



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 1198 OF 2001

JOSEPH NZYOKI MWANTHI.....PLAINTIFF/RESPONDENT

VERSUS

S.M. KHATAU.....1ST DEFENDANT/APPLICANT

SHABBIR'S MOTORS SPARES LIMITED.....2ND DEFENDANT

RULING

1. The application dated 19th August, 2019 principally seeks the following orders:

(1) Spent.

(2) That the 1st Defendant/Applicant herein, S.M. Khatau be released from civil jail forthwith.

2. Secondly, **that there be a stay of execution of the judgment and decree in this matter pending hearing and determination of Insolvency Petition E014 of 2019 (Re Shabbir Mohammedali Khatau).**

3. Judgment was entered herein against the Defendants for the sum of Ksh.3,600,000/= plus interest and costs on 20th May, 2015. It is stated in the affidavits in support of the application that as at 15th July, 2019, the decretal sum stood at Ksh.6,102,487/=. That on 15th July, 2019 the Applicant was arrested and committed to civil jail for a period of six months for failure to pay the debt.

4. It is contended that the Applicant is elderly, frail and a man of straw and is unable to pay the debt and has since filed Insolvency Petition No.EV14of 2009. That although the Applicant is still a Director and Shareholder for the 2nd Defendant, the company is no-longer a going concern, has closed shop and has no stock in trade. It is further averred that the Applicant has reached out to his community to help him raise funds to settle part of the decretal sum.

5. The application is opposed. It is stated in the replying affidavit that at the time of the entry of the judgment herein and the taxation of the party and party costs, the Applicant had a thriving motor spares business. That soon after taxation, the Applicant with the sole intention of avoiding the execution process closed the business and carted away the business stock worth then 20 million to an unknown place. That the Applicant has been operating a KCB M-banking Account through his Mobile telephone hand set with huge daily transactions going up to Ksh.500,000/= per day and also resides in a middle class estate in "South C".

6. It is contended that the Applicant is not a man of straw and is underserving of this court's discretion. It is further stated that no copies of KRA tax returns have been exhibited to demonstrate the Applicant's financial status. That no bankruptcy order has been issued and therefore no stay of execution can be granted at this stage.

7. The Respondent also filed the Notice of Preliminary Objection dated 30th August, 2019 on the following grounds:

1. That no bankruptcy order has been made in respect of the Applicant's estate under Section 41 of the Insolvency Act, 2015 before which no stay orders can issue.

2. That by dint of Section 48(1) of the Insolvency Act, 2015 this court, not being the bankruptcy court in the bankruptcy

proceedings, has no jurisdiction to issue orders of stay of execution pending hearing and determination of the Insolvency Petition.

3. That the application premised under Section 39(2) of the Insolvency Act, 2015 is incompetent and/or misconceived as there has been no interim trustee appointed by the bankruptcy court in respect of the Applicant's estate."

8. Both the application and the Preliminary Objection were canvassed simultaneously by way of written submissions. This ruling is therefore in respect of both.

9. Prior to the hearing of the application and the Preliminary Objection, the parties engaged in negotiations. On 25th September, 2019, the Applicant was released from Civil jail by the consent of the parties upon payment of the sum of Ksh.1,500,000/= to the Respondent. By the date of the release, the Applicant had been committed to civil jail and had served almost over three months. The provisions of Section 42 Civil Procedure Act are therefore applicable.

10. Section 42 (2) Civil Procedure Act stipulates as follows:

"A judgment-debtor released from detention under this section shall not merely by reason of his release be discharged from his debt, but he shall not be liable to be rearrested under the decree in execution of which he was detained in prison."

11. The 1st Applicant cannot be re-arrested over the same debt. However, it is inconsistent for the Applicant to seek stay of execution for the outstanding debt and in the same breath describe himself as having no property to liquidate the decretal sum. There is no reason to stay a valid court process. In any event, the Applicant's has nothing to fear as he states that he has no assets to be attached.

12. With the foregoing, this court sees no reason to stay the execution process generally. However, some of the prayers in the application are spent or have been overtaken by events. The 1st Applicant has already been released from civil jail and is not liable to re-arrest herein. The Application for stay of execution of the judgment and decree herein is dismissed with costs.

Date, signed and delivered at Nairobi this 6th day of May, 2020

B. THURANIRA JADEN

JUDGE