



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS CIVIL CASE NO. 370 OF 2018

IN THE MATTER OF: ARTICLE 165(6) AND 165(7)

OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: THE HIGH COURT (ORGANIZATION AND ADMINISTRATION ACT, 2015)

AND

IN THE MATTER OF: AN APPLICATION FOR REVIEW AND/OR

SETTING ASIDE ORDERS OF THE SUBORDINATE

COURT IN MOMBASA CMCC NO. 1723 OF 2018

BETWEEN

ALBANUS KYONGOI MULE t/a JOKANYANGI COMPLEX...APPLICANT

VERSUS

SEA ANGEL SERVICE STATION LIMITED.....RESPONDENT

RULING

1. The applicant being the defendant in MOMBASA CMCC NO. 1723 OF 2007 filed a miscellaneous application dated 24th December, 2018 praying for the following orders:-

(i) Spent;

(ii) Spent;

(iii) That this Honourable Court be pleased to call up file No. CMCC NO 1723 of 2007 of the Chief Magistrate's Court, Mombasa and to review and/or vary the order made therein on 10th December, 2018 on the applicant's request to pay the decretal sum by monthly instalments until payment in full;

(iv) That the court be pleased to set aside the orders the lower court made therein on 10th December, 2018 pending the hearing and determination of this application;

(v) That the court be pleased to issue an order that the respondent be released and be allowed to raise the decretal sum pending the hearing and determination of this application;

(vi) That such orders and/or directions be made as would secure the expeditious disposal of this application having regard to the disproportionality engineered by the detention of the applicant thereby deterring him from working for the same money sought by

the respondent; and

(vii) That costs of this suit be provided for.

2. The application is supported by the affidavit of the applicant Albanus Kyongoi sworn on 24th December, 2018. The respondent's Director, Gulamhussen F. Gulamhussin filed a replying affidavit sworn on 31st December, 2018 to oppose the application.

Submissions

3. The applicant through his Counsel Ms Ombat submitted that their prayer was for the court to review or set aside the orders made in Mombasa CMCC No. 1723 of 2007 delivered on 10th December, 2018 committing the applicant to civil jail. She submitted that the applicant had voluntarily and in obedience with the court order attended court on the 10th December, 2018 to show cause why he was not to be committed to civil jail. That further in pursuance of Order 22 rule 34(1) of the Civil Procedure Rules, the applicant offered to pay the decretal sum in installments in the sum of Ksh. 100,000/= per month until payment is cleared. Counsel further submitted that the applicant had initially proposed monthly installments of Kshs. 50,000/= which the respondent had found to be low, as a result of which the applicant reviewed the amount.

4. Ms Ombat relied on the case of **Kerugoya HCCA No. 16 of 2017 Solomon Murithi Gitandu & Another vs Jared Maingi Mburu**, where at page 3 the court held that committal to civil jail ought to be a last resort and that a person is not liable to be committed to civil jail for inability to pay a debt but for being a dishonest and fraudulent debtor. Counsel for the applicant submitted that the respondent had not even made efforts to attach the respondent's property as a mode of execution.

5. The respondent through its Counsel Mr. Atancha submitted that the applicant's application was opposed and that it had been brought under the wrong provisions of the law. He submitted that Prayer No. 3 of the application is untenable before this court as it cannot call for the lower court file and review the lower court orders as the applicant was given the right of appeal. Counsel further submitted that the authority that was relied on by the applicant's Counsel in her submissions arose from an Appeal to the High Court.

6. Mr. Atancha submitted that the decretal amount owed by the applicant was Kshs. 1,671,988.40 and that the monthly installments proposed by the applicant of Kshs. 100,000/= were too low and unacceptable. He further submitted that the respondent through an email dated 14th December, 2018 proposed that the applicant should make payment of half the amount due and thereafter he could make payments through installments of Kshs.100,000/=. This court was informed that the applicant had harassed the Court Bailiff when she went to serve warrants of arrest on him.

