



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Suit 121 of 2009

MOHAMED MAALIM OSMAN1ST PLAINTIFF

IBRAHIM ABDULLAHI KHALF2ND PLAINTIFF

VERSUS

KHEIRA MAALIM OMAR.....1ST DEFENDANT

MOHAMED ABDI MOHAMUD.....2ND DEFENDANT

RULING

1. The notice of motion dated 11th December 2009 seeks for an order of stay of execution of the order for the arrest and committal to civil jail of the judgment/debtors. The defendants/applicants are also seeking for an order to recall the notice to show cause issued by the Deputy Registrar on 4th December 2009 and that the arrest and committal of the judgment/debtor to prison be set aside *ex debito Justitiae*.

2. The application is based on the grounds stipulated on the body thereto

As well as the matters deposed to in the supporting affidavit sworn by **Mohamed Abdul Mohamud** on 11th December 2009. According to the applicants, a notice to show cause dated 15th October 2009 was served upon both defendants. It came up for hearing before the Deputy Registrar and the Deputy Registrar issued warrant of arrest for committal of the judgment debtors to civil jail on 4th December 2009. The defendants faced the imminent risk of being arrested and their liberty would be curtailed despite the fact that they have sufficient cause to show why they should not be committed to civil jail.

3. The reasons demonstrated are that the defendants are unable to raise the entire decretal amount due to their current financial situation. The 2nd defendant lost his ministerial and Parliamentary seat and he is not in any gainful employment. The defendants' further state that they are willing and undertake to settle the decretal amount if the warrants of arrests dated 4th December 2009 is waived. The defendants also contend that they have serious financial difficulties due to business down turn as well as educational obligations for three children currently pursuing university education abroad. They therefore sought for an order of stay for execution of the warrant of arrest.

4. Finally counsel made reference to the case of **Kenya National Corporation Limited versus New Homes**

Development Limited and Others HCCC NO.4698 OF 1987 in which **Waweru J** held that under the provisions of section 38 D of the Civil Procedure Act, a warrant of arrest is not issued “**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) *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 refused 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 except from attachment in execution of the decree; or*

5. This application was vehemently opposed by the plaintiff/respondent on

Grounds that the issues raised in this application regarding the judgment debtor’s financial means were heard and determined by this court on 30th July 2009. The court determined the issues regarding the Judgment/debtors financial circumstances such as the 2nd defendant’s loss of his Ministerial and Parliamentary seat and the issues of their financial obligations regarding the education of their children abroad. Those issues are *res judicata* as provided for under section VII of the Civil Procedure Act.

6. The applicant’s judgment/debtor failed to appear in court after they made an offer to pay the decretal sum by installments but they failed to record consent or to make up payments and warrants of arrest were issued for their committal to civil jail. According to the counsel for the judgment/ creditor this application is an abuse of the court process because the judgment/debtor’s affidavit of means was examined by this court and the proposal to pay the decretal sum in installments of one million was declined. The execution proceedings should proceed before the Deputy Registrar.

6. I have considered the rival submissions and especially the ruling in **Kenya National Corporation Limited** where **Waweru J** expounded on the meaning of the provisions of **section 38 of the Civil Procedure Act**. I find that this matter came up for hearing before the Deputy Registrar on the notice to show cause why the judgment/debtor should not be committed to civil jail for failure to pay the decretal sum. The judgment/debtor appeared and at first made an offer to settle the decretal sum and for that offer the notice to show cause was extended. When the matter came up for hearing, the judgment debtor filed an affidavit of means to show why they were not able to settle the decretal sum.

7. The deputy Registrar considered that affidavit of means and found the issues raised had been canvassed before the High Court and by the Ruling of 31st July 2009, and he declined to allow the payment of the decretal sum by installments after finding judgment/debtor had concealed vital information regarding their ability to pay. The present application raised the same issues which were determined in that application Those issues are *res judicata* . It is inappropriate for this court to determine the same issues which is tantamount to sitting on this courts own appeal.

8. As regards the provisions of section 38 of the Civil Procedure Act, the judgment/debtors were served with a notice to show cause. They were given an opportunity to be heard why the warrant of arrest and their committal to civil jail should not be issued. The Deputy Registrar considered the affidavit of means filed by the Judgment debtor and found there were no new issues raised regarding the judgment /debtors ability to settle the decretal sum and proceeded to issue the warrant of arrest. I concur with counsel for the applicant that this application lacks merit. I find no difficulty in dismissing it with costs to the plaintiff judgment/creditor.

RULING READ AND SIGNED ON 16TH APRIL 2010 AT NAIROBI.

M. K. KOOME
JUDGE