



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 198 OF 2015

MARY NDUKU NDUNDAPETITIONER

VERSUS

THE ATTORNEY GENERAL1ST RESPONDENT

COMMISSIONER OF PRISONS2ND RESPONDENT

AND

SALLY KURIA.....1ST INTERESTED PARTY

BERNARD MUSYOKA2ND INTERESTED PARTY

MARSHA NINDI3RD INTERESTED PARTY

JUDGMENT

Introduction

1. The petitioner filed this petition dated 13th May 2015 seeking various orders and declarations following her arrest and committal to civil jail on the orders of the respondent, and her incarceration at the Lang'ata Women's Prison for failure to pay a debt due to the interested parties. Together with the petition, the petitioner filed an application seeking the following orders:

1. *That this application be certified as urgent and service thereof be dispensed with in the first instance.*
2. *That there be a temporary conservatory order directing the 2nd respondent herein to release the petitioner/applicant from custody pending the bearing and determination of this application or further orders.*
3. *That there be an injunction restraining the 1st and 2nd respondents their agents or any other person acting on their authority or directions or on behalf of the interested parties from arresting or detaining the petitioner pending the hearing and determination of the petition herein.*

4. ***That the court be pleased to make any other or further directions as it may deem fit and necessary.***

5. ***That costs of this application be in the cause.***

2. When the parties appeared before the Court for hearing of the application inter parties, Counsel for the petitioner made certain proposals which resulted in a consent order between the parties. The consent order was for the release of the petitioner, Mary Nduku Ndunda, from Lang'ata Women's Prison where she had been committed; for the grant of a temporary and conditional stay of execution against the petitioner on condition that she furnishes the Advocates of the interested parties with a Banker's cheque for Kshs. Two Hundred Thousand (Ksh200,000/-) by the end of the day, and that she pays to the interested parties a sum of Kshs One Million (Kshs1,000,000) within the next 14 days from the date of the consent, 15th May, 2015.

3. The Advocates for the petitioner also undertook, as part of the consent, that they would ensure that the petitioner attended Court on every appearance. The matter was then fixed for further directions and to confirm compliance with the consent order on the 8th of June 2015.

4. Directions were then given for the respondents and interested party to file their response to the petition and the matter set for directions on 8th June 2015. Thereafter, the parties filed a written consent duly signed by the parties in which they adopted the terms of their earlier consent.

5. On the 8th of June 2015, Counsel for the petitioner informed the Court that his client had reneged on the terms of the consent between the parties, and that she had been unwell. He also requested for time to see if she would have made payment and if no payment made, take directions on the hearing of the matter.

6. Accordingly, the Court gave directions under which the petitioner was to meet the terms of the consent order failing which the matter would proceed to hearing. On the application of Mr. Kamunya appearing for the Attorney General, the Court excused the respondent from further participating in the proceedings.

7. Thereafter, there was no appearance for the petitioner in subsequent appearances before the Court on the dates scheduled for mention, namely the 26th of June and the 17th of July, 2015, and neither did she comply with the consent order or the directions of the Court with respect to filing of submissions with a view to prosecuting her petition.

8. On 23rd September 2015, her Learned Counsel, Mr. Ngala, appeared and informed the Court that discussions were ongoing between the petitioner and the interested parties, and requested for a mention date in 30 days to enable the parties discuss the matter. It was therefore rescheduled for 30th November 2015. Ultimately, the matter was not settled, and the petitioner did not file submissions as directed by the Court. The interested parties and the respondents filed submissions dated 2nd December 2015 and 9th December 2015 respectively, and requested for a judgment date. It is to be noted that despite the earlier application to be excused from the proceedings, the AG had appeared on 23rd September 2016 and had filed an affidavit in reply to the petition sworn by Mr. George Sirro, the Secretary to the 1st respondent, on 27th August 2015.

9. The petitioner has not prosecuted her claim, and aside from her petition and affidavit in support, there is nothing before the Court that evinces an interest on her part to litigate the alleged violation of her rights by the respondents and the interested parties. I will however, in the interests of justice, consider the pleadings and submissions placed before me with a view to bringing an end to this matter.

