



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL CASE NO. 285 OF 2004**

VIJAY MORJARIA.....  
 PLAINTIFF  
**VERSUS**  
 HARRIS HORN JUNIOR.....1<sup>ST</sup>  
 DEFENDANT/APPLICANT  
 HARRIS HORN SENIOR.....2<sup>ND</sup>  
 DEFENDANT/APPLICANT

**RULING**

By a Notice of Motion (*the Application*) dated 3<sup>rd</sup> March 2011, the Defendants (*Judgment-Debtors*) sought prayers -

(1) *that the application be certified urgent,*

(2) *that pending the hearing and determination of the application there be a stay of execution of the decree herein,*

(3) *that the court make a declaration that the arrest, threat to arrest and/or committal of the Applicant to civil jail in execution of the decree herein is unconstitutional and violates the Applicant's fundamental rights and freedoms,*

(4) *that this court declares that the sections of the law and specifically Section 38D of the Civil Procedure Act is unconstitutional,*

(5) *that the costs of the application be provided for.*

The application was supported by the Affidavit of the Applicant (*the 1<sup>st</sup> judgment-debtor*) in this suit, and the grounds that -

(1) *the Respondent (decree-holder) in execution of a money decree has threatened to incarcerate the Applicants in civil jail,*

(2) *the Respondent has in fact fixed the case for hearing of a notice of motion to show cause why the Applicants should not be incarcerated,*

(3) *the Respondent's acts are a threat to the Applicant's fundamental right as guaranteed by law,*

(4) *that the International Covenant on Civil and Political Rights which is part of the laws of*

*Kenya prohibits the Respondent's intended action specifically Article II which provides "no one shall be imprisoned merely for failing to fulfill contractual obligation."*

*(5) that the debt herein arises from a contractual obligation and that therefore it is illegal to have the Applicant committed to civil jail for the said debt.*

*(6) that the decree-holder is behaving like "the merchant of Venice" and is bent on ensuring that he Applicant is jailed for failing to pay a civil debt.*

*(7) that by committing the Applicant to civil jail, the decree-holder has effectually criminalized poverty;*

*(8) that should the Applicant be imprisoned any effort to satisfy the decretal sum will be curtailed.*

The Applicant contends in paragraphs 16 to 20 of his Supporting Affidavit, and on advice of his counsel -

*(a) that poverty is not a crime and that by providing that a person who fails to pay a debt be imprisoned; the Civil Procedure Act has criminalized poverty; (para. (6),*

*(b) that in light of the new constitutional order, it is not permissible for one to be imprisoned merely on the ground of inability to fulfill a contractual obligation (para. 17),*

*(c) that should the applicants be imprisoned they will be unable to raise any monies towards the liquidation of the decretal sum (para. 18),*

*(d) that whereas the applicants are willing to liquidate the decretal sum, the Respondent's acts have put the deponent into constant fear of apprehension, (para. 19),*

*(e) that the Respondent is not willing to listen to them and is determined to have them incarcerated (para. 20).*

Prayers 1 and 2 of the Application were granted, and are therefore spent. Prayers 3 and 4 are the subject of this Ruling.

In his Replying Affidavit sworn and filed on the 28<sup>th</sup> March 2011, the Respondent (decree-holder), opposes the application and depones inter alia that -

*(1) the application is made in bad faith, is incompetent and is an abuse of the court process;*

*(2) the suit was filed in 2004 for a liquidated claim for a sum of Ksh 22,500,000/= awarded to the Plaintiff/Respondent;*

*(3) the applicant appealed against the judgment, abandoned the appeal, and opted for review, and the review application was dismissed;*

*(4) the appeal against the Ruling on review was still pending;*

*(5) the Applicant again rushed to court, and obtained orders for liquidation of the decretal sum by instalments @Shs 1.0 million per month.*

*(6) the applicants have been on a space of filing applications to try and defeat the Respondent's right declared by a court of law;*

*(7) both the international law and the constitution protect the Respondent's rights with the same force of law as it protects the applicants. The applicants' invocation of civil and political rights cannot defeat the legal process of execution.*

And the Respondent prayed that since he has been deprived of the fruits of his judgment for almost three years, and this has incapacitated him financially the application be dismissed and he be allowed to recover his money.

