



**Wamukoya & 2 others v Mukabana & 6 others (Civil Appeal
E173 of 2024) [2024] KEHC 15894 (KLR) (16 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15894 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E173 OF 2024**

AC BETT, J

DECEMBER 16, 2024

BETWEEN

RODGERS MURUNGA WAMUKOYA 1ST APPLICANT

ROYAL HERITAGE (K) LTD 2ND APPLICANT

BUKURA PRIMARY SCHOOL 3RD APPLICANT

AND

**JUSTUS MUKABANA & 6 OTHERS & 6 OTHERS & 6 OTHERS & 6 OTHERS &
6 OTHERS & 6 OTHERS RESPONDENT**

RULING

1. Before me is an amended Notice of Motion brought pursuant to Sections 1A, 1B, 3, 3A, 43(2), 3(b) and 100 of the *Civil Procedure Act* and Order 8 rule 3, 5, 7, and 8 of the Civil Procedure Rules. The Applicant is mainly seeking for the orders that this Honourable court be pleased to release the Applicant from prison for nine months to enable him to seek specialized treatment unavailable in prison.
2. The grounds for the application are that the Applicant is suffering from Query underlying cad vascular condition (sic) and acute asthmatic attack and that his continued stay in prison is making him suffer since his application filed on 1st October 2024 was suffocated by the orders issued on 25th October 2024 extending his arrest.
3. In support of his application, the Applicant filed an amended Supporting Affidavit dated 28th October 2024. He stated that he notified the court of the urgency to stay committal orders through the doctor's sick report to enable him seek medication unavailable in prison while organizing to pay the debt, but the court continued to extend the committal orders without considering his application. He averred that he is suffering from Query underlying cad vascular condition and acute asthmatic attack and other



complications requiring a Cardiologist who is not available in prison. He also averred that he needs to undergo a colonoscopy procedure which is not available in the County hospital.

4. The Application was opposed by the Respondents vide a Replying Affidavit sworn by Justus Mukabana on 3rd November 2024. He deponed that the application is res judicata or sub-judice since the reliefs and orders sought therein raise the same issues raised by the 1st Applicant when the matter came up before the trial Magistrate for notice to show cause on 28th August 2024. He averred that nobody has denied the 1st Applicant the right to a fair hearing. He asserted that the Applicant is displaying some dishonesty and falsehoods in this court for when the case came up for hearing in the subordinate court, there was no order of stay barring the Respondents herein from proceeding to apply for further committal of the Applicant to civil jail for a further thirty (30) days. He stated that the Applicant had made an offer to deposit Kshs. 50,000/= by the end of September 2024 as partial payment towards settling the decretal sum and to offset the balance of the decretal sum by February 2025 but the offer was not acceptable since it was too low. He averred that the money owed to them is a debt of a liquidated sum that was to be paid by the judgement- debtors in the year 2018 after they delivered goods and services in the form of construction materials to the 3rd defendant's school but the judgement-debtors, having been paid by the county government of Kakamega, refused to pay what was due to them. He deponed that the Applicant has never deposited the Kshs. 50,000 he had proposed to pay. He stated that their advocate acts under their instructions and she cannot concede to any mode of payment of the decretal sum unless she was given consent by them. He asserted that the Applicant herein cannot blame the subordinate court or the Respondents for his failure to prosecute his application. He posited that should this court be inclined to grant orders of stay pending the hearing and outcome of the Applicant's appeal, then it should order him to deposit the decretal sum and costs in a joint interest earning bank account or otherwise the Applicant continues to serve his remaining period of three (3) months in civil jail until he makes a reasonable offer on how he wishes to pay the decretal sum.
5. Parties canvassed the application by way of oral submissions. The Applicant stated that his application is based on Section 43 (3)(b) of the *Civil Procedure Act*. He averred that he developed a serious medical issue and that he has received treatment from the prison health facility to no avail. He maintained that he has been advised to seek specialized treatment from a Cardiologist. He stated that he had already made proposals and that he is willing to settle the decree if he is given time. He averred that he does not contest the jail term, but he seeks to go for medical treatment. He asserted that he is an employee of the company and that the company needs to dispose of land to settle the debt.
6. Miss Change for the Respondents reiterated the contents of the Replying Affidavit. She averred that the debt was Kshs. 1,591,397 as at 29th August 2024. She submitted that there is interest and further costs, but no single cent has been paid. She advanced that it was not easy to arrest the Applicant since it took the police two (2) months to have him arrested. She stated that the debt goes back to the year 2018, but the Applicant has never made any attempt at payment since judgement was entered against him in 2022. She asserted that the Respondent has not made the application in good faith. She posited that the law has to protect the decree holder who has been denied justice.

Analysis

7. I have considered the oral submissions and affidavits filed by the parties. It is not in dispute that the Applicants owe the Respondent monies amounting to over Kshs. 1,591,397/=. The Respondents contend that the Applicant has been reluctant to settle the decretal sum, which is long overdue and for that reason, this application should be dismissed.



8. The Applicant avers that he is ailing, and he needs specialized treatment. I have perused the letter annexed to the Supporting Affidavit marked as RMW3. The letter reads that the Applicant has been experiencing continuous attacks while in custody which warrants continued nebulization and other management. That the Applicant has also developed chest complications with persistent pain and cough. That the Applicant has been having lower limb swelling which could mimic an underlying cardiovascular condition therefore requiring specialized review by a Consultant Cardiologist. That further management also reported chronic abdominal discomfort with bloating and melena stool which could indicate gut bleeding. The letter was signed by one Tony Nyadimo who was indicated to be the Clinical Officer in charge of the G.K. Prisons dispensary.
9. The Respondents in their Replying Affidavit did not controvert the Appellant's averments of ill health.
10. Section 43(3) of the Civil Procedure Act (Cap.21) provides as follows: -
- “ 43(3) Where a judgment debtor has been committed to prison, he may be released therefrom
-
- a. by the superintendent of the prison in which he is confined on the grounds of the existence of any infectious or contagious disease; or
 - b. by the committing court or the High Court on the ground of his suffering from any serious illness.”
11. I am satisfied that the Applicant has proved that he is indeed suffering from a serious illness thus he is entitled, under Section 43(3) of the Civil Procedure Act, to be released from civil jail in order to seek specialized treatment.
12. I have, however, considered the grievances of the Respondents. They have demonstrated the Applicant's unwillingness to pay the decretal sum despite the various commitments he made to offset the debt. The Respondents' advocate also submitted that the Applicant's arrest was hard to procure since it took the police 2 months to arrest him. This court, being guided by the principles of justice, should balance the interests of both parties in order to reach a just conclusion. In the premises, I make the following orders:-
- a. The order of committal of the Applicant to civil jail be and is hereby suspended subject to the Applicant abiding by the conditions set out hereafter.
 - b. The Applicant shall be released from civil jail upon executing a personal bond of Kshs. 1,500,000/- together with one surety of similar amount to enable him meet condition (c) below within 30 days from the date hereof and in default, a warrant of arrest to issue and the suspended order of committal to civil jail shall be reinstated unless the orders herein are varied by the court.
 - c. The Applicant shall pay to the Respondents a sum of Kshs. 200,000/- within 30 days from the date hereof.
 - d. The Respondents shall have the costs of this application.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 16TH DAY OF DECEMBER 2024.

A. C. BETT

JUDGE

In the presence of:



The Applicant in person
Ms. Change for the Respondents
Court Assistant: Polycap

