



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**COMMERCIAL DIVISION**  
**CIVIL CASE NO. 165 OF 2012**

**HENRY SIMIYU MURWA.....PLAINTIFF**

**-VERSUS-**

**TIMOTHY VITALIS MAKOKHA OKWARO**

**PRACTISING AS TIM OKWARO & CO. ADVOCATES.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**INGRID YVONNE DE WAERN.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The application before me is a Notice of Motion dated 20<sup>th</sup> September, 2021 brought under the provisions of Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya, Order 51 of the Civil Procedure Rules and all the other enabling provisions of the law. The 1<sup>st</sup> defendant/applicant seeks the following orders -

(i) Spent;

(ii) That this Honourable Court (The Honourable Judge) be pleased to quash or set aside or suspend or vacate the order made herein on the 6<sup>th</sup> September, 2021 by the Honourable Deputy Registrar/Honourable Mr. Nyariki committing the applicant to pay the respondent Kshs. 4,086,328.00 at once or be in prison sentence (sic) of six months with immediate effect;

(iii) That this Honourable Court (The Honourable Judge) be pleased to order that pending the *inter partes* hearing of this application, the applicant be forthwith released from the Shimo-la-Tewa Prison of the Kenya Prisons Service;

(iv) That this Honourable Court (The Honourable Judge) be pleased to grant any other or further order or relief as the Court (The Honourable Judge) may deem fit in the circumstance; and

(v) That this Honourable Court be pleased to direct that the judgment debtor liquidates the decretal sum by monthly installments of Kshs. 100,000/= with effect from the 5<sup>th</sup> of October, 2021 for a period of four months and thereafter be enhanced to installments of Kshs. 200,000/= per month till payment in full.

2. The application is premised on the grounds on the face of it and is supported by an affidavit sworn on 20<sup>th</sup> September, 2021, by Timothy Vitalis M. Okwaro, the applicant herein.

3. The 2<sup>nd</sup> defendant/respondent in opposition to the said application filed a replying affidavit on 27<sup>th</sup> September, 2021 sworn on 24<sup>th</sup> September, 2021 by Ingrid Yvonne De Waern.

4. The application was canvassed by way of oral submissions. Mr. J. Magolo, learned Counsel for the 1<sup>st</sup> defendant (applicant) submitted that the applicant was committed to civil jail for six months on 6<sup>th</sup> September, 2021, for failure to pay the decretal sum and since then, he has remitted Kshs. 900,000/= out of the outstanding sum of Kshs. 4,000,000/=. He submitted that the applicant is 70 years old, an Advocate of the High Court of Kenya and a sickly man. Mr. Magolo submitted that the applicant transmitted Kshs. 666,669.95 to the respondent, on 30<sup>th</sup> July, 2021, he paid Kshs. 100,000/= to Felix Egessa the donee of the power of attorney and on 13<sup>th</sup> September, 2021, and that the applicant had also paid Kshs. 150,000/= and Kshs. 50,000/= to the said Felix Egessa.

5. It was submitted by Counsel for the applicant that the applicant had not refused to pay the respondent and that he was proposing to pay Kshs. 100,000/= per month for a period of 4 months and thereafter, he would double the payment to Kshs. 200,000/= per month and clear the outstanding amount in 1 year since the decree holder has the right to have her money paid. Mr. Magolo urged this Court to release the applicant on bond so that he can look for the money. He stated that they can even avail a surety so that in the event the applicant defaults in making good the payment, the surety shall pay.

6. This Court gave an opportunity to the applicant who is an officer of the Court (Advocate) to explain how he planned to pay the respondent her money. He indicated that when he proposed to pay Kshs. 100,000/= per month, Felix Egessa informed him that the respondent had refused to accept the said proposal. The applicant stated that when a proposal was made for him to pay Kshs. 666,666/= per month, he found that it was difficult to raise the said amount of money since he has been sick from the year 2016 to 2020 when a catheter for kidney failure was removed from his body. He stated that he intends to tax his bills of costs, six of which are for the decree holder. He informed this Court that he does not have a piece of land which he can sell to get money to pay off the debt as what he has is a plot which cannot fetch a substantial amount of money, even if he was to sell it. He further stated that even the Kshs. 966,000.00 he had paid to the respondent, had been paid by his close relatives.

