



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

MISC CIVIL 254 OF 2018

JOSEPH KIPKURGAT MUTAI..... PLAINTIFF

VERSUS

SIMON MATIRI NJUGUNA DEFENDANT

RULING

1. The Applicant was a Defendant in *Nakuru CMCC No. 239 of 2017*. Judgment was entered against him for Kshs. 1,600,000/- with interests and costs. He did not pay up. The Respondent took out Notice to Show Cause why the Applicant should not be arrested as his chosen means of executing the decree in the case.

2. The Applicant responded by filing an Appeal in the High Court being *Civil Appeal No. 132 of 2017* contemporaneously with an Application for Stay of Execution. A ruling was delivered on 29/03/2018 on that stay. The Applicant was granted his prayers conditional on paying Kshs. 150,000/- per month.

3. The Applicant did not adhere to the conditions of the stay. He did not pay the monthly sum as ordered by the Court. Consequently, the Respondent re-activated the Notice to Show Cause in the Lower Court since the condition sine qua non for the stay had not been realized. A warrant of arrest was consequently issued.

4. The Applicant responded by filing the present Miscellaneous Application. The substantive prayers sought in the Application are the following:

3) That pending the hearing of this application inter-parte, warrant of arrest issued against the judgment debtor in Nakuru CMCC No. 239 of 2017 be stayed.

4) That the Applicant be allowed to pay the decretal amount by monthly installment of Ksh 50,000/= per month until payments in full.

5) That the Respondent to supply the Applicant with accounts of payment made to the Respondent

6) That the execution in this suit is unconstitutional in its present stage.

7) That pending the hearing and determination of this application, there be a stay of execution.

5. The Application is opposed. In short, the Respondent raises four objections:

a. First, that the Application is grossly incompetent as it is not founded on any existing appeal.

b. Second, that the Application offends section 34 of the Civil Procedure Act.

c. Third, that the Application is res judicata as the Applicant had litigated similar application in Civil Appeal No. 132 of 2017.

d. Fourth, that in any event the Applicant has not sufficiently demonstrated that he is unable to pay the decretal amount.

6. Though the Applicant has attempted to dress this application as a constitutional application of great import, it is anything but that. The Applicant hopes to litigate the applicability of Article 11 of the International Convention on Civil and Political Rights through his Miscellaneous Application. His argument is that the ICCPR is directly applicable in Kenya and that it prohibits sending one to civil jail for inability to pay a debt. He may as well have relied on *Zipporah Wambui Mathara [2010]eKLR*.

7. Even if I were to accept that the extreme deficiency in form does not detract from the substance of the constitutional argument the Applicant wants to make, and accepted the Application as validly before me, the Applicant would not succeed on this point. I need not do any more than cite Majanja J. in *Beatrice Wanjiku & another V Attorney General & another [2012]eKLR* in responding to this argument:

“[24]The Civil Procedure Act and the Rules provide a legal regime for arrest and committal as a means of enforcement of a judgment debt. Article 11 of the Convention states that “No one shall be imprisoned merely on the grounds of inability to fulfill a contractual obligation.” I read the merely as used above to mean that one cannot be imprisoned for the sole reason of inability to fulfill a contractual obligation. It means that additional reasons other than inability to pay should exist for one to be imprisoned. Article 11 recognizes that in fact there may be instances where imprisonment for inability to fulfill a contractual obligation may be permitted. As there is no inconsistency between Article 11 of the Convention and the general tenor of the committal regime under Civil Procedure Act and the Rules, the provisions of Article 11 of the Convention are at best an interpretive aid.”

8. In other words, I find no inconsistency between Article 11 of ICCPR and the committal regime of the Civil Procedure Act and Rules since committal is pegged not on inability to pay but refusal to do so.

9. I would also agree with the Respondent that this Application is as close to an abuse of the process of the Court as one can find: the Applicant approached this Court with a similar application less than a year ago. He was rewarded with discretionary stay amidst resistance by the Respondent. He went ahead and trampled on that stay. Now he seeks what, in essence, amounts to a second stay. I do not have to find that the application is res judicata: it is enough that this type of multiple litigation on the same issue in different forms is an abuse of the process of the Court.

10. Worse, rather than approach the Lower Court which issued the decree to plead his case, the Applicant elected to come to the High Court. As the Respondent argues, this goes against the express terms of Section 34 of the Civil Procedure Act.

11. Finally, even assuming that the Application was an appropriate one before me, I would not grant the prayers sought based on the material before me. In a further affidavit, the Applicant has attached a Pay Slip showing that he earns a gross salary of Kshs. 134,891.25 per month as an employee of Kenya Pipeline Company Limited. Due to various deductions – including a whopping deduction of Kshs. 75,715.90 to a Benevolent Fund, his net earnings is Kshs. 36,157.90. He claims that this Pay Slip is sufficient indication that he is unable to pay the decretal amount unless he is allowed to do so in instalments of Kshs. 50,000.00 per month. I do not think that deduction is logically warranted. The Applicant runs a business. He has not attached any documents showing how much income he gains from that business. His affidavit is also silent on what other properties he owns or co-owns. In other words, there is simply not enough demonstration of inability to pay the decretal amount in this case.

12. In short, the Application dated 05/10/2018 is wholly without merit. It is hereby dismissed with costs.

13. Orders accordingly.

Dated and delivered at Nakuru this 15th day of January, 2019

JOEL NGUGI

JUDGE