



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

MISC. CIVIL APPLICATION NO. 337 OF 2013

C N G.....APPLICANT

VERSUS

L N N.....RESPONDENT

RULING

1. By the Originating Notice of Motion filed in this court on 28th October 2013 and brought under Articles 22, 24 and 51 of the Constitution, the Applicant sought, *inter alia*, the following orders-

(a) that the court finds the warrants of arrest issued as a mode of enforcing the decree of the court unconstitutional, unfair and disproportionate and a clear infraction of his rights to personal liberty.

(b) that the court sets aside the warrants of arrest forthwith.

2. The application is supported by the affidavit of the Applicant, C N G, sworn on 28th October 2013. It is the Applicant's case that Respondent herein filed a suit before the children's court, Nakuru Children's Case No. 155 of 2013, wherein she sought maintenance of their 2 children by the Applicant. On 30th July 2013, the court delivered an ex-parte judgment in favour of the Respondent and ordered that *inter alia*, the Applicant shall contribute Kshs. 5,000/= for food and continue to pay one of the minor's school fees as and when it fell due.

3. The Applicant applied to set aside the ex-parte decree as he was not the father of one of the children. The court ordered the Applicant to comply with the order pending the hearing and determination of the application to set aside the decree. The Applicant however failed to honour the decree and warrants of arrest were issued against him.

4. He has now come to this court seeking a declaration that he warrants of arrest and detention be declared unconstitutional and unfair to the extent that they are disproportionate with the legitimate end and the same be set side. The grounds upon which he relies are that they were issued against him for his inability to settle a maintenance debt, that the arrest and detention of a person for a civil or contractual debt has been declared unconstitutional and against the International Covenant for Civil and Political Rights and that there are less restrictive means of execution of a decree for maintenance and arrest and detention ought to be the last step.

5. In opposition to the application, the Respondent, L N N, filed a Replying Affidavit sworn on 17th January 2014. It was her case that the application herein is inept, misconceived and an abuse of the court process for the reason that the warrants of arrest attached to the application have been overtaken by events as they were suspended when the Applicant agreed to settle the debt. In addition, the Applicant is a

man of means and has blatantly refused to settle the debt. It was her contention that the arrest and detention is a mode of execution which is legally recognized and approved. She urged the court to place the best interest of the children above all else and dismiss the application.

6. Counsel for the parties made oral submissions in further support of their respective positions. Mr. Githui for the Applicant submitted that what is being challenged by this application is not the legality of the process of detention for a civil debt. The question is whether the creditor has exhausted the less intrusive means. If she has not then this process fails to meet the requirements of Article 24 (1) (b) of the Constitution and Article 11 of the International Covenant on Civil and Political Rights.

7. Mr. Rabera for the Respondent submitted that there is no evidence that the Applicant is unable to settle the debt. It was his further submission that court orders have to be obeyed, that the warrants of arrest are legal under sections 38 & 40 of the Civil Procedure Act and Order 21 rules 7, 31, 32 and 35 of the Civil Procedure Rules, 2010 and in considering this matter the interest of the children are paramount.

I have considered the application, the affidavits sworn in support and against it, the submissions of Counsel and the authorities relied upon. The issues for determination are-

(a) *whether the application herein is incompetent as the warrants of arrest being challenged have been suspended,*

(b) *whether the warrants of arrest issued as a mode of enforcing the decree before other modes of execution are exhausted are unconstitutional*

WHETHER THE APPLICATION HEREIN IS INCOMPETENT

8. It is now well settled that where a person is alleging contravention of or threat of contravention of a constitutional right, he must set out the right infringed and the particulars of such infringement or threat (See **Anarita Karimi Njeru vs. The Republic [1979-80] KLR 1272**). In essence he must disclose to the court a justiciable issue that needs to be determined.

9. It was contended by the Respondent that the application herein is incompetent and an abuse of the court process as the warrants of arrest challenged herein have been overtaken by events since they were suspended when the applicant undertook to clear the debt.

10. It is my view that the fact that the warrants of arrest have been suspended does not render the application herein incompetent. Suspension denotes that the same are still in force but have been temporarily lifted. They can be reinstated at any time when the Applicant fails to honour his undertaking. The Applicant says their existence threatens his freedom of movement and he stands to suffer if the same are enforced against him. There is therefore a justiciable issue of whether the warrants of arrest issued against the Applicant are unconstitutional to the extent that they do not meet the threshold set out under Article 24 of the Constitution, Article 11 of the International Covenant on Civil and Political Rights and Order 22 of the Civil Procedure Rules.

WHETHER THE WARRANTS ISSUED HEREIN WERE IN BREACH OF THE CONSTITUTION AND THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

11. It was conceded by Counsel for both parties that arrest and committal to civil jail of a judgment-debtor is a mode of execution of a decree provided for under Section 38 of the Civil Procedure Act (*Cap 21 Laws of Kenya*) and its legality or constitutionality was not questioned. By the same argument, warrants of arrest issued under Section 101 (7) of the Children Act (*Cap 141 Laws of Kenya*) in enforcement of a maintenance order are constitutional. Mr. Githua for the Applicant argued that the warrants issued on 22nd October 2013 against the Applicant however, did not meet the requirements of Article 24 (1) (b) of the Constitution and Article 11 of the International Covenant on Civil and Political Rights as the Respondent failed to first exhaust the less intrusive means of execution.

