



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**LAND CASE NO. 135 OF 2013**

**VALERIA TANZI.....PLAINTIFF/APPLICANT**

**VERSUS**

**GIULIO GRIRO**

**FATMA BARALLON**

**FIDELITY COMMERCIAL BANK LTD.....DEFENDANTS/RESPONDENTS**

**RULING**

This ruling is in respect of an application brought by way of Notice of Motion dated 29<sup>th</sup> October 2021 by the Plaintiff/Applicant and an application dated 31<sup>st</sup> August 2021 by the 2<sup>nd</sup> Defendant/Applicant seeking the following orders respectively: -

**1. Spent**

**2. That the firm of BAMOMIN ADVOCATES & ASSOCIATES be allowed to file a Notice of Appointment of advocates to come on record for the Plaintiff/Applicant and the Notice of Appointment attached herein be deemed as duly filed.**

**3. That the proceedings and ruling delivered on the 25<sup>th</sup> October 2021 be set aside**

**4. That the 2<sup>nd</sup> Defendant herein be committed to civil jail for having disobeyed the orders issued by the chief magistrate on 26<sup>th</sup> October 2021 or alternatively the 2<sup>nd</sup> defendant do pay the entire balance of the decretal sum.**

2<sup>nd</sup> Defendant's application dated 31<sup>st</sup> August 2021: -

**1. Spent**

**2. THAT the firm of RICHARD O. & CO ADVOCATES be allowed to file Notice of Change of Advocates to come on record for the 2<sup>nd</sup> Defendant/Applicant in place of the firm of OMWANCHA & CO ADVOCATES.**

**3. THAT there be stay of execution herein pending the hearing and determination of this application inter-partes.**

**4. THAT all proceedings that took place on the 25<sup>th</sup> and 26<sup>th</sup> day of August, 2021 be declared null and void and be unconditionally set aside.**

**5. THAT the Notice to show cause against the 2<sup>nd</sup> Defendant/Applicant be set aside.**

**6. THAT the Plaintiff/Respondent be directed to refund to the 2<sup>nd</sup> Defendant/Applicant a sum of Ksh 1,000,000/= illegally and irregularly paid on the 26<sup>th</sup> day of August, 2021 on a purported Notice to show cause.**

**7. THAT the 2<sup>nd</sup> Defendant/Applicant's passport deposited in court be released to her.**

**8. THAT the Plaintiff/Respondent to render accounts of all the money so far received in settlement of the decretal sum.**

**9. THAT costs to this application be provided for.**

Counsel agreed to canvas the application vide written submissions which were duly filed.

### **PLAINTIFF/APPLICANT'S SUBMISSIONS**

The Plaintiff relied on her affidavit in support of the application where she deponed that this suit was heard and determined by this Honorable Court on 19<sup>th</sup> September 2017 and she filed a Notice of intention to act in person on 26<sup>th</sup> August 2021. It was the Applicant's case that Messrs. Richard Otara & Company filed a Notice of Motion on 2<sup>nd</sup> September 2021 seeking leave to act for the Defendant which application was not objected to by her counsel.

The Applicant further deponed that she filed a complaint at the Advocates Complaints Commission who advised her that her advocate Mr. Ambwere could no longer represent her since she had filed a complaint against him for receiving Kshs. 3,200,000/ from the 1<sup>st</sup> Defendant being part payment of the decretal sum of which he remitted to her only Kshs. 600,000/. She also stated that the advocate retained the balance which is against professional ethics.

It was the Applicant's case that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were jointly ordered to pay the decretal amount and the 1<sup>st</sup> Defendant fled the country and therefore she is apprehensive that the 2<sup>nd</sup> Defendant may also flee the country since her passport was released to her yet she has not paid her part of the decretal sum.

The Applicant stated that since there is a balance of Kshs 14,562,450/ yet to be paid she prays that the firm of Bamomin Advocates be allowed to represent her to pursue the payment of the balance, Further that the court ordered for the release of the 2<sup>nd</sup> Defendant's passport who is a flight risk hence the orders should be set aside and the Defendant committed to civil jail.

