



REPUBLIC OF KENYA

High Court at Mombasa

Miscellaneous Civil Application 52 of 2011

IN THE MATTER OF: AN APPLICATION BY EXPARTE APPLICANT

MOHAMED SALIM GULU FOR JUDICIAL REVIEW ORDERS OF CERTIORARI

AND

IN THE MATTER OF: PROCEEDING AND RULING OF 8TH APRIL, 2011 AND
SUBSEQUENT ORDERS THEREFORE IN HOLA RESIDENT MAGISTRATE'S COURT
CIVIL CASE NO. 2 OF 2010 ATHAMAN GODHANA KOMORA –VS- MOHAMED SALIM
GULU

AND

IN THE MATTER OF: SECTION 2(6) OF THE CONSTITUTION OF KENYA, THE
JUDICATURE ACT AND ORDER 53 RULES 1-3 OF THE CIVIL PROCEDURE RULES 2010
AND SECTION 8 AND 9 OF THE LAW REFORMS ACT

BETWEEN

REPUBLIC APPLICANT

AND

THE RESIDENT MAGISTRATE'S COURT, HOLA
RESPONDENT

AND

MOHAMED SALIM GULU EXPARTE
APPLICANT

AND

ATHMAN GODHANA KOMORA INTERESTED
PARTY

JUDGEMENT

1. The Exparte Applicant Mohamed Salim Gulu is a Defendant in a Civil Suit lodged in the Hola Court it being Hola Resident Magistrate's Civil Case No. 2 of 2010 Athman Godhana Komora –Vs- Mohamed Salim Gulu (hereinafter “the Civil Suit”).

2. The proceedings in the Civil Suit show that interlocutory judgement was entered against the Exparte Applicant on 25th March 2010 after he failed to file Defence. He had entered appearance. Those proceedings also show that on 15th September 2012 the matter came up for Notice to Show Cause. The Defendant was not present and the learned Resident Magistrate issued Warrants for his Arrest. On 7th April 2011 the Defendant was brought to Court under Warrants and on 8th April 2011 committed to Civil Jail.

3. The Exparte Applicant was displeased with what had happened in the Subordinate Court and on obtaining the leave of Court on 16th May 2011 filed a Motion dated 6th June 2011 seeking the following main prayer-

“That this Honourable Court be pleased to issue Judicial Review Order of Certiorari to remove the Proceedings and Ruling/Order of the Resident Magistrate’s Civil Case No. 2 of 2010; Athman Godhana Komora –Vs- Mohamed Salim Gulu committing the Exparte Applicant Mohamed Salim Gulu to Civil Jail for an initial period of thirty (30) days and other subsequent Orders arising and related therefrom thereto for the purpose of its being quashed by this Honourable Court.”

That application is for me to determine.

4. The grievance by the Exparte Applicant is that the order by the Magistrate was made without authority and jurisdiction as there was no final judgment on record capable of being executed. That at any rate the order abridged the Exparte Applicants basic Constitutional rights of freedom and liberty.

5. Section 25 of The Civil Procedure Act is on Judgments and Decrees and provides as follows-

“The court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow:—

Provided that it shall not be necessary for the court to hear the case before pronouncing judgment

(i) where the plaint is drawn claiming a liquidated demand, and either—

(a) the defendant has not entered such appearance as may be prescribed; or

(b) the defendant, having entered such appearance, has Failed to file a defence within the time prescribed; or

(ii) in such cases as may be prescribed under section 81 (2)(f).” (my emphasis)

Whether the Judgment entered on 25th March 2010 was interlocutory or final depended on the nature of the claim in the plaint. Was it a liquidated demand? This is unclear as the Court was not shown copies of the pleadings in the Civil Suit. The Court is unable to make a finding one way or other.

6. Anyhow, Section 34(1) of The Civil Procedure Act enjoins a Court executing a decree to deal with all questions arising between the parties relating to execution. Section 34(1) provides-

“(1) All questions arising between the parties to the suit in which the Decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the Decree and not by a separate suit.”

This Court is not told why the Exparte Applicant did not challenge the execution proceedings in the Civil Suit. Although these Judicial Review proceedings may be an alternative remedy, I doubt whether they are efficacious to resolve matters in respect to execution at the lower court. Whether the complaint of the Exparte Applicant was that the Court enforced an interlocutory judgement or that the execution was

premature because of want of a formal Decree, The Civil Procedure Act and the elaborate rules made thereunder provides adequate measures for challenging such execution. The very intendment of The Civil Procedure Act is to make provision for procedure in Civil Actions and Section 34(1) of that Act provides that questions relating to execution shall be determined by the Court executing the Decree. Judicial Review should not be used to micromanage proceedings of a Subordinate Court.

