



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

**Civil Case 700 of 1998**

**OMEGA CREDIT LIMITED .....PLAINTIFF**

**VERSUS**

**MT. KENYA ROSES LTD. ....1<sup>ST</sup> DEFENDANT**

**PAUL KIBUGI MUIITE .....2<sup>ND</sup> DEFENDANT**

**JAMES NGIGI MBURU .....3<sup>RD</sup> DEFENDANT**

**RULING**

On the hearing of a Notice of Motion of the 24.5.2002 the Respondent raised a preliminary point.

The Notice of Motion sought the following relief:-

- 1. A declaration that imprisonment of the defendant because of inability to perform a contractual obligation contravenes his right to liberty under section 72 of the constitution.**
- 2. A declaration that imprisonment of the defendant because of his inability to perform a contractual obligation contravenes the defendant's rights under section 73 of the constitution not to be held in servitude.**
- 3. A declaration that imprisonment of the defendant because of his inability to perform a contractual obligation contravenes the defendant's rights under section 74 of the constitution not to be subjected to degrading or inhuman treatment.**
- 4. A declaration that when the plaintiff herein applied for an order that its decree be executed through the committal to jail of the defendant for inability to satisfy the same it converted the application for execution in to a criminal charge within the meaning of section 77 of the constitution and imported into the proceedings all the safeguards accorded by that section to those likely to suffer loss of liberty at the conclusion of criminal and quasi-criminal proceedings.**
- 5. A declaration that the procedure by the Deputy Registrar in hearing the application for the execution of the decree contravenes the defendant's right under section 77(7) of the Constitution not to be compelled to give evidence at his trial.**

**6. A declaration that following the conversion of the application for execution into a criminal charge, the plaintiff assumes the burden of proving that the defendant had means to satisfy its decree.**

**7. A declaration that any orders made on the plaintiffs application for committal to civil jail will contravene the defendant's rights under section 77(2) (a) of the constitution to be presumed innocent until proved guilty or the applicant pleads guilty.**

**8. A declaration that any orders made by the learned Deputy Registrar on the plaintiff's application for defendant to show cause why he should not be committed to civil ail will be unconstitutional, null and void.**

**9. A declaration that all provisions in the Civil Procedure Act Chapter 21 of the Laws of Kenya and the Civil Procedure rules made there under permitting imprisonment to civil jail are unconstitutional, invalid and void.**

Mr. Gitau for the Objector raised three points:-

1. The Judgement Debtor's prayer that this Honourable Court declare that the Judgement Debtor's Right to liberty under Section 72 of the Constitution of Kenya as on 24<sup>th</sup> May 2002 would be contravened by imprisonment to civil Jail by the due process of the law arising from the Applicant's inability to satisfy the Court Judgement and Decree cannot be granted and does not lie as the committal to Civil Jail is exempted by the provisions of Section 72(1) (b) and (c) of the Constitution which provides "No person shall be deprived of his personal liberties save as may be authorized by law, in any of the following cases:

(b) In execution of the orders of the High court or the Court of Appeal punishing him for contempt of that court or of another court or Tribunal.

(c) In execution of the orders of a court order made to secure the fulfillment of an obligation imposed on him by law."

2. That the prayers sought in prayers 4, 5, 6, 7 and 8 of the application amount to criminal offences.

3. That the matter was decided by the ruling of a Constitutional Bench in **Kisya Investments Ltd v Attorney General & another CC No.2832 of 1990.**

This matter was argued before me by Mr. Gitau for the Respondent on the 8.11.05 when it was adjourned for further hearing on the 16.1.06 when it was stood over for hearing on the 20.1.06 when counsel for the Applicant did not appear. As a result the matter was stood over until the 1.3.06 when again counsel for the Applicant did not appear although he had been served with Notice of the same.

Although no arguments were adduced to me in reply, I must nevertheless consider whether or not the Respondent can succeed on his preliminary objection.

In the case of **Mukisa Biscuits Co. Ltd v West End Distributors Ltd [1969] EA page 696, Newbold P at page 701** defined a preliminary objection as follows:-

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

In so far as the preliminary objection will dispose of the application and the submissions are not based on facts I accept that the preliminary objection can be taken as such.

Mr. Gitau submitted that Section 72 of the Constitution was subject to the provision of Section 72 1 (b) and (c) of the Constitution which states as follows:-

**(b) in execution of the order of the High Court of the Court of Appeal punishing him for contempt of that court or of another court or tribunal;**

**(c) in execution of the order of a court made to secure the fulfillment of an obligation imposed on him by law;**

He submitted that the requirements of Section 73 and 74 of the Constitution were not breached by committing a person to civil jail.

With regard to the provisions of Section 77(1) of the Constitution he submitted that grounds 4, 5, 6 and 7 of the application could not be granted as the procedure of committal to civil jail being a procedure permitted under the Constitution an application for the same could not be deemed to be converted into a criminal charge. With regard to prayers 8 and 9 these seek declarations in respect of matters provided for by law, which cannot be granted.

He relied on the case cited above which determined that Section 70 of the Constitution is declaratory and does not create any violable Constitutional rights but that Section 72 1(b) of the Constitution itself permits or allows such deprivation of personal liberty as an exception to the protection of the right to personal liberty. He submitted that Section 72 1(c) is in effect that while the Constitution provides that no person shall be deprived of his personal liberty yet the same Constitution in this section permits the same if it is in the execution of a order of a court made to secure fulfillment of an obligation imposed on him by law.

The Judicature Act (Cap 8) Section 5 gives the High court and Court of Appeal power to punish for contempt of court. The mode of punishment is not specified but committal to civil jail has always been a remedy open to the courts.

The Civil Procedure Act in Sections 40, 41, 42 and 43 provide for the Arrest and detention, Subsistence allowance, Detention and release, and Release on grounds of illness respectively.

I would with respect agree with the Constitutional court in the case referred to above that Section 72 1(b) and (c) of the Constitution provides an exception to the fundamental principle that no person shall be subject to loss of his or her liberty. As committal to civil jail for breach of a court order is sanctioned by the Constitution such execution cannot be considered to be either slavery, servitude or torture of inhuman treatment.

Section 77 of the Constitution which deals with provisions to secure protection of law to persons charged with a criminal offence cannot have any relevance to an order of court in which a person is subject to committal to civil jail as the procedure in the civil court cannot be equated to proceedings in a criminal court or the right of a person charged in such a court.

I see nothing null and void or unconstitutional in relation to the provisions relating to imprisonment for breach of a court order in civil matter or that the provision of the Civil Procedure Act offend in any way the provisions of the Constitution in so far as the Constitution allows as an exception to liberty, imprisonment for breach of a civil court order.

In the result I uphold the preliminary objection and dismiss this application with costs.

Dated and delivered at Nairobi this 24<sup>th</sup> day of March 2006.

**P. J. RANSLEY**

JUDGE