



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL NO. 16 OF 2017

SOLOMON MURIITHI GITANDU (sued as next

Friend for **DAVID MWANGI MURIITHI**).....1ST APPELLANT

CHARITY NYAWIRA MURIITHI (sued as next

Friend for **DAVID MWANGI MURIITHI**).....2ND APPELLANT

-VERSUS-

JARED MAINGI MBURU (suing as the

next Friend for **JOSEPH MAINGI MAINGI**).....RESPONDENT

RULING

1. The appellants **Solomon Muriithi Gitandu** sued as next friend to David Mwangi Muriithi, **Charity Nyawira Muriithi** sued as next friend to David Muriithi filed a motion under **Section 1A, 1B** and **3A** of the **Civil Procedure Act Cap. 21 Laws of Kenya**. They seek orders that;

(i) Spent

(ii) That pending hearing and determination of this application, the appellants be released from Civil Jail unconditionally.

(iii) That pending hearing and determination of the appeal herein, the appellants be released from Civil Jail.

(iv) That such other orders as are expedient to be made.

(v) That the costs be in the appeal.

(vi) Spent

The application is supported by the affidavit of Margaret Kimani and based on the grounds that:

(a) The appellants were committed to civil jail on 10th April, 2017 on the grounds that they made no proposal.

(b) The orders for committal to civil jail were defective in substance in that the court did not give

reasons for committal as envisaged in the proviso to section 38 of the Civil Procedure Act.

(c) The orders of committal were one irregularly.

The facts giving rise to the application are that on 10th April, 2017 the appellants who are a husband and wife were committed to civil jail at Wanguru Senior Principal Magistrate's Court Civil Case No. 53 of 2016 for failure to pay a decretal sum of Ksh.189,000/-. The appellants failed to make a proposal on how to pay and were committed to civil jail for 30 days. They were dissatisfied with the order as the procedure under **Section 38 Civil Procedure Act** was not followed. The appellants aver that the trial magistrate disregarded the law and failed to give them a chance to show cause why they should not be committed to prison as it was the first time the matter was coming up in Court. They pray that the order be set aside and they be released from civil jail.

2. The Respondent **David Mwangi Muriithi who was the defendant in the suit and not Jared Maingi Mburu** as appears on the application opposed the application and contends that the application is not brought under any provision giving the Court jurisdiction to deal with the matter. They also contend that the orders cannot be granted. That the appellants failed to disclose material facts as they only annexed the proceedings of one day.

3. The Respondent further claims that the procedure for notice to show cause is provided under **Order 22 rule 7 (1) Civil Procedure Rules**. Failure to attend and show cause, the Court issues a warrant of arrest. The appellants said they had no money and did not make any proposals.

4. I have considered the application. From the proceedings annexed, "MKI" the appellants were presented in Court on 10th April, 2017 under a warrant of arrest. All they said was that they had no money and they were committed to prison. **Section 38 of the Civil Procedure Act** provides for powers of the Court to enforce execution. It is provided:

"Subject to such conditions and limitations as may be prescribed, the Court may, on application of 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 relief granted may require

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 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.

(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 of money which the judgment debtor was bound in a fiduciary capacity to account.”

The decree was for payment of money. The Court under the above provision was required to give the appellants an opportunity to show cause why they should not be committed to civil jail. Secondly the Court could not commit the appellants to prison without giving reasons in writing as provided above.

5. As deponed by the appellants they were committed to prison on other grounds than those envisaged in the **Civil Procedure Act** and did not take into account the proviso to **Section 38 of the Civil Procedure Act**. The Court erred in committing the appellants to prison.

6. The Respondent’s contention that there was none disclosure as the appellants did not annex all the proceedings does not change what is apparent on the face of the record. The record shows that the appellants were before the court for the first time and pleaded that they were not aware of the case. The Respondent pointed out the procedure provided under **Order 22 rule 7 Civil Procedure Rules** but has not proved that the procedure was followed. He who alleges bears the burden of proof as provided under **Section 107 of the Evidence Act**. There is no proof that the appellants were ever served with notice to show cause prior to their arrest.

7. The Respondents are contending that the appellants did not bring the application under any provision which donates power to this Court to hear the application. This matter was before a sub-ordinate court. **Article 165 (6) of the Constitution** gives the High Court supervisory jurisdiction over sub-ordinate courts. It is provided:

“The High Court has supervisory jurisdiction over the sub-ordinate courts.....”

Furthermore under **Article 159 (2) (d) of the Constitution** the courts are mandated to do justice without undue regard to procedural technicalities. It is provided:

“Justice shall be administered without undue regard to procedural technicalities.”

Also under **Order 51 rule 10 Civil Procedure Rules**, failure to cite the provisions under which the application is brought does not render the application to be defective.

“Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be refused merely by reason of failure to comply with this rule.”

