



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO 21 OF 2018

MWALIMU DONALD MATI.....PETITIONER

VERSUS

CHIEF MAGISTRATES COURT, MILIMANI.....1<sup>ST</sup> RESPONDENT

NIC BANK LIMITED.....2<sup>ND</sup> RESPONDENT

JUDGMENT

1. **Mwalimu Donald Mati**, the Petitioner, was at the time of filing this petition a director of **Media Analysis and Research Services Ltd**, a limited liability company. In October 2012, his company may obtain an overdraft facility, a Loan and a Credit from **NIC Bank Limited**, the 2<sup>nd</sup> respondent herein, a limited liability and banking institution. The banking facilities were secured by the petitioner's personal guarantee.
2. As it would turn out, the company was unable to service the facility and the 2<sup>nd</sup> respondent demanded payment from the petitioner. When the petitioner could not pay, the 2<sup>nd</sup> respondent instituted Civil suit **CMCC No 1457 of 2013** at the Chief Magistrate's Court Milimani, Nairobi and obtained judgment for **Kshs5522,520.78** with interest at **37.5%** per annum.
3. On 2<sup>nd</sup> March 2016, the petitioner and the 2<sup>nd</sup> respondent entered into a consent on the settlement of the decree, which the petitioner now contends was done by duress. He states that he was intermittently employed and was not, therefore, not steady in payments in terms of the consent.
4. The petitioner states that sometime in 2016, the 2<sup>nd</sup> respondent applied for warrants of arrest and committal to civil jail for then outstanding amount of **Kshs8,635,363/-** which the 1<sup>st</sup> respondent granted. The petitioner further states that he was arrested and committed to civil jail but well-wishers paid Kshs1,000,000/- to have him released which was done on 21<sup>st</sup> November, 2016.
5. The petitioner avers that he has no means of paying the civil debt and his arrest and committal to civil jail will not serve any useful purpose except to deprive him of his liberty and that the 1<sup>st</sup> respondent is determined to have him committed to civil jail without exhausting other modes of execution. According to the petitioner, the provisions for civil jail are intended for people who have means but are refusing to pay but not to deprive those unable to pay their liberty because they are poor.
6. The petitioner pleads various Articles of the Constitution including Article 27 on equal protection and benefit of the law, Article 28 on dignity and Article 29 on security of the person. He also cites Article 39(1) on the freedom of movement, contending that committal to civil jail infringes this right. The petitioner has filed this petition seeking the following reliefs:-

**a. A declaration that a committal to civil jail of the petitioner for inability to settle a civil debt namely the Decretal amount in the CMCC No 1457 of 2015 Milimani Commercial Court infringes on the petitioner's Constitutional Right to freedom of movement under Article 39(1) of the constitution.**

**b. That this Honourable court be pleased to quash and/or discharge the orders given in the CMCC No 1457 of 2015 Milimani Commercial for issuance of Warrant of Arrest against the petitioner.**

**c. Cost of this petition.**

**1<sup>st</sup> Respondents response**

7. The 1<sup>st</sup> respondent filed grounds of opposition dated 27<sup>th</sup> November 2018, contending that the petitioner has invoked inappropriate method of seeking to quash the orders given in **CMCC No 1451 of 2018** instead of filing an appeal; that the petition is imprecise and lacks sufficient details on the alleged violations and that the petition is frivolous, vexation and an abuse of the court process meant to interfere and circumvent execution of lawful orders of the court.

### ***2<sup>nd</sup> Respondent's response***

8. The 2<sup>nd</sup> respondent filed a replying affidavit by **Kenneth Mawira**, the 2<sup>nd</sup> respondent's legal Manager, sworn on 7<sup>th</sup> February 2018 in opposition to the petition. Mr Mawira deposed that the judgment and decree in CMCC No **1457 of 2013** was obtained because the petitioner failed to enter appearance or file a defence despite service of summons on them and that the interest awarded was contractual.

9. He went on to depose that when the petitioner was served with the Notice to show cause, he willingly approached the 2<sup>nd</sup> respondent and entered into a consent on the settlement of the decree resulting into the consent signed on 2<sup>nd</sup> March 2016. He contends however, that the petitioner thereafter made irregular payments but finally stopped paying as he had undertaken.

10. Mr Mawira denied that there was duress or coercion on the part of the petitioner in entering into the consent; that after warrants were issued and the petitioner arrested, the court gave him an opportunity to show cause why he could not be committed to civil jail and that the court was satisfied that section 38 of the civil procedure Act and order 22 rule 34 of the civil procedure rules had been complied with.

