



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL SUIT NO. 4 OF 2013

JEDIDA CHEPKOECH MUTAI (Suing as the Legal

representative of the estate of: JULIUS KIPKORIR

MUTAI (DECEASED).....PLAINTIFF

VERSUS

CHERONO BEATRICE.....DEFENDANT

RULING

Background

1. The applicant/judgment -debtor was sued in this matter as the registered owner of motor vehicle Reg. No.KBE 847 which was involved in a road traffic accident with motor cycle registration number KMCH 4392 on 25th November 2013. Following the said accident, one Julius Kipkorir Mutai sustained injuries to which he succumbed on 3rd December 2012. In its judgment dated 4th April 2015, this court made an award of Kshs.9,560,976 in general damages to the plaintiff/respondent.

2. Out of the decretal sum, Invesco Insurance company Ltd, which had insured the applicant's motor vehicle, made a payment of Kshs. 3,000,000/- leaving a balance of Kshs. 8,000,000/-, now claimed by the respondent. Various attempts at execution against the applicant were made by the respondent. These included notices to show cause why the applicant should not be committed to civil jail for failure to pay the balance of the decretal amount due to the respondent.

3. By her application dated 26th July 2017, the applicant seeks the following orders:

1. (spent)

2. (spent)

3. (spent)

4. That this honourable court be pleased to issue an order setting aside and/or lifting the order issued on 19th July 2017 committing to civil jail.

5. That this honourable court be pleased to compel the plaintiff/applicant to pursue alternative means of settlement of the decretal sum herein.

6. That necessary directions do issue.

7. That the costs of this application be provided for.

4. The application was supported by an affidavit sworn by the applicant on 26th July 2017 and was based on some eight grounds set out on the face of the application. The gist of these grounds is that the applicant had been committed to civil jail on 19th July 2017 for failure to show cause why she should not be so committed for failing to settle the sum of Kshs. 8,195,975/-, the balance of the decretal sum due to the respondent in this matter. She had previously been committed to civil jail on 19th April 2017 but the orders of committal had been lifted. She contends that she is a woman of low financial means but concedes that she is indebted to the respondent in the sum of Kshs. 8,195,975/- after her insurer, Invesco Assurance Co. Ltd, paid at least Kshs. 3,000,000/-.