Counsel filed submissions and identified three issues for determination by the court namely; whether the Plaintiff's/Applicant's application is properly before this court, whether the Application meets the threshold to warrant the orders sought and whether the application has been brought with clean hands.

Counsel reiterated the contents of the Applicant's supporting affidavit and relied on Section 22 rule 26 of the Civil Procedure Act which provides that: -

**Subject to the provisions of Section 38 of the Act, every decree for payment of money, including a decree for payment of money as an alternative for other relief may be executed by the detention in prison of the Judgment Debtor or by attachment and sale of the property, or by both.**

Counsel submitted that the 2<sup>nd</sup> Defendant/Respondent and Judgment Debtor is not known to own any tangible or landed property in Kenya. Counsel also submitted that the Plaintiff/Applicant herein is an Italian National and does not understand the Kenyan Laws and thus has to be represented by an Advocate.

Counsel therefore urged the court to allow the application as prayed.

### **2<sup>ND</sup> DEFENDANT'S SUBMISSIONS**

Counsel gave a brief background to what transpired in court on 25<sup>th</sup> August 2021 before the Deputy Registrar in respect of a Notice to show cause against the 2<sup>nd</sup> Defendant. That there was a warrant of arrest of the 2<sup>nd</sup> Defendant who was later committed to civil jail and given a payment plan whereby she undertook to pay Ksh 1,000,000/- and deposited her passport in Court and made a further undertaking to Ksh 500,000/- every month till payment in full.

It was counsel's submission that at the time of arrest, a larger part of the decretal sum had already been paid to the firm of Ambwere & Associates who is the Plaintiff/Respondent's advocates.

Mr. Otara submitted that the proceedings of the 25<sup>th</sup> day of August, 2021 violated the provisions of Order 49 Rule 5 of the Civil Procedure Rules which provides that : -

**Formal orders for attachment and sale of property and for the issue of notices to show cause on applications for arrest and imprisonment in execution of a decree of the High Court may be made by the Registrar or, in subordinate Court, by an executive officer generally or specially thereto empowered by the Chief Justice by writing under his hand, but in the event of any objection being taken to the proceedings thereunder, all further proceedings shall be before a judge....**

Counsel therefore submitted that the only Magistrate who is empowered by the Chief Justice to undertake the administrative mandate of the High Court in accordance to Order 49 Rule 5 of the Civil Procedure Rules is in Malindi Deputy Registrar Honourable Wasike who was on leave on that date.

It was counsel's further submission that on 26<sup>th</sup> August, 2021, the 2<sup>nd</sup> Defendant was brought before Court No. 2 who purported to act as a Deputy Registrar of the High Court and ordered the 2<sup>nd</sup> Defendant to give a payment plan or else be jailed. Counsel urged the Court to find that the proceedings were a nullity and cited the case of Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169, where Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said; -

**“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”**

Mr. Otara further submitted that the Plaintiff violated the express provisions of Order 9 Rule 9 of the Civil Procedure Rules dealing with the issue of change of advocates where a party decides to act in person after entry of judgment as such change cannot be effected without an order of the Court. That in view of that the Plaintiff had no capacity to prosecute the notice to show cause.

Counsel therefore urged the court to allow the application as prayed and order for a refund on the monies paid by the 2<sup>nd</sup> Defendant and declare the proceedings on 26<sup>th</sup> August 2021 a nullity.

### ANALYSIS AND DETERMINATION

It should be noted that there are two applications by the Plaintiff/Applicant and the 2<sup>nd</sup> Defendant/ Applicant. Each party argued their application without responding to the other party's application. I will therefore deal with each application as undefended.