11. He further deposed that after being committed to civil jail, the petitioner paid **Kshs1,000,000/-** and as a result, he was released from jail on condition that he pays **Kshs200,000/-** monthly to settle the decree but he has again failed to honour this undertaking. According to Mr Mawira, they are not aware of other of the petitioner's assets capable of attachment in execution of the decree. He contends that sections 38 and 40 of the Civil Procedure Act provide the legal framework for arrest and committal to civil jail hence they are not unconstitutional.

12. He further contends that Article 11 of **UNCCPR** recognizes the fact that there may be instances when imprisonment for inability to fulfil a contractual obligation is permitted hence the process of arrest and detention under sections 38 and 40 is not arbitrary and the court must also consider the rights of the decree holder.

### ***Petitioner's submissions***

13. Mr Thuita, learned counsel for the petitioner, submitted highlighting their written submissions dated 21<sup>st</sup> May 2018, that although the 1<sup>st</sup> respondent obtained judgment against the petitioner, the petitioner is not able to pay the decretal sum because he does not have the means to do so. Learned counsel submitted that the petitioner was committed to civil jail on 12<sup>th</sup> October 2016 but well-wishers assisted him pay **Kshs1,000,000/-** but that he has tried to pay the balance without success.

14. In that regard, Mr Thuita, urges the court to exercise its jurisdiction under Article 165 to protect the petitioner's right to liberty and movement. He contends that a person with no means should not be sent to civil jail. He relies on several decisions and international instruments to support their case that committing the petitioner to civil jail for failure to pay a civil debt is unconstitutional.

### ***1<sup>st</sup> respondent's submissions***

15. Miss Ndirang, learned counsel for the 1<sup>st</sup> respondent, submitted also highlighting their written submissions dated 27<sup>th</sup> November 2018, that there is no violation of the 1<sup>st</sup> respondent's rights; that the warrants of arrest were issued in accordance with the law and that the burden is on the 2<sup>nd</sup> respondent to show that the court violated his rights and fundamental freedoms in issuing the warrants of arrest. Learned counsel further submitted that the petitioner is not entitled to the reliefs sought since he has the option of filing an appeal if he feels aggrieved.

### ***2<sup>nd</sup> respondent's submissions***

16. Mr Rugendo, learned Counsel for the 2<sup>nd</sup> respondent, submits also highlighting their submissions dated 18<sup>th</sup> May 2018, that committal to civil jail is not unconstitutional, and that Article 24(1) (d) is clear that the Bill of Rights is enjoyed without prejudice to the rights of others. For that reason, counsel contends, the court is enjoined to balance between the petitioner's rights and those of the 2<sup>nd</sup> respondent.

17. Mr Rugendo argues that sections 38 and 40 of the Civil Procedure Act form the legal regime for committal proceedings in execution of judgments and decrees; that the petitioner admits at paragraph 11 of his petition that he provides consultancy services for a leaving but that he has not disclosed the earnings which, in counsel for the 2<sup>nd</sup> respondent's view, amounts to concealing material facts.

18. According to Mr Rugendo, when the petitioner was served with the Notice to show cause, he approached the 2<sup>nd</sup> respondent and the two entered into consent on how t the 2<sup>nd</sup> respondent was to liquidate the decretal sum. Counsel submits that following that consent, the petitioner made some payments but fell into default once again. He, therefore, contends that the petition is unmeritorious and is intended to deprive the 2<sup>nd</sup> respondent its right to recover the amount in the decree. He relies on a number of decisions in support of their position.

### ***Determination***

19. I have carefully considered this petition, the responses, submissions and the authorities relied on. The issue that arises for determination is whether arrest and committal to civil jail is a violation of rights and fundamental freedoms. The petitioner challenges the 2<sup>nd</sup> respondent's

desire to have him committed to civil jail for failure to meet his obligations under the decree contending that it is unconstitutional and a violation of his human rights.

20. The facts of this petition are not in dispute. The petitioner's company obtained a financial facility from the 2<sup>nd</sup> respondent which he personally guaranteed. When the company failed to service the loan facility, the 2<sup>nd</sup> respondent demanded payment from the petitioner. The petitioner did not pay, leading to a suit being filed against him. The 2<sup>nd</sup> respondent obtained a judgment after the petitioner failed to defend the said suit. The 2<sup>nd</sup> respondent then initiated execution proceeding.