7. Felix Egessa who holds the power of attorney for the respondent submitted that she sold a property in Diani and the applicant who was her Advocate retained the money and failed to pay it out to her. He further submitted that there is no trust between the applicant and the respondent, since the applicant had made promises to pay in the past but had failed to do so. As such, if the applicant was to be released from prison custody, he would need to deposit security to ensure that he pays off the amount he owes the respondent. Felix Egessa submitted that he was aware that the applicant has a piece of land in Funyula and that he bought two plots with the money he stole from the respondent, which he registered in his wife's name. He indicated that the applicant's wife died and she was buried in the land in Funyula.

#### **ANALYSIS AND DETERMINATION.**

8. This Court has considered the application filed herein, the grounds on the face of it as well as the affidavit filed in support thereof. It has also considered the replying affidavit by the respondent and the oral submissions by Counsel for the applicant and Felix Egessa, who holds a power of attorney on behalf of the respondent. The issue that arises for determination is whether the application herein is merited.

9. In the affidavit filed by the applicant, he deposed that since the year 2015, he has been debilitated by diabetes, kidney failure, high blood pressure and enlarged heart (failing heart) affecting his ability to work for income and continuity. He further deposed that the Honourable Deputy Registrar did not ask for his medical documents and that he would have made arrangements for the said documents to be sent over from Nairobi, where he lives and works since he had been flown to Mombasa in the custody of the Milimani Commercial Courts' Bailiff, thus he could not have collected his medicals (medical reports).

10. He further averred that the execution process herein started in June 2021 and he was unable to satisfy a scheme (of payment) proposed on 30<sup>th</sup> July, 2021 since many clients owing him outstanding professional fees were not forthcoming with payments as easily as he had anticipated. The applicant stated that as a sign of good faith, he had paid a total of Kshs. 966,669.00, part of which was deposited to the respondent's account, a portion of the money was sent to her Advocates on record and another portion was sent to her representative, Mr. Felix Egessa.

11. The respondent in her replying affidavit deposed that on 19<sup>th</sup> March, 2015, Hon. Lady Justice M. Kasango ordered the applicant to pay her Kshs. 4,000,000/= being sale proceeds of her apartment situated in Diani-Ukunda where the applicant had acted as her Advocate. That he received the sale proceeds but never released the same to her. She averred that over six years had elapsed but the applicant who is a senior Advocate of this Court had refused to comply with Court orders and has never made any payments in satisfaction of the judgment amount.

12. It was stated by the respondent that she extracted a decree dated 25<sup>th</sup> March, 2019 and served the same upon the applicant who never paid the decretal amount, which led her to commence execution proceedings against him. The respondent averred that she took out a Notice to Show Cause dated 15<sup>th</sup> July, 2021 which was heard by the Deputy Registrar on 30<sup>th</sup> July, 2021. She indicated that during the said hearing, the applicant did not produce any documents in defence of his case, including the current bundles of treatment notes attached to the present application.

13. The respondent further averred that the Deputy Registrar delivered a ruling on 30<sup>th</sup> July, 2021 after hearing both parties and directed the applicant to pay the decretal sum of Kshs. 4,086,328.00 by first paying Kshs. 100,000/= before close of business on 30<sup>th</sup> July, 2021. He also directed the applicant to be paying Kshs. 666,666.00 on or before the 15<sup>th</sup> day of every month beginning on 15<sup>th</sup> August, 2021 until the decretal sum was satisfied and in default of any installment, the applicant was to be committed to civil jail. The respondent stated that the applicant complied and paid the 1<sup>st</sup> installment but defaulted on the 2<sup>nd</sup> installment and did not communicate to her at all.

