



REPUBLIC OF KENYA



**KENYA LAW**

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**Too v Cheruiyot (Civil Appeal 26 of 2011) [2023] KEHC 18801 (KLR) (21 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18801 (KLR)

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

**CIVIL APPEAL 26 OF 2011**

**JK SERGON, J**

**JUNE 21, 2023**

**BETWEEN**

**DAVID KIPKURUI TOO ..... APPELLANT**

**AND**

**JOSEPH KIPLANGAT CHERUIYOT ..... RESPONDENT**

**RULING**

1. The Applicant herein filed the Notice of Motion dated May 25, 2023 under Certificate of Urgency supported by the grounds laid out on its face and the facts stated in the affidavit sworn by the Applicant seeking for the following orders:
  1. Spent.
  2. That the orders dated May 24, 2023 committing the applicant to Civil Jail for 30 days be reviewed and set aside.
  3. That the Applicant be released from prison forthwith.
  4. That any other order may be granted as deemed fit.
2. The Applicant in his affidavit avers that he was committed to 30 days civil jail by an order dated May 24, 2023, that the said orders should be reviewed and/or set aside in the interest of justice since he is diabetic and gets administered on insulin injection dosage in the morning and evening with a special diet of food as prescribed by the doctor hence the prison condition is not conducive.
3. The applicant further avers that he is the head of a public primary school and the running of the said school will be affected due to continued imprisonment.
4. The applicant acknowledged that he is indebted to the respondent to the tune of Kshs 808, 871/= as per the Notice to Show Cause that he received, that though he undertakes to pay the decretal sum, he



is unable to pay the said sum in full at once hence he has negotiated with the parties through emissaries to pay Kshs 200,000/= but their advocates insist that the sum should be paid in full.

5. The Applicant avers that he is able to pay the first instalment of Kshs 80,000/= and a monthly payment of Kshs 5,000/= till full payment, that his only source of income is salary as a primary school teacher with a salary net worth of Kshs 43,841/= and that he is currently having huge financial obligations and cannot be able to pay the full decretal amount.
6. To oppose the said motion, the Respondents put in a Replying Affidavit dated June 2, 2023 sworn by David Kipkirui Too on his own behalf and on behalf of the 2<sup>nd</sup> Appellant/Respondent herein Paul Kipsang Tonui who substituted Richard Rono (deceased).
7. The Respondents aver that the application has been made with unclean hands, in bad faith and a complete abuse of court process because the applicant herein who is the judgement-debtor wants to deny the respondents substantial justice as he wants the court to reduce the decretal sum of Kshs 808,871/= to Kshs 200,000/= a position the law does not espouse or contemplate and that their party and party bill of costs where the decretal sum herein emanated from was properly taxed as established by the court in its earlier rulings with regards to several applications filed by the applicant/judgement-debtor herein.
8. The Respondents avers that even after the matter was referred to the Deputy Registrar who issued a Notice to Show Cause, the Applicant has not showed any reasonable mode of payment with regards to the said decretal sum.
9. The Respondents denied ever negotiating with the Applicant and agreeing with him that the decretal sum of Kshs 808, 871/= be reduced to Kshs 200,000/= and that the applicant made the same application before the Deputy Registrar and has been doing so since the year 2015 to deny the Respondents substantial justice hence the Application herein should be dismissed and that all the applications preceding the instant application have all be dismissed.
10. The Respondents further avers that the amount owed to them by the Applicant being Kshs 808,871/=, if the proposed payment plan as contained in the instant application is allowed, full payment of the said decretal sum will take 12 years which position amounts to denying the respondents substantial justice and the fruits of their judgement since the Applicant is not ready to settle the matter hence the applicant be ordered to pay the decretal amount herein because the said applicant has been taking the court in circles since the year 2015.
11. It is the Respondents averment that the Applicant is not a sickly person, that all what the applicant deponed in his supporting affidavit are manipulating issues meant to hoodwink the court and that the medical report brought before court are doctored to deny the respondents justice hence the instant application should be dismissed with costs.
12. The Respondents avers that the Applicant has several plots in Longisa town of Bomet, and parcel of land title no. Kericho/Kongotic/1202 bordering the said plots, the lower court matter having been dismissed, the applicant can be ordered to sell a plot to satisfy the decretal amount herein and that the applicant is a farmer having dairy cows and also deals with agricultural farming hence he is a person of means and should not lie to court that he doesn't have a source of income that can satisfy the decretal sum.
13. The Respondent avers that the Applicant filed a similar application dated January 27, 2021 acting in person and the said application was dismissed and the OCS Bomet Police Station was ordered to assist in providing security meant for the auctioneers to attach the already-proclaimed six (6) cows, two calves and household goods but the applicant hid the said properties at his home located in Kaptembwa