To start with the application by the 2<sup>nd</sup> Defendant on the legality of the proceedings before the Deputy Registrar dated 26<sup>th</sup> August 2021. Counsel appeared before the court on 25<sup>th</sup> October and raised the issue of the 2<sup>nd</sup> Defendant's passport being irregularly impounded by the Lower Court of which the court gave an order that the passport be released to the 2<sup>nd</sup> Defendant forthwith which was done. The issue of the passport is therefore spent.

The issue of the Plaintiff acting in person was also dealt with on 25<sup>th</sup> October 2021 where the Plaintiff's former Advocate Mr. Ambwere informed the Court that he would not have a problem with the Plaintiff acting in person save for the fact that the Plaintiff filed a notice to act in person unprocedurally. Further that the 2<sup>nd</sup> Defendant owes the Plaintiff more than Kshs 12million which should be paid.

An issue also arose as to the conflict of interest, the Plaintiff having filed a complaint against her former Advocate Mr. Ambwere and had been advised by the Advocates Complaints Commission on the issue.

Ms Mona submitted that the Plaintiff was acting in person hence there was no need to serve Ambwere Advocate. I find that the Plaintiff was within her right to act in person having confirmed that there was a conflict of interest between her and the advocate having filed a complaint at the Complaints Commission. Further that the advocate did not have a problem with her acting in person save for following the procedure.

The issue of the proceedings having been handled by Hon. Chepseba in the absence of the Deputy Registrar Hon. Wasike on 26<sup>th</sup> August 2021, there can never be a vacuum in Court due to the absence of a Deputy Registrar. When the Deputy Registrar is away from the station either on leave or official duties, a designated Judicial Officer stands in to carry out the duties of a Deputy Registrar which includes signing of orders and any other matter that is assigned in accordance with the law and procedure.

The Honourable Magistrate was within his right to act as a Deputy Registrar in the absence of a substantive Deputy Registrar. However, the order granted for the impounding of the 2<sup>nd</sup> Defendant's passport without proper proceedings was reviewed by the Court on 16<sup>th</sup> November 2021 whereby the Court ordered that the passport be released forthwith hence that prayer is spent.

Counsel urged the Court to refund the amount of Kshs 1 Million which the 2<sup>nd</sup> Defendant had paid towards the satisfaction of the decretal amount, it should be noted that there is a judgment against the Defendants jointly and severally and that they have not paid the decretal sum in full. The 2<sup>nd</sup> Defendant also gave a commitment to be paying Kshs 500, 000/ per month until payment in full but paid only 2 instalments and has not fulfilled the undertaking. This means that the 2<sup>nd</sup> Defendant has not come to this Court with clean hands.

There is already a judgment and the parties should not be re-litigating the matter but should be looking at ways of paying the decretal sum ordered by the Court as there is no appeal proffered against the judgment. I find that the prayer for refund of the amount paid towards settlement of the decretal sum lacks merit and is therefore disallowed.

The Defendants should satisfy the judgment by paying the decretal sum as adjudged by the court.

On the Plaintiff's application dated 29<sup>th</sup> October 2021, the prayer for the firm of Bamomin and Associates has been overtaken by events as they were allowed to come on record for the Plaintiff. The Notice of Change is therefore deemed as properly filed, the Plaintiff's former counsel having had no objection as the Plaintiff had already filed a notice to act in person. The former counsel knows how to get any outstanding fees if any from his client.

On the issue whether the proceedings and ruling dated 25<sup>th</sup> October 2021 should be set aside, the Court has already conclusively dealt with the issue of the release of the passport and found that there were no proceedings leading to the impounding of the passport that is why the Court gave an order of the release of the passport. The said ruling was delivered after the submissions of the Plaintiff and counsel for the

Defendant and if they were dissatisfied with the ruling then they should have either filed an application for review of the orders or an appeal against the order in the Court of Appeal.

The parties should be concerned with the realization and implementation of the judgment and not side shows as a valid judgment was rendered by this Court

On the issue as to whether the 2<sup>nd</sup> Defendant should be committed to civil jail, the right to commit a judgment-debtor to civil jail is provided for under Section 38 of the Civil Procedure Act, Cap 21, and Laws of Kenya, which provides for powers of the court to enforce execution.