14. The respondent stated that she proceeded to cause the arrest of the applicant through the assistance of the Court Bailiffs from Milimani Law Courts and he was presented to the Deputy Registrar on 6<sup>th</sup> September, 2021 for directions on committal to civil jail. She indicated that the Deputy Registrar is empowered under Order 22 of the Civil Procedure Rules, 2010 to determine execution proceedings. The respondent contended that the bundle of medical documents availed by the applicant are not legible and that the treatment notes and medical reports were procured recently to meet the expectation of the orders sought.

15. It was also stated by the respondent that the applicant had been in active legal practice and in good health between the years 2012 to 2015 but still never paid the disputed amount. She averred that the proposal by the applicant is unreasonable given his age and health. The respondent contended that the net effect of the present application is by implication an attempt to appeal against the decision of the Deputy Registrar made on 30<sup>th</sup> July, 2021 and 6<sup>th</sup> September, 2021, yet there was no memorandum of appeal as per the provisions of Order 49 Rule 3 of the Civil Procedure Rules, 2010 challenging the same.

16. The right to commit a judgment debtor to civil jail is provided under Section 38 of the Civil Procedure Act, Cap 21, Laws of Kenya. It states as follows- ***“Subject to such conditions and limitations as may be prescribed, the Court may, on application of decree holder, order execution of the decree –***

- (a) by delivery of any property specifically decreed,***
- (b) by attachment and sale, or by sale without attachment of any property,***
- (c) by attachment of debts,***
- (d) by arrest and detention in prison of any person,***
- (e) by appointing a receiver or,***
- (f) in such other manner as the nature of relief granted may require.***

***Provided that where the decree is for 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.***

***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 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 of money which the judgment debtor was bound in a fiduciary capacity to account.*” (emphasis added).**

17. Order 22 Rule 34(1) of the Civil Procedure Rules, 2010 provides that:

***“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.”***

18. It should be noted that this Court can at any time, review orders issued by the Deputy Registrar on application by any of the parties to the suit. However, the main ground, ought to be that the rules were not adhered to by the Court and the parties thereof. The applicant herein prays for the orders of 6<sup>th</sup> September, 2021 made by the Deputy Registrar committing him to civil jail, to be set aside on the grounds that the said Deputy Registrar failed to address himself to the provisions of Order 22 Rules 34 and 35 of the Civil Procedure Rules, 2010 and that he did not examine the applicant as to his means. Committal to civil jail is lawful where the judgment debtor is in a position to pay and has refused or neglected to do so. It is also lawful where the decree is for a sum of money received in a fiduciary capacity and the judgment debtor has not accounted for it.

19. In the present case, the applicant received the decretal sum in a fiduciary capacity where he had acted as an Advocate for the respondent and received sale proceeds for her apartment situated in Diani-Ukunda, but he never released the money to her. Since the money was received in a fiduciary capacity, the applicant had an obligation to account for it. He has however not done so and neither has he released the proceeds to the respondent, apart from what he had paid as at the time of hearing of this application.

20. The Deputy Registrar delivered his ruling on 30<sup>th</sup> July, 2021 and directed that the decretal sum of Kshs. 4,086,328.00 be paid by the applicant. He was ordered to pay Kshs. 100,000/= before the close of business on 30<sup>th</sup> July, 2021. Kshs. 666,666.00 was to be paid subsequently, on or before the 15<sup>th</sup> day of every month beginning on 15<sup>th</sup> August, 2021 until the decretal sum was satisfied. The said Deputy Registrar ordered that in default of any installment, the applicant would be committed to civil jail.

