



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO. 137 OF 1998

NATIONAL BANK (K) LIMITED PLAINTIFF/RESPONDENT

-VERSUS

JOSEPH KIBET CHEROP..... DEFENDANT/APPLICANT

RULING

Before me is an application by way of Notice of Motion dated 1st April 2005 purported to be brought under section 43(3) (b), section 3 and 3A of the Civil Procedure Act (Cap.21). It seeks for the following orders: -

- 1. The application be certified as urgent and service thereof is dispensed with in the first instance.**
- 2. The defendant be released from detention in civil jail on the ground of serious illness.**
- 3. Costs to fall in the cause.**

When the application came before me on 4th April 2005 I certified it as urgent. I however, ordered that the matter be heard inter-partes. Therefore when the application came up for hearing interpartes, both parties were represented by counsel.

At the hearing of the application, Mr. Ng'eno for the applicant submitted that they were seeking that the applicant be released from civil jail on account of ill health. He relied on the grounds of the application and supporting affidavit sworn by the applicant on 1st April 2005. He submitted that the applicant suffers from peptic ulcers and hypertension and that his continued incarceration will make his health condition deteriorate further. That committal of a person in civil jail was meant to do justice and, if a person committed to civil jail establishes in court that his health is deteriorating, then his remaining in custody will not be serving the interests of justice. He submitted that the letters annexed to the supporting affidavit from Moi teaching & Referral hospital bring out the poor health condition of the applicant. Though the respondent has challenged those letters in the replying affidavit sworn by Isaac Simiyu Kuloba on 14th April 2005, he has not filed letters from a doctor to challenge the letters from Moi Teaching and Referral Hospital.

Therefore, on the balance of probabilities, the applicant has established that he has been suffering serious medical illnesses, to justify the court using its powers under section 43 of the Civil Procedure Act. (Cap.21) to discharge him from civil jail.

Mr. Kuloba for the respondent opposed the application. He submitted that he could not cross-examine the writers of the letters from Moi Teaching and Referral Hospital as they did not swear affidavits. Under Order 18 rule 2 of the Civil Procedure Rules only deponents of affidavits can be cross-examined in court on the contents of their affidavits.

He also submitted that the respondent is not under obligation to bring further medical evidence, as the writers of the documents from Moi Teaching and Referral Hospital were not medical doctors but administrators and therefore did not provide medical evidence requiring rebuttal. There were also no medical charts to show the treatment of the applicant for the last 3 years. He submitted that the letters from the administrators of Moi Teaching and Referral Hospital were written with prejudicial minds. One of the letters was dated 2003, when the applicant was not yet in prison. The other letter which was written in 2005, repeats the same words of the letter of 2003. The wording of the two letters show that the applicant came to court with unclean hands. He further submitted that when the applicant appeared before the Deputy Registrar, he did not complain of ill health. He only proposed to pay installments of Kshs.10,000/=, which he has not honoured. Further, though paragraph 8 of the supporting affidavit disputes the regularity of the judgement, that judgement was entered long time ago and no appeal has been preferred. That allegation on the regularity of the judgement therefore has no merit.

This is an application for release of the applicant from civil jail on health grounds.

Section 43(3) of the Civil Procedure Act (Cap.21) provides as follows: -

“43(3) Where a judgment debtor has been committed to prison, he may be released therefrom –

(a) by the superintendent of the prison in which he is confined on the grounds of the existence of any infectious or contagious disease; or

(b) by the committing court or the High Court on the ground of his suffering from any serious illness.”

From the above provisions of the law, a person who has been committed to civil jail as a judgement debtor can be released by the superintendent of the prison without any order of the court on the existence of any infectious or contagious disease. He can also be released by the court which committed him or the High Court, on the ground of his suffering from any serious illness.

The applicant herein was confined to prison as a judgement debtor by the Deputy Registrar on behalf of the High Court on 17th March 2005. So he was confined in prison by this court. He has applied to this court to be released from prison because he suffers from hypertension and peptic ulcers. He was to attend Moi Teaching and Referral Hospital for an operation.

From the submissions made by counsel before me in court, at the time of arguing the application, the prison authorities had already allowed the applicant to be admitted to Moi Teaching and Referral Hospital for the operation.

I have perused the letters annexed to the supporting affidavit. The letters on the illness of the applicant that were annexed to the supporting affidavit as “JKC1” and “JKC2” were signed by someone by the name Joseph K. Arusei, who does not indicate that he is a medical doctor or that he medically examined the applicant and diagnosed the illness suffered by the applicant. One of the letters “JKC1” is dated 20th May 2003 before the applicant was committed to civil jail. The other letter “JKC2” is dated 22nd March 2005.

The letter “JKC1” states that his further confinement will compromise his frail health, which has already deteriorated. It was dated 20th May 2003. In actual fact the applicant was not in confinement at that time in May 2003. The second letter “JKC2” states that his further confinement will compromise his fail health which has already deteriorated

and that the applicant has been booked for an operation on 11th April 2005. As I have stated above, at the hearing of the application, the applicant had already been allowed by the prison authorities to Moi Teaching and Referral Hospital for an operation.

This being an application for release from civil jail on account of ill health, it is for the applicant to persuade this court that he is suffering from a serious illness that will warrant this court exercising its discretion to release him from prison. In my view, the applicant has not done so. He has not produced any medical report that describes the nature of his illness and the unsuitability of his continued stay in prison as a result of that illness. The two letters annexed to the supporting affidavit as “JKC1” and “JKC2” are neither medical reports as they were not signed by a doctor who examined him and diagnosed the nature of illness, nor do they show the seriousness of the illnesses and the unsuitability of the applicant continuing to stay in prison, due to that ill health. The applicant has in any event already been allowed to be admitted to Moi Teaching and Referral Hospital for an operation by prison authorities. The applicant has therefore not satisfied the requirements of section 43 (3) (b) of the Civil Procedure Act (Cap.21) that he is suffering from a serious illness justifying his being released by this court from prison.

For the above reasons, I dismiss this application with costs to the respondent.

Dated and Delivered at Eldoret this 4th Day of May 2005

George

Dulu

Ag.

Judge