10. In her petition dated 13th May 2015, the petitioner seeks the following orders:

1. ***A declaration that sections 38 and 40 of the Civil Procedure Act and Orders 22 Rules 7, 31, and***

32 are unconstitutional to the extent they seek to limit fundamental rights that are not subject to limitation.

- 2. That the aforesaid provisions are unconstitutional to the extent that they do not comply with Article 24 of the Constitution of Kenya.***
- 3. That United Nations international; Covenant on civil and political rights is part and parcel of laws of Kenya having been so ratified.***
- 4. That the provisions in (1) herein above are in conflict with Article 11 of the convention in (3) hereinabove and under Article 20 of the Constitutional of Kenya, the conflict ought to resolved in favour of the convention hereinabove mentioned.***
- 5. A declaration that the petitioner's arrest is unlawful and unconstitutional.***
- 6. An injunction against the respondent, the interested parties or any other person acting on their behalf or direction from arresting or detaining the petitioner on the basis of inability to pay the decretal sum the subject herein.***
- 7. Costs of this petition.***
- 8. Any other order as the court may deem fair and just.***

11. In her affidavit in support of the petition, the petitioner avers that the interested parties were the plaintiffs in CTC No. 335 of 2011 before the Co-operatives Tribunals, and she was the defendant. The claim arose out of a civil obligation in which the plaintiffs, now interested parties, had acted as her guarantors. She alleges that summons in the suit were somehow left in her Advocates' offices as a result of which interlocutory judgment was obtained against her. She contends that by the time the suit was filed, she was no longer employed, had engaged in farming but was unsuccessful, and was no longer in gainful employment.

12. It is her further deposition that on or about October 2014, on the expectation that her farming business would improve, she had negotiated to be making to the interested parties monthly payments of Ksh200,000/-. She was however unable to make any payment. She deposes that she was woken up on 12th May 2015 at 5.00 a.m. by people who claimed to be policemen who showed her warrants issued on 8th December 2014. She alleges that she was hauled from the house and bundled to the Co-operative Tribunal where she waited until 11.00 a.m. to be dealt with by the Chairman. She had not bathed or refreshed or taken breakfast and was thoroughly scared and terrified. Her advocates went to the Tribunal and attempted to negotiate with the interested parties' Advocate for more time to settle the matter, to no avail. The interested parties' Advocate informed the Tribunal that the decretal sum was about Ksh.3 million and sought the petitioner's committal to jail for non-payment. The Court ignored her advocate's plea for more time and proceeded to commit her to civil jail.

13. The petitioner avers, on the advice of her Counsel, that the court ought to strictly adhere to the provisions of section 38 of the Civil Procedure Act and order 22 Rule 34 thereof. She contends that she does not have the means to pay the decretal sum, and would not have been committed to civil jail if she had. Her contention is that her committal is merely calculated to intimidate, humiliate, embarrass and punish her for a debt that she is unable to pay. She alleges that she suffers from a depressive condition that has worsened with her age and is likely to worsen with prison conditions.

14. In reply, the interested parties filed an affidavit sworn by the 2nd interested party, Mr. Bernard Musyoka, on 26th May 2015. The interested parties aver that they had guaranteed to the petitioner a loan of Kshs.6,000,000 from the United Nations Sacco Society Limited. They allege that before she finished repaying the loan, the petitioner resigned from employment, as a result of which the interested parties were left to repay the unpaid loan plus interest. Each of the interested parties had to pay an amount of

Kshs.649,605.00/- in satisfaction of the petitioner's loan. They therefore filed a claim before the Co-operative Tribunal to recover the amounts paid, and judgment in their suit, Co-operative Tribunal Cause No 335 of 2011, was entered on 22nd November 2011.

15. It is their further averment that the petitioner was duly notified of the existence of the judgment debt. She had been served by substituted service by placing a newspaper advertisement in the Standard newspaper of Friday 30th September, 2011 pursuant to leave of the court.

