



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO.24 OF 2018.

PAMELA MALUTI.....APPELLANT

VERSUS

JIMMY NANDWA.....1ST RESPONDENT

VINCENT AHONO.....2ND RESPONDENT

(Being an appeal against the order by Hon .C. OBULUTSA, Chief Magistrate in Eldoret Civil Case No.478 of 2017 between JIMMY NANDWA and VINCENT AHONO Vs PAMELA MALUTI and ERICK JOHNSTONE ESHIRERA delivered on the 24th January 2018).

RULING

Background.

1. The matter before this court is an appeal from the order of Hon. C. Obulutsa in Civil Case No.478 of 2017 delivered on 24th January, 2018. By an application dated 20th March, 2018 brought under certificate of urgency, the Appellant Pauline Maluti seeks the suspension of the order for committal to civil jail and consequential orders of the Chief Magistrate's Court against the Appellant. This matter was provoked by the Appellant's committal to civil jail for 6 months, for failure to comply with the court order issued on 22nd April, 2015 and the subsequent Notice to show cause issued on 24th January, 2018.

Applicant's Case

2. The Application is based on grounds that:

- i) The applicant has an arguable appeal.
- ii) The appellant is presently in civil jail and stands to suffer substantial loss unless stay is granted.
- iii) The Appellant is willing to provide reasonable security.
- iv) The Respondents do not stand to suffer any loss that cannot be compensated in monetary terms.

3. The application is supported by an affidavit dated 20th March 2018 wherein the Applicant states that she filed an application dated 6th February, 2018 for the review of the lower court's orders issued on 15th September 2017. The application was dismissed with costs on 7th March 2018 for lack of merit. The Appellant has now appealed from the said lower court's order and contemporaneously filed the present application. The Applicant contends that the matter proceeded ex parte in the lower court and an application for review was dismissed.

4. The claim in issue for which the Appellant has been committed arose out of a contract she entered into, in partnership with the Respondents. They carried out a contract in Kakamega County on behalf of the County government of Kakamega. The Respondents are claiming money they claim to have used to hire motor vehicles from Kenya National Roads Authority for the performance of the contract while the Applicant claims no such hiring took place.

5. The Applicant further argues that Mr. Kitiwa advocate who executed the indebtedness acknowledgement, is the one acting for the Respondents and in her view this gives rise to conflict of interest.

6. The Appellant further alleges that she is an Appellant in Nairobi EACC case no. 19 of 2017, which appeal arose from the same

circumstances as this case and which is coming up for hearing on 15th May 2018. In that appeal she was ordered to appear personally during the hearing and will not be able to comply if the orders sought herein are not granted. She states that she had paid a fine of Kshs. 1,700,000/- which she stands to lose if she does not attend court on that day. The Appellant also argues that she is a witness in Kakamega Criminal Case no. 4241 of 2017 and is required to attend court for the hearing. The Appellant states that she is diabetic as shown in her annexures and her health is likely to deteriorate if she continues to stay in custody.

7. The Appellant has offered security which would cover the decree of about Kshs. 2,000,000/-. She has offered a title deed for land valued at Kshs. 1,200,000/- and her brother in law's pay slip of a monthly net of Kshs. 145,000/-. The Appellant contends that she was incarcerated on 24th January, 2018 and there is a likelihood of serving the full six months before the appeal is heard. That should the appeal succeed, she will not be compensated for loss of life and liberty. Lastly, the Appellant states that she is a civil servant and is likely to lose her job if the committal order is not suspended.

Respondent's case

8. The Respondents opposed the application on grounds that there is no stay to be granted since the Applicant has already been committed to civil jail and is serving her third month. Further, that the issue of committal to civil jail is not among the grounds of appeal and thus cannot be sneaked in as a ground for stay. The Respondents also state that the issues of the Applicant's sickness, her attendance at the criminal court in Kakamega and security over the land owned by Joseph Eshirema, were all considered and adequately dealt with by the lower court. That no appeal has been filed on the determination of the lower court on any of those issues and neither does any of them appear as a ground of the appeal. It is argued that the present application is a duplication of the one made in the lower court and from which no appeal has been preferred.

Issues for determination

9. The issue for determination, is whether the applicant has made out a case for stay of, or suspension of enforcement of the order of the Chief Magistrate of 24th January, 2018 committing the Judgment debtor to civil jail, pending hearing and determination of an appeal against the Chief Magistrate's decision. The applicable law for stay of enforcement of an order or decree pending appeal is **Order 42 rule 6** of the **Civil Procedure Rules**, and the principles set there under guiding the grant of stay of execution pending appeal are settled.

10. The principles under **Order 42 rule 6** of the **Civil Procedure Act** are that the court must be satisfied that substantial loss may result to the Applicant unless the order is made; that the application has been made without unreasonable delay; and such security as the court orders for the due performance of such decree or order, as may ultimately be binding on him has been given by the applicant.

11. In granting or refusing stay of execution pending appeal, the court exercises discretion which must however, be based on sound judicial principles, as espoused in **Sections 1A** and **1B** of the **Civil Procedure Act**. **Sections 1A & 1B** espouse the overriding objectives of the law, thereby enlarging the conditions under **Order 42 rule 6(2)** of the **Civil Procedure Rules** for stay pending appeal.

12. On substantial loss the Applicant's counsel contends that committal to civil jail once served cannot be reversed or compensated by damages. Further, that the Applicant who is a civil servant, and who suffers from ill health, will be prejudiced if she serves a jail term of 6 months only for this court to reverse the committal order. This will, in essence render the appeal nugatory.

