



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
COMMERCIAL DIVISION – MILIMANI**

**CIVIL CASE 374 OF 1998**

**FIDELITY COMMERCIAL BANK LTD ..... PLAINTIFF**

**VERSUS**

**TAJDIN HUSSEIN NAZARALI ..... DEFENDANT**

**JAYENDRA R. SAMPAT ..... 3RD PARTY**

**JUDGMENT**

I have before me an appeal by Fidelity commercial Bank Limited the Plaintiff in the action, from the Ruling of the Senior Principal Magistrate in his capacity as a Deputy Registrar whereby the Learned Deputy Registrar declined to commit the Defendant/Respondent to civil jail as sought by the Plaintiff/Appellant. The Defendant/Respondent had appeared before the Deputy Registrar under a Warrant of Arrest in execution of a decree issued against him for Kshs 8,939,548.75 inclusive of interest.

The proceedings before the Deputy Registrar took place on 11th January 2005. Counsel for the Plaintiff/decree holder was Mr. Essa and the Defendant/judgment debtor was represented by Mr. Mutuli. For the judgment debtor it was argued that he had obtained a judgment against a third party and to put him in civil jail would defeat the purpose of the judgment against the third party. Counsel for the Plaintiff decree holder on his part argued that the Defendant had had ample time to pay the decretal amount and had not even made any proposal on how to pay.

The Deputy Registrar's ruling was delivered on 1st February, 2005. He said: **“Judgment debtor has no obligation to pay. Judgment debtor should expedite payment from 3rd party. Judgment debtor is therefore released.”**

It is against that ruling that the decree holder appealed. The following were the grounds of appeal set up by the Plaintiff/appellant.

1. That the Deputy Registrar erred in Law and in fact in finding that the Defendant was not liable to satisfy the decretal sum pursuant to the judgment against the Third Party of 20th July 2004. 2. That the Deputy Registrar erred in Law in discharging the Defendant/Judgment debtor having been arrested pursuant to the order of the Hon. Mrs Ongeri of 1st October 2004 which order had not been set aside.

3. That the Deputy Registrar erred in law in failing to appreciate that the third party proceedings only entitled the Defendant to get indemnity from the third party after satisfying the Decretal sum and did not shift the burden to the third party.

4. That in discharging the Defendant and failing to commit him to civil jail the Deputy

Registrar completely misdirected himself on the law applicable to the facts of the case thus arriving at a wrong decision.

It should be pointed out that the Deputy Registrar was dealing with the Application under the provisions of Order XLVIII R.5(1)(b) of the Civil Procedure Rules. The Defendant/Respondent appears to have been arrested and appeared before the Deputy Registrar pursuant to a warrant of arrest in execution of the decree in the suit and the proceedings were conducted under the provisions of Order XXI Rule 35(1). Under this rule the Deputy Registrar had a discretion. The Law is now settled that an appellate court will not interfere with the trial Court's exercise of such a discretion unless it is shown that the trial court erred in principle or that its decision was plainly wrong. As I understood Counsel for the Plaintiff/Appellant, the thrust of his submissions before me were that, the Deputy Registrar erred in Law in finding that the judgment debtor had no obligation to pay the decretal sum. The Plaintiff/Appellants 3rd and 4th grounds of Appeal are both related to the said ground and Counsel indeed argued the three grounds as one and abandoned ground 2.

Counsel for the Defendant/Respondent for his part submitted that there was no error of principle and the Deputy Registrar's exercise of discretion could not be faulted.

Third Party proceedings are governed by Order 1 Rules 14, 15, 16, 17, 18, 19 and 22 of the Civil Procedure Rules. There is nothing in these rules to suggest that a successful Defendant against a Third Party has no obligation to pay a successful Plaintiff. In the case at hand the Plaintiff's suit against the Defendant/Respondent was tried independently of the third party proceedings. There was no order that the decree against the Defendant/Respondent be satisfied by the Third Party. Indeed no such order could be made in the circumstances of this case.

What was before the Deputy Registrar was not whether or not the Defendant/Respondent had any obligation to pay. That issue had already been decided by the Judgment in favour of the Plaintiff/Appellant against the Defendant/Respondent. The Deputy Registrar's jurisdiction was to be exercised under Order XX1 Rule 35 of the Civil Procedure Rules. He had only to decide whether or not in the circumstances of the Defendant/Respondent a committal order was appropriate. He did not do so. He instead in effect set aside the judgment against the Defendant/Respondent by finding that the Defendant/Respondent had no obligation to pay. He went beyond the realm of discretion. He clearly fell in grave error and his ruling must be set aside.

The upshot is that the appeal is allowed with costs to the Plaintiff/Appellant and the ruling of the Deputy Registrar made on 1st February 2005 is set aside.

The proceedings for committal of the Defendant/Respondent are reinstated. The same to be conducted by a different Deputy Registrar.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JULY 2005.

**F. AZANGALALA**

**JUDGE**

Read in the presence of :-

Kipkorir for the Plaintiff/Appellant.

**F. AZANGALALA**

**JUDGE**

**14.7.2005**