



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Civil Appeal 54 of 2004

SILAS KOOME MAINGI..... APPELLANT/APPLICANT

VERSUS

MICHAEL MURITHIRESPONDENT

RULING

1. The Application dated 7.6.2006 is premised on Order XXI Rule 35 and Order XLI Rule 4 of the Civil Procedure Rules. The twin prayers now sought by Silas Koome Maingi are those of stay of an order of his committal to prison pending the hearing of this Application and stay of execution of the decree in Meru CMCC 874/2003 pending the hearing and determination of the Appeal herein.
2. It is the Applicant's case that Meru CMCC 874/2003 proceeded to conclusion without any notice being served on him and judgment entered against him on 2.3.2004 for Ksh.100,104/= plus costs thereof and interest. When he got wind of the Judgment he attempted to set it aside but his plea was turned down and his Application in that regard was dismissed on 16.8.2004. It is that decision that necessitated the pending Appeal.
3. The Applicant further depones in his Affidavit in support that he is of poor health and is unable to afford the large sum sought in the decree and that he will suffer if he is committed to prison. He depones further that he has already paid Ksh.15,000/= in part payment of the decretal sum and he should not be punished by committal to civil jail when he has a pending Appeal against the decision of the lower court.
4. The Respondent, Michael Muriithi in his Replying Affidavit sworn on 15.6.2006 depones that while the Applicant has paid Ksh.15,000/- in part satisfaction of the decretal sum, he only did so when his arrest and committal to civil jail became imminent. That the Applicant has also clandestinely colluded with strangers to defeat execution by attachment of his property and the Respondent's only option is committal of the Applicant to civil jail.
5. The Respondent also argues that the Applicant has consistently refused to honour Notices to show cause and yet has a butchery which is still a going concern and in sound liquidity.
6. Mr. Kiogora Advocate for the Applicant argues that the court has discretion to issue a stay of execution on medical grounds and that such discretion should favour the Applicant.
7. Mr. Mwangi Advocate for the Respondent argues on the other hand that the Applicant was before the wrong court and should have canvassed his case for stay of execution in the court that ordered his arrest

and committal to civil jail. In any event that the delay in filing the instant Application is unexplained and yet it is inordinate since the Ruling under challenge was delivered on 16.8.2004. He urges this court to dismiss the Application as it is actuated by bad faith.

8. I have had occasion to peruse part of the record of the lower court. I note that the Applicant had time between 16.8.2004 and 23.5.2006 to pay the decretal sum by instalments of Ksh.15,000/= per month as directed by that court upon his Application dated 14.3.2005. He never paid that money although I note that he paid Ksh.5,000/- and Ksh.10,000/= earlier. I have seen that he was granted bond prior to 23.5.2006 to enable him pay the arrears of instalments as earlier ordered. On 23.5.2006 the learned magistrate commented as follows:-

“The court has since seen the reluctance by the J-D in liquidating this suit...I direct that this matter be mentioned after 3 weeks by which time all the outstanding instalments should have been cleared otherwise I do not find any reason at all why the J/D should not be committed to Civil Jail.”

9. Instead of complying with that order which was given on the application of the counsel for the Applicant, the Applicant dashed to this court to seek orders that he should not be committed to civil jail because he is sick and yet impecunious. His conduct prior to the filing of the Application did not meet the favour of the trial court and neither does this court find his conduct amenable to the exercise of discretion in his favour. He who comes to equity must come with clean hands. The Applicant cannot for reasons of that conduct be seen to be a party with clean hands and equity must frown upon his conduct.

10. I note also that Order XXI Rule 35(1) has been invoked by the Applicant. That Rule provides as follows:-

“Where a judgment-debtor appears before the court in obedience to a notice issued under rule 32, or is brought before the court after being arrested in execution of a decree for the payment of money, and it appears to the court that the judgment-debtor is unable, from poverty or other sufficient cause, to pay the amount of the decree, or if that amount is payable by instalments, the court may, upon such terms as it thinks fit make an order disallowing the application for his arrest and detention or directing his release, as the case may be.”

11. Order XXI Rule 35(1) cannot apply in the circumstances of this case. This court did not issue any notice under Rule 32 which is the Rule granting a court **“discretionary power to permit a judgment debtor to show cause against detention in Prison.”** That notice was issued by the learned Senior Resident Magistrate who exercised discretion as aforesaid and instead of ordering the committal of the Applicant to prison, gave him time to pay the decretal sum as he had sought. Order XXI Rule 35(1) would then have been the Rule to be invoked to that court and that court would make the necessary orders. This court cannot in my view interfere at this stage with the exercise of discretion by the lower court in the manner that the Applicant is now asking it. He may appeal to the High Court against the decision made under Rule 32 but I cannot see how he can avoid that court and dash to this court for exercise of discretion properly exercised by the Senior Resident Magistrate. It is instructive as I said earlier that although the discretion was in favour of the Applicant, he failed to abide by that decision made in his favour.

12. The Applicant has also invoked Order XLI Rule 4(1) of the Civil Procedure Rules to seek stay of execution pending appeal. I have seen the Memorandum of Appeal filed on 19.8.2004. It seeks that the Ruling of 12.8.2004 by Hon. J. Omburah Esq, learned Senior Resident Magistrate declining to set aside the ex parte judgment in CMCC 874/2003 be overturned. Pending hearing of that Appeal the Applicant wants his arrest and committal to civil jail stayed. I have set out the reasons thereby as being ill health and impecuniosity. Those are arguable grounds if the Applicant had properly invoked Order XXI Rules 32 and 35 but I have said that he has not. To come properly within Order XLI Rule 4, the Applicant ought to have complied with Order XLI Rule 4(2) which states as follows:-

“No order for stay of execution shall be made under subrule (1) unless

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant”.

13. The Appeal herein was filed on 19.8.2004. It may be true that the Applicant was thereafter engaged in Applications before the lower court but I have said like the lower court that in that period, he engaged in cat and mouse games calculated to frustrate recovery of the decretal sum. I have said elsewhere above why I think so.

14. The delay in binging the instant Application cannot be wished away by falling back on the matters before the lower court as an excuse.

15. The Applicant has previously committed himself to paying the decretal sum by instalments but failed to do so. He now comes to this court and offers no security for the due performance of such decree or order, as may ultimately be binding on him. The condition for security can be ordered by court but the Applicant says he has nothing to offer but still invokes Order XLI Rule 4 in which security is required. He cannot have it both ways.

16. Granted, there may be loss if the Applicant is committed to Civil Jail. I have seen medical documents showing that he may be of ill health. However, viewed in the totality of the case since inception and particularly the Applicant’s conduct in deliberately refusing to meet his obligations under the decree and for two(2) years taking the subordinate court and the Respondent in circles, I see no reason why this court should, for reasons of ill health alone, allow the Applicant another chance to play cat and mouse games.

17. I see no good reason therefore to grant the prayers sought in the Application dated 7.6.2006 and will instead dismiss that application with costs to the Respondent.

18. Orders accordingly.

DATED SIGNED, AND DELIVERED AT MERU THIS 2ND DAY OF AUGUST 2006

I. LENAOLA,

JUDGE

In the presence of:

Mr. Kiogora Advocate for the Applicant

Mr. Mithega Advocate for the Respondent

I. LENAOLA,

JUDGE