



REPUBLIC OF KENYA



**KENYA LAW**  
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**Waore v Ombaso (Civil Appeal E143 of 2022)  
[2023] KEHC 1825 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1825 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CIVIL APPEAL E143 OF 2022  
RPV WENDOH, J  
MARCH 16, 2023**

**BETWEEN**

**DERICK OMONDI WAORE ..... APPLICANT**

**AND**

**FIDERIS NYANCHERA OMBASO ..... RESPONDENT**

**RULING**

1. This ruling is in respect to the applicnats Notice of Motion dated February 20, 2023. The applicant seeks
  - a. This court be pleased to order the immediate release of the judgement debtor/appellant from the Migori G.K. Prisons as this court had ordered for an extension of execution to committal civil jail on February 13, 2023 following his committal to the said prison by Hon SN Mutava (RM) on the said date.
  - b. That in the alternative, this court to order the Deputy Registrar Migori High Court to prepare release warrants for the said appellant immediately.
  - c. Costs be in the cause.
2. The grounds upon which the application is based, are found in its body and the supporting affidavit of Albert Ongoso Ayoma, Counsel for the applicant. He deponed that the applicant and the presumed judgement debtor is currently serving 6 months civil jail at Migori GK Prisons since February 13, 2023 by an order of Hon SN Mutava (RM); that he filed an application dated February 10, 2023 seeking extension of the stay orders following expiry of the prior orders by Hon Lady Justice TA Odera; that the orders were extended on February 13, 2023 till February 28, 2023; that the instant application is to seek release orders on behalf of the applicant pursuant to the court orders of February 13, 2023.



3. The application was opposed. The respondent filed a replying affidavit dated March 1, 2023. The respondent deposed that the application is an abuse of the court process and a waste of judicial time; that the basis upon which the appeal was initiated is that further court fees had not been paid but the further court fees was duly paid on February 1, 2023; that the appellant has since been committed to civil jail upon issue of committal orders on February 13, 2023 by Hon SN Mutava (RM); that the interim orders of stay pending appeal was obtained through concealment of material facts by the appellant's advocates and the same should be vacated.
5. None of the parties filed their written submissions. The applicant is asking this court to order for his immediate release from the Migori GK Prisons as the stay of execution of the committal orders were extended by this court on February 13, 2023 till February 28, 2023. In his response, the respondent has not advanced any reasons as to why the applicant should not be released from civil jail but he deposed on the merits of the appeal and stated that it has been overtaken by events since the only issue was under assessment of the filing fees which has since been regularized.
6. It is the correct position that on 13/2/2023, this court issued orders that the order committing the applicant to civil jail be extended till 28/2/2023. Looking at the genesis of the dispute before the trial court, it is centred around a sale agreement. The parties filed a consent dated 15/7/2022 whereby the applicant was to pay the respondent a total sum of Kshs. 1,440,000/= in three instalments of Kshs. 480,000/= beginning 30/9/2022. It is the failure of the applicant to pay the first instalment that led to the respondent commencing execution proceedings before the trial court which culminated in an order for committal to civil jail.
7. Section 38 (d) of the *Civil Procedure Act* allows the court upon application of the decree holder, to order execution of a decree by arrest and detention in prison of any person. The provision further gives the conditions which the court should satisfy itself, before committing a judgement debtor to civil jail. The unfortunate bit is that this court does not have the advantage of perusing the court record to have an opportunity to appreciate what transpired in the trial court.
8. This court is inclined to address the issues raised by the respondent in his replying affidavit. The appeal dated December 13, 2022 is against the ruling and order of Hon SN Mutava dated and delivered on December 7, 2022. The alleged ruling is not part of this court's record. Therefore, the appeal was filed against a non - existing ruling and order.
9. From the ruling of Hon SN Mutava (RM) dated January 18, 2023, this court takes cue that there was a notice of motion dated December 5, 2022 by the applicant seeking inter alia stay of execution of the notice to show cause dated October 3, 2022 for the committal of the applicant in civil jail and the stay of the proceedings emanating from the pleadings filed on February 14, 2022 and dated February 10, 2022 on the grounds that the court fees were not fully paid. This position has since been overtaken by events since the fees were assessed afresh and the respondent paid the further court fees on February 1, 2023. That being the case, what then is there to be determined before this court even without delving into the merits or demerits of the appeal?
10. Being guided again by the ruling of the trial court, the Magistrate declined to set aside the consent judgment entered between the parties on July 15, 2022 and adopted before her court on July 20, 2022. The Magistrate observed:-

' The parties entered into a consent wilfully and they filed it in court with appended signatures of both counsel representing the parties. How can the defendant distance himself



from the said consent and approach this court for stay orders?...the defendant has not given this court any reasonable or plausible issue to set aside the consent."

11. The trial Magistrate reasoned that the applicant had not shown any efforts in making payments as per the consent judgement of July 15, 2022 and he had asked the court to give him time to comply with the terms of the consent. The trial court found that the applicant was not acting in good faith and committed him to civil jail. The trial Magistrate further observed:-

' I find that if the defendant faulted the process at which he was committed to civil jail, he should have applied for review of the orders under Order 45 of the Civil Procedure Rules or choose to appeal the matter. This court shall therefore not alter the orders issued on October 5, 2022. The defendant's counsel is therefore advised to move the proper court to obtain requisite orders."

