



**REPUBLIC OF KENYA**

**High Court at Machakos**

**Civil Appeal 29 of 2010**

**BERNARD MUTETI MAWEU..... APPELLANT**

**V E R S U S**

**PENINAH MUSEMBI .....RESPONDENT**

**R U L I N G**

1. On 16<sup>th</sup> March 2010 the lower court in **Machakos CMCC No 894 of 1997** dismissed the Appellant's application by chamber summons dated 1<sup>st</sup> February 2010. By that application the Appellant had sought an order to set aside an order of the court of 28<sup>th</sup> January 2010 by which that court had ordered the arrest of the Appellant and his committal to civil jail in execution of a decree for money.

2. The Appellant then appealed herein against the said order of 16<sup>th</sup> March 2010. He also applied by **chamber summons dated 22<sup>nd</sup> March 2010** for the main order that there be stay of execution of the decree of the lower court pending disposal of the appeal. That application is the subject of this ruling.

3. The application was brought under **Order XLI, rule 4** of the then **Civil Procedure Rules (the Rules)**. **Section 3A** of the **Civil Procedure Act, Cap 21** was also cited.

4. When the matter was placed before the court on 23<sup>rd</sup> March 2010 under certificate of urgency, the court granted interim relief in order to satisfy itself at the hearing of the application *inter partes* that the very strict legal requirements under **section 38** of the **Act** regarding execution of money decrees by arrest and committal to civil jail of a judgment-debtor had been met.

5. I heard the application *inter partes* on 10<sup>th</sup> June 2010 but could not prepare and deliver the ruling sooner on account of my poor state of health the last few years. The delay is deeply regretted. But thanks to God I have now fully recovered.

6. It turned out that the decree was for a fairly modest sum of money which had as at the date of hearing of the application grown to the sum of KShs 187,190/00. More importantly, it turned out that the decree had never been challenged in appeal or otherwise and had been in place then for about 13 years!

7. It appeared therefore that the Appellant (who was the judgment-debtor in the lower court) was determined to avoid or delay paying the decretal sum as long as he could.

8. The interim relief granted to the Appellant on 23<sup>rd</sup> March 2010 was extended to the date of delivery of ruling upon the condition that he should pay KShs 100,000/00 towards the decretal sum within 30 days of 10<sup>th</sup> June 2010. In default the interim stay of execution would lapse.

9. The Appellant has now had more than ample time to pay up the unchallenged decree. If he has not, then he is clearly abusing the process of the court to delay or avoid meeting a decree that he has not challenged. To grant him the order sought in the present application would be to facilitate him in that abuse. The court will not do that.

10. In the result the chamber summons dated 22<sup>nd</sup> March 2010 is refused. It is dismissed with costs to the Respondent. The interim stay of execution now in place is hereby lifted. Those will be the orders of the court.

**DATED AT NAIROBI THIS 7<sup>TH</sup> DAY OF AUGUST 2012**

**H.P.G. WAWERU**

**JUDGE**

**COUNTERSIGNED AND DELIVERED AT MACHAKOS**

**THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2012**

**ASIKE-MAKHANDIA**

.....

**JUDGE**