



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI NAIROBI

CIVIL APPEAL NO. 178 OF 2017

DICK MINYUKI MUTURI1ST APPELLANT

EDNA WANJA MINYUKI2ND APPELLANT

DICKY DICK CONSTRUCTION CO. LTD3RD APPELLANT

VERSUS

YOSEPH TADESSERESPONDENT

RULING

There is a multiplicity of applications in this matter but the subject of this ruling is the application dated 13th June, 2018 by way of Notice of Motion under Section 43 (2), (3) (b) of the Civil Procedure Act, Cap 21 Laws of Kenya. It seeks the release of the 1st appellant herein who has been committed into civil jail following a warrant of arrest against him.

The application is founded on the reasons on the face of the application alongside supporting affidavit sworn by one Christine Minyuki who is the wife of the applicant. The main reason for seeking the said order is that the applicant is of ill health and cannot serve the remand sentence owing to his poor health. The application is opposed and there is a replying affidavit sworn by the respondent herein.

Two medical reports have been presented. One is by doctor Antony Were while the other is by Joshua Omboki described as In charge of Medical Facility Nairobi Remand Prison. I have heard both learned counsel in this matter. Section 43 (2) and (3) (b) provides as follows,

“(2) Where 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)

(b) By the committing court or the High Court on the ground of his suffering from any serious illness.”

The applicant has demonstrated through the two medical reports that the ailment he is suffering from has adverse effect on his health and this court has jurisdiction to order his release. The respondent has submitted in his replying affidavit that the respondent is determined to avoid the payment of the decretal sum which is due and payable.

In fact he alludes to the applicant’s previous conduct of avoiding payment by switching off his mobile phone and moving houses which took 5 months to be traced. He also submits that there are medical facilities in Kenya Prisons which can adequately attend to the applicant’s condition.

I have not been asked to determine the merits or otherwise of the dispute between the parties herein. What is clear however is that the applicant was committed to prison because of default to pay the decretal sum due and owing to the respondent.

There are several undertakings on the record including the offer to have the respondent take over some materials lying on the applicant’s yard and sell the same to recover the sum due and owing. For now there is no stay order with respect to the warrant of arrest, neither is there a prayer to review the same. Section 43 (4) provides as follows,

“(4) A judgment - debtor released 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.”

I have considered all the facts presented by both parties. I have also weighed the interest of the parties relating to the dispute. The warrant of arrest has been executed but shall remain in place.

However, based on the medical reports, I allow the application for the release of the applicant for a period of one month from the date of this ruling such that, in the event he does not discharge his obligation under the decree he shall be rearrested and committed to civil jail to finish his term under Section 42 of the Civil Procedure Act. His release is conditional on executing a bond of Kshs. 500,000/= with one surety of equal sum. This matter shall be mentioned on 23rd July, 2018 for further directions.

Dated, signed and delivered at Nairobi this 22nd Day of June, 2018.

A. MBOGHOLI MSAGHA

JUDGE