds that the Applicant was committed to civil jail for a period of **six (6) months** following the inability to satisfy a monetary decree. That he has prepared an arguable appeal that shall be rendered nugatory as he would have served a prison term. That the Respondent did not pursue any alternative means of enforcing the decree therefore the court wrongly exercised the discretion where it was not proper to do so and in the premises **Section 38 of the Civil Procedure Act** was not complied with.

3. The Application is supported by an affidavit deponed by **Joseph Tamata**, counsel for the Applicant where he deponed that the decree holder failed to exhaust all other less restrictive or extrusive remedies under Section 38 of Civil Procedure Act for enforcement of a monetary decree; the applicant is of an advanced age and is ready to be bound by condition to be set by the court for due performance of the decree or order.

4. The Respondent filed grounds of opposition where he stated that the applicant was issued with a Notice to show cause and when he appeared in court with his advocates he made a proposal to settle the decretal amount by paying monthly instalments of **Kshs. 20,000/= per month** and the proposal was reduced into a consent and accordingly recorded. That a warrant of arrest was issued after the Applicant defaulted in payment. After his arrest and being arraigned in court the Applicant was given 14 days to pay the decretal sum and was accordingly bonded.

5. That at the hearing of the Notice to show cause the court was informed that the Applicant had the following properties:

- 1. Land Parcel No. Ikutha/Mbitini /252**
- 2. Share in Ikutha /Mbitini /237**
- 3. Share in land Parcel No. Ikutha/Mbitini /238**

which he could voluntarily sell to realize the decretal sum but had refused to do so.

6. That there was no illegality in committing the Applicant to civil jail because of the adamancy shown in disposing his property to settle the decretal sum and incase of a stay order being granted the appellatant to deposit the entire sum of **Kshs. 133,228/= inclusive of interest for 27 months** with the court.

7. The Respondent also filed a replying affidavit where he deposed that a case filed against him by the Applicant was dismissed in 2014 with costs and he never appealed. Costs were assessed at **Kshs. 76,800/=**. The total recoverable sum consists of costs and interest that the applicant is a man of means as he owns;

**(i) Land Parcel No. Ikutha/Mbitini/252 measuring 17.06Ha registered in his names. I attach a copy of title deed, extract of title and certificate of search marked KM-1 (a)(b) & (c).**

**(ii) Land parcel No. Ikutha/Mbitini/237 measuring 13.7 Ha where he owns 1/3 share, and a certificate of search is hereby attached and marked KM-2**

**(iii) Land parcel No. Ikitha/Mbitini/238 measuring 13.46 Ha where he owns ½ share, attached herein is a certificate of search marked KM-3.**

8. The application was canvassed by way of oral submissions. Mr. Tamata counsel for the Applicant submitted that at the time of committal to civil jail the judgment creditor had not exhausted all other options of execution. He faulted the judgment creditor for not providing the court with means of the judgment debtor (Applicant). That the judgment creditor had options of executing the decree by attachment.

9. In response, Counsel for the Respondent/Judgment creditor Mr. Kalili submitted that a consent order was recorded on 4/3/2015 where the Applicant committed himself to pay **Kshs. 20,000/= per month with effect from 15.4.2015** and there was a default clause that a warrant of arrest would be issued; And after he was arrested and produced in court he was given time to pay. That prior to being committed to jail it was stated that he was a man of means but had declined to pay. Therefore Section 38 of the Civil Procedure Act was complied with.

10. I have considered rival submissions of both counsels alongside the applicant's authorities. The application here being stay of and suspension of orders of the committal of the Applicant to civil jail pending hearing of the appeal, this court must determine if conditions of granting a stay have been met.

11. **Order 42 rule 6 of the Civil Procedure Rules** is clear in that this court must consider whether;

**(i) The applicant will suffer substantial loss unless the order sought is granted.**

**(ii) The application is made without unreasonable delay**

**(iii) Whether the Applicant has security for due performance of the decree**

**(iv) Courts also consider whether there is an arguable case (See *Madhupauper International Ltd-vs- Kerr (1985) KLR 846*)**

12. It is the contention of the applicant that he is 78 years old and in ill health. This was an allegation that was not established. However, being incarcerated is irreversible as clearly put by the applicant therefore there is a possibility of suffering loss that cannot be adequately compensated by damages.

13. The applicant was committed to civil jail on the 7<sup>th</sup> day of February 2018. The Application was filed on the 23<sup>rd</sup> day of February 2018. The delay cannot be said to be inordinate. Regarding security, it is deponed in paragraph 7 of the affidavit in support of the Application that the applicant is ready and willing to be bound by conditions (security) as the court would find it necessary for due performance of the decree or order.

14. The question begging would be; if the appeal, if any, would be arguable? It is argued by the Applicant that Section 38 of the Civil Procedure Act was not complied with. The alluded to provision of the law provides thus;

**“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”.**

15. In this matter following the decree of the court on **21<sup>st</sup> January 2015** a Notice to show cause why execution should not issue was issued. The applicant was to appear in court to give reasons why he could not be committed to jail. The Applicant/Judgment debtor did not appear in court but he was represented by an advocate who entered into a consent with counsel for the Respondent. The Applicant was given the opportunity of explaining why he could not be committed to jail. He promised to settle the sum by paying the sum in installment. However he failed to comply.

16. Another Notice to show cause was issued on **15<sup>th</sup> January 2018**. When the Applicant/Judgment debtor appeared before court he was given the opportunity of giving an explanation. He denied knowing anything to do with the case. The court determined the issue and came up with a brief ruling. He was released on his own personal bond of 500,000/=. On the 7/2/2018 the applicant appeared before the learned Magistrate and remained adamant that he did not know anything to do with the case.

17. At the point of committing him to jail on the 7/3/2018 the court had given him the opportunity to show cause why he should not be committed to jail.

18. I have perused a memorandum of appeal that has not been filed. It is attached to the application where the learned magistrate is being faulted to misdirecting himself by committing the applicant to jail. This court would have to determine whether or not the Applicant is a man of means but has deliberately refused to pay.(see *National Bank Limited –vs- Linus Kuria Ndungu Milimani HCCC NO. 81 of 1998 (unreported)*)

In his submission the Respondents counsel had no objection to the applicant being released on condition that he deposits security of the sum owing, **Kshs. 133,228/=** What is interesting in this matter is that the intended appeal is not against the dismissal of the case that culminated into the amount of costs that are accruing. The appeal is against the order committing the applicant to jail.

19. That notwithstanding, the intended appeal would be inconsequential if the order of stay is not granted. In the premises I grant a stay and suspension of orders of committal of the court dated 7/2/2018 committing the applicant to jail on condition that he deposits half the decretal sum in court.

20. In default of filing of the appeal within the next 14 days, the order shall stand vacated.

21. Costs of the Application shall abide the outcome of the appeal.

22. It is so ordered.

**Dated, Signed and Delivered at Kitui this 14<sup>th</sup> day of March 2018**

**L.N. MUTENDE**

**JUDGE**