In addition to the grounds, the Supporting and Replying Affidavits, counsel for both the Applicants and the Respondent filed written submissions. I will begin by reference to the submissions of the Applicant the sum total of which is that Section 38 of the Civil Procedure Act (*Cap. 21, Laws of Kenya*) is unconstitutional, and it should so declared. Mr. Kahiga, counsel for the Applicant (*judgment-debtor*) referred to Article 29 of the Constitution which guarantees the freedom and security of the person, that a person shall not be deprived of freedom arbitrarily or without just cause.

Mr. Kahiga also referred to Article II of the United Nations International Covenant on Civil and Political Rights which provides that -

***"No one shall be imprisoned merely on the ground of inability to fulfill contractual obligation."***

Counsel relied on the decisions of the Court in **Re THE MATTER OF ZIPPORAH WAMBUI MATHARA [2010]eKLR** that -  
***"an order of imprisonment in civil jail is meant to punish humiliate and subject the debtor to shame and indignity due to failure to pay a civil debt. That goes against the international covenant on civil and political rights that guarantees basic freedoms of movement and of pursuing economic, social, and cultural development ....."***

Counsel for the Applicants also referred to the decision of the Court in **DIAMOND TRUST BANK KENYA LTD vs. DANIEL MULWA [2010]** eklr where it was held -

***"Since Section 40 is at variance with the provisions of an international convention which is part of the law of Kenya, it follows that we now have two conflicting laws .. that conflict calls for a reconstruction of the probative value of Section 40 in light of new constitutional dispensation, ... if it does not find a place in the new constitutional civil liberties, then Section 40 should be repealed as being unconstitutional. In the spirit of the new constitutional order, it is more likely than not, that Kenyans would prefer a system where there is no threat to civil jail."***

On his part, Mr. Githui learned counsel for the plaintiff/respondent (*decree-holder*), after reciting the history of matter, (*as already set out in the synopsis of the Replying Affidavit of Harris Horn Junior*), submitted that the Defendants/Applicants have applied for stay of execution at every conceivable stage; when the suit was heard and judgment entered, the Defendants applied for stay of judgment, which was granted subject to deposit of Sh 2,250,000/= . The deposit was made late, and the stay orders were vacated, the rate of interest was a subject of proceedings, a review application was dismissed, an order for payment by way of instalments was granted. The Defendant's defaulted in November 2010, and a Notice to Show Cause was taken out and warrants of arrest were issued. The warrants of arrest are the subject of these proceedings.

I have considered those rival arguments. The borne of contention in this matter is whether a person who has been adjudicated by a competent court of law to be liable for a contractual debt, can lay claim to protection under the constitution that his civil liberties which are guaranteed under the Constitution can be limited by way of civil jail.

Mr. Githui learned counsel for the Decree-holder, argued that there is limitation in the constitution as to enjoyment of civil rights. The rights of an individual are to be enjoyed subject to the existing laws and subject to the rights of others, and that a party cannot claim that right to liberty has been contravened when he has been incarcerated for a lawful sentence, that before a party is committed to civil jail, he is invited to appear in court, to show cause why he should not be jailed for refusal to settle the debt, that a judgment debtor is not committed to civil jail due to poverty, he is committed to jail for refusing to settle the judgment debt despite having the means, that it is on the basis of the same argument that a party's property is attached for refusal to pay the judgment debt.

Counsel submitted that the Bill of Rights is a two way street. The rights must be enjoyed subject to the rights of others, and the existing laws, that the judgment debtors are persons of means. They are directors of a sisal estate, they deal in million of shillings. They can hire the best counsel money can buy.

The judgment debtors have not refuted any of these submissions, their sole case rests upon the argument that Section 38(d) of the Civil Procedure Act is inconsistent with the right to liberty. Section 38 is in these terms -

***"S.38. Subject to such conditions and limitations as may be prescribed, the court may, on the application, of the decree-holder, order the execution of the decree -***

- (a) by delivery of any property specifically decreed,***
- (b) by attachment and sale, or by sale without attachment of property,***
- (c) by attachment of debts,***
- (d) by arrest and detention in prison of any person,***
- (e) by appointment of a receiver, or***
- (f) such other manner as the nature of the relief granted may require.***

There is however a limitation on execution by way of arrest and detention in prison of any person. The proviso to Section 38 says -

***"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 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 judiciary capacity to account.***

A money-decree is an order of court for payment of money by the judgment/debtor. According to the proviso to Section 38, the decree-holder is not entitled to exercise the right to have the judgment-debtor arrested and committed to detention for any specified period of time unless the conditions in the proviso are met. From the decree-holders Replying Affidavit, it is clear that the judgment-debtor has, throughout a multiplicity of applications after the decree for Shs 22,500,000/= was issued, avoided to pay the decretal sum, and even when he got orders in his favour to pay the decretal sum by instalments, the judgment-debtor never explained to the decree-holder, why he was unable to pay, or the cause of the default for three months.

