



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC APPLICATION NO. 174 OF 2017**

**W. G. WAMBUGU & CO. ADVOCATES..... APPLICANT**

**VERSUS**

**EMMA MUTHONI WAMBAA.....1<sup>ST</sup> RESPONDENT/APPLICANT**

**WINGFRED NGANGA REGERU.....2<sup>ND</sup> RESPONDENT/APPLICANT**

**CATHERINE NYANGOI REGERU..... 3<sup>RD</sup> RESPONDENT**

**ESTHER WANJA REGERU..... 4<sup>TH</sup> RESPONDENT**

**STEPHENE KAGECE..... 5<sup>TH</sup> RESPONDENT**

**VIGINIA WANJIRU ..... 6<sup>TH</sup> RESPONDENT**

**PAULINE WANJIKU..... 7<sup>TH</sup> RESPONDENT**

**DENIS WAMBAA REGERU..... 8<sup>TH</sup> RESPONDENT/APPLICANT**

**JOSEPH KAVATI REGERU.....9<sup>TH</sup> RESPONDENT/APPLICANT**

**DANSON MUCHUGIA REGERU.....10<sup>TH</sup> RESPONDENT/APPLICANT**

**PIUS WAITHAKA REGERU.....11<sup>TH</sup> RESPONDENT/APPLICANT**

**RULING**

1) The subject matter of this ruling is the motion dated 13<sup>th</sup> January 2021 taken out by the 1<sup>st</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> respondents/ applicants whereof they sought for the following orders *inter alia*:

***i. THAT this application be certified urgent.***

***ii. THAT the service of this application be dispensed with in the first instance owing to the urgency of the matter.***

***iii. THAT this honourable court be pleased to permit the applicants to be represented by Messers Kamau Kuria and Company Advocates in place of Messers Patrick Karanja Advocates;***

***iv. THAT this honourable court be pleased to enlarge the time from 10<sup>th</sup> September 2020 within which the applicants are to file their memorandum of appeal under Order 49 Rule 7 of the Civil Procedure Rules.***

***v. THAT if prayer no. 4 is granted, the intended memorandum annexed to the supporting affidavit herein be deemed to be filed and served on the applicant/respondent.***

***vi. THAT this honourable court be pleased to stay the execution of the order made herein on 23<sup>rd</sup> December 2020 that warrants of arrest do issue against the 1<sup>st</sup>, 8<sup>th</sup> to 11<sup>th</sup> respondents for their committal to jail until further orders of this honourable court.***

vii. *THAT this honourable court be pleased to stay the execution of the order made herein on 23<sup>rd</sup> December 2020 that warrants of arrest do issue against the 1<sup>st</sup>, 8<sup>th</sup> to 11<sup>th</sup> respondents for their committal to jail pending the hearing inter parties and determination of the application herein and thereafter pending the hearing and determination of the appeal herein.*

viii. *THAT if warrants of arrest of the 1<sup>st</sup>, 8<sup>th</sup> to 11<sup>th</sup> respondents for their committal have been issued, the same be lifted/suspended/stayed until further orders of this honourable court.*

ix. *THAT the costs be provided for.*

- 2) The aforesaid motion is supported by the affidavit of Emma Muthoni Wambaa. When served with the motion, Wanja Wambugu, the applicant/respondent herein filed a replying affidavit she swore to oppose the same.
- 3) I have considered the grounds stated on the face of the motion dated 13.1.2021 plus the facts deponed in the supporting and opposing affidavits together with the rival oral submissions. It is the submission of Dr. Kamau Kuria, learned advocate for the applicants that this court should issue an order for stay of execution of the order made on 23<sup>rd</sup> December 2020 that warrants of arrest do issue against the 1<sup>st</sup>, 8<sup>th</sup>, to 11<sup>th</sup> respondents for their committal to jail until further orders of this court.
- 4) This court has also been beseeched to lift, suspend and stay committal orders if they have been issued until further orders of this court.
- 5) The learned advocate pointed out that the execution proceedings contravened Order 22 rule 35 of the Civil Procedure Rules in that the judgment creditor did not discharge the evidential burden to prove that the judgment debtor has the means to pay the decretal sum or substantial part of it and that he or she has refused to settle the same.
- 6) It was pointed out that the applicants had informed the Deputy Registrar that they were unemployed and that they relied on rental proceeds from **Mombasa/Block XX/281/A Syndicate** building from which they each receive ksh.25,000/= per month. It is argued that the decree holder did not controvert the disposition that the applicants receive ksh.25,000/= per month or that they are unemployed.
- 7) The learned advocate further pointed out that the Deputy Registrar made a mistake when she ordered each applicant to pay a sum of kshs.250,000/=, a figure which was plucked from the air.
- 8) The applicants have also argued that under Section 38 of the Civil Procedure Act, no judgment debtor should be committed to jail where he is unable to satisfy a decree.
- 9) It is also argued that this court has supervisory jurisdiction over the subordinate court's proceedings, pursuant to the provision of Order 49 rule 7 of the Civil Procedure Act.
- 10) In response to the applicants' submissions, Mrs. Wambugu, learned advocate urged this court to dismiss the applicants' application for lacking in merit. The learned advocate argued that the applicants admitted owing to the advocate, the decretal sum and that they have approached this court with unclean hands.
- 11) It is pointed out that the ruling delivered by the Deputy Registrar on 10<sup>th</sup> September 2020 is not illegal since it took into account all relevant factors and that the court had not made final orders.
- 12) The learned advocate further stated that the current application was filed with the aim of obstructing her from enjoying the fruits of her judgment which has not appealed against. The advocate/ applicant averred that the applicants are persons of means but have intentionally failed to settle the decree.
- 13) Having considered the material placed before this court plus the rival submissions, it is not in dispute that on 10<sup>th</sup> September 2021 the Deputy Registrar of this court issued an order directing each applicant to pay a sum of ksh.250,000= to settle the decree.
- 14) It is also apparent that on 23<sup>rd</sup> December 2020, the Deputy Registrar ,proceeded to issue warrants of arrest and committal orders against the applicants after hearing both the advocate and the applicants. The learned Deputy Registrar noted that the applicants had not shown the willingness to settle the decretal sum.
- 15) A close perusal of the recorded proceedings before the Deputy Registrar show that the applicants had indicated that they each receive a monthly sum of ksh.25,000/= from rental income from **Mombasa/block XX/281/A** and that they have no other source of income.
- 16) The record also shows that the Decree Holder stated that she is aware that the applicants receive rental income from the Mombasa property.
- 17) A careful reading of order 22 rule 35 of the Civil Procedure Rules will reveal that in money decrees, the decree-holder may be required to apply for the judgment-debtor to be examined *inter alia* as to whether he/she has any and what property of means of satisfying the decree. Such an examination will assist the court determine the sort of execution that should follow.
- 18) In the instant case, the court issued a notice to show cause which eventually gave rise to the issuance of warrants of arrest and committal orders against the applicants.

19) The procedure in execution is clearly stated in Section 38 of the Civil Procedure Act. The relevant proviso which covers this case is Section 38 (d) and provision which provides **inter alia** as follows

**“38. Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree-holder, order execution of the decree-**

(a) .....

(b) .....

(c) .....

(d) **By arrest and detention in prison of any person**

(e) .....

(f) .....

**Provided that where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the court, for reasons to be recorded in writing, is satisfied-**

**a) That the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree-**

**i. is likely to abscond or leave the local limits of the jurisdiction of the court; or**

**ii. has after the institution of the suit in which the decree was passed, dishonestly transferred, concealed or removed any part of his property, or committed any other act of bad faith in relation to his property; or**

**b) That the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree, or some substantial part thereof, and refused or neglects, or has refused or neglected, to pay the same but in calculating such means here shall be left out of account any property which, by or under any law, or custom having the force of law, for the time being in force, is exempt from attachment in execution of the decree; or**

**c) That the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.**

20) It is apparent from the material placed before this court that the judgment-debtors had informed the Deputy Registrar of this court that they each receive a sum of ksh.25,000/= as rental income from a Mombasa/Block XX/281/A Syndicate Building and property that the amount is the only income they get in a month.

21) The advocate respondent merely stated that she is aware that the applicants receive rental income from a Mombasa property. She did not controvert the fact that the rental income was the only source of earning.

22) In other words, the respondent/advocate failed to discharge the burden of proof that the applicants have the means to pay the entire decretal sum or some substantial part thereof and have neglected to do so.

23) The learned Deputy Registrar, therefore erred when she went ahead to issue a warrant of arrest before satisfying herself that the decree-holder had discharged the burden of proof. For the above reason(s) the applicants are entitled to the order sought.

24) The execution process is a continuous process therefore the decree-holder is not barred from making a fresh application for warrants of arrest and committal if new evidence present themselves to the satisfaction of the court.

25) In the end, I find the motion dated 13<sup>th</sup> January 2021 to be meritorious. Consequently, the warrants of arrest and the committal order issued against the 1<sup>st</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> respondents are hereby set aside.

26) In the circumstances of this case, a fair order on costs is to order which I hereby do that each party meets its own costs.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 13TH DAY OF MAY, 2021.**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Applicant

..... for the Respondent