



Prime Bank Limited v Foton East Africa Limited & 5 others (Commercial Civil Case 59 of 2019) [2021] KEHC 368 (KLR) (Commercial and Tax) (15 December 2021) (Ruling)

Neutral citation: [2021] KEHC 368 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL CASE 59 OF 2019
DAS MAJANJA, J
DECEMBER 15, 2021**

BETWEEN

PRIME BANK LIMITED PLAINTIFF

AND

FOTON EAST AFRICA LIMITED 1ST DEFENDANT

DA LI 2ND DEFENDANT

YOU CAI YAO 3RD DEFENDANT

CHEGMING ZHANG 4TH DEFENDANT

JIANG MAO HANG 5TH DEFENDANT

FENG HUI ZHU 6TH DEFENDANT

RULING

1. This ruling is in respect of an appeal under Order 49 rule 7(2) and (3) of the *Civil Procedure Rules* from the decision of the Deputy Registrar dated 14th June 2021 dismissing the Notice to Show Cause (“NTSC”) why the 2nd Defendant (“the Judgment-Debtor”) should not be committed to civil jail for failure to satisfy the decree against him.
2. In his affidavit in response to the NTSC, the Judgment-Debtor stated that he had travelled to China for treatment on 1st August 2020. The Deputy Registrar observed that at the time of hearing it was not clear whether he was in Kenya and concluded that, “The Judgment debtor has failed to show whether he is willing to pay the decretal amount and no proposal for payment advanced to the decree holder and on the issue of illness no documents were presented to support the said averment.”



3. The Deputy Registrar then proceeded to consider the provisions of section 38 of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which provide that 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—

38(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 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.
4. After citing *Braeburn Limited v Gachoka and Another* [2007] 2 EA 67 where it was held that, “A person is not liable to be committed to civil jail for inability to pay a debt but a dishonest and fraudulent debtor is liable to be punished by way of arrest and committal,” the Deputy Registrar dismissed the NTSC by stating that:

The decree-holder has not given any reasons to support the application for the judgment-debtor to be committed to civil jail. That is to say that there is a likelihood of him absconding or that he is able to pay and has refused to do so or that he has transferred or concealed part of his property.

5. It is the above decision that has precipitated this appeal commenced by the Memorandum of Appeal dated 21st June 2021. The Memorandum of Appeal is rather prolix but as I understand the Plaintiff attacks the discretion of the Deputy Registrar and in particular that she failed to understand and wrongly applied the provisions of section 38 of the *Civil Procedure Act* in light of the facts of the case.
6. Having considered that ruling in its entirety, I agree with the Counsel for the Plaintiff/Decree Holder that each of the grounds upon which the court must not order committal of a judgment debtor in section 38 of the *Civil Procedure Act* must be read disjunctively. This means that failure to establish any ground, as was held the Deputy Registrar, is not fatal. I would add that once the Decree-holder shows that the debt is outstanding and the judgment-debtor has failed to satisfy it, the evidential burden shifts to the judgment-debtor to show why he has not satisfied the decree. This is the reason for the NTSC. It gives the judgment-debtor an opportunity to show that he is able to pay the debt or otherwise. Whether or not he is able to pay the debt is a matter peculiarly within his knowledge and he bears the evidential burden of establishing the facts he or she relies on to contest the NTSC (see *National Industrial Credit Bank Ltd vs Aquinas Francis Wasike & Another* [2006] eKLR).
7. I have read the Judgment-Debtor’s affidavit and he states that he was ill and requires time to recover by which time he would be in a better position to give a proposal. The proper course then for the Deputy



Registrar was to direct the Judgment-Debtor to file and serve his Affidavit of Means to show that he has or lacks means to pay the debt or make proposals for payment. Thereafter the Decree-Holder ought to be given an opportunity to examine the Judgment-Debtor in order to establish whether it is appropriate for the court to commit him to civil jail.

8. Since this appeal challenges the exercise of discretion by the Deputy Registrar, the court is guided by the principle set out in *Mbogo and Another v Shah [1968] EA 15* as follows:

An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.

9. For the reasons I have set out above, I am satisfied that the Deputy Registrar failed to exercise discretion in accordance with section 38 of the *Civil Procedure Act*, the facts and circumstances of the case.
10. I allow the appeal, set aside the decision of the Deputy Registrar dated 14th June 2021. The matter shall be placed before any other Deputy Registrar apart from Hon. Wanyama to deal and consider the Notice to Show Cause in line with the directions I have set out above. Costs of the application shall be in the cause.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF DECEMBER 2021.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Mr Mutua instructed by Mutua Waweru and Company Advocates for the Plaintiff.

