



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUSIA.**

**ELC. NO. 45 OF 2014 (FORMERLY HCC. 42 OF 2010)**

**JOHN MUYODI .....PLAINTIFF**

**VERSUS**

**1. PETER LUNANI ONGOMA )**

**2. CELTEL Alias ZAIN KENYA LTD. )..... DEFENDANTS**

**3. SAFARICOM LIMITED. )**

**R U L I N G.**

**JOHN FRANCIS MUYODI**, hereinafter referred to as the Applicant, filed the application dated 10<sup>th</sup> March, 2014 praying for the court to set aside its order of 5<sup>th</sup> March, 2014 that Applicant deposits with the court the whole decretal sum as a precondition to his being released from civil jail. The order was issued by the court following the Applicant’s application under certificate of urgency, dated 5<sup>th</sup> March, 2014 in which he was challenging the Deputy Registrar’s committal order of 3<sup>rd</sup> march, 2014.

The application is opposed by Peter Lunani Ongoma, hereinafter referred to as the Respondent through the grounds of opposition dated 19<sup>th</sup> March, 2014 and replying affidavit by Respondent’s counsel, sworn on 2<sup>nd</sup> April, 2014. Both the Applicant and Respondent filed written submissions.

The application is said to be brought ‘‘under Section 19(3) (b) of the Environment and Land Court Act, 2011 and section 3A and 42 (i) (iv) and (2) of the Civil Procedure Act.’’. It is important to observe from the start that the whole of sub section 3 of section 19 of the Environment and Land Court Act was deleted under L.N. No.12 of 2012 and therefore is non-existent and cannot be the basis of this application. This does not in any way, affect the standing of the Applicant’s application as the court is obligated to consider and rule on the substance of the application without undue regard to technicalities

I have carefully considered the contents of the submissions by both parties, the supporting and replying affidavits filed by the Applicant and for the Respondent and find as follows:

1. That indeed the Applicant was taken before the Deputy Registrar on 3<sup>rd</sup> March, 2014 following the execution of warrant of arrest issued on 9<sup>th</sup> January, 2014 for none payment of Kshs.122,376/=, being taxed costs.
2. That the Respondent applied for the Applicant to be committed to civil jail on their undertaking to pay his subsistence allowance.

3. That the Deputy Registrar allowed the Respondent's application.
4. The Respondent do not appear to have paid the subsistence allowance and the Applicant was released. The circumstances of the Applicant's release are not clear.
5. That two days after the order of 3<sup>rd</sup> March, 2014, the Applicant filed the Notice of Motion under certificate of urgency dated 5<sup>th</sup> March, 2014 challenging the Deputy Registrar's order committing him to civil jail. The order the Applicant is now challenging through his application dated 10<sup>th</sup> March, 2014 was then issued.
6. That the court had in addition to the order Applicant is challenging of 5<sup>th</sup> March, 2014 also directed that the application dated 5<sup>th</sup> March, 2014 be set down for hearing and this has not been done.
7. That the order the Applicant is challenging was only meant to allow him to be free from civil jail as he prosecutes his application dated 5<sup>th</sup> March, 2014. That order being ex parte was to be either confirmed, varied or vacated following the inter partes hearing of the application dated 5<sup>th</sup> March, 2014 and there was no need for the Applicant to file an independent application dated 10<sup>th</sup> March, 2014 to challenge it.

For reasons shown above, the court finds that the Applicant's application dated 10<sup>th</sup> March, 2014 is unnecessary, frivolous and misplaced and the same is dismissed with costs.

It is so ordered.

**S.M. KIBUNJA,**

**JUDGE.**

**DATED AND DELIVERED ON 29<sup>TH</sup> DAY OF MAY 2014**

**IN THE PRESENCE OF;**

**JUDGE.**