



REPUBLIC OF KENYA



KENYA LAW
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**Maundu v Mwaura (Civil Case 59 of 2011)
[2023] KEHC 23674 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23674 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 59 OF 2011
AN ONGERI, J
OCTOBER 19, 2023**

BETWEEN

PATRICK KYALO MAUNDU PLAINTIFF

AND

JOSEPH MWAURA DEFENDANT

RULING

1. The application coming for consideration in this ruling is the one dated 15/12/2022 brought under sections 1A, 1B, 3A, 3B, 63(e) Civil Procedure Act, Order 45, Order 22, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law seeking the following orders;
 - i. That this application be certified as urgent and same be dispensed with in the first instance.
 - ii. That the honourable court be pleased to stay any execution of warrants of arrest arising from default and or failure to pay the instalment amount ordered on 11/8/2022 pending the hearing and determination of this application.
 - iii. That the honourable court varies, reviews, rescinds and or vacates the order issued on 11/8/2022 directing payment of the decretal sum by instalment of ksh.300,000 and substitute with an order of payment of the decretal sum by installments of kshs.100,000 per month payable on before 15th day of every month commencing January 2022.
 - iv. That costs of this application be provided for.
2. The application is based on the ground that the applicant has made every effort to secure the decretal sum but his efforts are futile since he has other financial obligations to meet and further that he is ready to have the title encumbered to secure the decretal sum.



3. The application is supported by the affidavit sworn on 15/12/2022 in which he has deposed that upon hearing the plaintiff's notice to show cause on 11/8/2022 the court directed that he pays Kshs. 300,000 per month commencing September 2022. He is however unable to raise the said amount since he solely relies on rental income which is also used to pay running loans that he services on a monthly basis.
4. He indicated that in the event that he is unable to service those loans that are currently being paid at a cumulative instalment of Kshs. 400,000 per month his family home will be repossessed as he has used the home as security. He seeks the court to reconsider varying the amount payable from Kshs. 300,000 per month to Kshs. 100,000 which is reasonable taking into account the circumstances.
5. So far he has paid Kshs. 700,000 leaving a balance of Kshs. 500,000. He is apprehensive that, he risks being arrested anytime if the orders sought herein are not granted.
6. The plaintiff opposed the application vide his replying affidavit sworn on 7/2/2023 in which he has deposed that the applicant has not been making the payments of the instalment amounts ordered by the court. The court thereafter issued a warrant of arrest in execution of the decree issued against the applicant on 22/12/2022 for defaulting in paying the decretal amount of Kshs. 11,373,318.
7. He indicated that his daughter has special needs and required special attention, facilities and assistance requiring regular hospital visits to monitor her health and mental progress which requires a lot of finances. The applicant is quite capable of paying the Kshs. 300,000 as ordered without breaking a sweat and therefore it would be an injustice to claim that the amount payable be varied downwards. He indicated that it is the intention of the applicant to avoid settling the monthly payable amount and subsequently the judgement debt.
8. The applicant owns several properties which were not properly disclosed in his petition where he generates income of over Kshs. 1,500,000 per month. His intention of settling the decretal sum in instalments of Kshs. 100,000 is a mockery of justice and is intended to demonstrate spite and bad will against the judgment of the trial court.
9. The applicant in his supplementary affidavit dated 2/3/2023 deposed that as regards his properties he receives; Kshs 180,000 from the property in mathare north, the family home is charged to Family Bank, the properties in Mount Kenya are charged to Co-operative Bank and the residential building the respondent desposes is commercial business also services loans.
10. The applicant indicated that the rent collected is based on the occupancy and currently there is no house with 100% occupancy. There are tenants who have either defaulted or vacated leaving their personal items and thus impossible to recover some arrears.
11. The applicant indicated that he was arrested on 20/2/2022 and appeared before the deputy registrar where the court directed that he pays Kshs. 300,000 by the close of the business that day and a further Kshs. 300,000 be paid within 7 days which were paid.
12. The applicant further stated that he owes his property agent Kshs. 1,297,600 as of January 2023. He is entitled to receive monies from the property agent but it is usually less any expenses incurred, their management fees and loan repayment.
13. The parties filed written submissions as follows; the applicant submitted that this court can invoke its discretionary powers and vary, review and or vacate its orders issued on 11/8/2022 and substitute the same with an order of payment of the decretal sum by instalments of Kshs 100,000 per month payable on or before the 15th day of every month commencing January 2022. This is because the defendant cannot afford, at the moment, the amount ordered given his financial responsibilities as outlined in the documents.



