



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO.63 OF 2012

BETWEEN

PETER OKWAKO MURWAAPPELLANT

AND

SYLVANUS IMMANUEL WALUSTACHIRESPONDENT

(Being an appeal from the ruling in Kakamega CMCC No.387 of 2005 by the Honourable P. Achieng SRM on 06/07/2012 committing the appellant to civil jail)

J U D G M E N T

Introduction

1. The long and short of this case is that the Respondent herein brought this suit by way of an amended plaint dated 03/10/2006 against the appellant seeking judgment for the sum of kshs.188,000/= or in the alternative an order of eviction against the appellant for breach of an agreement for sale of land. After a full hearing and upon careful consideration of the evidence that was before it, the learned trial Court entered judgment for the respondent as prayed in the amended plaint.
2. The parties were in and out of Court on diverse dates and before various Magistrates and on 06/07/2012, the matter came up for mention before Hon. P. Achieng, then a Senior Resident Magistrate. The mention was to confirm why the appellant had not completed payment of the decretal sum. On that day Counsel for the appellant informed the Court that the appellant had not been able to pay the balance of the decretal that the appellant was waiting for some other monies to be recouped from another case to enable him pay the balance of the decretal sum. Counsel asked for time and secondly that there was a pending Bill of costs on record which they needed to tax as it would probably reduce the amount still pending. The respondent objected to the appellant's request for more time to pay and urged the Court to commit the appellant to civil jail since the matter had taken a long time.
3. The brief ruling of the Court which has given rise to this appeal was the following:-

“I have considered the application by Mr. Munyendo seeking more time to pay the balance of the decretal sum. I do not find any merit in the same as the last time the matter was in Court, the judgment debtor promised to pay the sum of kshs.70,000/= which he has not done.

Payment of the said amount was not pegged on some other payment in another file.

Since the judgment debtor has failed to comply with the order requiring him to pay the sum of kshs.70000/= and has not given a good reason as to why that has not been done, I order that he be committed to civil jail for a period of 30 days but may be released at any time as soon as the said amount is paid before the 30 days are over. The decree holder to pay his subsistence. Mention on 10/08/2012.

P.A. ACHIENG, SRM”

The Appeal

4. Being aggrieved by the said ruling the appellant brought this appeal before this Court on grounds:-
1. THAT the trial Magistrate erred in law and in fact in committing the appellant on a mention day of his case.
 2. THAT the learned trial Magistrate erred in law and in fact in the absence of any evidence that he was deliberately avoiding to pay the decretal sum as he had paid kshs.350,000/= out of the decretal sum of kshs.410,000/=.
 3. THAT the learned trial Magistrate failed to accord the appellant a chance for a hearing as there were pending proceedings that ought to be dispensed with before execution of decree could proceed.
 4. THAT the learned trial Magistrate erred in law and in fact in failing to find that it was necessary that the appellant's bill of costs be taxed first before proceeding with execution of decree herein as it would have an effect on the final figure or sum to be paid.
 5. THAT the learned trial Magistrate erred in law in disregarding the principles necessary for committal of judgment debtor to civil jail.

REASONS WHEREFORE the appellant prays that this appeal be allowed and the decision of the trial Magistrate committing the appellant be vacated with costs to the appellant.

The submissions

5. The parties agreed to canvass this appeal by way of written submissions. The appellant's submissions which are dated 27/08/2015 were filed in Court on the same date, while the Respondent's submissions which are dated 11/02/2015 were filed in Court on 18/03/2015. I have carefully read through both sets of submissions together with the authorities supplied by Counsel for the appellant. The respondent who appears in person, did not cite any authorities but that is not to say that he is in any worse situation than the appellant. It is the law that this Court will apply in determining whether it was proper for the learned trial Magistrate to commit the appellant to civil jail and to do so on a mention date.

Analysis and Findings

6. The respondent who filed his submissions first contends that the learned trial Court acted within the law in committing the appellant to civil jail and also avers that the committal of the appellant to civil jail was based on the fact that he (respondent) had proved his case against the appellant on a balance of probabilities. The appellant contends otherwise and submits that the learned trial Magistrate was in contravention of Section 38 of the Civil Procedure Act, Cap 22 Laws of Kenya in making the committal orders as the appellant was not given an opportunity to show cause why he should not be committed to civil jail, and in spite of the fact that the appellant had shown a willingness to pay the balance of the decretal sum. The appellant through Counsel, also contends that his being committed to civil jail was in contravention of Article 24 of the Constitution which provides that limitation of a person's right to liberty must be reasonable, justifiable and dignified. In a nutshell, the appellant is saying that the decision to commit him to civil jail was unfair and did not accord with the law.
7. In the two persuasive cited authorities the first of which I shall consider being **Nairobi (Milimani Commercial Courts) Bankruptcy cause No.19 of 2010 - In the matter of Bankruptcy Act,**

Chapter 53 of the Laws of Kenya. RE: Zipporah Wamboi Mathara, the Court, Martha Koome J (as she then was) made reference to the Constitution of Kenya 2010 and noted article 2(6) thereof which provides that:-

“any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution”

Koome J argued, and quite rightly so in my view, that by virtue of that provision Article 11 of the International Covenant on Civil and Political Rights which Kenya ratified on 01/05/1972 and which article provides for the promotion and protection of human rights as well as recognizing that individuals are entitled to basic freedoms in order to allow them find ways and means of bettering themselves, is part of Kenyan law.