12. The right to freedom of movement is provided for under Article 29 of the Constitution. The right is limited however by Article 24 of the Constitution which provides-

24. (1) a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justified in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors, including-

(a).....

(b) the importance of the purpose of the limitation;

(c)

(d)

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve this purpose.

(2)

(3) the state or a person seeking to justify, a particular limitation shall demonstrate to the court that the requirements of this article have been satisfied

13. My construction of the above provision is that fundamental rights and freedoms are not absolute and may be limited by law. However such limitation must be reasonable and justified. In determining whether the limitation is reasonable and justified the court ought to take into account factors such as the importance of the limitation and whether there are other means by which the end result can be achieved which do not involve the infringement of the right threatened. Consequently even where a decree-holder has a right to execute a decree in a civil matter by way of committal of the judgment-debtor to civil jail, the onus lies on him to establish that this mode of execution is reasonable and that there are no other means by which he could recover his debt.

14. The decree-holder must **firstly**, demonstrate that other less intrusive modes of execution have failed and the only option left is to incarcerate the judgment-debtor. In the case of **VIJAY MORJARIA vs. HARRIS HORN JUNIOR & ANOTHER Civil Case No. 285 of 2004 (U/R)** this court dealt with the issue of interpretation of Article 24 of the Constitution vis-a-vis committal to civil jail and addressed itself as follows-

“What, I think, Article 24 (1) of the Constitution demands of Wanjiku (that is the decree-holder) who desires to have the freedom of another person (the judgment-debtor) restricted, must show is that he has exhausted other less intrusive or restrictive measures to secure payment from the judgment-debtor, and that the only method left is to have the judgment-debtor incarcerated, and he forgets his debt or money- decree..... If a decree-holder has not exhausted other means of execution, then he is caught by Article 24 (1) (e) that the judgment- debtor's right to liberty cannot be restricted by way of arrest and detention in prison in execution of a money decree until those modes are exhausted.”

and in **R.P.M VS P.K.M [2012] eKLR** it was stated thus-

“There would be no need to send a debtor to civil jail if one can attach his property and recover the debt owed. Civil jail is a measure taken as a matter of final resort. In this case, the Petitioner has resorted to civil jail ostensibly because she is unable to identify any property belonging to the Respondent which she can attach.”

15. Section 101(5) of the Children Act provides for other modes of enforcement of a maintenance

order or contribution order and such modes include issuing a warrant for distress of a the Respondent's property, an order of attachment of the Respondent's earnings including any pension payable to the defaulter or order the detention, attachment, preservation or inspection of the Respondent's property.

16. It has not been established before this court that enforcement of the maintenance order issued against the Applicant via the above means failed. Indeed the Respondent conceded that the Applicant is engaged in gainful employment at N C where he is employed as a senior clerk earning a salary of over Kshs. 40,000/= and is also a part-time lecturer at G I (E) which facts have not been disputed by the Applicant. There was no attempt to attach his salary before the warrants of arrest were issued. The application for committal of the Applicant to jail for failure to satisfy the maintenance order was clearly not a matter of last resort. For these reasons the said warrant of arrest failed to meet the “reasonable and justified” test of limitation of a right under the Constitution.

17. **Secondly** the warrant must be in compliance with Article 11 of the International Covenant on Civil and Political Rights, (ICCPR). The treaty was ratified by Kenya and therefore forms part of the laws of Kenya pursuant to Article 2 (6) of the Constitution and by which it is placed in the same footing as the written laws of the land. Article 11 thereof provides that- **No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation.**

18. By the above provision, inability to satisfy a decree is not on its own sufficient cause to warrant the detention of a person. There must exist further reasons to justify such arrest in order for such arrest to be deemed as reasonable and justifiable under Article 24 of the Constitution. (See the holding of Hon. Majanja, J in **BEATRICE WANJIKU & ANOTHER VS AG & ANOTHER [2012] eKLR**). Such reasons as contained in Section 101 (7) of the Children Act which grants the court power to issue a warrant committing the Respondent to imprisonment for a period of not less than 5 days nor more than 14 weeks provide that the same shall not be issued unless the court is satisfied that -

- (a) *the respondent has persistently and willfully refused or neglected to make payment of all or part of the monies to be paid under a maintenance order or a contribution order without reasonable cause;*
- (b) *the respondent is present at the hearing*
- (c) *an order of attachment of earning would not be appropriate;*
- (d) *it has inquired into the cause of the default and is satisfied that such default was due to the respondent's willful or culpable neglect*

19. In the instant case, there was no inquiry into the means of the Applicant as provided for under Section 101 (4) for the court to satisfy itself that the Applicant herein had the means to comply with the judgment and had negligently and willfully neglected to do so. It did not also make a finding that attachment of his salary was not appropriate

20. For the above reasons I allow the application and set aside the warrants of arrest issued in Children's case No. 155 of 2013 against the judgment-debtor. The decree-holder is however at liberty to pursue other modes of execution.

21. There shall be orders accordingly.

22. This being a family matter I direct that each party shall bear its own costs.

Dated, signed and delivered at Nakuru this 18th day of February, 2014

M. J. ANYARA EMUKULE

JUDGE