



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. E059 OF 2021**

*(An appeal arising from the ruling and order of the Hon. Ndururi, Senior Principal Magistrate (SPM), in Kakamega CMCCC No. 140 of 2010, of 28<sup>th</sup> October 2021)*

**JOY NASIMIYU.....APPELLANT**

**VERSUS**

**PAUL KALUKHANA.....RESPONDENT**

**RULING**

1. The application for determination is the Motion, dated 4<sup>th</sup> November 2021, which seeks release of the appellant on bond. She had been committed to civil jail by the trial court on 28<sup>th</sup> October 2021, on a decree in the cause before that court, against her and others, for Kshs. 690, 000.00, of which she has paid Kshs. 180,000.00.

2. Her case, as set out in the affidavit that she swore on 4<sup>th</sup> November 2021, in support of the Motion, is that she has been paying the debt, she was likely to lose her job, the provisions of section 38 of the Civil Procedure Act, Cap 21, Laws of Kenya, relating to committal to civil jail in execution of a decree were not observed or complied with, and that she had applied to the trial court for review of the decree since the same was against three defendants, so that the decretal amount is apportioned between the three.

3. The respondent has reacted to the Motion, through his affidavit, sworn on 9<sup>th</sup> November 2021, essentially saying that the court was being misled and misinformed, and that the appellant was attempting to delay and defeat justice. She is accused of being stubborn and reluctant to pay the amount in the decree. It is averred that notices to show cause were issued, which the appellant did not honour, leading to the issuance of a warrant for her arrest, and the subsequent committal to civil jail.

4. I note that the respondent has used the affidavit to argue serious points of law, inclusive of citing judicial authorities. Affidavits are only meant for evidence, not law. A deponent ought to only depose to matters of fact and not law, and there should be no occasion to cite statutory provisions or case law. The legal arguments advanced in that affidavit are issues that should come up at the hearing of the appeal, by way of oral or written submissions. The appellant is equally guilty of similar sins.

5. I have not had the benefit of perusing the trial court records, for they were not placed before me, but from the material before me, it would appear that there are several issues that the appellant is agitating before this court and the court below. I would not want to say anything that may prejudice those pending proceedings, save to say that the appellant should be afforded opportunity to have her day in court, with regard to those proceedings, for it would appear that there could be some formidable arguments in both cases, which should be heard first, before adverse orders are made.

6. In the end, I will allow the Motion, dated 4<sup>th</sup> November 2021, in terms of prayer 3 thereof. The appellant is hereby admitted to a bond of Kshs. 150, 000.00, with one surety of like amount. The Motion is disposed of in those terms.

**DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 15TH DAY OF NOVEMBER, 2021**

**W. MUSYOKA**

**JUDGE**