



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NO. 80 OF 2012

GABRIEL WAMALWA BARASAAPPELLANT

VRS

THEOPHILUS N. NAMUSONGE.....RESPONDENT

(Appeal arising from Bungoma CM CC No.202 of 2003 In the Ruling and Orders made by Hon. Margaret Wambani SPM)

RULING

1. By a Motion on Notice, Gabriel Wamalwa Barasa applied under Sections 3 and 3A of the Civil Procedure Act and Order 21 rule 12 (2) of the Civil Procedure Rules for him to be released from Bungoma, G. K. prison and that he be allowed to liquidate the decree in monthly installments of Kshs.10,000/=.The application was supported by his Affidavit sworn on 17/12/12.
2. The grounds for the application were that he had already paid a sum of kshs.30,000/= to the Plaintiff, that he was of ill health. That he had been committed to civil jail for one month on 13/10/11/ Mr. Onchiri, Learned Counsel for the Applicant submitted that under Section 542 (2) of the Civil Procedure Act, once one has been committed he cannot be re-arrested that he becomes an undischarged debtor, that the lower Court contravened that provision when it ordered that the Applicant be committed to civil jail yet that Court had released him on bail. That Article 29 (f) of the Constitution of Kenya had been violated. Counsel urged that the application be denied.
3. The application was opposed by the Respondent vide a Replying Affidavit of Jane Nasimiyu Wakhome sworn on 7th January, 2013. She contended that judgment had been entered against the Applicant but he had always fought hard to avoid settling the decretal amount, that the decretal amount had not been appealed against, that the present appeal was one of the efforts by the Applicant to avoid liquidating the decretal sum; that the Applicant had been committed to civil jail to settle a sum of kshs.342,000/= but was released on bond seven days thereafter; that his proposal to pay Kshs.10,000/= per month by the trial Magistrate was allowed by the Trial Court but he not only failed to pay the same but fled his home; that he thereafter went to Court for cancellation of the bond and only managed to arrest the Applicant one year later. She urged that the application be dismissed.
4. Mr. Sichangi, Learned Counsel for the Respondent submitted that it is only after one has served the entire period that he can become a discharged debtor. Under Section 42 (2) of the Civil Procedure Act, that the Applicant had only served for one (1) month before he was released; that he was released on bond and after he defaulted the bond was set aside. That he had been given a conditional story. That the Applicant has not demonstrated any willingness to settled the decree, that he is seeking to evade justice, that there is no breach of Article 29 of the Constitution of Kenya as the law has provided for instances when one's freedom can and may be restricted. Counsel urged that the application be dismissed.

5. I have considered the Affidavits on record and submissions of counsel. There was a submission that committal to civil jail was a violation of the Applicant's right to liberty under Article 29 of the Constitution of Kenya. With respect, I do not think so. Anything that is done by sanction of law is lawful unless the provision of law that sanctions such an act is itself unconstitutional. To my mind, the safeguards that have been put in Order 22 on execution by committal civil jail insulate the provision and process from being unconstitutional. A debtor will not be committed to civil jail unless it is shown that he/she has the ability to pay but is only refusing or deliberately avoiding to liquidate the decretal amount. This is why Article 29 (I) **prohibits deprivation of freedom arbitrarily or without just Cause.** To my mind, if a judgment debtor is committed to civil jail for failing to comply with the order to pay, that is a just cause and cannot be said to be arbitrarily. Accordingly, I hold that the Committal Order by the lower Court against the applicant was no unlawful or unconstitutional.

6. It was argued that the lower Court acted illegally by seeking the Applicant to be re-committed to civil jail yet he was an undischarged debtor. That by virtue of Section 42 (2) of the Civil Procedure Act, the Applicant could not be re-arrested and against recommitted to civil jail having already been released. In order to understand this argument forcefully put forward by Mr. Onchiri, a clear reading of the entire Section 42 aforesaid is called for and not Sub-section 2 only.

7. Section 42 of the Civil Procedure Act provides:

“ 42. (1) Every person detained in prison in execution of a decree shall be detained-

a) where the decree is for the payment of a sum of money exceeding one hundred shillings, for a period not exceeding six months; and

b) in any other case, for a period not exceeding six weeks:

Provided that he shall be released from such detention before the expiration of the said period of six months or six weeks, as the case may be-

i) on the amount mentioned in the warrant for his detention being paid to the officer in-charge of the prison; or

ii) on the decree against him being otherwise fully satisfied, the court so orders; or

iii) on the request of the person on whose application he has been so detained, if the court so orders; or

iv) on the omission of the person, on whose application he has been so detained, to pay subsistence allowance.

(2) A judgment-debtor released from detention under this Section shall not merely by reason of his release be discharged from his debt, but he shall be liable to be rearrested under the decree in execution of which he was detained in prison.”

8. The Section gives maximum periods and for which amount a judgment debtor may be committed to civil jail. However, the proviso to Section 42 (1) gives four instances when a judgment – debtor can be released before serving the full period of six (6) months or six (6) weeks as the case may be. These instances are either upon the amount in the warrant being paid to the prisons authorities; or on satisfaction of the decretal amount or **if the Court so orders;** or upon request by the decree-holder or if the decree-holder fails to pay the subsistence allowance. These are the only four instances upon which a judgment debtor committed to civil jail can be released before the expiry of the period set by Sub-section (1) (a) and (b) of Section 42.

9. Upon the release of a judgment debtor under Section 42 (1) as aforesaid, Sub-section (2) thereof bars any subsequent re-arrest of such an undischarged debtor. That Sub-section is clear that it is an

undischarged debtor **“released from detention under this Section.”** It does not apply to any release from detention of such a debtor. In the Case before me, it is clear that the applicant was first committed to civil jail on 13/10/11. He was released on bond by the same Court that committed him on a promise to liquidate the decretal amount by monthly installments of Kshs.10,000/=. He defaulted and the Court ordered for him to be re-arrested and committed to complete his prison terms.

10. It is clear that the release of the applicant by the Court was not under Section 42 (1) of the Civil Procedure Act. It was under the inherent jurisdiction of that Court. The release was conditional. The Applicant breached the terms of the released. In my view therefore, the order for his re-arrest and committal to civil jail was perfectly in order. It was not in breach of any law, be it Section 42 (2) of the Civil Procedure Act or Article 29 of the Constitution of Kenya as contended by the Applicant.

11. One other thing, when the applicant rushed to this Court on 18/12/12 under a Certificate of Urgency, he undertook to continue paying the decretal sum in installments of Kshs.10,000/= per month. The Court ordered for his release from prison on that condition. As at the time the application was being argued before me on 12/02/14, the applicant had only paid a sum of Ksh.30,000/=. Instead of Ksh.140,000/= expected as at that date. That only shows the contempt with which the Applicant has treated the proceedings against him both before this court and the Court below. He is a litigant who is not deserving any Court's equitable discretion. Court orders are to be obeyed by everyone and there can be no exception. The applicant promised both the lower court and this court to continue liquidating the outstanding amounts by making monthly installments of Kshs.10,000/=. He failed to do so both in the lower Court and before this Court.

12. Accordingly, I find the application before me to be unmeritorious and hereby dismiss the same with costs.

DATED and Signed at Bungoma this 07th day of April, 2014

A. MABEYA

JUDGE

DATED and Delivered at Bungoma this 10th day of April, 2014.

A. OMOLLO

JUDGE