

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

PETITION NO.6 OF 2011

SIMON KAMOTHO NGATIA.....PETITIONER/APPLICANT

versus

JENNIFER WANJIKU WAMUGUNDA.....RESPONDENT

R U L I N G

Jennifer Wanjiku Wamugunda, hereinafter referred to as the '**Respondent**', filed a suit against Simon Kamotho Ngatia, hereinafter referred to as the '**Applicant**' claiming she was indebted by the applicant in the sum of Kshs.220,000/= vide **Nyeri Chief Magistrate's Civil Case No.226 of 2009**. The debt is stated to have arisen out of a friendly loan advanced by the Respondent to the Applicant. In the end it would appear judgment was entered in favour of Respondent and against the Applicant. The applicant did not satisfy the decree as ordered. He was consequently committed to Civil Jail on 14th April, 2011. The applicant is now before this court having taken out the Petition dated 21st July, 2011 claiming his Constitutional rights were breached when he was committed to Civil Jail. He has beseeched this Court to make a declaration to the effect that the imprisonment of the Applicant in Civil Jail is Unconstitutional and is in breach of the Fundamental Rights. Pending the substantive hearing of the Petition, the Applicant has taken out the motion dated 21st July, 2011 whereof he seeks to be released on bond. The motion is supported by the affidavit of the Applicant. The Respondent opposed the motion by filing a replying affidavit she swore on 29th July 2011. She claimed the Applicant has come to Court with unclean hands because he is using the court process to delay the settlement of his debts. She alleged that the Applicant has deliberately refused to pay his debts hence she was entitled to take the option of committing him to Civil Jail.

In dealing with applications for bail, the court has a wide discretion. The Applicant must show that he/she has an arguable case and that if the order is denied he/she will suffer substantial loss. On his part, the Applicant has argued that he will be able to show during the hearing of the Petition, the substantive matter herein, that his Constitutional rights were breached. The Applicant averred that the Respondent had exercised the option of putting in Civil Jail before exhausting the other modes of execution to recover a civil debt. The Applicant further argued that he will be able to show that he is unable to pay at once the decretal sum hence he has not deliberately avoided to satisfy the decree. After a careful consideration of the rival arguments, I am convinced that the applicant has shown he has an arguable case which should be tested via a trial. The Petition in itself raises serious Constitutional questions which cannot be wished away. I think those questions should be interrogated in a full trial. Having come to the conclusion that the Applicant's Petition is not frivolous, let me now turn my attention to the question as to whether the applicant has shown the substantial loss he would suffer if he is not released on bond/bail pending the hearing of the Petition. It is the Applicant's submission that he may serve the entire jail term before the Petition is heard and concluded. The Respondent did not address her mind to this critical issue. There is doubt that the Applicant herein was sentenced to serve 30 days in Civil Jail in two separate occasions. He had already served the first 30 days in full by the time of filing the Petition.

The Petition is yet to be fixed for hearing. I appreciate that the diary of this Court may not accommodate the hearing of the Petition expeditiously due to the congested cause list for this year. It is therefore possible that unless the Applicant is released on bail/bond, he may serve the whole or substantial part of the jail term before the Petition is heard and determined. Again, I am satisfied that the Applicant has shown the substantial loss he would suffer if denied the orders. On the other hand, this Court must also take care of the interest of the Respondent/Decree Holder. The decree has to be satisfied within the shortest time possible so that justice can be seen to have been done to both sides. In the circumstances, I

will allow the motion by admitting the Respondent to bail/bond. Consequently, the Respondent should be released upon signing a bond of Kshs.300,000/= with one surety of like sum. I also direct the Applicant to expedite the fixing of the Petition for hearing within a period of 90 days. Costs of the motion to abide the outcome of the Petition.

Dated and delivered this 27th day of April 2012.

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J. K. SERGON

JUDGE

In open court in the presence of Waweru Macharia for the Petitioner/Applicant and K. Wachira holding brief G. Mwangi for the Respondent.