21. When the petitioner was served with the notice to show cause why he could not be committed to civil jail, he entered into negotiations leading to a consent being recorded on how he would liquidate the decretal sum. That consent notwithstanding, the petitioner still failed to perform his obligations under the terms of the consent prompting the petitioner to take committal proceedings. The petitioner was committed to civil jail but he paid **Kshs1,000,000/-** to secure his release. The 2<sup>nd</sup> respondent states that the petitioner had undertaken to pay a monthly installment of **Kshs200,000/-** when he was released but he has not done so.

22. Based on the above facts, the petitioner has filed this petition seeking the courts intervention. The petitioner's argument is that he is poor and therefore unable to pay the debt hence he should not be committed to civil jail. He contends that committing a poor person like him to civil jail for inability to pay a debt, is unconstitutional and a violation of liberty and freedom of movement. The respondents on their part contend that there is no violation of rights and fundamental freedoms; that committal to civil jail is not unconstitutional; that the right to liberty and freedom of movement is not absolute and that enjoyment of one's right should not prejudice rights of others. This therefore calls on the court to determine which side is right.

### ***Whether arrest and committal to civil jail is unconstitutional***

23. The law relating to execution of judgments and decrees and in particular committal to civil jail is provided for in sections 38 and 40 of the Civil Procedure Act. Section 38 empowers the Court, upon application by a decree holder, to order execution. One of the means of execution is to order arrest and detention of the person in prison.

24. The section has a proviso to the effect that where the decree is for payment of money, execution by detention in prison should not be ordered unless, after giving the judgment debtor an opportunity of showing cause why he should not be committed to prison, the court is satisfied 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; or that the decree is for a sum for which the judgment debtor was bound in a fiduciary capacity to account. This section is therefore clear that a person should be arrested and committed if he has the means to pay but has since the date of the decree refused to do so.

25. Section 40 provides for the manner in which the judgment debtor may be arrested and thereafter dealt with. The two sections are augmented by Order 22 of the Civil Procedure Rules, (2010). The rules provide that the law recognize a decree as a right that accrues to the decree holder upon obtaining judgment in his favour, bestows a legal obligation on the judgment debtor to pay the amount of the decree.

26. The petitioner's contention is that the threat to his arrest and committal to civil jail will violate his rights and fundamental freedoms; that it will not only violate the Constitution but also **ICCPR**. Article 11 of **ICCPR** provides that no one should be imprisoned merely on the ground of inability to fulfill a contractual obligation. The petitioner's contention seems to be that since **ICCPR** is part of the law of Kenya by virtue of Article 2(6) of the Constitution, his arrest and committal to civil jail will be contrary to that law.

27. As this court observed in ***Charles Lutta Kasamani v Concord Insurance Co. Ltd & 2 others*** [2018] eKLR, although **ICCPR** is one of the International Conventions that were ratified by Kenya and by virtue of Article 2(6) of the Constitution, it is part of the laws of Kenya, what must be clear is that the fact of being part of the law of Kenya by virtue of Article 2(6) of the Constitution, **ICCPR** or any of its Articles does not rank above other Acts or statutes enacted by the Parliament of Kenya. ***"It can only rank in pari passu with them. It is neither equal to Articles in the Constitution."***

28. In ***Beatrice Wanjiku & another V Attorney General & another*** [2012]eKLR the Court stated:

***"[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 Rues, the provisions of Article 11 of the Convention are at best an interpretive aid."***

29. I entirely agree with the above holding. For my part, I see no apparent contradiction or conflict between sections 38 and 40 of the Civil Procedure Act on the one hand and Article 11 of **ICCPR**. A proper reading of section 38 shows that details circumstances under which a person can be committed to civil jail. The section is clear that a person will not be committed because s/he is unable to pay but rather where one though able, refuses to pay or discharge his obligations under the decree.

30. There is no doubt therefore, that both Article 11 of **ICCPR** and section 38 of the Civil Procedure Act protect the dignity of those unable to pay civil debts. They should, however not be taken as a cover for even those who have the means but simply refuse to pay. A different interpretation to Article 11 and section 38 would render execution process under the Civil Procedure Act and Rules meaningless in so far as committal to civil jail as a means of executing decrees is concerned.

