



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAMIRA**

**PETITION NO.7 OF 2016**

**CHARLES OKELLO OMBOGA..... PETITIONER**

**-VERSUS-**

**BENARD NYANGAU OMBORI .....RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

On or about the 22nd day of August 2013 the 1<sup>st</sup> respondent herein **Bernard Nyangau Ombori filed an proceedings vide NYAMIRA CMCC NO. 136 OF 2013** [hereinafter referred to as the original suit] whereby the 1st respondent sought for refund of the sum of Kshs.240,000/= plus interest at 14% and costs of the suit, arising from a collapsed sale transaction between applicant and the 1st respondent. In its judgment, dated 29th January 2015, the trial court entered judgment in favour of the 1st respondent herein decreeing refund of purchase price which was to be paid by the applicant. Upon the delivery of the said judgement, the applicant sought and obtained an order of stay of execution for 30 days.

**THE PLEADINGS**

The applicant has now filed a Notice of Motion under **Article 2 ,3, 19, 20, 22, 23, 24, 27, 28, 29, 59, 165,258** and **order 22** rules seeking:-

**1. Spent**

**2. Spent**

**3. That pending the hearing of the petition herein, there be an interim stay of execution of the decree in Nyamira CMC NO. 126 of 2013.**

**4. That the honourable court declare that the arrest threat and/or committal to civil jail of the applicant herein will violate the applicants fundamental rights and freedoms thus unconstitutional for lack of proportionality**

**5. That this honourable court be pleased to declare that a blanket application of Section 38D of the Civil procedure Code in Civil and debtors is an effort to the provisions of the constitution.**

The above application was supported by a supporting affidavit by the applicant acknowledging that, there was warrant of arrest issued against him in executing of the money decree that was passed in **Nyamira CMCC NO.126 of 2013**. He further contended that he has not intentionally refused, ignored or failed to

satisfy the dictates of the said decree and he terms his inability to satisfy the decree lack of funds. He has further contended that he has five children 3 of which are all school going and paying for their fees is an uphill but for him alone feeding them.

He further deponed that all the conclusion of the case he agreed that to give the 1<sup>st</sup> respondent a share of his parcel of land but the respondent has been adamant on being refunded cash which amount he cannot raise and the same continues to attract interest.

Lastly, he deponed that he has already filed an appeal against the decision in **Nyamira CMCC No. 126 of 2013** and if he is arrested, as the respondent wishes the appeal would be rendered nugatory and he will suffer prejudice.

The above application was opposed by the 1st respondent in his replying affidavit dated 29th March 2016. The 1st respondent has deponed that the applicant approached him with an intention to sell a portion of **L.R.No. West Mugirango/Siamani/4879** [hereinafter also known as suit property]. He further states that pursuant to the approach, he executed a sale agreement whereby the applicant contended to transfer a portion of the suit property.

He further contended that upon the applicants receipt of the purchase price he contends that the applicant started playing mischief and dodging all efforts to execute the transfer instruments hence it became necessary for him to lodge a complaint with the police culminating into the arrest/arraignment of the applicant in court on charges of obtaining money by false pretence.

That later he contended that the applicant heeded the sale agreement and entered into a subsequent land sale agreement and in the latter occasion the applicant represented his utmost desire to conclude the land sale agreement that however, the applicant failed to adhere to the terms of the latter agreement and hence he was constrained to file civil proceedings vide **Nyamira CMCC No. 136 of 2013** which matter was rendered on the 29th of January 2015. He attached a copy of the said judgment which was marked as **BNO 1**.

He has further contended that despite the applicant being aware of the judgment he never found it prudent to pay monies which were paid in a fiduciary capacity and hence requiring utmost fidelity. Hence to the extent that the applicant had been aware of the judgment but had chosen to disregard the same, it is apparent that the applicant is one who is bent on defeating and delaying the cause of justice. Thus, the applicant having failed to adhere to the judgment of the honourable court, it was incumbent upon his advocates on record to commence/take out execution proceedings towards realizing/recovering the decretal sum and the only known mechanism in respect of actualizing judgment is by granting liberty to levy execution unless the applicant [judgment debtor] voluntarily pay the suit judgment.

He further deponed that granting of liberty to levy execution proceedings by way of arrest and committal of the applicant to civil jail in execution of decree does not constitute/amount arbitrary to arrest or violation of the applicant constitutional rights either in the manner alleged or at all. It is thus the respondent's case that the execution of a lawful court order, including the judgment tendered in the 29th day of January 2015, cannot amount to violation of the applicant rights.

He has further contended that the applicant is merely keen on defeating the realization of judgment and decree issued vide **Nyamira CMCC No.136 of 2013** as the applicant had previously filed other proceedings, challenging the said judgment and execution proceedings. He attached a copy of the Memorandum of Appeal to that effect which was marked as "**BNO2**".

He further contended that the applicant has also since transferred the suit property in favour of his wife namely **Wilkista Kemunto Okello** with the view to defeating/circumventing the realization of the judgment. Hence, the above application by the applicant is merely intent on playing potter game without court process.

When the above matter came before me on 30<sup>th</sup> March 2016, both parties agreed to argue the above

application by way of written submissions. The advocates representing the respective parties have each filed their submissions and I have read the same.

