



**Emidan Enterprises Company Limited v Getaweru (Civil Suit
1 of 2019) [2023] KEHC 859 (KLR) (15 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 859 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL SUIT 1 OF 2019
LM NJUGUNA, J
FEBRUARY 15, 2023**

BETWEEN

EMIDAN ENTERPRISES COMPANY LIMITED PLAINTIFF

AND

KENNETH NYAGA GETAWERU DEFENDANT

RULING

1. The application for determination before the court is dated 06.10.2022 wherein the applicant seeks for orders that :
 - i. Spent.
 - ii. Spent.
 - iii. Spent.
 - iv. This court be pleased to set aside the warrants of arrest issued against the defendant/applicant on 19.09.2022 in the suit herein.
 - v. This court do issue an order allowing the defendant to pay the outstanding decretal amount of Kes. 33,039,617 in instalments of KEs. 50,000 as from December 2022 onwards until payment in full.
 - vi. Costs of the application be in the course.
2. The application is premised on the grounds on its face and further supported by the affidavit of the applicant.
3. The defendant/respondent vide a replying affidavit sworn on 21.10.2022 opposed the application herein citing reasons that it is clear from the plaint that the applicant was to refund the plaintiff a sum of Kes. 22,000,000.00 being the consideration for a sale that did not go through. That the parties



agreed that the defendant would pay Kes. 2,000,000.00 by 21.09.2018 and a further 20,000,000.00 in installments of 1,600,000.00 till payment in full. The plaintiff contended that the defendant failed to honour the agreement and by a ruling delivered on 10.12.2019, the defendant was ordered to pay the plaintiff amounts owed which he has not honoured to date. It was deposed that the proposal made by the defendant would mean that the outstanding amount of Kes. 33,000,000.00 would be paid in a span of 60 years and the interest continues to accrue. That the defendant has the ability to refund the amount owed and the application herein is meant to deny the plaintiff the fruits of its judgment. It was deposed that the defendant has not made the application herein in good faith and he has approached this court with unclean hands. The plaintiff was categorical that it would be agreeable to the payment of the decretal sum in reasonable installments but not as per the proposal made herein. It was its prayer that the application be dismissed with costs.

4. The defendant swore a further affidavit on 05.12.2022 wherein he reiterated the contents of mutual business agreement with the plaintiff which was aimed at putting up an infrastructure for a television station business known as Mbugi T.V.; which they indeed put up but the main contractor did not complete the construction in as much as he was paid in full. That his failure to honour the agreement was due to Covid – 19 pandemic and the ill health of his late father. He deposed that the tenders he is normally awarded as an advertisement agent, earns him only 10% of the total tender amount and that as previously stated, he is willing to cede 50% of the total commission earned towards the payment of the decretal sum and to be paying Kes. 50,000.00 per month. It was his case that he has started servicing some tenders and from the same, it is very likely that as at the beginning of the month of April, 2023, he might receive the 10 % commission for all the tenders serviced and the said amount shall be remitted to the plaintiff.
5. It was deposed that in accordance to his projections, he will from the month of May, 2023 review the payment upwards to Kes. 250,000.00 and commit to review the amount further upwards in the intervals of six months. He was categorical that as per his projection, he shall have completed the amount owed within a span of five years. He thus prayed that the application herein be allowed.
6. The court gave directions that the application be canvassed by way of written submissions and both parties complied with the directions.
7. The defendant/applicant submitted that the execution of a decree by way of committal to civil jail is provided for under section 38 of the *Civil Procedure Act* while the procedure is captured under Order 22 Rule 26 of the *Civil Procedure Rules*. Reliance was placed on the case of *Beatrice Wanjiku & Another Vs Attorney General & Another* [2012] eKLR. It was submitted that it is not in dispute that he was served with the NTSC dated 31.08.2022 on 15.09.2022, when he was required to attend court but the same was served four days to the hearing date. That he was willing to attend court but he was unwell and had strict instructions from his doctor who had put him on bed rest for a period of seven days and therefore he could not attend the said hearing of notice to show cause. It was contended that as a result, he did not have an opportunity to show cause why he should not be committed to civil jail. Further, it was his submission that he would have no reason to leave the local limits of this court's jurisdiction given that he has obtained tenders from Reco Ventures, KCA University and Zetech University. That from the said earnings, he will use the same to service the said debt.
8. He reiterated that he is willing to pay the decretal sum but the only challenge that he faces is that, he cannot pay the whole amount at once. That given an opportunity, he is willing to be paying Kes. 50,000.00 per month and also cede 50% of the entire commission he will receive from the advertising tenders. Further, that, he will review the monthly amounts of Kes. 50,000.00 upwards to Kes. 250,000.00 after a period of six months from the date of this application. In support of his case, the defendant relied on the cases of *MN. vs AM* [2021] eKLR and *Coetzee vs Government of South Africa*