31. The petitioner also contends that arrest and committal to civil jail will violate his rights and fundamental freedoms more so the right to liberty, dignity and freedom of movement. He argues that committal to civil jail will therefore limit his rights in contravention of Article 24(1) of the Constitution. Article 28 of the Constitution guarantees every person's inherent dignity and the right to have that dignity respected and protected. On the other hand, Article 29 secures freedom and security of the person including the right not to be deprived of his freedom arbitrarily, not to be subjected to violence, not to be detained without trial and not to be treated or punished in a cruel, inhuman or degrading manner. Article 39 further guarantees the right to freedom of movement.

32. It is true, therefore, that the Constitution guarantees and protects the right to liberty and freedom of movement of every person. This right is however not absolute. Article 24(1) of the Constitution provides for instances when a right in that Bill of rights may be limited. The limitation should be law, be reasonable and justifiable in an open and democratic society. The limitation should also apply only if there is no other less restrictive means of limitation. Further still, one's enjoyment of the right(s) should not be at the prejudice of another person's right.

33. It is worth of note that the limitation is by law, namely; sections 38 and 40 of the Civil Procedure Act and Order 22 of the rules. The limitation, in my view, is also reasonable and justifiable because it is meant to enforce court decrees where a party, though with means, declines to meet his obligation under the decree. This limitation is also justifiable and permissible in a society guided by democratic principles and the rule of law.

34. ***“Without enforcing Court decrees through committal to civil jail where one has the means but has refused to pay, would infringe on the rights of those who have successfully gone through legal processes and obtained decrees, which they cannot enforce because judgment debtors who have refused to pay would rush to court and obtain declarations of violation of fundamental rights and freedoms once they are committed to civil jail.” (Charles Lutta Kasamani v Concord Insurance Co. Ltd & 2 others ) (supra)***

35. I also agree with the holding in *Jayne Wangui Gachoka v Kenya Commercial Bank Limited [2013]eKLR* that-

***“[33] The deprivation of liberty sanctioned by sections 38 and 40 of the Civil Procedure Act is permissible and is not in violation of either the Constitution or ICCPR. The caveat, however, which has been emphasized in all the cases... is that before a person can be committed to civil jail for non-payment of a debt, there must be strict adherence to the procedures laid down in the Civil procedure Act and Rules, which provide the due process safeguards essential to making limitation of the right to liberty permitted in this case acceptable in a free and democratic society.”***

36. Committal to civil jail will only be permissible if the person sought to be committed is genuinely unable to pay the amount in the decree and due process has been followed. The law does not protect those who willingly refuse to meet their obligations under the decree. In this case, the petitioner contends that he is poor while the 1<sup>st</sup> respondent argues otherwise.

37. The petitioner is a director of a company offering consultancy services. That would mean the company generates income and the petitioner in return is able to eke out a living. After judgment and decree was obtained against him, the petitioner willingly made arrangements with the 2<sup>nd</sup> respondent how to settle the decretal amount. He was thus fully aware of his obligation and even before committing himself to paying, he knew the source of the money and even paid **Kshs. 1000,000/=** and undertook to pay a monthly sum of Kshs200,000/- which he has not paid. The Court must always balance interests of the parties before it, the petitioner and respondent, flowing from obligations under the decree.

38. A party seeking to rely on poverty as reason for avoiding his obligations under a decree, must show that there is indeed total inability to pay. The petitioner's contention that he is poor and unable to pay the decree is unconvincing given the manner in which he has conducted himself throughout the proceedings before the Magistrate's court. He has always entered into consents to settle the amount only turn away from the terms of those consents the moment he secures his freedom. For the above reasons, I am unable to accept the contention that the petitioner is totally poor to the extent of not discharging his obligations under the decree or part thereof.

39. Regarding the 1<sup>st</sup> respondent, I am unable to understand why the court was enjoined in to these proceedings. This is so because **Article 160 (5)** of the Constitution insulates judicial officers from suits arising from performance of their official duties. The Article provides that (5) ***“A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function.”*** Further, section 45 of the **Judicial Service Act, 2011**, shields judicial officers from any civil action or suit for or in respect of any matter or thing done or omitted to be done in good faith by him/her as a judicial officer. That being the law, I find that the inclusion of the Magistrate's court as a respondent in the petition was unnecessary and was in violation of clear provisions of the Constitution and statute.

40. In the circumstances, therefore, having considered the petition, submissions the constitution and the law, I am not persuaded on the merit of this petition. Consequently, this petition is declined and dismissed with costs to the 2<sup>nd</sup> respondent.

**Dated, Signed and Delivered at Nairobi this 14<sup>th</sup> Day of March 2019**

**E C MWITA**

**JUDGE**