



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

FAMILY DIVISION

MISCELLANEOUS APPLICATION NO. 33 OF 2016

OMOLLO ONYANGO & COMPANY ADVOCATES....APPELLANT

VERSUS

NZINGO MAURER aka ZENA..... RESPONDENT

RULING

1. Before me is a the Notice to Show Cause (NTSC) dated 22.3.19, issued by the Court on the Application of Omollo Onyango & Company Advocates the Applicant, for the personal arrest and committal to civil jail of Nzingo Maurer **aka Zena, the Respondent, in execution of the decree herein for the sum of Kshs. 2,053,805.80**. The Respondent was required to appear before this Court and show cause why execution should not be granted.
2. In her Replying Affidavit sworn on 10.6.19, the Respondent averred that by a letter dated 14.5.19, she offered to pay the decretal amount in monthly installments of Kshs. 50,000/= each owing to the fact that she was not in formal employment and had no steady income. She is engaged in subsistence poultry farming, the proceeds of which amounting to Kshs. 45,000/= are used to sustain herself, and her brother's school going children and 2 gardeners. School fees is about Kshs, 24,000/= per term. The Respondent's offer was however rejected by the Applicant *vide* her letter dated 29.4.19 (this letter appears to be wrongly dated). The Respondent averred that she has neither refused nor neglected to pay the decretal sum but lacks the financial means to do so. The Respondent further stated that committing her to civil jail will have dire, ruinous and destabilizing consequences on the family of 5 dependents that depends on her. She pleaded with the Court to allow her to pay Kshs. 50,000/= on or before the 10th day of each month in the interest of equity, human dignity and social justice.
3. Parties filed submissions as directed by the Court, which I have considered together with the authorities cited by the Respondent.
4. It was submitted for the Applicant that the proposed payment plan by the Respondent was unfair as the amount is too little and it would take 41 months to pay off the decretal sum. Without factoring in interest and inflation, the Applicant would end up losing out yet the payment is for work done and completed diligently. It was contended that for any installment plan, a lump sum deposit is required. The Applicant further submitted that since the costs were taxed on 22.11.17, the Respondent has not made a single payment and has been avoiding to pay the same. The Applicant contends that the Respondent's claim of inability to pay the decretal sum is untrue as she is named in the will of the late Anthony Pape as a beneficiary of Plots 840, 841 and 844 Section III Mainland North, Mombasa and 60% of cash held by the deceased at the time of his demise. As a result of the Respondent's failure to pay the amount owed, the Applicant's practice which requires liquidity, will suffer damage.
5. For the Respondent, it was submitted that the Respondent's stated reasons as to why she should not be arrested and committed have not been countered by the Applicant. They therefore remain uncontroverted. Further, she has offered to pay the decretal amount in monthly instalments of Kshs. 50,000/=. It was further submitted that execution of a court decree by means of arrest and committal to civil jail must be the last resort after all other less restrictive options have been exhausted (see Elijah Momanyi t/a Anassi Momanyi & Co. Advocates v Bartera Maiyo [2006] eKLR). Further, it was submitted that a person is not liable to be committed to civil jail for inability to pay a debt unless it is shown that that person is dishonest and fraudulent (see Braeburn Limited vs. Gachoka and Another [2007] 2 EA 67). It was also submitted that arrest and committal can only be done if the proviso to Section 38 of the Civil Procedure Act has been complied with (see Vijay Morjaria v Harris Horn Junior & Another [2011] eKLR). Finally, the Respondent contended that it was the duty of the decree holder to satisfy the Court that the judgment debtor is not suffering from poverty or any other sufficient cause and is able to pay the decretal amount.
6. The record shows that the Applicant, an advocate represented the Respondent in Succession Cause No. 431 of 2014, Estate of Anthony Paul Pape. The Applicant then filed a bill of costs dated 10.10.16 against the Respondent which was taxed on 22.11.17 and a certificate of costs was issued on 8.12.17. By an application dated 8.2.18, the Applicant moved this Court to enter judgment against the Respondent in terms of the said certificate of costs. This application was opposed by the Respondent through her grounds of opposition dated 17.10.18. Following a hearing, the Court entered judgment in favour of the Applicant on 30.11.18. What is now before me is a notice to show cause

dated 22.3.19 seeking the arrest and committal to civil jail of the Respondent in execution of the decree dated 4.12.18.

7. The power of the Court to enforce execution by arrest and committal to civil jail is contained in the Civil Procedure Code. Section 38 provides in part:

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—

(d) by arrest and detention in prison of any person;

8. The prescribed conditions and limitations are set out in the proviso to Section 38 as follows:

Provided that where the decree is for the 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; 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.

9. In the present case, the relevant provision is paragraph (b) of the proviso. For the Court to make a finding in favour of the Applicant, it must be demonstrated that the Respondent has, since the date of the decree, the means to pay the decretal amount or some substantial part thereof but refuses or neglects to do so. In this regard, determining the capacity of the Respondent to pay the amount due, any property exempt from attachment in execution of a decree shall be excluded.