7. Ms Ombat in response to the respondent's submissions indicated that the Notice to Show Cause issued by the lower court was for an amount of Kshs. 1,215,245.00 with interest up to 5th May, 2015. She submitted that the respondent had not illustrated that the applicant was in a position to pay 50% of the amount due. On the issue of the threats made to the Court Bailiff she submitted that the respondent failed to give out details of the same.

Analysis and Determination

The issue that this court has been called upon to decide is whether the applicant has made out a good case to justify the grant of orders for review of the lower court's ruling dated 10th December, 2018.

8. The provisions of Article 165(6) and (7) of the Constitution of Kenya grant the High Court supervisory jurisdiction over subordinate courts and empowers the High Court to call for the record of any proceedings before any subordinate court or person, body or authority and make any orders or give any directions it considers appropriate to ensure fair administration of justice.

9. Section 80 of the Civil Procedure Act provides as follows:-

“Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

10. Order 45 Rules 1 and 2 of the Civil Procedure Rules provides thus:-

“1. (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review”

11. From the above provisions, it is clear that while Section 80 of the Civil Procedure Act grants the court the power to make orders for review, Order 45 rules 1 and 2 of the Civil Procedure Rules sets out the jurisdiction and scope of review. Therefore the statutory grounds upon which orders for review can be obtained are firstly, that there ought to exist an error or mistake apparent on the face of the record. Secondly, that the applicant has discovered a new and important matter in evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the order was made. Thirdly, that there is sufficient reason to occasion the review.

12. In instances where an applicant has been wrongly deprived of an opportunity to be heard or where the impugned decision or order was procured illegally or by fraud or perjury, the applicant may be given an opportunity to apply for review. See **Serengeti Road Services vs CRBD Bank Limited [2011] 2 EA 395**. An impugned order can also be reviewed with a view of promoting public interest and enhancing public confidence in the rule of law and the justice system.

13. In the instant case, orders were made by the lower court committing the applicant to civil jail upon Notice to Show Cause being issued. Section 34(1) of the Civil Procedure Act enjoins the court executing a decree to deal with all questions arising between the parties relating to execution. It provides as follows:-

“All questions arising between the parties to the suit in which the decree was passed, or their representatives and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit”.

14. The respondent herein contends that the amount the applicant offered to pay to satisfy the decretal sum was too low and it is on that ground that it sought to commit the applicant to civil jail. It is however apparent, that the applicant has indeed not refused to pay the respondent and the only issue is on how the amount will be settled. The issue of whether or not the applicant is possessed of sufficient means to settle the decree as demanded by the respondent can only be determined by the court which passed the decree which is seized of execution of the said decree and not by this court.

15. The issue of committal to civil jail is one of the remedies available in our statutes and as long as it is applied procedurally without any abuse of due process, it is legitimate. See **Kisumu CA 43/2006 Paul Ojigo Omanga vs Japheth Angila**. It therefore follows that the constitutionality of the execution procedure by way of committal to prison would not be in question as long as the safeguards under the relevant provisions of the Civil Procedure Act and Rules thereof are complied with.

16. The same issue was considered by Nyamu J (as he then was) and Wendoh J in **Braeburn Ltd vs Gachoka & Another (2007) 2 EA 67** where the court held thus:-