14. The applicant argued that the courts discretion to commit a judgement debtor to civil jail ought to be exercised with caution, reservation and or judiciously and as a last resort more so where there is credible evidence that the judgement debtor's financial position cannot realistically meet the amount ordered by the court. That in such situation the court can use its powers and or discretion to review and or revise its previous orders to enable compliance by the judgement debtor. The applicant urged the court to consider the case of *Solomon Muriithi Gitandu & another v Jared Maingi Mburu* [2017] eKLR in which the court quoted with approval the case of *Braeburn Limited v Gachoka and another* (2007) where 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.”

15. the applicant argued that a judgment debtor in view of the provisions of section 38 of the *Procedure Act* and Order 22 rule 31 (1) of the *Civil Procedure Rules* will not and ought not be committed to prison on account of his inability to pay or on account of poverty. That this court has jurisdiction to make an order regarding settlement of a decree by way of installments by dint of Order 21 Rule 12 of the *Civil Procedure Rules* sub-Rule (2) provides thus:“ After passing of any such decree, the court may, on the Application of the judgment debtor and with the consent of the Decree Holder or without the consent of the decree holder for sufficient cause shown, order that the payment of the amount decreed be postponed or be made by installments on such terms as to the payment of interest, the attachment of the propertyor otherwise as it thinks fit....”

16. The applicant submitted that there is no evidence that some of the properties indicated by the respondent belong to the applicant. That equally the allegations that the defendant has income of over Kshs. 1,500,000 per month is unsubstantiated. The applicant therefore urged the court to find that the application is merited and allow the same.

17. The respondent alternatively submitted that Order 49 Rule 7(b) (x), the Registrar (read Deputy Registrar) is empowered to hear any application and to give directions under Order 22 except those with respect to Order 22 Rules 28 and 75. It is in the exercise of her powers under this rule that the Deputy Registrar ordered the defendant to be paying Kshs.300,000/= per month.

18. The respondent argued that by dint of Order 49 Rule 7(2) and (3), the decision made by the Deputy Registrar on 11/8/2022 can only be challenged through an appeal in the manner prescribed under Order 49 Rule 7(2) and (3). That no memorandum of appeal has been lodged against the decision of the DR of 11.8.2022 such that there is absolutely no basis to invoke the jurisdiction of this court.

19. The sole issue for determination is whether the applicant should be allowed to reduce the monthly repayments from 300,000 per month to 100,000 per month.

20. The amount of Kshs. 300,000 per month payable in this case is reasonable in the circumstances of this case which involves a minor who has special needs arising out of the injuries she sustained in the accident the subject of this suit.

21. The *Constitution* of Kenya and the *Children Act* admonish all individuals, government institutions, courts and tribunals to act in the best interest of the child in all matters involving minors.

22. Article 53(2) of the *Constitution* provides as follows:

“A child's best interests are of paramount importance in every matter concerning the child.”



23. The *Children Act* also provides at section 4(3) that:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

24. I find no reason to reduce the figure to Kshs. 100,000 per month for the outstanding balance. The said orders will jeopardize the welfare of the minor the subject of this case.

25. I dismiss the Application dated 15/12/2022 with costs to the Respondent and direct that the applicant continues paying Kshs.300,000 per month on the 15th of each month with effect from 15/11/2023 until payment in full.

26. In default execution to issue without reverting back to court.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 19TH DAY OF OCTOBER, 2023.

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A. N. ONGERI

JUDGE