Having received no explanation for the default, the decree-holder in compliance with requirements of the proviso to Section 38, gave notice to the judgment-debtor to show cause why he should not be committed to prison.

The judgment-debtor's argument, and indeed the substance of Mr. Kahiga's (*his counsel*), submission is that even where the decree-holder has demonstrated and satisfied the requirements of the proviso to Section 38, the Court nevertheless cannot make orders to commit the judgment-debtor to jail. The sole ground or reason for this position is Section 29 of the Constitution of the Second Republic which provides -

**"29. 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."**

And Section 50 of the Constitution says -

**50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.**

**[(2) sets out of a host of not less than 20 rights of an accused person].**

The question to be answered is whether the proviso to Section 38 of the Civil Procedure Act is inconsistent with Article 29 of the Constitution. The proviso to Section 38 of the Civil Procedure Act clearly lays down conditions which a decree-holder must fulfill before an order to commit a judgment-debtor to jail is made. The requirement in Article 29(a) of the Constitution is that no person may **be deprived freedom arbitrarily or without just cause.**

Where, as in this case, the decree-holder has given the judgment-debtor notice to show cause, for intended execution of the decree, and thereby invited him to exercise his right to have his dispute under the application resolved in a fair and public hearing in a court or tribunal, the judgment-debtor cannot in my humble view, claim either, that his rights to protection of law are being taken away or threatened. Neither, in my further opinion, can the judgment-debtor claim that Section 38, proviso, is inconsistent with the Constitution or is void to the extent of the inconsistency.

The Constitution of the Second Republic has placed enormous responsibility upon the superior courts and upon Wanjiku. It is therefore necessary to closely examine each of its provisions particularly those forming the Bill of Rights, to ensure that the rights claims by any person vis-à-vis another are in tandem with that other person's rights. That, I think, is the basis of the qualification or limitation of the individual rights under Section 24 of the Constitution -

**"24(1) A right or fundamental freedom in the Bill of Rights shall not be Limited except by law, and taken only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into all relevant factors, including -**

**(a) - (c)**

**(d) the need to ensure that the enjoyment of rights and fundamental freedoms by an individual does not prejudice the rights and fundamental freedoms of others, and**

**(e) the relation between the limitation and its purpose, and whether there are less restrictive means to achieve the purpose.**

**(2) ...**

**(3) the state or a person seeking to justify a particular limitation shall demonstrate to the court that the requirements of this Article have been satisfied.**

My humble understanding of this provision is **firstly**, that individual rights must be subject to the rights of others. This is what Mr. Githui learned counsel for the decree-holder called, a two way street, **secondly**, if there are less restrictive means to achieve the purpose of the limitation, then such less restrictive means shall be applied, or employed to achieve the purpose, and **thirdly**, that the person seeking the limitation, must satisfy the court that the requirements of this Article (24) have been satisfied.

Though the decree-holder has advanced grounds why the judgment-debtor should be committed to civil jail, I am not satisfied that he (*the decree-holder*) has demonstrated that there are no less restrictive means to secure the payment of the money - decree. There are at least four other ways of enforcing the payment of the decree. The mode chosen, (*arrest and detention in prison of the judgment-debtor*) would not, I think, achieve repayment of the debt. It merely intimidates, humiliates and subjects the judgment-debtor to embarrassment and indignity, as Lady Justice Koome put it in the case of **Re ZIPPORAH WAMBUI, [2010]eKLR** but it would not ensure the payment of the debt.

What, I think, Article 24(1) of the Constitution demands of Wanjiku (*that is the decree-holder*) who desires to have the freedom of another person (*the judgment-debtor*) restricted, must show is that he has exhausted other less extrusive or restrictive measures to secure payment from the judgment-debtor, and that the only method left is to have the judgment-debtor incarcerated, and he forgets his debt or money-decree.

