



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MURANG'A
CIVIL APPEAL NO 238 OF 2013

1. NELSON NJUGUNA KIIRU
2. JULIUS MWANGI KIIRU.....APPELLANTS

VERSUS

JESSE MUTHIGA ALBERT.....RESPONDENT

RULING ON INTERIM RELIEF

1. The Respondent in this appeal, **Jesse Muthiga Albert**, has a money decree against the Appellants, **Nelson Njuguna Kiiru** and **Julius Mwangi Kiiru**. Judgement was passed on 28/09/2012 for KShs 50,500/00 plus costs and interests after an *ex parte* hearing on 25th/07/2012. Apparently the trial court found that the Defendants had been duly served with hearing notice. An application to set aside the judgement was dismissed with costs in a ruling delivered on 06/09/2013. This court was informed that an application for stay of execution was refused by the lower court on the same date.
2. The Appellants then appealed herein against the order of the lower court of 06/09/2013 that dismissed their application to set aside judgement, but they never applied for stay of execution.
3. On 26/02/2015 the Respondent (plaintiff/decree-holder) sought execution of the decree by way of arrest and committal to civil jail of the Appellants. Notice to show cause was served upon them for 10/04/2015. The Appellants (defendants/judgment-debtors) duly appeared before the lower court. After representations made by the learned counsel for the decree-holder and by the judgement-debtors (who were in person) the court committed them to civil jail for a period of 30 days.
4. The Appellants then applied herein by notice of motion dated 30/03/2015 seeking the main order of stay of execution pending hearing and determination of their appeal. They also sought interim stay of execution pending hearing and determination of that main prayer.
5. I heard representations from both sides on 27/04/2015. The Appellants were brought to court from civil jail upon production orders issued herein. This ruling concerns only interim relief.
6. **Section 38(d)** of the **Civil Procedure Act, Cap 21** permits execution of money decrees by way of arrest and committal to civil jail of the judgement-debtor. However, the *proviso* to that section (which has been re-enacted in **Order 22, Rule 34(2)** of the **Civil Procedure Rules, 2010**) sets out strict conditions for such execution. It provides -

“Provided that where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgement-debtor an opportunity of showing cause why he should not be committed to prison, the court, *for reasons to be recorded in writing* (emphasis supplied), is satisfied –

a. That the judgement-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; or

b. That the judgement-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 for which the judgement-debtor was bound in a fiduciary capacity to account”.

7. It can be readily seen that committing a money decree judgement-debtor to civil jail in execution thereof is a very serious matter indeed, no doubt because personal liberty is one of the fundamental rights and freedoms enshrined in the bill of rights of our *Constitution*. This freedom may be limited, in execution of a money decree, only upon fulfilment of the conditions set out in the *proviso* quoted above.

8. In the instant case, how did the court below deal with those requirements of the law? This is all it said -

“I agree with counsel for the Plaintiff that the proposal (by the Defendants to pay the decretal sum by monthly instalments of KShs 2,000/00 each) is unreasonable. The Defendants are therefore committed to civil jail for a period of 30 days....”

8. Learned counsel for the Plaintiff, **Mr. Waiganjo Gichuki**, did not himself, in his address to the court below, deal with any of the legal requirements set out in the *proviso*, yet it is clear that the *proviso* requires the decree-holder to establish on balance any of the conditions set out in the *proviso*.

9. The court below on its part, had the legal obligation to make a reasoned decision in writing of any of the conditions that the decree-holder may have urged, or the court may otherwise have found to have been met. It did no such thing.

10. I find that the order to commit the Appellants herein to civil jail was made without meeting the legal requirements set out in the *proviso* to section 38 of Cap 21. The order is thus illegal and is hereby set aside. The Appellants shall be forthwith released from civil jail. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 29TH DAY OF APRIL 2015

H.P.G. WAWERU

JUDGE

DELIVERED THIS 29TH DAY OF APRIL 2015