[1995] 4 SA 631. He reiterated that he does not have the means to pay the decretal sum, however, he remains optimistic that as the economy opens, he will gradually service the debt. It was his prayer that the orders sought herein be allowed.

9. The plaintiff/respondent submitted that the application herein is devoid of any merit as the defendant was given a conditional stay of execution as per the court's ruling dated 27.05.2020. That the defendant has neither complied with the said order nor filed an appeal or review of the said judgment delivered on 10.12.2019; in essence, it was submitted that the orders therefore are still in force. Reliance was placed on section 38 of the Civil Procedure Act, Order 22 Rule 7 and Order 22 Rule 26 of the Civil Procedure Rules. That the execution herein was precipitated by the defendant's failure to settle the decretal sum arising from the judgment of this court. It was submitted that the defendant has not in any way attempted to explain the reason why he has failed to comply with the court order.
10. That the defendant admits that he is still in business and has secured contracts but has not explained why he has never made attempts to settle the decretal sum, yet, he is aware that the judgment is still in force. The plaintiff submitted that a court order in execution of a decree can only be set aside if it is proved that the process that led to the issuance of the order did not adhere to the legal procedure stipulated by the Civil Procedure Act and Civil Procedure Rules. Reliance on this proposition was placed on the case of Innocent G. Ondieki vs Julius Nakaya Kabole [2019] eKLR. That the application herein does not challenge any step of the execution process and therefore, this court was urged to dismiss the application herein with costs to the defendant as the same was an afterthought.
11. I have considered the application herein, the responses thereto, and the written submissions by the parties and I find that the sole issue for determination in this application is whether the orders sought herein should issue.
12. The right to commit a judgment-debtor to civil jail is provided for under Section 38 of the Civil Procedure Act which provides that:

‘Subject to such conditions and limitations as may be prescribed, the Court may, on application of decree holder, order execution of the decree –

 - a. by delivery of any property specifically decreed,
 - b. by attachment and sale, or by sale without attachment of any property,
 - c. by attachment of debts
 - d. by arrest and detention in prison of any person
 - e. by appointing a receiver or
 - f. in such other manner as the nature of relief granted may require.
13. Provided that where the decree is for payment of money, execution by detention in prison shall not be ordered unless after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the Court, for reasons to be recorded in writing is satisfied –
 - a. that the judgment-debtor with the object or effect of obstructing or delaying the execution of the decree –
 - (i) is likely to abscond or leave the local limits of the jurisdiction of the Court or



- (ii) has after the institution of the suit in which the decree was passed, dishonestly transferred, concealed or removed any part of his property, or committed any other act of bad faith in relation to his property.
 - (b) That the judgment-debtor has or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects, or has refused or neglected, to pay the same, but in calculating such means there shall be left out of account any property which by or under any law, or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree, or
 - (c) That the decree is for a sum of money which the judgment debtor was bound in a fiduciary capacity to account.’
14. In *Jedida Chepkoech Mutai (Suing as the legal representative of the Estate of Julius Kipkorir Mutai (Deceased) vs Cherono Beatrice* [2018] eKLR, it was stated that -

‘As I understand it, the general position in law is that the arrest contemplated under section 38 and 40 of the *Civil Procedure Act* is not unconstitutional. All that is required in proceeding under the two provisions is that there has to be strict adherence to the law. In *Jane Wangui Gachoka v Kenya Commercial Bank Limited* [2013] eKLR, the petitioner asked the court to declare sections 38(d) and 40 of the *Civil Procedure Act* and Order XX1 Rules 32, 33 of the Rules which allowed for commitment to civil jail for non-payment of a debt as archaic and unconstitutional. In declining to make the declaratory orders sought by the petitioner, the court stated as follows:

“[33] The deprivation of liberty sanctioned by sections 38 and 40 of the *Civil Procedure Act* is permissible and is not in violation of either *the Constitution* or ICCPR. The caveat, however, which has been emphasized in all the cases set out above is that before a person can be committed to civil jail for non-payment of a debt, there must be strict adherence to the procedures laid down in the *Civil Procedure Act* and Rules, which provide the due process safeguards essential to making limitation of the right to liberty permitted in this case acceptable in a free and democratic society.”