These alternative or less restrictive measures under Section 38 of the Civil Procedure Act include attachment of property, the appointment of a receiver, or bankruptcy proceedings. If a decree holder has not exhausted these other means of execution, then he is caught by Article 24(1)(e) that the judgment-debtor's right to liberty cannot be restricted by way of arrest and detention in prison in execution of a money-decree until those other modes are exhausted. At this point in time, the mode chosen, arrest and detention in prison of the judgment-debtor would not, I think achieve the payment of the debt.

This, however, is not the question raised by the application herein. The question raised in this application is whether Section 38(d) of the Civil Procedure Act in so far as it allows the arrest and detention of a judgment-debtor for non payment of debt, is unconstitutional or for being inconsistent with the provisions of Article II (1) of the International Covenant on Civil and Political Rights ratified by Kenya, and is part of Kenya law by virtue of Article 2(5) of the Constitution (*the general rules international law form part of the Laws of Kenya*).

In my humble view again, Section 38(d) of the Civil Procedure Act is not in violation of or contrary to the Constitution of Kenya. I set out in the paragraphs following, my reasons for holding that position.

**Firstly** and generally, the execution by way of arrest and detention of a judgment debtor, is a process of examination of a judgment-debtor to establish whether he has, or does not have the means to satisfy the decree against him. An order for arrest and detention will only be issued where the court is satisfied in terms of the proviso to Section 38 of the Act that the judgment-debtor has the means to satisfy the debt and refuses and/or neglects to do so. In other words the judgment-debtor is granted a full and fair hearing of his side of the reasons why he is unable to pay, and not why he would not pay. The question of poverty does not arise. He will not be committed to jail if it is shown that he is indigent.

**Secondly** and perhaps more fundamentally, the right to liberty and security of the person by the **International Covenant on Civil and Political Rights** include the freedom from arbitrary arrest and detention (Article 9), and the right of the person deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person. (*that is what is said in the United Nations Manual on Human Rights in the Administration of Justice - (United Nation, New York and Geneva 2003 - pp. 3)*).

The Manual at pp. 34 -35 sets out the criteria to look for in determining whether the exercise of a right has been lawfully limited. These criteria are -

- (i) *the principle of legality, in that the restricted measure must be based on law;*

(ii) *the principle of a legitimate aim in a democratic society, restrictions on the exercise of human rights cannot be lawfully justified under the covenant for reasons not expressly contained therein or purposes alien to the effective protection of human rights.*

(iii) *the principle of proportionality is that the interference with the exercise of the individual's right must be necessary for the legitimate purpose or purposes; it follows that it is not sufficient that the measure is simply reasonable or possibly advisable, it be necessary.*

Several conclusions may be stated in terms of these criteria in relation to the application herein, **firstly**, that the restriction must be based in law, and **secondly**, that the interference must be necessary for the legitimate purpose or purposes.

As already outlined above, the application for committal to civil jail is clearly based on law, Section 38(d) of the Civil Procedure Act, and is also consonant with Article 24(1)(e) of the Constitution. The first principle of legality is therefore met and fulfilled. The second criteria of proportionality is not however met. It is not met because, under Article 24(1)(e) of the Constitution, and the Section 38, there are other less restrictive methods for the judgment creditor to enforce its rights to recover its debt. I have already made reference to Section 38(a) (*delivery of the property decreed*), 38(b) (*attachment and sale of the property or sale without attachment of any property, appointment of receiver, or even bankruptcy proceedings*).

For these reasons, I am unable to say that Section 38(d) of the Civil Procedure Act, is inconsistent with the Constitution. I would however say that the Decree-holder has not exhausted other less restrictive or extrusive remedies. I would therefore allow the judgment-debtor's application on those grounds.

I would however direct that the judgment-debtor pay the costs of the application as its clear from past litigation, that he or they intend to stretch and postpone the payment of the decretal sum as so long as they are able to engage the decree-holder in endless legal gymnastics which are clearly intended to abuse the process of court.

There shall be orders accordingly.

**Dated, delivered and signed at Nakuru this 30<sup>th</sup> day of June 2011**

**M. J. ANYARA EMUKULE**  
**JUDGE**