21. The applicant defaulted on the 2<sup>nd</sup> installment and the respondent made arrangements for him to be arrested and he was presented before the Deputy Registrar on 6<sup>th</sup> September, 2021 for directions on committal to civil jail. On the said date, he stated that he was not able to collect monies owed from clients and that he needed time to file bills of costs. He also informed the Deputy Registrar that he had been out of practice for a long time due to sickness. The applicant proposed to remit Kshs. 100,000/= on every 5<sup>th</sup> day of the month for the next four months, then the matter can be mentioned so that he can increase the said amount. This proposal was rejected by the respondent. Consequently, he was committed to civil jail for 6 months.

22. From the foregoing, it is clear that the applicant was given two opportunities to show cause why he should not be committed to civil jail and the Deputy Registrar was not satisfied by his explanation as he noted that this is an old matter and at some point litigation must come to an end. It is noteworthy that since the applicant was committed to civil jail he has paid Kshs. 966,000.00 towards satisfying the decretal sum of Kshs. 4,086,328.00, thus leaving a balance of Kshs. 3,120,328.00. The applicant averred that the said monies were paid by his close relatives. The above is an indication that the applicant has not deliberately refused to pay the respondent the decretal sum.

23. The applicant is a senior Advocate of the High Court of Kenya. He is also a senior citizen aged 70 years. Although some of the medical documents he attached to his affidavit are not legible, a good number of them are legible. They paint the picture of a man who has battled ill health for a number of years. Although the applicant made no effort to pay the decretal sum for some years, he has since been committed to civil jail paid Kshs. 966,669.00, he has therefore demonstrated his willingness to pay the decretal sum. He has blamed his inability to pay the decretal sum due to ill health which caused him not to work thus making it impossible for him to meet his financial obligations.

24. This Court takes judicial notice that we are currently living in the era of the Covid -19 pandemic when the economic conditions of many Kenyans have been affected. As regards the risk of infection, the elderly and those with underlying medical conditions are worse off in prison and in crowded places. Recognizing the threat that the pandemic has caused and continues to, more so in crowded spaces, prisons included, the National Council on the Administration of Justice (NCAJ) issued a circular on the 15<sup>th</sup> March, 2020, in its plan to combat the threat of Covid -19 entitled Administrative and Contingency Management Plan to Mitigate Covid -19 in Kenya's Justice Sector.

25. Following the said circular, the Honourable the Chief Justice issued directives to the Courts to decongest the prisons by review of deserving cases. Immediately thereof, Courts moved quickly and decongested, and continue to decongest prisons to curb the runaway pandemic that has threatened to cut short the lives of the most vulnerable, including the elderly. Numerous convicts have since been released from prison. The applicant's continued stay in prison leaves him exposed and vulnerable to contracting Covid-19.

26. In consideration of his age, current financial position, health and the risk of him contracting Covid-19, a pandemic that has caused havoc worldwide, it is my finding that the application herein is merited. I hereby exercise my discretion and allow the application dated 20<sup>th</sup> September, 2021 in the following terms-

- (i) That the order made on the 6<sup>th</sup> September, 2021 by the Deputy Registrar, Hon. Nyariki, is hereby suspended;
- (ii) That the applicant shall be released from the Shimo-la-Tewa Prison upon execution of a bond in the sum of Kshs. 700,000/- with a surety of a similar amount;
- (iii) The applicant shall pay the respondent the sum of Kshs. 300,000/= before being released from Shimo-la-Tewa Prison;
- (iv) That the applicant shall pay Kshs. 200,000/= on or before the 15<sup>th</sup> day of every month to the respondent from the 15<sup>th</sup> of November, 2021 until the decretal sum is satisfied;
- (v) That in default of making good any installment, the applicant shall be committed to civil jail; and
- (vi) There shall be no order as to costs for this application.

**DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 14TH DAY OF OCTOBER, 2021. In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April, 2020 and subsequent directions, the ruling herein has been delivered through Teams Online Platform.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of;**

**Mr. P. Magolo holding brief for Mr. J. Magolo for the applicant**

**Mr. Felix Egessa - the respondent's representative vide a power of attorney**

**Ms Ingrid Vyonne De Waern - respondent**

**Mr. Oliver Musundi- Court Assistant**