16. The interested parties assert that had the petitioner wished to dispute the ex parte judgment, she should have made the relevant application under Rule 17 of the Co-operative Tribunal (Practice and Procedure) Rules, 2009. Instead, the petitioner has employed tactics of engaging in all legally known means of avoiding repaying the judgment debt. She has filed for bankruptcy in Bankruptcy Cause No. 16 of 2012, then avoided attending the meeting of creditors, leading to a discharge of the receiving order; she has intimated to the 1st respondent that she would give a settlement proposal every time the matter was scheduled for a notice to show cause why she should not be committed to civil jail in satisfaction of the judgment debt; she has filed the present petition as a way of delaying and/or avoiding execution of the decree.

17. The interested parties observe that her allegation that she is unable to service the debt has never been raised before. They note that the petitioner is living a luxurious life and her refusal to repay the amount due to them is just plain defiance of the court decree.

18. They also observe that the petitioner had made a proposal to repay the decretal amount by instalments of Kshs. Two Hundred Thousand per month with effect from 5th November 2014 and subsequently on or before every 5th day of every other month until satisfaction of the decree, and in default, warrants of arrest were to issue. She had not paid in terms of the consent, and her cheque given on 2nd of December 2014 for Kshs. Two Hundred Thousand was dishonoured as she stopped payment thereof. The interested parties therefore argue that the petitioner's committal to civil jail on 12th May 2015 was proper and procedurally done in accordance with the relevant laws, and they ask for the petition to be dismissed with costs.

19. In his affidavit, Mr. Sirro, on behalf of the respondents, avers that the petitioner was the respondent in Co-operative Tribunal Cause No 335 of 2011 filed on 14th July 2011 by the interested parties. He confirms the averment by the interested parties that they had guaranteed a loan of Kshs.6,000,000 to the petitioner by United Nations Sacco Society Limited; that the petitioner defaulted in repaying the loan balance of Ksh.3,248.025 as a result of which the interested parties were required to pay an amount of Kshs.1,948.815, which they then claimed at the Tribunal from the petitioner. Mr Sirro further confirms that an application for substituted service on the petitioner was made and granted, and thereafter a request for judgment made and granted. The interested parties thereafter applied for warrants of attachment which were issued and the petitioner's goods attached. Following an objection, however, the attachment did not proceed. An application for committal of the petitioner to civil jail was thereafter made, and was allowed on 11th August 2014, following which the petitioner and the interested parties entered into a consent on 24th October 2014 that the petitioner should pay Ksh.200,000 per month for the next six months.

20. According to Mr. Sirro, the petitioner, again defaulted on payment, and the interested parties applied for warrants of arrest for the petitioner to be committed to civil jail for failing to honour the terms of the consent, and she was arrested on 12th May 2015. It is his averment therefore that the respondent acted in accordance with the law, and that the petitioner is employing delaying tactics with regard to paying the debt due to the interested parties by filing the present petition. It is also his averment that sections 38 and 40 of the Civil Procedure Act and Order 22 Rules 7, 31 and 32 are consistent with the Constitution of Kenya.

Determination

21. This matter is fairly straightforward. It relates to a party who has not disputed that she was guaranteed by her colleagues when she borrowed a loan from the United Nations Savings and Credit Society Limited, in which they were all members. She left employment and defaulted in repaying the loan, and the interested parties had to meet the terms of their guarantee by paying the amount then outstanding. They then lodged their claim before the Co-operatives Tribunal, obtained orders against the petitioner for the amount they had had to repay, attempted to execute by way of attachment but were thwarted by an objection application by the petitioner's spouse, and they resorted to an application for committal of the petitioner to civil jail.

22. I note from the pleadings that the petitioner has made commitments to pay, on at least two occasions, which she had not honoured. She has also made various attempts to avoid paying, including a bankruptcy petition, and the present challenge to the constitutionality of sections 38 and 40 of the Civil Procedure Act and Order 22 Rules 7, 31 and 32 is the latest in this attempt.

