



**Nasimiyu v Kalukhana (Civil Appeal E059 of 2021)
[2023] KEHC 20387 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20387 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E059 OF 2021
WM MUSYOKA, J
JULY 21, 2023**

BETWEEN

JOY NASIMIYU APPELLANT

AND

PAUL KALUKHANA RESPONDENT

(Being an appeal from the ruling and order of Hon. Ndururi, Senior Resident Magistrate, SRM, delivered on 28th October 2021, in Kakamega SPMCCC No. 140 of 2010)

JUDGMENT

1. The suit before the trial court was by the respondent against the appellant, and 2 others, for compensation, for malicious prosecution, allegedly arising from a report that the appellant had made to the police, which caused the prosecution of the respondent in Butali RMCCRC No 778 of 2003. It was alleged that the said report caused the police to arrest and detain the respondent, and later charge him with the offence of burglary and stealing, which prosecution terminated with him being acquitted on a no case to answer. The appellant resisted the suit by a defence, in which she denied liability. She averred that she did make a report to the police, and she had no control of whatever happened after that. A trial was conducted, and only the respondent testified. A judgment was delivered on October 17, 2019, finding and holding the appellant liable, and awarding damages at Kshs 500, 000.00.
2. The appeal herein does not arise from the judgment, but from what followed. A notice to show cause was extracted, for the appellant to show cause why she could not be committed to civil jail. She did not attend court, and warrants for her arrest were issued on February 16, 2021. Before her arrest could be effected, the parties agreed, by a consent adopted by the court, on February 18, 2021, that she would deposit Kshs 200, 000.00, by March 18, 2021. There was no compliance by March 18, 2021, and, on that date, an order was made for her committal to civil jail for 30 days. Later that day, she paid Kshs 175, 000.00, and it was agreed that the balance would be settled within 1 week, whereupon she was released. On April 29, 2021, the appellant was given another 30 days to settle the balance. A warrant



of arrest was issued on August 5, 2021, as the balance had not been settled by that date. An application then lodged by the other defendants, for the setting aside of the judgment, which was dismissed, vide a ruling delivered on September 30, 2021. On October 28, 2021, the court noted that the appellant had previously given undertakings to pay, which she had not honoured, but granted her to pay Kshs 100, 000.00 on that day, with the balance to be paid within 7 days. The record is vague on the point, but it would appear that the appellant was placed in custody on October 28, 2021, after she failed to pay the Kshs 100,000. 00 ordered that day.

3. The appellant was aggrieved, hence the appeal. She avers that she was committed to civil jail in a casual manner, and that the trial court had contravened the relevant law.
4. Directions were taken on June 15, 2022, for canvassing of the appeal by way of written submissions. Neither party has filed written submissions.
5. I have closely perused the trial record. It is clear, from that record, that the appellant did make several undertakings to settle the decretal amount, the respondent had conceded to requests for more time, and the court had exercised discretion to allow the appellant time to pay. Judgment was delivered on October 17, 2019. The initial warrant of arrest was made on February 16, 2021. Between then and October 28, 2021, when the impugned orders were made, the matter came up in court several times, and the appellant made several undertakings and promises to pay, before the court eventually put its foot down. It cannot be said that the trial court acted casually, or contrary to the law. There was a valid judgment against the appellant, which had not been appealed against, and in respect of which there was no stay order. The appellant had not displayed serious efforts to settle the same.
6. I am not persuaded that the appeal herein has any merit. I hereby dismiss it with costs. The orders made on November 15, 2021, herein, are hereby discharged. The file, in Kakamega SPMCCC No 140 of 2010, shall be returned to the relevant registry, for the execution proceedings to be finalized. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 21ST DAY OF JULY 2023

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Mr. Munyendo, instructed by Oscar Wachilonga & Company, Advocates for the appellant.

Mr. Mbaka, instructed by Omwando Mbaka & Company, Advocates for the respondent.

