Njogu v Kakai (Judicial Review E003 of 2023) [2023] KEHC 20161 (KLR) (14 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20161 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITUI

JUDICIAL REVIEW E003 OF 2023

RK LIMO, J

JULY 14, 2023

BETWEEN

NICK NJOGU ..... APPLICANT

AND

PATRICK MBUVI KAKAI ..... RESPONDENT

RULING

1. The applicant through a Notice of Motion dated July 11, 2023has approached thiscourt invoking the provisions of article 165(6) of the *Constitution* of Kenya, sections 1A, 1B,3A and 45 of the *Civil Procedure Act* for the following reliefs namely: -

    i. Spent

    ii. That this hon. court be pleased to review and set aside the committal order made on July 11, 2023made against the applicant for an initial period of 30 days.

    iii. That this court do make a declaration that committal to civil jail is an execution measure of last resort.

    iv. That this court do admit the proposal made by the applicant to pay a sum of 1 million shillings within 14 days and thereafter a quarterly payment of Kshs. 500,000 until payment is made in full.

    v. That cost be provided for.

2. This application is grounded on the following grounds;

    i. That the applicant has been committed to a civil jail for an outstanding amount of Kshs. 10,353,383 in Kitui CMCC No. 67 of 2019.

    ii. That the Lower Court issued a warrant of arrest on 27/6/2023 but the applicant presented himself on 11th July, 2023 before the trial court.

iii. That the applicant does not challenge the validity of the judgement and wishes to settle the debt but he is currently incapable.

iv. That he made a decent proposal to pay the decretal sum before the trial court and that unless he is released, he will suffer irreparable harm and will not get funds to pay.

v. That this Hon. Court should allow him to pay 1 million shillings within 14 days and the remaining sum be liquidated through a quarterly payment of Kshs. 500,000.

vi. That the applicant is interested to engage the respondent for a workable formula to settle the debt.

vii. That the respondent has not attempted other modes of execution and that committal to civil jail should be a measure of last resort.

3. The applicant has sworn an affidavit majorly reiterating the above grounds contending that the respondent will not suffer any prejudice.

4. In his oral submissions through learned Counsels M/s Mati and Mutunga, the applicant submits that committing one civil jail in execution of a decree is not fair. They ask this court to invoke its supervisory jurisdiction over the trial court under article 165(6) of the *Constitution* of Kenya.

5. They argue that the *Civil Procedure Act* as enacted does not have a procedure envisaged under article 165(6) of the *Constitution* of Kenya.

6. The applicants counsel while holding that they were not challenging the process of execution, they in the same vein. They fault the trial court for not complying with the provisions of section 38 of *Civil Procedure Act* in ordering the applicant to be committed to civil jail. Section 38 deals with the procedure of execution which includes committal to avoid jail.

7. They submit that they are not questioning the validity of the judgment and decree but faults the respondent for failing to prove that the applicant had means to satisfy the decree and that the procedure to commit one to civil jail should not be used as a punitive measure.

8. They contend that committing one to civil jail should be used as a last resort and cites the decision of *Rossana Pluda Moi v Philip Kipchirchir Moi* (Nbi HC Divorce Cause No 154 of 2008) to back up their contention.

9. They concede that the application before court is wrongly drawn as Judicial Review but attribute the same to some inadvertence stating that it should have been a miscellaneous application.

10. The respondent has opposed this application through grounds of opposition dated 12.7.2023 and oral submissions by learned counsel M/s Kinyua Musyoki Advocate.

11. The respondent avers that in the first place, this court lacks the jurisdiction as the matter is improperly before this court. He argues under the provisions of section 34 of the *Civil Procedure Act*, the Court seized with the jurisdiction to determine questions arising from execution or satisfying a decree is the court that passed the decree and not through a separate suit. The respondent contends that this proceeding brought to this court is a separate suit by the operations of section 2 of the *Civil Procedure Act* because they are civil proceedings commenced by the manner chosen by the applicant.

12. He contends that the application further violates the provisions of Order 21 Rules 12(2) of the *Civil Procedure Rules* because the applicant has lodged this application in this court instead of first going to the court that passed the decree.

13. The respondent submit that there is no receiving order barring execution adding that the attempt by the applicant to be adjudged bankrupt were futile after the court declined to issue a receiving order.

14. He argues that the order to commit the applicant to civil jail was a judicial one arrived after the trial court considered the Notice to Show Cause.

15. The respondent contends that the Order by the trial court can only be challenged by a review under Order 45 of Civil Procedure or section 80 of *Civil Procedure Act*. He also contends that applicant can appeal with leave as stipulated under section 75(g) of the *Civil Procedure Act* and Order 43 of the *Civil Procedure Rules*. He submits that an appeal against execution process is not automatic and that the applicant should have sought leave as stipulated.

16. The respondent submits that what is before this court is neither an appeal nor a review and that there is no provision in law that committal to civil jail should be a last resort.

17. This court has considered this application and the response made. The main issue for determination is whether the applicant has laid down sufficient basis to invoke supervisory jurisdiction of this court. This is because the application placed before is neither an appeal nor review though it is headed or cited as Judicial Review. The applicant states that it was an oversight and/or an oversight on his part to state that it was a Judicial Review.

18. The applicant has invoked the supervisory jurisdiction of this court under article 165(6) of the *Constitution* of Kenya.