In the case of *Solomon Muriithi Gitandu & Another vs. Jared Maingi Mburu [2017] eKLR* the court held that -

**‘In the case of Braeburn Limited -V- Gachoka and another (2007); it was held inter alia;**

**“A person is not liable to be committed to civil jail for inability to pay a debt but a dishonest and fraudulent debtor is liable to be punished by way of arrest and committal.”**

**The Court further observed that: -**

**“Section 38 of the Civil Procedure Act however, provides a limitation of the courts’ power to order execution of a decree by way of detention in prison. The section prohibits the court from making an order of execution of any decree for the payment of money unless the judgment-debtor has first been given an opportunity of showing cause why he should not be committed to prison and even where the judgment debtor has been given such notice to show cause, the court must itself be satisfied and give reasons in writing for that.”**

**These limitations are further re-stated under Order 22 rule 31 (1) Civil Procedure Rules. A notice to show cause may be issued requiring the judgment debtor to show cause and where he fails to appear a warrant of arrest is issued. In the case the Court found that the requirement for Notice to Show Cause is mandatory and whether the judgment appears for notice to show cause or under warrant of arrest, it is the duty of the decree holder to satisfy the court that the judgment debtor is not suffering from poverty, or any other sufficient cause and is able to pay the decretal sum or proof the provisions of Order 22 rule 35 Civil Procedure Rules, that is examination of the debtor as to his property.**

A person should not be committed to civil jail for non-payment of a debt without adhering to the rules and procedures under Section 38 of the Civil Procedure Act and Order 22 rule 31 (1) of the Civil Procedure Rules. This does not mean that arrest and committal to civil jail of a debtor is unconstitutional and was held in the case of *Jane Wangui Gachoka vs Kenya Commercial Bank Limited [2013] eKLR*, where the Petitioner had asked the Court to declare Sections 38(d) and 40 of the Civil Procedure Act and Order XX1 Rules 32,33 of the Rules which allowed for commitment to civil jail for non-payment of a debt as archaic and unconstitutional. The Court declined to declare the sections unconstitutional.

Section 38 of the Civil Procedure Act provides for different options or methods of enforcing a civil debt, attachment being one of them including civil jail. In the case of *Beatrice Wanjiku & another V Attorney General & another [2012] eKLR* the Court held that : -

**“ [24]The Civil Procedure Act and the Rules provide a legal regime for arrest and committal as a means of enforcement of a judgment debt. Article 11 of the Convention states that “No one shall be imprisoned merely on the grounds of inability to fulfill a contractual obligation.” I read the merely as used above to mean that one cannot be imprisoned for the sole reason of inability to fulfill a contractual obligation. It means that additional reasons other than inability to pay should exist for one to be imprisoned. Article 11 recognizes that in fact there may be instances where imprisonment for inability to fulfill a contractual obligation may be permitted. As there is no inconsistency between Article 11 of the Convention and the general tenor of the committal regime under Civil Procedure Act and the Rules, the provisions of Article 11 of the Convention are at best an interpretive aid.”**

A notice to show cause had already been issued to the Defendants but the Defendants doubted the process which was used. The court is of the view that the Respondent had made a commitment and a payment plan for the decretal sum but paid partly and defaulted. This shows commitment in payment of the sum hence committal to civil jail would not be the appropriate form of enforcement of the judgment at this juncture.

I order that a fresh Notice to show Cause be issued to the Defendants why they should not pay the decretal sum and failure the Plaintiff is at liberty to enforce the judgment using the available enforcement mechanisms including committal to civil jail depending on the circumstances and following the laid down procedures.

Parties to bear their own costs as no one responded to each other’s application.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 20<sup>TH</sup> DAY OF APRIL, 2022**

**M.A. ODENY**

**JUDGE**

**NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.**