8. As submitted by the counsel for the applicant **Section 1A, 1B and 3A Civil Procedure Act** gives court inherent jurisdiction to make orders in the interest of justice and to give effect to the overriding objectives of the Act. The application is properly before this Court.

In the case of **Braeburn Limited -V- Gachoka and another (2007)**; it was held *inter alia*;

“A person is not liable to be committed to civil jail for inability to pay a debt but a dishonest and fraudulent debtor is liable to be punished by way of arrest and committal.”

The Court further observed that:-

“Section 38 of the Civil Procedure Act however, provides a limitation of the courts’ power to

order execution of a decree by way of detention in prison. The section prohibits the court from making an order of execution of any decree for the payment of money unless the judgment-debtor has first been given an opportunity of showing cause why he should not be committed to prison and even where the judgment debtor has been given such notice to show cause, the court must itself be satisfied and give reasons in writing for that.”

These limitations are further re-stated under **Order 22 rule 31 (1) Civil Procedure Rules**. A notice to show cause may be issued requiring the judgment debtor to show cause and where he fails to appear a warrant of arrest is issued. In the case the Court found that the requirement for Notice to Show Cause is mandatory and whether the judgment appears for notice to show cause or under warrant of arrest, it is the duty of the decree holder to satisfy the court that the judgment debtor is not suffering from poverty, or any other sufficient cause and is able to pay the decretal sum or proof the provisions of **Order 22 rule 35 Civil Procedure Rules**, that is examination of the debtor as to his property.

9. As execution by way of arrest and committal to prison deprives the debtor his liberty, the trial court ought to have ensured strict compliance with **Section 38 supra and Order 22 rule 31 (1) supra** to determine the appellants' ability to pay. The Court had a duty to ensure constitutional safeguards as to due process by ensuring the notice of intended execution by way of committal was personally served and a due inquiry and satisfaction of the Court by the decree holder as to the judgment debtor's ability to pay. It is only then that the Court would rightly commit him to prison. A judgment debtor in view of the provisions of **Section 38 of the Procedure Act and Order 22 rule 31 (1)** will not be committed to prison on account of his inability to pay or on account of poverty.

10. It has been held severally that no person should be sent to prison for inability to pay a debt. In **Zippora Wambui Muthara – Milimani B. C. Cause 19/2010 (unreported)** Justice Koome (as she then was) observed as follows:

“There are several methods of enforcing a civil debt such as attachment of property. The respondent's claim that the debtor has money in the bank, that money can also be garnished. An order of imprisonment in civil jail is meant to punish, humiliate and subject the debtor to shame and indignity due to failure to pay a civil debt. That goes against the international covenant on civil and political rights that guarantees parties' basic freedoms of movement and of pursuing economic cultural development”

11. It is incumbent on the party seeking to execute a civil debt by way of committal to civil prison to adhere to the legislative safeguards before a party can be committed to civil jail. In the case of **Braeburn supra and Jane Wangui Gachoka -V- Kenya Commercial Bank Petition 51/2010** it was held that **Section 38 and 40 of the Civil Procedure Act** are neither inconsistent with the provisions of the relevant provisions of the **Constitution and International Bills of Human Rights**. I am persuaded to agree with the findings. However, for a judgment debtor to be committed to prison, the Court must ensure that the conditions for committal to prison on account of a money decree are strictly followed. A judgment debtor will not be committed to prison for inability to pay or to fulfill contractual obligation. There must be additional reasons and the court being satisfied after the debtor has been given notice to show cause and give reasons in writing as provided under **Section 38 of Civil Procedure Act and Order 22 rule 31 (1) Civil Procedure Rules**. There is also a requirement that the debtor be served with notice of entry of judgment under **Order 22 rule 20**. This gives the debtor opportunity to pay before the decree holder starts the execution process. There is no proof that such notice was served.

12. I am of the view that though the Respondent was entitled to execute the decree, the procedure was flawed. The trial magistrate erred by not complying with the provisions of **Section 38 of the Civil Procedure Act** and committed the appellants to prison merely on account of inability to pay and denying them a chance to show cause why they should not be committed to civil jail. As pointed out in the case of **Rosana Pluda -V- Phillip Kipchirchir Moi Nairobi Divorce Cause 154/2008** (unreported), ***no one should be sent to jail for inability to pay a debt. It would be morally wrong to do so. And it would make no sense to send to civil jail a person who is unable to pay. That would be malicious. Civil jail is for those who refuse to part with their money to pay debts.*** It is also trite law that there are other

modes of execution and not only by way of committal to prison. I find that this application has merits. The order to commit the appellants to prison were made in fragrant disregard of the provisions of the **Civil Procedure Act and rules**. They cannot be allowed to stand. I find that the application has merits. I allow it as prayed with costs.

Dated and delivered at Kerugoya this 27th day of June, 2017.

L. W. GITARI

JUDGE

Ruling delivered in open Court in the presence of the Respondent, the 1st appellant absent, court assistant Naomi Murage.

L. W. GITARI

JUDGE

27.06.2017