



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(MILIMANI COMMERCIAL COURTS)
CIVIL CASE NO. 47 OF 2007

AMRIK SINGH KALSI

(Suing as the Administrator of the Estate of

Ram Singh Kalsi (Deceased) **PLAINTIFF / RESPONDENT**

Versus

BHUPINDER SINGH KALSI **DEFENDANT / APPLICANT**

RULING

Arrest and committal to civil jail

[1] The Applicant is under the threat of arrest and committal to civil jail for failure to pay the decretal sum herein. He therefore, applied by a Motion dated 15th May, 2014 for two significant orders, namely:-

- a. A stay of execution of the warrant of arrest and committal of the applicant to civil jail.
- b. The setting aside of illegal and/or irregular Warrants of Arrest and committal of the Applicant to civil jail.

The other orders sought relate to costs of the application, and the usual general prayer that the court issues such further or other orders it deems just and expedient.

[2] The application was not opposed. It was supported by the affidavit of Odhiambo Marcellus Titus Adala and other grounds he adduced in submissions to court. The major grounds include:-

- a. That the Respondent has applied that the Applicant does show cause why one third (1/3) of his monthly salary should not be attached and remitted to Court in settlement of the Decretal sum plus costs and interest.
- b. The Respondent has never applied for or served on the Applicant an application calling on him to appear in Court and show cause why he should not be arrested and committed to civil jail in default of payment of any money herein.
- c. Therefore, the warrants of arrest and committal to civil jail were issued in error and irregularly, thus, illegal.
- d. The said illegal warrants are with the court bailiffs and he may be arrested any time which is a threat to the Applicant's security, human and constitutional rights.
- e. In the circumstances, the court should protect the Constitution and legal rights of the Applicant by

- setting aside the warrants of arrest herein without delay.
- f. The Court and the Respondent will not suffer any prejudice by observing the due process and upholding the Rule of Law in the issuance of warrants of arrest.
 - g. The applicant is an Airline Pilot and is contesting the Decree and the warrant now in the process of execution
 - h. This application is meritorious and the orders sought are well deserved.

[3] The Applicant amplified the above grounds of his application through the submissions he filed in court. He emphasized that, in the absence of formal application requiring the Applicant to show-cause why he should not be arrested and committed to civil Jail in default of payment of the decretal sum, no lawful warrants of arrest can be issued against the Applicant. The Applicant stated that a perusal of the record of proceedings in this case will clearly show that no such Application had been formally made and / or served on the Applicant or his Advocate seeking the said Orders. Therefore, the warrants of arrest herein were issued in error and hence illegal. They should be set aside. Certainly, illegal warrants if executed amounts to a violation of the Constitutional and human rights to freedom of the Applicant.

[4] It was urged that the Court certified the applications as urgent and ordered the same to be served on the Advocates for the Plaintiff / Decree Holder for Hearing *inter-partes* on 4/6/2014. It also ordered the Applicant to appear personally before this Court on the Hearing of the Application. Mr. Adala was emphatic that, in compliance with the Order of this Court the Applicant attended the Court on 4th June 2014 but unfortunately the matter was not listed and the file was not brought to Court as the Cause List for that date would confirm. The Applicant through his Counsel confirms that the Advocates for the Plaintiff were served on 30th May 2014, with the Application and the Hearing Notice for 4th June 2014 and that the said Advocates received and stamped the Application **“Under Protest that the Date is not convenient”**. The Affidavit of Odhiambo M. T. Adala, Advocate for the Defendant / Applicant and filed in Court on 6th June 2014 deposes that the file was not diarized for Cause Listing on 4-6-2014 because it was kept in the Strong Room and by the time it was found it was in the afternoon on 5th June 2014. The Affidavit states that the Applicant again attended Court on 05-06-2014 until Lunch break by which time the file had not been found or brought to Court and being an Airline Pilot who had secured Two (2) days off from his Employers Kenyan Airways to attend Court, he went back to work. Ultimately, this file was brought before the Court on Monday 9th June 2014 when the Court Ordered that the Application be heard on 17th June 2014.

[5] It is averred in the Affidavit of service sworn by AMOS OTIENO ADWERA on 13th June 2014 that the Advocates for the Plaintiff / Respondent were again served with Hearing Notice on 11th June 2014; they acknowledged receipt of the same without endorsing any protest or conditions. He made further depositions: That, when this matter came up for Hearing of the initial Application by way of Notice of Motion dated 15-05-2014 the file was called out at 9.30 a.m. but there was no representation on the part of the Plaintiff / Respondent: That the file was placed aside to enable Counsel for the Applicant to file the Affidavit of Service and by the time the Court exhausted the Cause List after taking all other Hearings and Applications and called out this file again for Hearing, the Affidavit of Service was now on record but the Advocates for the Plaintiff / Respondent were once again still not in Court and accordingly the Applicant was allowed to proceed with the same as an undefended / uncontested Application.