23. Is there any merit to this petition? To begin with, I note that once the petitioner obtained an order by consent for her release from civil jail, she lost all interest in the matter. She did not keep the terms of the consent, nor did she bother to prosecute her claim to show how the provisions she challenges violate her constitutional rights. What emerges from the material before me is that the petitioner took advantage of her guarantors, has taken them round in circles with promises to meet her obligations, but with no intention of so doing. This petition is her latest attempt to avoid her obligations.

24. As submitted by the respondents, the petitioner has an obligation to show the Court how the provisions she impugns infringe on her rights, but she has not done so. Aside from her averments and her claim that she cannot repay the debt, there is nothing before me that demonstrates the unconstitutionality of the above provisions. The burden is always on a party alleging that a statute violates the Constitution to show how it is unconstitutional, for as was held in the case of **Ndyanabo vs Attorney General of Tanzania [2001] EA 495**, there is a general presumption that every Act of Parliament is constitutional, and the burden of proving the contrary rests upon any person who alleges otherwise.

25. The interested parties have submitted that the provisions impugned by the petitioner are constitutional and in accord with the provisions of Article 9 and 11 of the International Covenant on Civil and Political Rights. Section 38 of the Civil Procedure Act, so far as is relevant, provides as follows:

38. 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; (Emphasis added)

26. At Section 40, the Act provides as follows:

40. (1) A judgment-debtor may be arrested in execution of a decree at any hour and on any day, and shall as soon as practicable be brought before the court, and his detention may be in any prison of the district in which the court ordering the detention is situate, or, if such prison does not afford suitable accommodation, in any other place which the Minister may appoint for the detention of persons ordered by the courts of such district to be detained....:

27. The proviso to section 40 prohibit the entry into a dwelling-house for the purpose of making an arrest after sunset and before sunrise, or the breaking of the outer door of the dwelling-house unless the dwelling house is in the occupancy of the judgment debtor and he refuses or in any way prevents access thereto.

28. In her petition, the petitioner relied on the decision in **Re The Matter of Zipporah Wambui Mathara (2010)eKLR** to support her contention that the above provisions are unconstitutional. However, as submitted by the interested parties, the issue has been the subject of consideration in several other later cases, and a contrary position taken. In **Jayne Wangui Gachoka vs Kenya Commercial Bank High Court Petition No. 51 of 2010**, the Court expressed the following view:

“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 the 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 the limitation of the right to liberty permitted in this case acceptable in a free and democratic society.

I therefore find and hold that there has been no violation of the petitioner’s constitutional rights in the process of execution of the decree against her in respect of High Court Civil Case No 104 of 2006. Save that the provisions set out in the Act and Rules must be adhered to, the process of execution should continue. In the event that the petitioner is not satisfied with the process or decision relating to the execution process, then she is at liberty, as provided in the Civil Procedure Rules, to lodge an appeal in the usual manner.”

29. Similarly, in his decision in **Republic vs Permanent Secretary Office of the President Ministry of Internal Security and Another ex parte Nassir Mwandhihi (2014) eKLR**, Odunga J observed that:

“In normal execution of decree by committal to civil jail, as long as safeguards under the relevant provisions of Civil Procedure Act and Rules made thereunder are complied with, an objection on the constitutionality would not be upheld.”

30. See also the decisions in **Mohammed & Muigai Advocates vs Samuel Kamau Macharia & Another Milimani HCCC 1158 of 2002 (Unreported)** and **Braeburn Limited vs Gachoka & Another (2007)EA 67**.

31. I agree fully with the sentiments expressed by the Courts in the above matters. As the petitioner has not seen fit to prosecute her petition and demonstrate to the Court how her circumstances are different from the circumstances in the above matters where the constitutionality of the arrest and civil jail was upheld as being in conformity with the constitution, I am constrained to find that she was using the Court to delay the day of reckoning with respect to her debt.

32. The present petition is therefore wholly without merit, and it is hereby dismissed with costs to the respondents and the interested parties.

Dated, Delivered and Signed at Nairobi this 19th day of February 2016

MUMBI NGUGI

JUDGE

Ms. Muchiri instructed by the State Law Office for the respondent.

Ms. Mwinzi instructed by the firm of M. Korongo & Co. Advocates for the interested party.

No appearance for petitioner.