10. Liberty is one of the most sacred of fundamental rights and freedoms. Given that committal to civil jail deprives an individual of liberty, it must be done as an absolute last resort. This was the holding in Elijah Momanyi p/a Anassi Momanyi & Co. Advocates v Barera Maiyo [2006] eKLR, where Ibrahim, J. as he then was stated:

In my view, execution by way of arrest and committal to civil Jail must done the last resort after all other options have been exhausted. The deprivation of an individual's liberty is not a matter to be treated lightly or in haste. The protection of the right to liberty in my view is the most sacred of the fundamental rights and freedoms of the individual.

11. And in Braeburn Limited vs. Gachoka and Another [2007] 2 EA 67, the Court of Appeal stated that the execution of a judgment decree by way of arrest and committal to prison is extreme in nature. The Court also stated:

“...the deprivation of a person's liberty whether for contempt of court (under section 72(1)(b) of the Constitution), or for default to pay a money decree, is in the nature of criminal proceedings and for a person to suffer the loss of liberty, it must be in the words of that hackneyed phrase, be proved beyond reasonable doubt, that he has the means to pay but that he has refused and/or neglected to pay...”

12. Has the Applicant satisfied the Court that the Respondent has the ability to pay but has refused to and/or neglected to pay the decretal amount? The Applicant contended that the Respondent has the means to pay the decretal amount but refuses to pay the same. The Applicant further contended that the Respondent is named in the will of the late Anthony Pape as a beneficiary of Plots 840, 841 and 844 Section III Mainland North, Mombasa and 60% of cash held by the deceased at the time of his demise. For her part, the Respondent argued that she does subsistence farming and is only able to pay the amount due in monthly instalments of Kshs. 50,000/=. The Applicant however rejected this amount as being too little arguing that it would take 41 months to pay off the decretal sum. Without factoring in interest and inflation, the Applicant would end up losing out.

13. The Applicant's arguments, are in my view legitimate given that she rendered legal services to the Respondent in 2016 and is yet to be paid for the same. The Applicant must however demonstrate that the Respondent has the capacity to pay the decretal amount. In National Bank v Linus Kuria Ndung'u [2008] eKLR, Lesiit, J. stated:

“The burden of proof in a Notice to Show Cause lies with the Decree Holder at all times. It is the duty and evidential burden of the Decree Holder to prove that the Judgment Debtor has or has had the means to satisfy the decree and further that the Judgment Debtor has refused or neglected to pay.”

14. On the Applicant's claim that the Respondent is a beneficiary of the will of the deceased, this Court is aware that the said will is yet to be

proved as the matter is still pending before it. Given the circumstances, it cannot be said that because the Respondent has been named in the will as beneficiary, she has the means to pay the decretal amount. Accordingly, the Court finds that the Applicant has not discharged the burden of proof placed upon it.

15. On her part, the Respondent contends that that the proceeds of her chicken rearing are insufficient to pay the amount due as she has a family of 5 dependents who depend on her. However, the Respondent did not give any details of the amount she makes from her chicken business. Further, no evidence was placed before the Court of the existence of the alleged children for whom she pays school fees and whom she maintains.

16. It is not disputed that the Applicant rendered legal services to the Respondent. The Court notes that since the legal services were offered, the Applicant prepared a bill of costs dated 10.10.16, which was taxed on 22.11.17 at Kshs. 2,053,805.80. The taxed amount remained unpaid prompting the Applicant to move to Court. Pursuant to the Applicant's application dated 8.2.18 judgment was entered in its favour on 30.11.18. Since that time, the amount has remained unpaid to date. It would appear to me that this notice to show cause has been filed by the Applicant out of frustration.

17. When the Respondent approached the Applicant to represent her in the matter, surely she must have been aware and prepared to pay for the legal services rendered. There is nothing on record to show that the Applicant offered her legal services to the Respondent on a pro bono basis. An advocate is entitled to legal fees for services rendered. The monthly amount offered by the Respondent to liquidate the amount due, is in my view unreasonably low. Had the Respondent put aside the monthly sum of Kshs. 50,000/= she had offered, the amount would, from 8.12.17, the date the certificate of costs was issued to date, have accumulated to over Kshs. 1,400,000/=. It would appear that the Respondent continues with her life like she does not owe the sum due, while the Applicant continues to seek payment of the same. The decretal amount will not go away and remains payable. Over 3 years after services were rendered to her, and the legal fees became due, the Applicant is still insisting on monthly installments of Kshs. 50,000/=. This is indicative of mala fides on the part of the Respondent.

18. In the end I make the following orders to meet the ends of justice:

- i. The Respondent shall pay to the Applicant a lump sum of Kshs 1,600,000/= within the next 30 days from the date of this Ruling i.e by 5.6.2020.
- ii. The Respondent shall liquidate the balance payable, together with interest in monthly instalments of Kshs. 100,000/= with effect from 5.7.2020 and thereafter on the 5th day of each subsequent month until payment in full.
- iii. In default of any instalment, execution to issue forthwith.

DATED, SIGNED and DELIVERED in MOMBASA this 5th day of May 2020

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

..... **for the Respondent**

..... **Court Assistant**