village in Bomet County and that the Applicant cannot in law qualify for consideration in issues to do with review or appeal because when his reference meant for the party and party bill of costs dated November 6, 2013 was dismissed on December 17, 2021, he had asked for 30 days stay of execution to file appeal, but he never did so, hence he should not be allowed to delay the instant matter any longer.

14. The instant motion was canvased by way of oral submissions in court on June 14, 2023.
15. Mr JK Rono learned counsel for the applicant submitted that the applicant is sick and has been attending Longisa hospital and that the said applicant is employed as a primary school head teacher.
16. He further submitted that the applicant had proposed to settle the debt by instalment which proposal was rejected, that he had proposed to pay the initial instalment of Kshs 80,000/= and Kshs 5,000/= per month.
17. Mr Weldon Ngetich, learned counsel for the Respondent submitted that the application is made in bad faith hence an abuse of the court process. He relied on the Respondents' Replying Affidavit and submitted that the Bill of Costs was not disputed.
18. Mr Rono learned Counsel for the Applicant submitted that the applicant has offered to pay Kshs 200,000/= using the amount given as security and proposed to pay the balance by monthly instalment of Kshs 15,000/= with effect from August 1, 2023.
19. Mr Ngetich learned counsel for the Respondent agreed that the Respondents can be paid Kshs 200,000/= upfront but the balance be settled by monthly instalment of Kshs 100,000/=.
20. I have considered the grounds laid out on the body of the motion; the facts deponed in the supporting affidavit, the Replying Affidavit and the rival oral submissions.
21. The orders being sought in the motion are two-fold:
22. First is the order seeking for review and setting aside of orders dated May 24, 2023 committing the applicant to Civil Jail for 30 days.
23. Section 80 of the [Civil Procedure Act](#) provides as follows:

' Any person who considers himself aggrieved—

- a) By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- b) By a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.'

24. Furthermore, Order 45 Rule 1 of the [Civil Procedure Rules](#) provides that:

' 1.

(1) Any person considering himself aggrieved—

- a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of



new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.'

25. In *Shanzu Investments Limited v Commissioner for Lands (Civil Appeal No 100 of 1993)* the Court of appeal upheld its earlier decision in *Wangechi Kimata & Another Vs Charan Singh (CA No 80 of 1985)* (unreported) where it was held: -

' Any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the Court by Section 80 of the *Civil Procedure Act*; and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous.'

26. The Applicant in his supporting affidavit stated that he is diabetic and gets administered on insulin injection dosage in the morning and evening with a special diet of food as prescribed by the doctor hence the prison condition is not conducive.
27. The Respondent on the other hand stated that the Applicant is not a sickly person, that all what the applicant deponed in his supporting affidavit are manipulating issues meant to hoodwink the court and that the medical report brought before court are doctored to deny the respondents justice hence the instant application should be dismissed with costs.
28. Upon my perusal of the annexures attached to the Application, I find that the Applicant has annexed a copy of the medical bill, sick sheet and special manual diet which clearly indicates that he is diabetic, the Respondents on the other hand have not filed any proof or documentation to show that the documents annexed by the Applicant are doctored.
29. Consequently, I find that as per the document annexed, the Applicant is indeed diabetic in a diet and the prison condition is not conducive and qualify as any sufficient reason for review.
30. Accordingly, the orders dated May 24, 2023 committing the applicant to Civil Jail for 30 days are set aside.
31. The second prayer is that the Applicant be released from prison forthwith.
32. The applicant acknowledged that he is indebted to the respondent to a tune of Kshs 808, 871/= as per the Notice to Show Cause that he received, that though he undertakes to pay the decretal sum, he is unable to pay the said sum in full at once hence he has negotiated with the parties through emissaries to pay Kshs 200,000/= but their advocates insist that the sum should be paid in full. The applicant further stated that he is the head of a primary school with a net salary of Kshs 43,841 which is his only source of salary therefore, he cannot afford to pay the entire decretal amount at once hence the proposed mode of payment as contained in the instant application.