7. Then there are questions raised that the order committing the Defendant to Civil Jail is unconstitutional. The power of Court to commit a judgment Debtor to Civil Jail is found in Section 38 of The Civil Procedure Act which reads in part-

“38. ...

Provided that where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the court, for reasons to be recorded in writing is satisfied-

(a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree-

(i) is likely to abscond or leave the local limits of the jurisdiction of the court; or

(ii) has after the institution of the suit in which the decree was passed, dishonestly transferred, concealed or removed any part of his property, or committed any other act of bad faith in relation to his property; or

(b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree, or some substantial part thereof, and refuses or neglects, or has refused or neglected, to pay the same, but in calculating such means there shall be left out of account any property which, by or under any law, or custom having the force of law, for the time being in force, is exempt from attachment in execution of the decree; or

(c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.

8. The Court record shows that the Defendant was given an opportunity to show cause why he should not be committed to Prison. He gave an explanation but the Magistrate was not satisfied with it. If the Exparte Applicant was unhappy with the order of the Court then he should have appealed against it or sought a review. He did neither.

9. On the Constitutionality of Committal to Prison for a Civil debt, the Courts attention was drawn to the decision of Koome J (as she then was) in **Bankruptcy Cause No. 19 of 2010 In the matter of Zipporah Wambui Mathara**. I am afraid my analysis of the law brings me to a different decision from the learned Judge. The judge had observed-

“Thus the provision of Article 11 of the International Covenant on Civil and Political Rights which Kenya ratified on 1st May 1972 is part of the Kenyan Law. This Covenant makes provisions for the promotion and protection of human rights and recognizes that individuals are entitled to basic freedoms to seek ways and means of bettering themselves. It obviously goes without saying that a party who is deprived of their basic freedom by way of enforcement of a civil debt through imprisonment, their ability to move and even seek ways and means of repaying the debt is curtailed.”

10. Article 11 of The International Covenant on Civil and Political Rights provides that-

“No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation.” (my emphasis)

I think the use of the word merely has a significant connotation. Contrary to popular notion the purpose of committal to jail for a Civil debt is not to punish a Debtor who has no ability to pay. The wording of Section 38 of The Civil Procedure Act makes clear when this process can be invoked. It is, inter alia, to deal with obstructive or reluctant Debtors not unable Debtors. It is for this reason that I find that Section 38 is consistent with Article 29 of The Constitution which provides that-

“Every person has the right to freedom and security of the person, which includes the right not to be:-

(a) deprived of freedom arbitrarily or without just cause.”

(my emphasis)

The elaborate provisions in Section 38 ensures that, if properly applied, the deprivation of freedom is not arbitrary and is only for just cause.

11. And I am not alone of this view. **Chemitei J** in **Ksm Civil Appeal No. 43 of 2006 Paul Ojigo Omanga –Vs- Japheth Angila** held-

“The Constitution and other laws including execution proceedings protect both the judgement Creditor and the judgement Debtor ... The International laws imported and applied in Kenya in line with Article 2(6) of The Constitution cannot be applied blindly ... The committal to Civil Jail is one of the available remedies available in our statutes and as long as its applied procedurally without any abuse then its legitimate.”

On his part Majanja J when upholding that Section 38 of the Civil Procedure Act was Constitution said this (in **Nrb Petition No. 190 of 2011 Beatrice Wanjiku & Anor –Vs- The Attorney General & Another**)-

“The objective and intendment of The Civil Procedure Act and the rules is to provide the mechanism for the enforcement of judgement debts which is a legitimate and reasonable state objective and arrest and committal is one of enforcing Court judgements. What is to be kept in mind whether the means adopted distinguished those who can pay but are merely refusing to pay and those who cannot.”

12. From whichever way I look at the application it lacks in merit. The Motion of 6th June 2012 is denied with costs.

Dated and delivered at Mombasa this 31st day of October, 2012.

**F. TUIYOTT
JUDGE**

Dated and delivered in open court in the presence of:-

..... for Applicant

..... for Respondents

..... for Exparte Applicant

Court clerk - Beatrice

**F. TUIYOTT
JUDGE**