12. Looking at all the applications filed by the applicant in this court dated December 13, 2022, February 10, 2023 and February 20, 2023, none of the applications are challenging the fact that the applicant was unprocedurally committed to civil jail in execution of the consent judgement. What the applicant wants this court to do is simply release him from performing his duty which he wilfully entering into a consent. In addition, there is an agreement on record which the applicant acknowledged that he had a debt to the respondent in the amount of Kshs 1,440,000/= which he sought to pay and in default, the respondent would take ownership of Land Title No Kamagambo/Kabuoro/9064.

13. What then would be the benefit of aggrieved persons coming to court to seek redress only for the same courts to aid the wrong doers? On page 8 of the ruling, the Learned Magistrate held:-

' I find that the defendant is being callous and full of mischief. The defendant is trying to deny the plaintiff the fruits of their judgement. From the contract on record, it is quite clear that the defendant was to sell a parcel of land to the plaintiff. The plaintiff paid some monies in consideration but the transaction was not completed. The defendant now has the monies and the property. He appears to be deceptive and conniving and is looking for ways to ensure that he does not settle the plaintiff by seeking to disown the consent."

14. The applicant knows very well that he needs to pay some substantial amount of money to the respondent but he is deliberately refusing to do the same. The trial court observed as much when it held:-

' The suit was instituted on February 14, 2022 after the defendant failed to pay the monies. A consent was entered into on July 15, 2022 to make payment in three instalments and the instalments were to be made on 30<sup>th</sup> of every month to commence in September 2022 to January 2023. The defendant did not make any payments and when he appeared before the court his defence was that he was unwell and needed more time to comply with the payments. The defendant did not demonstrate to this court that he was poor, he demonstrated that he was not willing to pay the plaintiff. He did not furnish any proof before court of his illness and/or admission to hospital and this court found that he was not acting in good faith and committed him to civil jail..."

15. Articles 28 and 29 of the Constitution provides for the fundamental rights on the right to liberty and freedom of every individual. However, it is not a non - derogable right under Article 25. When a person is committed to civil jail, it is at the instance of a private individual but not the state. As observed, the applicant is not challenging the process through which he was committed to civil jail and the consent



judgement which in any case, he challenged and the decision was rendered by the trial Magistrate in her ruling of January 18, 2023. The grounds upon which the applicant's appeal is based, have been overtaken by events.

16. From the foregone discourse, it is clear that the applicant simply wants to go scot free. He is evasive and has not suggested to this court on the steps he intends to make in settling any amount of the consent judgement sum. The trial court observed that the applicant has the land which the money was advanced to him for the sale of the property but he refused to give possession to the respondent. The applicant wants to unjustly enrich himself.
17. Section 42 of the [Civil Procedure Act](#) which provides as hereunder:-
- (1) Every person detained in prison in execution of a decree shall be so detained—
- (a) where the decree is for the payment of a sum of money exceeding one hundred shillings, for a period not exceeding six months; and
- (b) in any other case, for a period not exceeding six weeks:
- Provided that he shall be released from such detention before the expiration of the said period of six months or six weeks, as the case may be—
- (i) on the amount mentioned in the warrant for his detention being paid to the officer in charge of the prison; or
- (ii) on the decree against him being otherwise fully satisfied, if the court so orders; or
- (iii) on the request of the person on whose application he has been so detained, if the court so orders; or
- (iv) on the omission of the person, on whose application he has been so detained, to pay subsistence allowance.
- (2) A judgment-debtor released from detention under this section shall not merely by reason of his release be discharged from his debt, but he shall not be liable to be rearrested under the decree in execution of which he was detained in prison.
18. Whereas committal to civil jail of a judgement debtor is a means sought to enforce compliance, it is not an end in itself. Kuloba, J in *Mbugua v Mbugua* (1992) KLR 448 expressed himself as follows:-
- ' The committal to civil jail will be an end in itself, serving no useful purpose. It will be for vindictiveness only; but civil justice is placatory, not retaliatory or revengeful. As Courts administering civil justice we do not sit here unleashing reprisals of vengeance to satisfy egoistic vendetta veneered with some court orders. Committal to civil jail is redressal, not merely punitive. In this case if the Court sends the defendant to jail for six months, the wrong will not have been redressed; her sojourn in jail will be punishment to her, but it will not enforce the order said to have been disobeyed."
19. Section 42 (2) of the [Civil Procedure Act](#) provides that even if the judgement debtor is released from detention, it does not discharge him from his debt or liability. Bearing the above in mind, this court will do its best to balance the competing interest of the parties herein. It cannot blindly order for the release of the applicant without any assurance that the respondent will only be left with a paper judgement.



20. The applicant failed to obey court orders. He cannot therefore run to the same court with unclean hands to seek audience in the face of disobedience of court orders.
21. I find that the application dated February 20, 2023 is devoid of merit and the following orders do issue:-
1. A release order is hereby issued directing the Officer Commanding Station (OCS) Migori GK Prisons to release the applicant on condition that he first facilitates payment to the respondent a sum of Kenya Shillings Four Hundred and Eighty Thousand (Kshs 480,000/=) to defray part of the debt owed to the respondent as per the terms of the consent judgement dated July 15, 2022.
  2. In default, the applicant should remain in prison for the prescribed term.
  3. Costs of this application awarded to the respondent.
  4. Mention before Deputy Registrar on May 22, 2023.

**DATED, DELIVERED AND SIGNED AT MIGORI THIS 16<sup>TH</sup> DAY OF MARCH, 2023**

**R. WENDOH**

**JUDGE**

Ruling delivered in the presence of:-

No appearance for the Applicant

No appearance for the Respondent

Nyauke Court Assistant