5. It is her contention that she has never refused and/or deliberately failed to settle the decretal sum but it has proved daunting to do so in view of her low financial means.
6. The applicant contends that the respondent has not exhausted alternative means of settlement of the decretal sum including but not limited to levying execution against the applicant's insurer which paid at least Kshs. 3,000,000/- in satisfaction of the decretal sum.
7. It is her contention further that committal to civil jail as a means of compelling satisfaction of a decree should only be resorted to as a means of last resort. Even then, a distinction should be made between those who are merely refusing to pay and those who cannot pay due to poverty.
8. The applicant's affidavit in support of her application reiterates the grounds set out in her application. She contends that as a civil servant earning a gross salary of Kshs.25,971/- with a net salary of kshs7,686/- she cannot meet the decretal sum of Kshs. 8,195,975/-. She annexes her payslip for the month of June 2017 and an affidavit of means to demonstrate her inability to pay. She further avers that she is solely responsible for the maintenance and payment of school fees for her four children in various institutions of learning and attaches their birth certificates and fees structures from their schools.
9. The applicant avers, on the basis of information from her advocate, that the provisions of section 3(a) of the **Insurance (Motor Vehicle Third Party) (Amendment) Act, 2013** and the proviso to subsection 1 of section 10 of the **Insurance (Motor Vehicle Third Party Risks) Act (Cap 405)**, which capped the maximum amount payable by an insurer in respect of such claims as the instant one at Kshs. 3,000,000/-, were declared unconstitutional. It is her contention therefore that the respondent may still perfectly levy execution against her insurer, Invesco Insurance Co. Ltd, to secure payment of the balance of the decretal sum. She further asserts that the respondent did not satisfy the court that she had the means to satisfy the balance of the decretal sum but refused and/or neglected to do so.
10. The respondent opposes the application and has filed an affidavit sworn on 14th September 2017. In the said affidavit, the respondent confirms the undisputed facts pertaining to this case, including the payment of Kshs. 3,000,000/- by the applicant's insurer. She avers, however, that pursuant to the provisions of section 3(a) and section 10 (1) of the Insurance (Motor Vehicles Third Party Risks) (Amendment) Act, the insurer had paid the maximum amount that it was required to pay before the provisions of the Act were declared null and void in 2016.
11. It is her case, further, that provisions of the law declared unconstitutional do not operate retrospectively, and cannot therefore apply to the present matter. She contends that it is upon the applicant to institute a suit against her insurer to enforce payment of the balance of the decretal sum, but until then, she remains indebted to the respondent. She deems the present application an attempt to deny her the fruits of her judgment, noting that the applicant has not shown any prejudice that she will suffer, has indicated willingness to pay the decretal sum but failed to do so, and has failed to make proposals on how to settle the matter.
12. In her written submissions, the applicant submits that she is a woman of low financial means indebted to the tune of Kshs. 8,195,975; that she is a Clerical Officer in the Ministry of Trade earning a gross salary of Kshs. 25,971 and a net salary of Kshs.7,686; and that she risks loss of employment if committed to civil jail for more than 14 days. She has relied on the provisions of section 38 and 40(1) of the Civil Procedure Act and Order 22 rule 34(1) – (3) of the Civil Procedure Code to submit that judicial precedents have held that where the judgment debtor alleges inability to pay the decretal sum or any part thereof, the onus is on the judgment creditor to show that the debtor has the means to do so.
13. The applicant relies on the decision in **Beatrice Wayikut & Another vs AG (2012) eKLR** to submit that the conditions set out in section 38 and Order 22 rule 34(2) must be strictly fulfilled before an order for committal is made. She also cites **Braeburn Ltd vs Gachoka & Another/2007) 2 EA 67** cited in **R vs PS, Office of the President Ministry of Internal Security & Another – ex-parte, Nassir Mwanditu (2014) eKLR** to submit that she has demonstrated her low financial means and the application should be allowed.
14. She further submits that committal to civil jail should be resorted to as a means of last resort, and she relies on **Elijah Momanyi & Co. Advocates vs Beatrice Maiyo HC Eldoret Misc. 149 of 2005**.
15. In her submissions in response, the respondent contends that the declaration of section 3(a) of the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act as unconstitutional was done in 2016. It does not therefore apply to matters prior to that date. Further, the declaration of unconstitutionality does not apply to the capping of the maximum payment to be made by an insurer.

Analysis and Determination

16. I have considered the pleadings and submissions of the parties in this matter. The two prayers that the applicant seeks, the rest having been addressed when the matter came up before the court, are a prayer for setting aside the orders of committal to civil jail and an order compelling the respondent to pursue an alternative means of settlement of the decretal sum.
17. In determining whether these orders are merited, I consider first the position in law of the remedy of committing a debtor to civil jail for failure to pay a debt.
18. The respondent has argued that the remedy is lawful and constitutional. She relies on **Paul Otieno vs Ann Achieng Asari Miranja t/a Paul & Co. Advocates Nairobi HC Misc. No.624 of 2012** and **Samuel Njenga vs Augustino Onando & Another (2015) eKLR** to submit that as long as section 40 remains in the statute books, it is not unconstitutional for a judgment debtor to be committed to civil jail upon failure to pay a debt. She also cites **Beatrice Wanjiku & Another vs AG** on the objectives of the Civil Procedure Code with respect to enforcement of debts.
19. Section 38 of the Civil Procedure Act allows the arrest and detention of a debtor in prison on the basis of conditions set out in the section

while section 40 titled “arrest and detention” sets out the process for arrest and detention in civil jail of a debtor.