8. In the said case, the Court was of the view, and I entirely agree,

“That a party who is deprived of their basic freedom by way of enforcement of a civil debt through imprisonment, their ability to move and even seek ways and means of repaying the debt is curtailed.”

The Court also made the following poignant statement:

“There are several methods of enforcing a civil debt, such as attachment of property. The Respondent claims 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 in Civil and Political Rights that guarantee parties basic freedoms of movement and of pursuing economic social and cultural development.”

I fully agree with the above, especially considering the fact that money is not easy to come by to many people in the Kenyan economy and people need every opportunity to move and seek ways and means of repaying any debts that they owe.

8. In the second case of **Beatrice Wanjiku & Another –vs- Hon Attorney General and 3 others – Nairobi Petition No. 190 of 2011** (unreported), the Petitioners argued their case against an order committing them to civil jail on grounds, inter alia that: 1) Kenya has ratified the United Nations International Covenant on Civil and Political Rights which at Article 11 disallows civil jail for matters whose cause of action arises from contractual obligations; 2) Article 2(5) and 2(6) of the Constitution incorporates into Kenyan law the above mentioned convention and thus civil jail for debtors is unlawful c) Further, imprisonment of a debtor violates their rights as captured in the Bill of rights including the right to liberty and movement”
9. In part of his judgment Majanja J refers to the case of **Farieda Co’etzee –vs- Republic of South Africa case No.CCT 19/94** where Sachs J, at paragraph 44 of his judgment states:

“there can be no doubt that committing someone to prison invokes a severe curtailment of that person’s freedom and personal security. Indeed, the very purpose of committal is to limit the freedom of the person concerned. Given the manifest and substantial invasion of personal freedom thus involved the real issue that we have to decide is whether such infringement can be justified in terms of general limitations on rights permitted by Section 33 of the Constitution. This is the nub of the problem before us.”

That indeed, is the problem before me in this case.

11. From the record in this case, and admittedly so by the respondent the balance out of the decretal sum of kshs.410,000/= was only kshs.70,000/=. When the parties appeared before the Court on

22/06/2012, Counsel for the appellant informed the Court thus:

“We have not completed payment as the delay has been occasioned by the decree holder who was required to sign the transfer document. The balance is kshs.70,000/= which we intend to pay in two weeks time.”

Of course the respondent objected and told the Court that he had not agreed with the appellant that he would give him the land if he paid the money. The respondent also stated:

“the land which the defendant is talking about has a case and without the same being finalized it would be difficult to have it subdivided”.

The case was then fixed for mention on 06/07.2012 and it was on the said 06/07/2012, that the appellant was committed to civil jail.

12.From the above, I find that the order of committal did not only breach the Constitutional right of the appellant but clearly it was made against the grain of the evidence that was before the Court. By jailing the appellant, the trial Court was condemning the appellant, not because he was unable to pay back because he needed a little more time to put his house in order. As GBM Kariuki J (as he then was) stated in the **Rosanna Pluda Moi –vs- Philip Kipchirchir Moi** case – Nairobi Divorce Cause No.154 of 2008 (unreported), civil jail should be employed only as a last resort and not to be used whimsically by the Court. In any event even sending a person who is unable to pay does not make sense, because as it were, it amounts to throwing good money after bad. In my considered view, there are other ways by which the respondent herein can recover the remaining kshs.70,000/= from the appellant. He can attach some other property of the appellant or go after his bank account instead of humiliating him and denying him the opportunity to seek ways and means of paying off the balance.

Conclusion

13.For the reasons above stated I find and hold that the appellant’s appeal has merit. The same is allowed. The order by the learned trial Court dated 06/07/2012 committing the appellant to civil jail be and is hereby vacated. Each party shall bear its own costs for this appeal.

14.So that this matter does not remain dormant the lower Court file shall be mentioned before the Chief Magistrate’s Court on a date to be fixed by the parties herein within thirty (30) days of this judgment.

Orders accordingly.

Judgment delivered, dated and signed in open Court at Kakamega this 22ND day of SEPTEMBER 2015.

RUTH N. SITATI

J U D G E

In the presence of:

Mr. Anziya for Nandwa (present) for Appellant

Present in Person for Respondent

Mr. Solomon Lagat - Court Assistant