REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISC. CIVIL APPLICATION NO. 13 OF 2018

IN THE MATTER OF ADVOCATES ACT

AND

IN THE MATTER OF ADVOCATE -CLIENT BILL OF COSTS IN KAKAMEGA

ELC NO 5 OF 2013 ADRIANO WASAYA ANYINGA VERSUS JULIUS NAKAYA KABOLE

BETWEEN

INNOCENT G. ONDIEKI....................................APPLICANT

VERSUS

JULIUS NAKAYA KABOLE...........................RESPONDENT

RULING

1. The respondent, Julius Nakaya Kabole, herein has filed an application dated 15th April 2019, seeking that he be released forthwith from civil jail on terms that are judicious or on execution of a personal bond pending the hearing and determination of the application, that the order committing him to civil jail on the 23rd April 2019 on the basis of a notice to show cause dated 28th February 2019 and all consequential orders issued therein be set aside, and that he be granted leave to file a response in Kakamega Misc. Application No 13 of 2018 and the applicant's bill of costs dated 7th March 2018.

2. The main ground of the application is that he has never been served with the court process in respect to the miscellaneous cause which brought about the costs he is now asked to pay. It is his position that he does not owe the applicant any legal fee and that the applicant wants to unjustly enrich himself.

3. In his oral submissions in court, Mr. Chitwa, advocate for the respondent, stated that he sought to set aside orders of the court issued on the 3rd April 2019 and not the 23rd April as he indicated in the application. He stated that the civil imprisonment was unfair as the respondent was never aware of the taxing of the bill of costs against him as the applicant never served him with the same. He submitted that the respondent was being represented by the applicant, who, without notice, ceased acting for him in the matter and that was after he had paid him Kshs. 20,000.00 as legal fees, which they had agreed upon. He also stated that the respondent was sickly, and that necessitated that he be released.

4. The applicant on his part opposed the application, stating that the same had no basis. He stated that the orders sought to be set aside were non-existent and that therefore there was nothing to be set aside. He further stated that the application had not been amended to capture the proper dates and as such the same cannot be allowed as prayed. He further stated that the respondent had been arrested in execution of the certificate of costs that had not been appealed against and which was still in force.

5. The right to commit a judgment-debtor to civil Jail is provided for under Section 38 of the Civil Procedure Act, Cap 21, Laws of Kenya, which provides for powers of the court to enforce execution. It is provided that:

> '*Subject to such conditions and limitations as may be prescribed, the Court may, on application of decree holder, order execution of the decree –*
>
> *(a) by delivery of any property specifically decreed,*
>
> *(b) by attachment and sale, or by sale without attachment of any property,*

(c) by attachment of debts

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

(e) by appointing a receiver or

(f) in such other manner as the nature of relief granted may require.

Provided that where the decree is for 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.

(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 of money which the judgment debtor was bound in a fiduciary capacity to account.'

6. In *Jedida Chepkoech Mutai (Suing as The Legal Representative of the Estate of Julius Kipkorir Mutai (Deceased) vs. Cherono Beatrice* [2018] eKLR, it was stated that -

'As I understand it, the general position in law is that the arrest contemplated under section 38 and 40 of the Civil Procedure Act is not unconstitutional. All that is required in proceeding under the two provisions is that there has to be strict adherence to the law. In Jane Wangui Gachoka vs Kenya Commercial Bank Limited [2013] eKLR, the petitioner asked the court to declare sections 38(d) and 40 of the Civil Procedure Act and Order XX1 Rules 32,33 of the Rules which allowed for commitment to civil jail for non-payment of a debt as archaic and unconstitutional. In declining to make the declaratory orders sought by the petitioner, the court stated as follows:

"[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 set out above 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."

See also Mary Nduku Ndunda vs Attorney General & 4 Others [2016] eKLR.'

7. It should, however, be noted that the court can, at any time, review its orders based on the grounds advanced by the respondent. The main ground, as stated above, ought to be that the rules were not adhered to by the court and the parties thereof.

8. The application before me has not been premised on any provision of the law and therefore the court, in the interest of justice, can only rely on the face of the application and the affidavit in support thereof. The respondent herein prays that orders of this court committing him to civil jail, issued on the 23rd April 2019, be set aside. As correctly urged by the applicant no such orders were issued on that date and thus there are not orders capable of being set aside if the court goes by the date that is stated in the application.

9. As stated above, the only viable ground of setting aside an order for committal to civil jail, is when the respondent challenges the mode or manner in which the said orders were attained. The respondent herein states that he was not aware of the notice to show cause proceedings against him as he was not served with the notice.

10. The court in *Grand Creek LLC & Another vs. Nathan Chesangmoson* [2015] eKLR held that -

'In all cases where Order 22 Rule 18(1) of the Civil Procedure Rules applies, a Notice must be served upon the person against whom execution is applied requiring him to show cause, on a date to be fixed, why the decree should not be executed against him. It should be noted, however, that there must have been an application for execution of a decree for payment of money by arrest and detention in prison of a judgment-debtor. And Order 22 rule 31 will come into play where the court, instead of issuing a warrant of arrest, decides to issue a notice calling upon the judgment-debtor 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. But where the judgment-debtor does not appear as directed in the notice, the court will issue a warrant for his arrest. This rule follows after section 38 and 40 of the Civil Procedure Act. The warrant of arrest is to bring the judgment-debtor to court and it is not an automatic committal to prison because the court will still be required to satisfy itself of all the requirements of Order 22 rule 33 and rule 34 of the Civil Procedure Rules. The proceedings under Order 22 rule 34 act as the safeguard against denial of liberty in execution of a decree without due process. And courts have

comprehensively pronounced themselves on the constitutionality of the procedure of arrest and committal to jail in execution of a decree in not one case. See the cases cited by the Respondents, especially National Bank of Kenya case (supra), Jayne Wangui Gachoka (supra), Braeburn Limited (supra), Beatrice Wanjiku and Ex parte Nassir Mwandithi (supra). This point is settled that arrest and committal to prison in execution of a decree under the Civil Procedure Act and Rules is not unconstitutional as long as all the safeguards provided in law are afforded to the judgment-debtor. I so hold in this matter.'

11. In *Solomon Muriithi Gitandu & Another vs. Jared Maingi Mburu* [2017] eKLR the court held that -

'In the case of Braeburn Limited -V- Gachoka and another (2007); it was held inter alia;

"A person is not liable to be committed to civil jail for inability to pay a debt but a dishonest and fraudulent debtor is liable to be punished by way of arrest and committal."

The Court further observed that: -

"Section 38 of the Civil Procedure Act however, provides a limitation of the courts' power to order execution of a decree by way of detention in prison. The section prohibits the court from making an order of execution of any decree for the payment of money unless the judgment-debtor has first been given an opportunity of showing cause why he should not be committed to prison and even where the judgment debtor has been given such notice to show cause, the court must itself be satisfied and give reasons in writing for that."

These limitations are further re-stated under Order 22 rule 31 (1) Civil Procedure Rules. A notice to show cause may be issued requiring the judgment debtor to show cause and where he fails to appear a warrant of arrest is issued. In the case the Court found that the requirement for Notice to Show Cause is mandatory and whether the judgment appears for notice to show cause or under warrant of arrest, it is 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 sum or proof the provisions of Order 22 rule 35 Civil Procedure Rules, that is examination of the debtor as to his property.

9. As execution by way of arrest and committal to prison deprives the debtor his liberty, the trial court ought to have ensured strict compliance with Section 38 supra and Order 22 rule 31 (1) supra to determine the appellants' ability to pay. The Court had a duty to ensure constitutional safeguards as to due process by ensuring the notice of intended execution by way of committal was personally served and a due inquiry and satisfaction of the Court by the decree holder as to the judgment debtor's ability to pay. It is only then that the Court would rightly commit him to prison. A judgment debtor in view of the provisions of Section 38 of the Procedure Act and Order 22 rule 31 (1) will not be committed to prison on account of his inability to pay or on account of poverty.

10. It has been held severally that no person should be sent to prison for inability to pay a debt. In Zippora Wambui Muthara – Milimani BC Cause 19/2010 (unreported) Justice Koome (as she then was) observed as follows:

"There are several methods of enforcing a civil debt such as attachment of property. The respondent's claim that the debtor has money in the bank, that money can also be garnished. An order of imprisonment in civil jail is meant to punish, humiliate and subject the debtor to shame and indignity due to failure to pay a civil debt. That goes against the international covenant on civil and political rights that guarantees parties' basic freedoms of movement and of pursuing economic cultural development"

11. It is incumbent on the party seeking to execute a civil debt by way of committal to civil prison to adhere to the legislative safeguards before a party can be committed to civil jail. In the case of Braeburn supra and Jane Wangui Gachoka -V- Kenya Commercial Bank Petition 51/2010 it was held that Section 38 and 40 of the Civil Procedure Act are neither inconsistent with the provisions of the relevant provisions of the Constitution and International Bills of Human Rights. I am persuaded to agree with the findings. However, for a judgment debtor to be committed to prison, the Court must ensure that the conditions for committal to prison on account of a money decree are strictly followed. A judgment debtor will not be committed to prison for inability to pay or to fulfill contractual obligation. There must be additional reasons and the court being satisfied after the debtor has been given notice to show cause and give reasons in writing as provided under Section 38 of Civil Procedure Act and Order 22 rule 31 (1) Civil Procedure Rules. There is also a requirement that the debtor be served with notice of entry of judgment under Order 22 rule 20. This gives the debtor opportunity to pay before the decree holder starts the execution process.'

12. In the instant cause, the matter came up for notice to show cause on the 20th March 2019. On that day, the applicant filed an affidavit of service, deponed by one Benson Wanzala, on the 15th March 2019. In the affidavit, the process server gave an elaborate account of how he served the respondent herein. It is on the basis of that affidavit of service that the Deputy Registrar proceeded to issue warrants of arrest against the respondent. The respondent, through his advocate, denied service of the same. He challenged the fact of service and the place where he was allegedly located by the process server for purpose of service.

13. A perusal of the court record shows that the respondent was indeed served. It should be noted that the respondent herein was once a client of the applicant, who must have become familiar to him and to places where he could be found or traced. The respondent has also not proposed to cross-examine the process server to challenge the veracity of his averments in the affidavit of service.

14. In *Grand Creek LLC & Another vs. Nathan Chesangmoson* [2015] eKLR**,** the court allowed a similar application on the basis that the judgment debtor wished to cross-examine the process server to establish the veracity of the affidavit of service. The court in its judgment observed that -

‘[14] In law, failure by the judgment-debtor to acknowledge or sign the process does not invalidate service at all. Indeed, the law is that such is good service. See order 5 of the Civil Procedure Rules. But, personal service of the notice has been vigorously contested. The judgment-debtor stated that he has never met the process server named ARCHBALD WEKESA NYUKURI. I note the judgment-debtor intimated that he will require the attendance of the said process server for cross-examination on the purported service of the notice herein. Service of pleadings generally has also been contested and parties made some arguments towards that end. They did not really argue the application dated 25thFebruary, 2013 which carried substantial complaints. It is possible that the notice was served but the affidavit of service does not contain much detail except that he found the judgment-debtor in his home at Kiwanja Ndege within Kitale. I also reckon that his application dated 25thFebruary 2013 is also pending and raises some fundamental issues which merit hearing on merit despite the fact that the judgment debtor has been quite lethargic in setting down his said application for hearing. I am also acutely aware that the liberty of the judgment-debtor is at stake. Therefore, even though the decree-holder has rights on the decree, I am convinced that there is need to give the judgment-debtor an opportunity to canvass his application dated 25thFebruary 2013. I do this purely in the interest of justice and to bring the issues to closure once and for all. But, in recognition of the rights of the decree-holder, I will not lift the warrant of arrest. Instead, I will stay them pending the hearing of the said application dated 25thFebruary 2013. I will also assign the application a date for the hearing in order to avoid any further delay in the matter. Costs of the two applications shall be paid by the Respondent. It is so ordered.’

15. It is clear that the service herein has not been successfully challenged. The Deputy Registrar considered the affidavit of service, and found and held that the service was proper. It is my holding, therefore, that the service of the notice to show cause was proper and that the respondent has not offered any sufficient reason to warrant the setting aside of the orders made on the 3rd April 2019.

16. It is the prayer of the applicant that the jail term be extended. The respondent contends that there is no law that allows the extension of the said civil jail term, and prayed that he be released on bail.

17. It should be noted that the respondent herein has served a term of 30 days in prison. The court in *Munyui Kahuha vs. Ng’ang’a Kahuha* [2007] eKLR, held that -

‘Any kind of incarceration involves the limitation of a person’s liberty. Although the law permits that person’s liberty may be curtailed in specified situations, the law implores upon us to ensure that “due process” is followed. That is most fundamental. A person cannot simple be condemned or incarcerated without being heard. That is contrary to the principles of natural justice. It was completely irregular to “extend” his imprisonment at the instance of the Respondent, on a “mention” of the case. That could have only been done by way of a formal application, giving the Judgment Debtor the opportunity to be heard.

However, the Respondent’s argument that once the Court had exercised its discretion to sentence him to thirty days’ civil jail, the Court had no further discretion to extend time, is untenable in law. Section 42(1) of the Civil Procedure Act allow detention in execution of a decree “for a period not exceeding six months.” That simply sets the maximum limit of detention to six months, whether it is done by way of one sentence, or several sentences, aggregating to a maximum of six months. What is important, however, is that due process must be followed.’

18. The maximum term for civil imprisonment is six months, the same can be ordered in one sentence or can be extended in several sentences to amount to the six months. It should, however, be noted that the extension of such term cannot be done on an oral application in court, just like in the above case, a formal application for the same ought to be made and the judgment debtor be granted a chance to respond to the same.

19. In the upshot, I find that the application before me has no merit, especially bearing in mind that the respondent has already served the 30 days and the order is, therefore, spent. I shall accordingly dismiss the application dated 15th April, 2019

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 9th DAY OF May 2019

W MUSYOKA

JUDGE