20. As I understand it, the general position in law is that the arrest contemplated under section 38 and 40 of the Civil Procedure Act is not unconstitutional. All that is required in proceeding under the two provisions is that there has to be strict adherence to the law. In **Jane Wangui Gachoka vs Kenya Commercial Bank Limited [2013] eKLR**, the petitioner asked the court to declare sections 38(d) and 40 of the Civil Procedure Act and Order XX1 Rules 32,33 of the Rules which allowed for commitment to civil jail for non-payment of a debt as archaic and unconstitutional. In declining to make the declaratory orders sought by the petitioner, the court stated as follows:

“[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.” See also **Mary Nduku Ndunda vs Attorney General & 4 Others [2016] eKLR**.

21. In the present case, I have not heard the applicant to say that there was any failure on the part of the respondent to follow the process mandated by law in executing for the debt under the provisions of section 38 and 40 of the Civil Procedure Act. The issues that the applicant raises are matters which should have been placed before the court that was dealing with the notice to show cause against her. As the applicant submits, it is her Counsel(s) then on record who failed to present material before the court with respect to her ability or otherwise to pay the decretal sum.

22. The applicant has also argued that the respondent should be compelled to seek an alternative means of settling the decretal sum. She argues that certain provisions of the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, 2013 were declared unconstitutional, and the cap on the amount that an insurer was required to pay removed.

23. I have, however, considered the decision that the applicant seeks to rely on. I note that the cap of Kshs 3,000,000 introduced by the **Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, 2013** was found to be constitutional by Onguto J in **Law Society of Kenya vs Attorney General & 3 Others [2016] eKLR** in which he stated as follows:

73. What the Principal Act has done is cap the amount of money that the insurer pays to the injured person. Nothing in the Principal Act stops a litigant or the injured person from pursuing a claim against the insured individual where an award in excess of the amount recoverable from the insurer is made.

74. I hasten to add that the provision as to the mandatory insurance cover of the amount of Kshs. 3,000,000/= does not in any way prohibit any insured who may be minded to source and seek a higher cover from agreeing with the insurer on such cover, subject of course to a higher premium and other agreement on the terms of the policy.

75. I consequently find nothing unconstitutional with the provisions of Section 5(b) of the Insurance (Motor Vehicles Third Party Risks) Act (Cap 405).

24. What the court found unconstitutional, which finding was affirmed by the Court of Appeal in **Justus Mutiga and Others vs LSK and AG Civil Appeal No 141 of 2016**, was the schedule to the Amendment Act which introduced a Structured Compensation Liability schedule.

25. This leaves the parties to this matter in what I consider an unenviable position. The applicant was insured, but because of the cap imposed by the law, her insurer was only required to pay Kshs 3,000,000 out of the decretal sum due to the respondent. The respondent, on her part, is left chasing an individual while the expectation would have been that she would get compensation, in accordance with the Insurance (Motor Vehicle Third Party Risks) Act, from the applicant’s insurer. The Court of Appeal captured this quandary in its decision in **Justus Mutiga and Others vs LSK and AG** when it expressed the following sentiments:

“Though the appellant contends that the limitation is justified, no evidence was adduced to prove that justification. If anything, limiting the compensation payable by the underwriter who has received premiums; particularly in the face of an innocent third party who is armed with a court judgment, is unjustifiable. It offends the very essence of insurance; which is to ensure mitigation against risks that result in loss. In particular, it defeats the very objective of compulsory third party insurance cover, if an innocent victim is left to recover the bulk of his claim against the insured personally.

26. The Court of Appeal did not, however, declare the cap unconstitutional, and that therefore remains the law.

27. Accordingly, I am unable to issue the orders that the applicant seeks in this matter. The application dated 27th July 2017 is therefore dismissed but with no order as to costs.

Dated Delivered and Signed at Kericho this 18th day of May 2018.

MUMBI NGUGI

JUDGE