13. The Applicant also submits that the appeal as filed is arguable and has high chances of success. That may be so. It is not for this court at this stage to venture into the demerits and or merits of the filed appeal as that would prejudice the appeal itself. However, this is not to say that this court cannot, in one sentence state whether or not the appeal as filed is frivolous.

14. Under **section 38** of the **Civil Procedure Act**, execution of a money decree by way of committal to civil jail can only be effected if the circumstances there under are satisfied, that is, that the judgment debtor is likely to leave the jurisdiction of the court, or is evading to pay the decretal sum by transferring his properties to third parties which is not the case in this matter.

15. On the other hand, the Respondents maintain that the Applicant refused to pay the decretal sum even after she had fully acknowledged the indebtedness by willfully signing a written acknowledgement of the debt and committing to pay the debt on or before 5th October, 2016. The Applicant was said to be evasive, and had to be dragged to court under a warrant of arrest after she failed to attend court and show cause. Hence, she cannot be heard to say that she is unable to settle the decree herein. The Respondents contend that in any event, no appeal has been filed challenging the judgment and decree passed in 2015 hence the judgment debtor cannot escape execution.

16. On the issue of whether the appeal is arguable, an Applicant seeking orders of stay pending appeal from the order of the subordinate court, tribunal or body or Deputy Registrar to this court is not required to prove that they have an arguable appeal unlike if it was an application for stay pending appeal to the Court of Appeal. See **Nakuru HCC 211 of 1998 Martha Njeri Wanupite & 3 Others Vs Peter Machewa Mwangi & 3 Others**. Nonetheless, nothing prevents this court from establishing whether the appeal is frivolous.

17. **Order 42 rule 6(2)** of the **Civil Procedure Rules** gives this court in its appellate jurisdiction, discretionary power to stay execution pending appeal on sufficient cause being established by the Applicant. The incidence of the legal burden of proof on matters which the Applicant must prove of course lies with the Applicant. See **Nairobi Industrial Cause No. 137 of 2014 Jenny Luesby Vs Standard Group Ltd (2014) eKLR**.

18. In **Absalom Dorb Vs Tarbo Transporters (2013) eKLR** the court held as follows:

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantages, but administers the justice that the case

deserves this in recognition that both parties have rights, the appellant to his appeal which includes the prospects that the appeal will be rendered nugatory; and the decree holder to the decree which includes the full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination.”

The lower court, according to record, noted the reluctance of the judgment debtor in settling the decretal sum despite promises. That conduct may have influenced the decision to have her committed to civil jail. She was committed through a valid provision after attempts to settle failed. The court further noted that she admitted she had paid a fine of Kshs. 1,700,000/- in a criminal case yet she could not pay the plaintiffs.

19. Nonetheless, there is a limitation on execution by way of arrest and detention in prison of any person. Under the proviso to **section 38** of the **Civil Procedure Act** it states that:

“provided that where the decree is for 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 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 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 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 which the judgment debtor was bound in a judiciary capacity to account.”

20. The Applicant has approached this court by way of an appeal. The court cannot deny the decree holder his benefit of a lawfully obtained judgment. However, the right of appeal is a fundamental right enshrined and guaranteed by the Constitution and other law, **Order 49** of the **Civil Procedure Rules**.

21. That right when exercised guarantees an appellant the right to access justice. It would be a travesty of justice for this court to curtail that right thereby ousting the Appellant from the seed of justice. This especially in the absence of any evidence that the judgment debtor was examined on her means and, or that the decree holder exhausted all other less restrictive, or extrusive remedies under **section 38** of the **Civil Procedure Act** for enforcement of a monetary decree of the court.

22. In the present case, the judgment debtor was given an opportunity to settle the debt but became evasive and thus in my opinion the decree holder exhausted all other less restrictive remedies. From the record, judgment was delivered in 2015 and the Appellant has never attempted to fulfill the decree. In view of all the above considerations, I find that the Respondents fulfilled the above mentioned requirement.

23. In **Vijay Morjana Vs Harns Horn Junior & Another, HCC 285 of 2004**, the court held that a decree holder who desires to have the freedom of a judgment debtor restricted must show that he has exhausted all other means to secure payment and that the only option left is incarceration.

24. On the second condition under **Order 42 rule 6(2)** of the **Civil Procedure Rules** that the application must have been filed without undue delay. The order for committal to civil jail was made on 24th January, 2018 and the application herein was made on 21st March 2018, two months later. In my opinion there was undue delay in the filing of this application. At the time of hearing the present application, the Appellant is serving her third month in the civil jail and therefore there seems not to be any urgency in the matter. The application was thus not brought promptly and did not satisfy this requirement.

25. The last condition to be fulfilled by the Applicant to warrant a stay being granted is that he must offer security, or the court may direct the deposit of such security for the due performance of the decree or order as may ultimately be binding on the Applicant.

26. The Applicant has offered security in the form of a title deed of a parcel of land registered in the name of Joseph Kachi Eshirera, whom she claims is her brother in law. However, there is no affidavit on record sworn by the said Joseph Kachi Eshirera attesting that he agreed to offer his land as security. The Applicant deposes that she is a civil servant of poor health, and currently on interdiction. That if let free, she will ensure that she raises the required decretal sum.

27. Upon careful consideration of the foregoing grounds, I am not persuaded that the application has merit. Consequently I disallow the application. Costs to the Respondents.

DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF JUNE 2018.

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L. A. ACHODE

HIGH COURT JUDGE

DELIVERED, DATED AND SIGNED IN OPEN COURT AT ELDORET THIS 31ST DAY OF OCTOBER 2018.

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H. A. OMONDI

HIGH COURT JUDGE