[6] According to Mr. Adala, the record is self-explanatory the only application which came for Hearing several times before the Deputy Registrar, Mr. Nyakundi was a Notice to Show Cause why one third (1/3rd) of the Defendant's monthly salary should not be attached and remitted to Court in settlement of the Decretal sum plus Costs and interest. The Warrants of Arrest and committal of the Applicant to Civil Jail should be lifted, revoked and set aside as prayed in prayer 3 of the Applicant's Notice of Motion Application dated 15th May 2014. The Court should also award Costs of and incidental to the Application to the Applicant.

COURT'S RENDITION

[7] The Respondent was served with the Notice of Motion Application dated 15th May 2014. The affidavit of service confirms that fact. Neither the Respondent nor his counsel filed any documents or response to or appear before court to submit on the said application. Nonetheless, the decision of the Court will be based on the merits of the application.

[8] The record shows that the only application which was filed in Court is the one for attachment of a portion of the Applicant's salary in settlement of the decretal sum herein. But what is disheartening is the persistent failure by the Applicant- the judgment-debtor- to attend Court to show-cause why a portion of his salary should not be attached in satisfaction of the decretal sum herein. His Counsel, Mr Adala has, somehow found a way of making excuses for the non-attendance by the judgment-debtor before Court. The reason given always for his non-attendance is that he is an Airline Pilot and is out of the jurisdiction of the Court. The said sad state of affairs drawing upon what I have just stated, forced the Deputy Registrar, Honourable Nyakundi, on 5th December, 2012, to issue a summons requiring attendance of the judgment-debtor; it was to be served on the judgment-debtor and effected by the Court Bailiff with the assistance of the Police. I must confess, but without doubting the averments by Mr. Adala that on all occasions Mr Adala has appeared before me I did not have the benefit of seeing the physical being of the judgment-debtor. These things takes me to another super judicial meditation and starts to appreciate the famous theory of justice, the "original position" formulated by John Rawls where I presume any person should have a great sense of justice and would respond to matters of administration of justice with awe and in recognition that judicial process is the engine that drives and vindicates human rights and fundamental freedoms. In that sense, I feel obliged to state that judicial process including execution of a decree is sacrosanct process in the administration of justice and it runs its own course, not really dependent on the convenience of parties especially the one who has offended the process as is the case here with the Applicant. I find that the unsatisfactory conduct of the Applicant towards court process needed nothing less that summons requiring his attendance under Order 22 rule 18 of the Civil Procedure Rules and I am glad the Deputy Registrar was aware of that fact and issued a summons to be enforced by the Court bailiff with the assistance of the Police. Those orders were in order in the circumstances of this case. That notwithstanding, as this Court only pays homage to the law, I agree with Mr. Adala that execution for the payment of money by arrest and detention in prison of a judgment-debtor will require an application in that behalf under Order 22 rules 7 and 31 of the CPR as the minimum safeguard against the coercive and intrusive nature of execution of a decree through arrest and committal to civil jail of a judgment-debtor for payment of money. Therefore, in the absence of an application in that behalf, the warrants of arrest issued herein were, in so far as they relate to committal to civil jail for non-payment of the decretal sum, issued in error and I set them aside. Needless to say execution of such warrants which are irregular would constitute a violation of a right and fundamental freedom of an individual under the Constitution. But that should not be misconstrued to mean that warrants of arrest cannot be issued in a civil process. They are permitted in law to compel obedience of Court orders including execution orders as long as the due process provided in the law is strictly observed. And an extension of that argument is that it is a justifiable limitation of a right and fundamental freedom under Article 24 of the Constitution, having been provided in for in the law, that is, the Civil Procedure Act and Rules.

[9] Nonetheless, this matter should be brought to closure by the Court. Towards that end, I direct that the Applicant to appear in person before the Deputy Registrar on 14th October, 2014 to show-cause why execution should not issue as applied for by the Respondent. The Deputy Registrar (DR) will then deal with the matter as by law prescribed. But if the Applicant fails to appear before the DR on the appointed date, the Applicant shall be arrested wherever he will be and at any time and be brought to Court with all convenient speed. The assistance of the Court Bailiff and Police will be welcome move should the Applicant choose to comply with the order of this Court by defaulting. These orders are necessary and informed by the circumstances of this case, and by the very inherent desire of the Court to do justice and to vindicate the process of the Court. I have also been moved by what I stated earlier, that, the process of the Court is not dependent

upon magnanimity or willingness or convenience of the judgment-debtor or any other party for that matter to comply. It is self-reinforcing; it is self-vindicating. It is so ordered.

Dated, signed and delivered in open Court at Nairobi this 23rd day of September, 2014

F. GIKONYO

JUDGE