Having considered the above application by the applicant the replying affidavit by the 1st respondent and its annexures and the written submissions filed by each of the respective parties in this case, the following issues have arisen before this court for determination:-

**(a) Whether the orders sought by the applicant can be issued by this court?**

**(b) Was the applicant afforded the opportunity to show cause prior to issuance of warrant of arrest?**

**(c) Was the procedure following the issuance of the warrants of arrest a breach of the applicant's fundamental rights?**

**(d) Is the intended committal of the applicant to civil jail unconstitutional?**

With regard to the first issue, it is an undisputed fact that the applicant has filed the instant application seeking to obtain a stay order to suspend the execution of the decree issued by the subordinate court vide **Nyamira CMCC No.136 of 2013. Order 42 rule 6 of the civil Procedures Rules** expressly stipulates conditions that must be met by any person seeking a stay of execution of decree which briefly are:-

**1. The application must be timely**

**2. The applicant must demonstrate substantial loss**

**3. Security for costs.**

In the present application by the applicant I note that his supporting affidavit to the application has not even addressed any of the above conditions for this court to grant stay of execution. Furthermore, I note that the last two prayers in the said application are declaratory in nature and in my humble view declaratory orders as correctly submitted by counsel of the 1<sup>st</sup> respondent can only be issued after a full hearing of the petition and evidence.

Where the parent statute provides for recourse towards a particular situation in this case [Order 42 rule 6 on stay of execution], it is not open for a litigant to invoke the constitution and thereby seek to rely in the same as was held in the Application **Speaker of the National Assembly -vs- James Njenga Karume, Court of Appeal, Civil number 92 of 1992] e KLR** where the court of Appeal held as follows:-

**"In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievances prescribed by the constitution and an Act of Parliament that procedure be strictly followed"**

Therefore in the instant case, the applicant should have anchored his application on **order 42 rule 6 of the Civil procedure Rules** which specifically deals with conditions to be met before stay of execution is granted instead of filing a petition invoking the provisions of the constitution when already the civil procedure rules provide for the procedure to be invoked.

With regard to the second issue of whether the applicant was afforded the opportunity to show cause prior to the issuance of warrants of arrest, it is for a judgment debtor upon being served with a Notice to show cause to appear before the court which has issued the same and offer an explanation of how he intends to pay the decretal sum. However in this case, it seems the applicant may not have offered reasonable proposal on how to offset the said debt hence warrants of arrest were issued against the applicant in respect of executing a lawful judgment and decree of the court. I note that the applicant in his replying affidavit has not stated that he was not served with notice to show cause and if anything, what he has alleged is his inability to pay the debt and has not denied that he actually owes the 1st respondent money.

The 1st respondent is the decree holder of the suit in the lower court hence he has a right to enjoy the fruits of judgment and decree as against the applicant.

Thirdly on whether the issuance of arrest warrants was a breach of the applicants fundamental rights, it is worthy to note that the warrants of arrest which were issued against the applicant were issued in respect of lawful judgment of the court arrived at after a full trial whereby both parties got their day in court and were duly heard. Consequently due process of the law was to observed. Furthermore, the provisions of **Article 24 of the constitution 2010** which the applicant has relied upon in this application has been the basis of various judgments and decisions.

In the case of **Jayne Wangui Gachoka –vs- Kenya Commercial Bank Petition Number 01 of 2010** it was held:-

**“The deprivation of liberty sanctioned by section 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 nonpayment 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 safeguarding essential to making the limitation of the right to liberty permitted in this case acceptable in a free and democratic society.”**

In the case of **Ufanisi Capital & Credit limited -versus- Stephen Kipkenda Kiplagat & 2 others (2013) e KLR Ougo-J** held:-

**“I note that Article 11 of the International Covenant in Civil and Political Rights for which Kenya is a signatory and certified on the 15<sup>th</sup> May 1972 are important; however I do not agree with the applicants’ submissions that when a court gives an order or committal to Civil jail in the appropriate circumstances, there will be a violation of the 1<sup>st</sup> defendant’s constitution rights as provide in the said Article. The 1<sup>st</sup> defendant shall be given a chance at the hearing to show cause why the orders should not be granted. If the procedure has not been followed then the applicant is at liberty to raise objections on the same and the court shall determine the issue when raised.**

In all the above authorities cited, the keyword to observed is, the fact that due procedure was followed before the warrant of arrest was issued. In the present case, the applicant has not contended nor demonstrated that the issuing/execution of the arrest warrant was conducted without due process. The applicant owed moneys to the 1<sup>st</sup> respondent and it is up to him to propose how he intends to offset the money owed.

In the end, I decline to grant prayers **3, 4, & 5** of the applicant’s Notice of Motion dated 2<sup>nd</sup> February 2016 with costs to the 1<sup>st</sup> respondent.

**Dated and delivered at Nyamira this 30<sup>th</sup> day of September 2016.**

**C.B. NAGILLAH**

**JUDGE**

**In the presence of:**

Nyamwange hold brief Ochoki for the Applicant/Petition

Oguttu Mboya (absent) for the Respondent

Omayio – Court Clerk