“To determine whether the right to liberty is limited by the law prescribed, and the person whose liberty is circumscribed has been subjected to due process under the law an independent and impartial court established by the law as per Section 77(1) and 77(7), this court must examine the concerned law in the light of Section 84(1) of the Constitution to establish that both the substantive and procedural law under which a person may be deprived of his liberty, itself meets with the constitutional safeguards under those provisions of the Constitution and in a manner justifiable in a democratic society..... rules 18 and 32 of Order 21 of the Civil Procedure Rules do meet and in a very special way in relation to a debtor surpass the standard laid down in the Constitution for the deprivation of a person’s liberty. This is so because 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...To Conform with that high standard proof, the discretion conferred upon the court to either issue a warrant of arrest and instead issue a notice calling upon the judgement to appear before the court on a day to be specified in the notice and show cause why he should not be committed to prison, must be construed, strictly, that is to say mandatorily, that upon an application by a decree holder for execution of a money decree by way of arrest and committal to prison the court to which an application is made for issue of a warrant of arrest shall in the instance first issue a notice to the judgement debtor to appear in court and show cause why he should not firstly be arrested, and secondly, committed to prison. That is the first step towards the execution of a decree for payment of money...The second step is the examination of the judgement debtor when he appears in court. Of course if he does not appear, the court issuing the notice in the first instance is at liberty to issue a warrant of arrest and if arrested, the judgement debtor may be detained in prison pending his appearance in court and may be released upon provision of security to ensure his attendance or appearance in court...If however the debtor appears to the notice to show cause, which is mandatory, in terms of the said Order 21, rule 35, or pursuant to his arrest and appearance before he can be committed to prison, it is the duty of the decree holder (who has sought the arrest and committal of the judgement debtor to prison) to satisfy the court that the judgement debtor is not suffering from poverty or any other sufficient cause and is able to pay the decretal sum that: (i) the judgement debtor, with the object or effect of obstructing or delaying the execution of the decree: (a) is likely to abscond or leave the local limits of jurisdiction of the Court; (b) 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 (ii) the judgement-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 is exempted from attachment, in execution of the decree; or (iii) that the decree is for a sum for which the judgement-debtor was bound in a fiduciary capacity to account (trustees or persons holding moneys in a professional capacity or in trust)...In essence, the judgement debtor should be examined in the manner envisaged in Order 21, rule 36 as to the debtor’s total wealth and indebtedness to determine the judgement debtor’s total ability or inability to pay and whether such inability to pay is from poverty or other sufficient cause. It is only after the court is satisfied of these matters, after subjecting the judgement-debtor to due process in the manner construed, the requirements of

mandatory notice, before a warrant of arrest may be issued for his arrest and compulsion to attend or appear before a court can decree for payment of a money debt be executed upon a judgement debtor by way of arrest and committal to prison...The execution of a judgement decree by way of arrest and committal to prison is extreme in nature. It deprives a citizen of his liberty, to do so, the highest standards, that is to say, the constitutional safeguards as to due process by way of notice of intended execution of the decree by way of arrest and committal be given to the judgement debtor as a first step and as a second step, a due inquiry and satisfaction to the court, by the decree holder, as to judgement debtor's ability to pay and refusal and/or neglect to pay, and therefore the necessity to punish him for contempt of a court order by depriving him of his liberty...It is clear under both section 38 of the Civil Procedure Act and Order 21, rule 35(1) that no judgement-debtor will, on account of his inability from poverty or other sufficient reason, be arrested and committed to prison...The section is not vindictive and the Court, in the exercise of its discretion would not order the imprisonment of a defaulting trustee unless it was likely to be productive of payment..."

17. Having considered the submissions made and the applicable provisions of the law and authorities, it is my finding that the respondent herein has not in any way satisfied the terms of requirements of Order 21 Rule 35 of the Civil Procedure Rules since the applicant presented himself before the lower court in obedience to the Notice to Show Cause and even made proposals on the mode of payment of the amount due.

18. This court must add that due to the failure by the applicant's Counsel to avail copies of the lower court proceedings that required review, I was unable to deliver the ruling as expeditiously as I would have liked to. This court had to call for the lower court proceedings and make copies thereof in order to gain sight of what had transpired in the said court.

19. Consequently, I am inclined to allow the applicant's application dated 10th December, 2018 in the following terms:-

- (i) That the order made in Mombasa CMCC 1723 of 2007 committing the applicant to civil jail is hereby reviewed and set aside; and
- (ii) Each party shall bear its own costs of this application.

DELIVERED, DATED and SIGNED at MOMBASA on this 8th day of February, 2019.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Ombat for the applicant

Mr. Atancha for the respondent

Mr. Oliver Musundi - Court Assistant