REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI COMMERCIAL & TAX DIVISION – MILIMANI
CIVIL CASE NO. 70 OF 2002

DIAMOND TRUST KENYA LTD…….....
……. DECREE/HOLDER

VERSUS

DANIEL MWEMA MULWA. …….....…….....
JUDGMENT/DEBTOR

RULING

This application is brought by a Chamber Summons dated 4th October, 2010, and taken out under **Order IXB Rule 8; Order XXI Rule 22 (1)** and **(3)** of the **Civil Procedure Rules;** and **Section 3** and **3A** of the **Civil Procedure Act** and all other enabling provisions of the law. By the application, the applicant seeks from the court the following orders –

1) That the application herein be certified as urgent and ipso facto heard ex parte in the first instance.
2) That there be a stay of execution of the warrant of arrest issued on 28th September, 2010 pending the hearing and determination of this application.
3) That the consent dated 20th February, 2004 be set aside, discharged and/or vacated.
4) That the suit be set down for hearing afresh.
5) That costs be in the cause.

The application is supported by the annexed affidavit of the applicant, DANIEL MWEMA MULWA and is based on the following grounds –

a) That a warrant of arrest has been issued against the judgment debtor for committal to civil jail in settlement of a civil dispute.
b) That the warrant of arrest issued on 28th September, 2010, against the judgment debtor is unconstitutional and violates his basic fundamental rights and freedom.
c) That judgment-debtor was not party to the consent entered into by the judgment debtor's former advocate and the decree holder without the judgment-debtor's knowledge.
d) That the judgment-debtor's advocate did not have the authority to enter into a consent with the decree holder without the judgment-debtor's knowledge.

e) That in any event the alleged consent is null and void as it sought to award the decree holder a prayer which was not sought in the suit.

At the oral hearing of the application, Mr Amadi for the Applicant relied on the grounds on the face of the record and the supporting affidavit. He argued that the main issue before the court was that it was unconstitutional to commit a debtor to civil jail and therefore the warrants of arrest issued on 28ht September, 2010 were illegal. Furthermore, the replying affidavit contains a letter from Munaro Civil

Investments, who were Private Investigators, showing that the judgment debtor owns a school by the name of Premise Green Hill Academy, and that he is also an employee of the Old Mutual where he earns over Kshs 200,000/-. He therefore urged the court to set aside the warrants of arrest.
On his part, Mr Rimui for the Respondent opposed the application and relied on the replying affidavit of Elizabeth Hinga, the Head of Debt Recovery Unit of the decree/holder, sworn on 15th October, 2010. He argued that the application was brought under **Order IXB Rule 8** which makes provisions for situations in which an *ex parte* judgment has been entered for non attendance which is not the case in this matter; and that **Order XXI Rule 22** speaks of transferring decrees from one court to another which again is not the case here. He submitted, therefore, that the jurisdiction of the court has not been properly invoked and the application is incompetent.

Secondly, counsel argued that the prayers sought in the application have not been canvassed. He said that the application had 5 prayers and yet the only substantive one was prayer No. 3 which sought the setting aside of the consent order dated 24th February, 2004. That prayer was also not adverse, and Mr Rimui submitted that the reason for not canvassing it was that it was being sought on a misrepresentation and lies to this court that the judgment debtor's advocate had no authority yet, the applicant wrote to the bank directly making that proposal. Finally, counsel argued that the warrants of arrest were not unconstitutional as alleged and that they could only be illegal. However, he hastened to add that where a party defies a court order, the court has jurisdiction to issue the warrant of arrest. That aspect of it removes the matter from mere breach of contract especially where there is a judgment and decree.

