



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

HCA 135 OF 2010

LESIT, J.

EDITH WAKARIMA WAIRIMU.....APPELLANT
VRS

PETER KIANO CHABARI.....RESPONDENT

RULING

The appellant in this appeal seeks an Order of stay of the execution of the Ruling and Orders of the lower court made on 12th Nov, 2010 pending the hearing and determination of this appeal. The application is a Notice of Motion dated 18th Nov 2010 brought under O.XLI V.4 of the CPR.

The appellant is premised on grounds on the face of the application follows;-

- i. **That** the lower court ordered the committal of the appellant to civil jail and hence the appeal.
- ii. **That** the appeal has overwhelming chances of success.
- iii. **That** the appellant shall not abscond from the limits and jurisdiction of the court prior to finalization of appeal.
- iv. **That** the appellant is a person of poor health and has a pregnancy at an advanced stage.
- v. **That** it is the interest of justice that the appellant be granted stay of execution of the order.

The application is also supported by an affidavit sworn by the applicant of even date.

The respondent as opposed the application. He has filed a replying affidavit dated 24th Nov 2010.

I have considered the two affidavits for and against the application. I have also considered submissions by Mr Mutwiri for the appellant/applicant and Mr Mwenda for the respondent.

The appeal before the court challenges a Ruling by the Learned Magistrate in CM Civil Suit No. 297/10.

The ruling arises out of a Notice to show cause proceedings in which the Respondent's Advocate urged the court to commit the appellant to Civil Jail for failing to honor a consent order. The consent order was to the effect the appellant would pay a certain stated sum of money by installments in order to liquidate

the decretal sum in this cause.

Since the consent order was recorded, it is said that the appellant made no attempt to pay any installment as agreed. By the time the NTSC was heard, the appellant had not made payment of three installments.

The Learned Trial Magistrate found that no good cause had been shown why a warrant for the arrest of the appellant had been shown and he proceeded to issue one.

I have perused the ruling of the Learned trial Magistrate. What seems to have led the Learned Magistrate to reach the conclusion he did of the matter was.

“ The fact that the J.D undertook to liquidate the amount by installments suggests that she is a person of means and not a pauper. In the upshot, I do find that no sufficient cause has been shown why warrant of arrest should not be issued against the J.D.....”

The Notice to show cause issued to the J.D in this case is shown on the forum to have been issued under O.XXI rule 18 of the CPC.

O.XXI V 18 provides for an application to be made for the J.D to show cause why a decree should not be executed against the J.D. It provides that an application for such Notice to issue must be made.

The Learned trial Magistrate heard the J.C's application for execution by arrest and detention to Civil Jail on the 29th Oct 2010. On that date the J.C's Advocate formerly applied for the Notice to Issue. The J.D's Advocate opposed the application and pointed out what the J.C needed to prove before the arrest and detention order could be made.

After hearing both parties the Learned trial Magistrates made his ruling in which, as shown above, he found that no good cause was shown why a warrant for the arrest and detention of the J.D should not issue. He proceeded to issue a warrant of arrest.

The power of court to enforce execution is exercised subject to the provisions of S 38 of the CPA. The proviso under that section clearly restricts the power of court to issue execution of decree by detention on certain conditions. The very first condition set is that the court must give the J.D an opportunity to be heard in order to show cause why he should not be committed in prison. The section then sets out principles the court must apply and tests which must be met before detention is ordered. The Section provides that the court must record in writing its reasons for committing the J.D to prison.

The proceedings before the lower court did not follow this procedure, nor did it apply the tests set under S.38 of the CPA.

There was a clear oversight on the part of the Learned trial Magistrates to issue Notice to show cause to the J.D. Instead, the Learned trial Magistrate heard the application for issuance of the NTSC and went straight away and issued a warrant for the J.D's arrest. That was a fatal mistake on the part of the trial Magistrates. The J.D should first have been given an opportunity to show cause why the execution should not issue. The J.D should have shown cause either by filing an affidavit of means, or of lack of it. The J.C could at the time the J.D Shows Cause also file an affidavit or adduce proof that the J.D has the means to pay the decree and has refused; or that the J.D has recently sold or transferred property to avoid attachment or such other cause as set out under S 38 of the CPA.

All these processes were not followed. The Learned trial Magistrate therefore acted prematurely when he issued the warrant of arrest as he did. In the circumstances I set aside the order of warrant for the arrest and or arrest and detention of the J.D.

The matter should be sent back to the Principal Magistrate Mr Ochieng to dispose of in compliance with S. 38 of the CPC.

The application by the J.D / Appellant succeeds to the extent shown in this Ruling.

Those are the orders of the court.

Dated at Meru this 9th Day of December 2010.

**LESIT, J.
JUDGE.**

9TH DECEMBER 2010

CORAM:

LESIT, J.....JUDGE
KIRIMI/MWONJARU.....COURT CLERKS
MR.MUTWIRI.....FOR APPELLANT
MR MWENDA.....FOR RESPONDENT

JUDGEMENT/RULING WAS READ, SIGNED AND DELIVERED IN OPEN COURT THIS 9TH
DECEMBER 2010

**LESIT, J.
JUDGE**