33. The respondent on the other hand in denying ever negotiating with the Applicant stated that if the proposed payment plan as contained in the instant application is upheld, full payment of the said decretal sum will take 12 years which position amounts to denying the respondents substantial justice and that the Applicant has several plots in Longisa town of Bomet, and parcel of land title no. Kericho/Kongotic/1202 bordering the said plots, the lower court matter having been dismissed, the applicant can be ordered to sell a plot to satisfy the decretal amount herein.
34. The Respondent also stated that the applicant is a farmer having dairy cows and also deals with agricultural farming hence he is a person of means and should not lie to court that he doesn't have a source of income that can satisfy the decretal sum.
35. From the record I note that the Applicant has annexed the minutes of the said negotiation meeting and the Respondents have not disputed the authenticity of the said minutes. The Applicant has also annexed his pay slip that shows that his net salary is indeed Kshs 43, 841/=. The Respondents have not filed any documentations to show that the Applicant is the registered owner of the plots of land they claim the Applicant owns.
36. In his oral submission, the Applicant submitted that he has offered to pay Kshs 200,000/= using the amount given as security and proposed to pay the balance by monthly instalment of Kshs 15,000/= with effect from August 1, 2023.
37. The Respondent agreed that they can be paid the Kshs 200,000/= upfront but the balance be settled by monthly instalment of Kshs 100,000/=
38. Upon my study of the record and my consideration I find that a monthly instalment of Kshs 100,000/= as proposed by the Respondent is too high for the Applicant whose net salary is Kshs 43,841 and the proposal of Kshs 15,000/= monthly instalment is reasonable in the circumstances.
39. I also note that the parties have found themselves here because the Applicant has not been diligent and vigilant in settling the decretal sum and therefore the proposed Kshs 15,000/= monthly instalments should not be paid at the discretion and mercy of the Applicant rather the same should be attached from his salary.
40. It is also worth noting that the Applicant has spent a substantial amount of time in the civil jail and the application for immediate release has been overtaken by event
41. The upshot therefore is that the notice of motion dated May 25, 2023 is allowed thus giving rise to the following orders:
  - i. The Order committing the Respondent/Applicant namely:- Joseph Kiplangat Cheruiyot to civil Jail for 30 days dated May 24, 2023 is stayed and or suspended.
  - ii. The Respondent/Applicant is hereby allowed to settle the decretal sum by monthly instalments as follows:-
    - a. The sum of Kshs 200,000/= which is deposited in Court as security should be released and paid to the Appellant/Respondent as the initial deposit forthwith.
    - b. A sum of Kshs 15,000/= to be attached from the applicant's/Respondent's salary and be paid directly to the Appellant/Respondent as a monthly instalment to settle the balance of the decretal sum with effect from July 15, 2023 and on the 15th of each succeeding month until payment in full.
  - iii. In default of any one instalment, the stay on suspension order shall stand automatically discharged and the committal order reinstated.



iv. Each party to meet their own costs of the motion.

**DATED, SIGNED AND DELIVERED THIS 21ST DAY OF JUNE, 2023.**

.....

**J.K. SERGON**

**JUDGE**

**In the presence of:**

C/Assistant - Rutoh

Ngetich for the Appellant/Respondent

Kibet holding brief for J. K. Rono for the Respondent/Applicant