    Article 165 (6) of the *Constitution* of Kenya provides as follows;

    "The High Court has supervisory jurisdiction over subordinate courts....."

19. The *Constitution* of Kenya 2010 does not specify the grounds upon which a party can invoke the supervisory jurisdiction. Article 165(7) provides as follows:-

    > "For the purpose of Clause (6), the High Court may call for the record of any proceedings before any subordinate court.....and may make any order or give any direction it considers appropriate to ensure "fair administration of justice." (Emphasis added)

20. The above provision means that a party having issues with the administration of justice in the Lower Court for example fears of miscarriage of justice due to say unfairness, right to a fair trial, malpractice of justice in any claim of malpractice can invoke the Supervisory jurisdiction of this court and this court is then seized, where the evidence of such claim are presented, with the supervisory jurisdiction to call for the Lower Court file or any matter in a tribunal and make such orders as just and fair in the circumstances.

21. The applicant herein, has not made out a case of any malpractice, fair trial or miscarriage of justice. In fact, there are no allegations to that fact. The applicant belatedly attempted to introduce the provisions of Section 38 that the trial court did not adhere to it but the application before me is completely silent on that question and pressed to clarify the inconsistency during the hearing of this application, he submitted that the process was valid.

22. The applicant seems to be aggrieved by the legality of committal to civil jail as an option of execution of a decree. He does not challenge the validity of the judgement or the legality/validity of the court decree that the respondent is executing.

23. The applicant states that, he does not challenge the execution process or any of the procedural aspects of the execution carried out by the applicant. He has not said that the process of execution was flawed.

His only complaint is that the committal to civil jail should have been a measure taken as a last resort. Though he had cited the provisions of section 38 of the *Civil Procedure Act*, he appears conflicted because he insists that he is not faulting the process.

24. The provisions of section 34(1) of the *Civil Procedure Act* provides;

> "All question arising between the parties to the suit in which the decree was passed, ...and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit."

25. The above provision means that, jurisdiction to determine how the decree should be satisfied i.e. Whether by payment by instalment or attachments etc., is placed on the court that passed the decree. If any party is aggrieved then subject to the provisions ofsection 75 of *Civil Procedure Act*, he can appeal. For avoidance of doubt because the issue of whether or not leave to appeal is needed was canvassed, an aggrieved party who has been jailed in execution of a decree requires leave to appeal against the order of committal as provided under section 75(I)(G) of the *Civil Procedure Act* and Order 43 (1) of the *Civil Procedure Rules.*

26. This Court has called for the lower court file Kitui CMCC No. 67 of 2019 pursuant to article 165(7) of the *Constitution* of Kenya and a perusal of the same indicates that the applicant had prior to the oral application made when he was called upon to show cause why he should not be committed to civil jail had previously made two formal applications to be allowed to pay the decretal amount by instalment. The 1st application was a Notice of Motion dated January 22, 2020 which was disallowed by court and the other dated September 28, 2021 which was also disallowed.

27. The applicant never attempted to challenge any of the said decision disallowing proposal to pay by instalments. He also never made any attempt to pay as proposed. In light of the above, he cannot fault the trial for not exercising discretion in his favour.

28. In the absence of an appeal against the dismissal of the applicant's proposals this court lacks the jurisdiction to interrogate whether the trial court in rejecting the proposal made by the applicant exercised its discretion judiciously.

    This court can only intervene with the discretion exercised by a trial court if the appellate jurisdiction is invoked or if there claims of illegality or procedural flaws.

29. The question of the legality or constitutionality of a committal to civil jail as an option in execution of a decree can only be canvassed through a Constitutional Petition particularly where the process of the execution itself like in this case is not being challenged. The original jurisdiction under article 165(3) of this court to interrogate the Constitutionality of Civil imprisonment as an option in execution of a decree passed in court has not been invoked here.

30. The applicant conceded during the hearing of this application that he could not pursue review under Order 45 of the *Civil Procedure Rules* because there was no discovery of a new matter. The door for review was therefore, not available given the fact that there was nothing new. The fact that he had made similar application in vain to be allowed to pay by instalment in 2 previous occasions shows that this application lacks in merit.

31. This court is unable to find any merit to the applicant's contention that the decision to commit him to civil jail was unconscionable or unfair because of his past conduct. He ought to have demonstrated to the trial court that he has made genuine attempts to satisfy the decree. He made an application in the year 2020 to be allowed to pay Kshs. 1.5 Million half yearly but there is no evidence of payment of the proposed amount. Again vide an application dated September 28, 2021he again asked to be allowed to

pay Kshs. 500,000 every six months. He has not shown that as a sign of good faith he has been paying Kshs. 500,000 half yearly or any other amount.

So when the applicant says that he is been subjected to a punitive process, it is difficult to see in light of the proceedings from the lower court where he is coming from.

This is because the decree holder is entitled to enjoy the fruits of his judgement which judgement is not being challenged and the law is on his side because all the due process was followed.

In the end, the application placed before me not only lacks in merit but also as observed above, is ill conceived and improperly placed before this court. The same is struck out with costs.

DATED, SIGNED AND DELIVERED AT KITUI THIS 14TH DAY OF JULY, 2023.

HON. JUSTICE R. K. LIMO

JUDGE