After considering the pleadings and the submissions of counsel, I note that prayers 3 and 4 were not canvassed and therefore I shall treat them as having been abandoned. The main issue that remains to be determined in this matter is whether the warrant arrest issued in this matter is unconstitutional and violates the fundamental rights and freedom of the judgment debtor. Todate the only literature I have come across on that issue is the ruling of Honourable Martha Koome, J., in **RE ZIPPORAH WAMBUI MATHARA**, **Bankruptcy Cause No. 19 of 2010,** and a stimulating review of that case by Mr D. Majanja, Advocate, in the Nairobi Law Monthly, Vol. 1, issue No. 3 of December, 2010 at page 94.
Article 2 (6) of the Constitution of Kenya states that –

"Any treaty or convention ratified by Kenya shall form part of the Law of Kenya under this Constitution."

In that context, it is noteworthy that **Article 11** of the **International Convention** on **Civil and Political Rights** states that –
"No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation."

This covenant was ratified by Kenya on 1st May, 1972, and has now become part of the laws of Kenya by virtue of **Article 2 (6)** of the **Constitution**.

We have in this country a three-tier hierarchy of the law. At the apex is the Constitution of Kenya, which is the supreme law of the land, to which all other laws as subservient. Next in rank are **Acts of Parliament**, followed by subsidiary legislation at the bottom of the pile. The **Civil Procedure Act** is an **Act of Parliament** which provides for procedure in Civil Courts. **Section 40** thereof makes provision for the arrest and detention of judgment- debtors. It states as follows –

"A judgment-debtor may be arrested in execution of a decree at any hour and on any day, and shall as soon as practicable be brought before the Court, and his detention may be in any prison of the district in which the Court ordering the detention is situate …"

To the extent that this **Section** provides for the arrest and detention of a judgment-debtor, it is clearly in conflict with **Article 11** of the **International Convention on Civil and Political Rights**. The two are contradictory. This raises several issues. Can the two provisions co-exist? If so, how can operate side by side? And if they cannot co-exist, which of them should take precedence over the other?
In my view, **Article 11** of the **International Convention on Civil and Political Rights** cannot rank *pari*

passu with the **Constitution.** The highest rank it can possibly enjoy is that of an **Act of Parliament**. And even if it ranks in parity with an Act of Parliament, it cannot oust the application of **Section 40** of the **Civil Procedure Act.** Nor, for that matter, can it render **Section 40** unconstitutional. For that reason, fore as long as **Section 40** remains in the statute Book, it is not unconstitutional for a judgment-debtor to be committed to a civil jail upon his failure to pay his debts.

Since, however, **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, none of which is superior to the other. That conflict calls for a re-consideration of the probative value of **Section 40** in the light of the new Constitutional dispensation. Only after a revaluation can it be determined whether to retain **Section 40** in the **Civil Procedure Act**, or to do away with it altogether in favour of **Article 11** of the **Convention on Civil and Political Rights**. If it doesn't find favour in the current climate of 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 in which there in no threat of civil jails. Until a decision is taken at a proper forum, **Section 40** of the **Civil Procedure Act** will continue to haunt the liberal freedoms enshrined in the Constitution until it is repealed or found to be unconstitutional at a proper forum. In my view, where a section of the law takes away a right which is conferred by another section, the former section should itself be taken away.

As we have two conflicting provisions of the law in force, it is correct to say that both of them are applicable. In that event, if the applicant is jailed under **Section 40,** and that Section is later found to be out-dated in the current Constitutional order, the Applicant's rights will have been trampled on. On the facts of this case, I find that the Judgment –debtor has some means of income. He is in the gainful employment of a leading insurance Company and has also a thriving business in the form of a school. Even if he is not committed to a civil jail, the judgment-creditor can have reasonable recourse to alternative modes of execution.

In order to avoid the possible violation of the Applicant's rights in view of **Article 11** of the **International Convention**, I therefore allow the application and grant a stay of the warrant of arrest issued against the judgment-debtor. The decree holder is, however, at liberty to explore and pursue alternative means of execution.

As this matter has been brought about by the judgment-debtor's refusal to pay his debts when he has the means to do so, he will pay the costs of this application in any event.

Orders accordingly.

Dated and **Delivered** at **Nairobi** this 15th day of December, 2010

L NJAGI
JUDGE