



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET**

Civil Case 193 of 2001

SHAMSHA SINGH.....PLAINTIFF

-VS-

1. JOHN KITUYU:.....1ST DEFENDANT

2. THE MIRROR:.....2ND DEFENDANT

3. ELD-INFORMATION:.....3RD DEFENDANT

RULING

Before me is an application dated 19th October,2005 brought by way of Notice of Motion by Douglas Ombati & Company Advocates on behalf of the applicant John Kituyi, the judgement debtor. It is purported to be brought under section 3 and 3A of the Civil Procedure Act (cap.21) and Order 50 of the Civil Procedure Rules. It seeks for three orders, one of which has already been spent as follows:-

1. (Spent)
2. That this Honourable court be pleased to order that the judgement debtor be released pending the final disposal of the application dated 12th July 2004 which seeks to set aside the consent order dated 2/3/2004.
3. That costs of this application be borne by the respondent.

The application was filed under certificate of urgency. It has grounds on its face and is supported by the affidavit sworn on 19th October 2005 by Douglas Ombati the advocate for the applicant.

The grounds of the application are that there was an application before this court dated 12th July 2004, which was pending final submissions. In the meantime, the applicant/judgement debtor was committed to civil jail on 18/10/2005 by the Deputy Registrar, thus rendering the pending application useless. That the Deputy Registrar was not vested with jurisdiction to make substantive orders such as the release of judgement debtors, hence the application before this court. The applicant was therefore seeking for an order of release from civil jail pending the ruling of the application dated 12/7/2004.

When the application first came before me on 19/10/2005, Mr. Kuloba was present in court. He stated that he was served with the application. As the application was under certificate of urgency, I gave a hearing date for 26/10/2005 at 2:30 pm, in the presence of Mr. Kuloba. However on the hearing date, Mr. Kuloba never appeared in court from 20:30pm until when the matter was mentioned for hearing that afternoon. Therefore I decided to proceed and hear the application, the absence of counsel for the

respondent notwithstanding.

Mr. Ombati for the applicant submitted that he was now seeking for prayers (2) and (3) as prayer (1) of the application had already been spent. He submitted that the application dated 12/7/2004 for setting aside of the consent order was still pending in court, as final submissions were yet to be made in that application. However in the meantime, the judgement debtor was arrested and put in civil jail. Though there was no court order for stay of execution, the application dated 12/7/2004 had very high chances of success. Therefore the judgement debtor was seeking for release from civil jail. He asked the court to exercise its discretion under section 3 and 3A of the Civil Procedure Act (cap.21) to release the judgement debtor in the interests of justice, pending the outcome of the application dated 12/7/2004.

I have considered the application and submissions of counsel for the applicant. In my view, this application raises two issues. The first issue is whether the Deputy Registrar has no jurisdiction to make orders such as the release of the judgment debtor from civil jail. The second issue is whether this application is competent and has merit.

On the first issue as to whether the Deputy Registrar has no jurisdiction to make substantive orders such as the release of a judgment debtor who has been put in civil jail, Counsel for the applicant has submitted that that was the reason why he made the application to a Judge, while the committal to civil jail was done by the Deputy Registrar. Counsel for the applicant has not cited any legal authority to me on this point.

In my view, the committal to civil jail of the applicant was done by the Deputy Registrar, acting as the representative of this court, in execution proceedings under order XXI Civil Procedure Rules. Under Order XXI the Deputy Registrar has jurisdiction to make orders for the execution of decrees of this court. Releasing the prisoner from civil jail or extending the period of the civil jail are, in my view, functions that the Deputy Registrar can actually perform, as those are still part of the execution functions which the Deputy Registrar can perform on behalf of this court. I find no substance for the assertion that the Deputy Registrar cannot release someone whom the same Deputy Registrar has committed to civil jail. In my view, the applicant could apply for a review of the committal orders before the Deputy Registrar. That however does not mean that this court has no jurisdiction to entertain this application. Therefore I will deal with the merits of the application, which leads me to the second issue.

The second issue is whether this application is competent and has merit.

The applicant seeks for the exercise of discretion of this court under section 3 and 3A of the Civil Procedure Act (cap.21). Section 3A of the Civil Procedure Act (cap.21) provides as follows:-

“3A Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent an abuse of the process of the court”.

The applicant herein has come to this court under section 3 as well as section 3A of the Civil Procedure Act and Order 50 of the Civil Procedure Rules. Order 50 of the Civil Procedure Rules merely provides that, if there is no specific provisions of law to the contrary, under the Rules, all applications are to be brought by way of motions. Section 3 of the Civil Procedure Act (cap 21) provides that, where there is no specific procedure provided for under the Civil Procedure Act and Rules, special procedures prescribed under other laws can be used.

The powers of committal of the applicant to civil jail exercised by the Deputy Registrar are provided for under Order XXI of Civil Procedure Rules. Under Order XLVIII Rule 5(2) Civil Procedure Rules, there are provisions for appeals from orders made under Order XXI Civil Procedure Rules except orders made under rule 28,57 and 79. The arrest and committal of the applicant/ judgement debtor herein was done in exercise of the powers of the Deputy Registrar under Order XXI Civil Procedure Rules. From the provisions of the law, the avenue open to the applicant was to appeal from the order of the Deputy Registrar to this court within 7 days as provided for under Order XLVIII Rule 5(3) Civil Procedure Rules. The appeal is to be made to a Judge in Chambers. Instead of appealing, he has come to this

court under a procedure which is not provided for, seeking the exercise of discretionary power of the court under section 3A of the Civil Procedure Act (cap.21).

It is trite that where there are specific provision of law to bring or challenge a certain matter or decision, the provisions of section 3A of the Civil Procedure Act, will not be applicable. In our present case, there is specific provision for appeal. The applicant should have used the appeal procedure to challenge the decision of the Deputy Registrar. The applicant should have followed the correct legal procedure to come to this court. His coming to this court using the wrong procedure renders his application incompetent and improperly before this Court (see case of Salome Namukasa =vs= Y. Bukya (1966) E.A. 433).

The applicant has not appealed nor has his Counsel stated before me why he did not appeal against the decision of the Deputy Registrar. He has come to this court seeking for exercise of discretionary orders on the basis that there are high probabilities of success of the pending application dated 12/7/2004. There was no stay of execution granted, and he does not say why he did not obtain stay of execution. The application dated 12/7/2004 is still before me for hearing, and I have not made up my mind one way or the other on its chances of success. I am not in a position to say at this stage if it has overwhelming chances of success.

In my view, the applicant has not followed the proper procedure provided by law for challenging the decision of the Deputy Registrar before this court through filing an appeal within 7 days. He has made the application seeking for the exercise of the discretionary powers of this court, when there are specific legal procedures for seeking relief from the decision of the Deputy Registrar. As there are specific procedures for challenging the decision of the Deputy Registrar through appeal, he should have used those procedures. His failure to do so means that his application is incompetent, lacks merit and cannot succeed.

For the above reasons, I dismiss the application. I make no order as to costs, as the respondent was not represented at the hearing of the application.

Dated at Eldoret this: 8Th day of November, 2005

George Dulu

AG. JUDGE

IN THE PRESENCE OF: