



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

IN THE MATTER OF HIGH COURT CIVIL CASE NO. 14 OF 2019

HUSSEIN MARSHALLO GURACHA.....APPLICANT/APPELLANT

VERSUS

MARHALLO GURACHA.....1ST RESPONDENT

FATUMA ABDI LIBA.....2ND RESPONDENT

RULING

1. The applicant herein was committed to civil jail by the Deputy Registrar of this court for failure to pay a decretal sum of Ksh 751,500/=. He has consequently filed an application dated 28th of October 2020 seeking for orders that:

1. Spent

2. That this honourable court be pleased to review, set aside the order of committal of the applicant to civil jail and order the unconditional release of the judgement debtor or upon reasonable bond terms.

2. The grounds in support of the application are that the committal of the judgement debtor to civil jail violates his rights, civil liberties and/or freedoms under the Constitution of Kenya 2010. That the committal was irregular as there was no notice to show cause served upon the judgement debtor. That the judgement debtor has partially satisfied the civil debt by paying ksh 100,000/= to the judgment holder. That the judgment debtor is a brother to the 2nd respondent and the decree herein is money awarded out of entitlement to inheritance of the 2nd respondent deceased father's estate pursuant to the judgment of Moyale Kadhi Court case number 3 of 2019 and Marsabit High Court where no grant of letters of administration intestate has been filed. That the committal is irregular, unlawful and in breach of the Constitution of Kenya, Civil Procedure Act, Judicature Act and International Law and Conventions which bars committing a person to civil jail on account of a civil debt. That it is in interest of justice that orders prayed for herein be granted, especially now, owing to the ravaging worldwide Corona virus pandemic and the Kenya's ministry of Health protocols and guidelines on decongesting prisons and police stations to curb the spread of the deadly disease.

3. The application was supported by the affidavit of the applicant sworn on the 28th December 2020.

4. The same was opposed by the 2nd respondent vide her replying affidavit sworn on the 17th December 2020 wherein she deposes that the applicant was ordered to pay her a sum of Ksh 750,000/= being her share of the proceeds of sale of land which was part of their deceased father's estate. That the applicant did not honour the payment despite having offered to pay the decretal sum by monthly instalments. That it is upon committal to civil jail that he paid a sum of Ksh 100,000/= but the rest has not been paid. That the applicant has not made any effort to demonstrate his inability to pay the balance and has not provided evidence of the use of the money. That the existence of Covid 19 pandemic is not a ground for disobeying a valid court order. Further that committal to civil jail is lawful under section 38 of the Civil Procedure Act and Order 22 of the Civil Procedure Rules 2010. That the application is without merit.

5. Mr. Biwott, holding brief for the firm of **Nelko Misati & Co. Advocates**, made submissions for the applicant while **Mr. Behailu** submitted on behalf of the 2nd respondent. Mr. Biwott submitted that an application to commit a judgment debtor to civil jail should be resulted to only as a last resort. That the applicant herein did not exhaust all other modes of execution before resorting to application for committal to civil jail. That committal to civil jail is not permitted under United Nations Convention on Civil and Political Rights which are domesticated under the Kenyan constitution. Therefore, that the committal of the applicant to civil jail is unlawful.

6. Mr. Behailu on the other hand submitted that the proceeds of the sale of the land was paid into the bank account of the applicant. That the applicant admitted that he received the money and has refused to share it. That committal to civil jail is not an illegality as it is provided for under section 38 of the Civil Procedure Act and Order 22 of the Civil Procedure Rules.

7. I have considered the pleadings, the grounds in support of the application, the grounds to the objection thereto and the submissions by the advocates for the parties. There is no dispute that the applicant, as administrator of his father's estate, received money for the sale of his late father's land estate which he was obligated to give the 2nd respondent her share of the estate. He did not do so as a result of which he was committed to civil jail on application of the 2nd respondent. The issue raised in the application is whether committal to civil jail for failure to pay a civil debt is unlawful.

8. The applicant argues that committal to civil jail for inability to pay a civil debt is unlawful and unconstitutional according to the International Convention of Civil and Political Rights which Kenya has domesticated as part of its laws. The 2nd respondent on the other hand argues that the same is lawful as it is allowed by section 38 of the Civil Procedure Act and Order 22 of the Civil Procedure Rules, 2010.

9. Section 38 of the Civil Procedure Act provides as follows: -

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) - (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 judgement-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 judgement-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 judgement-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 refuses or neglects, or has refused or neglected, to pay the same, but in calculating such means there 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.

10. Rule 34(1) of order 22 of the rules provides that:

34 (1)Where a judgment-debtor appears before the court in obedience to a notice issued under rule 31, or is brought before the court after being arrested in execution of a decree for the payment of money, and it appears to the court that the judgment-debtor is unable, from poverty or other sufficient cause, to pay the amount of the decree, or if that amount is payable by instalments, the amount of any instalment thereof, the court may, upon such terms as it thinks fit, make an order disallowing the application for his arrest and detention or directing his release, as the case may be.

11. Rule 35 provides for the examination of the judgment-debtor's capability of satisfying the decree.

12. Section 11 of the International Convention on Civil and Political Rights states that:

No one should be imprisoned merely on the ground of inability to fulfil a contractual obligation.

13. I have considered the provisions in the Civil Procedure Act and the rules in relation to committal to civil jail. I have also considered some High Court authorities that have dealt with the issue. In the case of **Innocent G. Ondieki v Julius Nakaya Kabole**, Kakamega HC Misc. Civil Application No.13 Of 2018 (2019)eKLR, where the applicant was challenging his committal to civil jail, the court cited the case of **Jedida Chepkoech Mutai (Suing as The Legal Representative of the Estate of Julius Kipkorir Mutai (Deceased) vs Cherono Beatrice** (2018)eKLR where it was stated that:

'As I understand it, the general position in law is that the arrest contemplated under section 38 and 40 of the Civil Procedure Act is not unconstitutional. All that is required in proceeding under the two provisions is that there has to be strict adherence to the law. In Jane Wangui Gachoka vs Kenya Commercial Bank Limited [2013] eKLR, the petitioner asked the court to declare sections 38(d) and 40 of the Civil Procedure Act and Order XX1 Rules 32,33 of the Rules which allowed for commitment to civil jail for non-payment of a debt as archaic and unconstitutional. In declining to make the declaratory orders sought by the petitioner, the court stated as follows:

"[33] The deprivation of liberty sanctioned by sections 38 and 40 of the Civil Procedure Act is permissible and is not in violation

of either the Constitution or ICCPR. The caveat, however, which has been emphasized in all the cases set out above is that before a person can be committed to civil jail for non-payment of a debt, there must be strict adherence to the procedures laid down in the Civil Procedure Act and Rules, which provide the due process safeguards essential to making limitation of the right to liberty permitted in this case acceptable in a free and democratic society.”

See also Mary Nduku Ndunda vs Attorney General & 4 Others [2016] eKLR.’

14. In the case of **Charles Lutta Kasamani v Concord Insurance Co. Ltd. & Deputy Registrar Milimani High Court Commercial and Admiralty Division** (2018)eKLR, Mwita J. considered at length the constitutionality or otherwise of sections 38 of the Civil Procedure Act and the relevant rules of the Civil procedure Rules vis a vis section 11 of the ICCPR and held that there was nothing unconstitutional in sections 38 and 40 of the CPA and further that committal to civil jail of one who is able to pay but has refused to do so is lawful and does not amount to violation of rights and fundamental freedoms in the Bill of Rights.

15. Also in the case of **Beatrice Wanjiku & Another vs Attorney General & Another** (2012)eKLR, Majanja J. while finding that section 38 is consistent with the Bill of Rights held that:

44. An analysis of the provisions of s.38 of the CPA and rules 22 of the Rules and their application demonstrate the following:

a) The process of arrest and detention is not arbitrary. The debtor is given an opportunity to show cause before an order is made by a judicial officer.

b) The Judgment-Creditor can only be committed to civil jail once it is demonstrated that he or she has refused or neglected to pay, is about to abscond or is intent on obstructing or delaying execution of the decree.

c) The burden of proof rests on the judgment-creditor to show prove the elements that are necessary for the arrest and committal of the judgment-debtor.

d) That arrest and committal is the last resort after other modes of execution have failed.

e) There is a right of appeal against the decision of ordering arrest and committal.

To the above I would add the provision that the court can commit a judgment debtor to prison where it is satisfied that the decree is for a sum for which he was bound in a fiduciary capacity to account.

16. It is clear from the above authorities that committal to civil jail is lawful where the judgment debtor is in a position to pay and has refused or neglected to do so. The same is also lawful where the decree is for sum of money received in a fiduciary capacity and the judgment debtor has not accounted for it. The question is whether the procedure for committal to civil jail was adhered to before the applicant was so committed.

17. The applicant received the decretal sum in a fiduciary capacity as administrator of his father`s estate. He was supposed to pay the decretal sum to the 2nd respondent as her share of the estate. Being money received in a fiduciary capacity, the applicant was obligated by the law to account for it. He has not done so and neither has he paid it. The only conclusion that can be made is that the applicant has deliberately refused to pay the money.

18. The applicant was served with a notice to show cause on the 2/7/2021 wherein he was required to appear before court on 21/7/2021 but did not appear. A warrant of arrest was thereupon issued. He was arrested but was released on cash bail of Ksh. 20,000/= pending appearance before the DR. When he appeared before the DR on the 12/8/2021, he said that he was not ready to pay the money as he had filed an appeal. The judgment creditor thereupon asked for his committal to civil jail. The applicant replied that he did not mind being sent to jail but would not pay. The court then committed him to civil jail.

19. From the foregoing, it is clear that the applicant was given an opportunity to show cause why he should not be committed to civil jail and he failed to do so. Instead, he was adamant that he would rather go to prison than pay. It is worthy of note that it is not until when the applicant was committed to jail that he made part-payment of Ksh.100,000/=. Before then he had paid Ksh. 20,000/= in cash bail pending his appearance before the DR. When he filed this application he was released on a cash bail of ksh.50,000/= pending the hearing and determination of the application, which sum he paid. The above is an indication that the applicant is in a position to pay the decretal sum but he is a recalcitrant debtor. The committal to civil jail was therefore proper. The fact that there is a pandemic is no reason to fail to pay the money.

20. In the foregoing, it is my finding that the application is without merit and I dismiss it in its entirety with costs to the 2nd respondent. I do order that the applicant be re-arrested and returned to prison to serve the remaining term of the civil jail as committed by the Deputy Registrar. It is further ordered that the cash bail paid into court by the applicant totaling to Ksh.70,000/= be paid to the 2nd respondent to defray part of the debt.

Delivered, dated and signed in open court at Marsabit this 17th day of June 2021.

JESSE NYAGA NJAGI

JUDGE

In the presence of:

.....for Applicant thro' video link

.....for 2nd Respondent

Parties:

Applicant –

2nd Respondent –

Court Assistant –

30 Days R/A.