15. It should, however, be noted that the court can, at any time, review its orders based on the grounds advanced by the respondent, the defendant in this case. The main ground, as stated above, ought to be that the rules were not adhered to by the court and the parties thereof.
16. In the instant case, the defendant herein prays that the warrants of arrest issued against the defendant on 19/9/2022 be set aside. My perusal of the record reveals that the court after being moved by the plaintiff, was satisfied that the defendant herein was duly served and as a result allowed the prayers sought.
17. As stated above, the only viable ground of setting aside an order for committal to civil jail, is when the respondent challenges the mode or manner in which the said orders were issued. The defendant herein does not deny having knowledge of the said hearing of notice to show cause, his defence is that he was served with the same notice four days to the hearing date and further, he had strict instructions from his doctor to be on bed rest for a period of seven days i.e 15 September 2022 to 22nd September, 2022. I



have perused the affidavit of service sworn by Alfred Njeru, a process server and dated 15/9/2022 and of importance is paragraph 4 which I will quote verbatim:

“That on 15.09.2022 at about 4.30 p.m. while I was waiting at the said offices reception, Mr. Kenneth Nyaga Getaweru , Judgment debtor came in and introduced himself to the receptionist where I served him with the said NTSC document dated 31.08.2022. He accepted the NTSC retained a copy and endorsed by signing on the front page of the original copy. Returned herewith to this Honourable court duly served.”

18. In the case herein, the defendant signed the NTSC but instead indicated that the said date was not convenient to him and that he was on bed rest following instructions from his doctor. The court has perused the alleged letter from Kenyatta National Hospital and I note that in as much as it is indicated that the defendant was to be on bed rest for a period of seven days, the said letter in my view raises more doubts than answers; I say so for the reason that the letter does not even indicate the name of the doctor who attended the defendant, the time of the visit amongst others but that notwithstanding, it is my considered view that indeed execution by way of arrest and committal to prison deprives the debtor his liberty in that it is ideal that the debtor’s ability to pay must also be considered.[See Section 38 supra and Order 22 rule 31 (1)].
19. The above notwithstanding, since the inception of this case, the defendant in his pleadings has severally indicated that he was ready to pay the decretal amount only that he needed time. In the same breadth, he has intimated that he has started receiving work but of importance to note is the fact that he has never made any attempt to make even the least of the payment. It is noteworthy to say that since the delivery of the ruling dated 10.12.2019; the ruling by this court dated 27.05.2020; a temporary order of stay issued by this court on 18.10.2022, the defendant has never paid any amount of money to the plaintiff.
20. In the same breadth, since filing of the notice of appeal on 20.12.2019, the defendant has never prosecuted the said appeal and he did not comply with the order on conditional stay of execution. It is trite that he who comes to equity should do so with clean hands.
21. In *Solomon Muriithi Gitandu & Another Vs Jared Maingi Mburu* [2017] eKLR the court held that -
“In the case of Braeburn Limited Vs Gachoka and another (2007); it was held inter alia;
“A person is not liable to be committed to civil jail for inability to pay a debt but a dishonest and fraudulent debtor is liable to be punished by way of arrest and committal.”
22. As already noted, the Deputy Registrar considered the affidavit of service and found and held that the service was proper. It is my holding, therefore, that the service of the notice to show cause was proper and that the applicant has not offered any sufficient reason to warrant the setting aside of the orders made on 19.09.2021.
23. In the upshot, I find that the application before me is devoid of merit and the same is hereby dismissed with costs to the applicant.
24. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 15TH DAY OF FEBRUARY, 2023.

L. NJUGUNA

JUDGE

..... Plaintiff/Respondent



..... Defendant/Applicant

