REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

MISC CIVIL APPLICATION NO.175 0F 2019

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW BY GEORGE ARAB MULI MWALABU FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE DECISION BY MS. E. AGADE SENIOR RESIDENT MAGISTRATE IN THE SENIOR PRINCIPAL MAGISTRATES COURT AT KANGUNDO

BETWEEN

GEORGE ARAB MULI MWALABU.....APPLICANT

VERSUS

SENIOR RESIDENT MAGISTRATE KANGUNDO...1ST RESPONDENT

INSPECTOR GENERAL.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

AND

FESTUS MBAI MBONYE.....INTERESTED PARTY

JUDGEMENT

1. By a Notice of Motion dated 22nd July, 2019, the ex parte applicant herein, **George Arab Muli Mwalabu**, seeks the following orders:

> **1)THAT an order of Certiorari do issue to remove to this Honorable Court for the purpose of being quashed and to quash the decision of the 1st Respondent dated 17th January, 2019 ordering the arrest of the applicant by Flying Squad, Nairobi.**
>
> **2) THAT Prohibition do issue prohibiting the Respondents from arresting and/or detaining the applicant in the implementation of the said decision**
>
> **3) THAT the Costs of this application abide the result thereof.**

2. According to the Applicant, the interested party herein filed civil suit No. 72 of 2016 before the SPM's Court Kangundo and obtained ex parte judgement against the applicant. A subsequent attempt by the applicant to set aside the said judgement was unsuccessful and in execution of the resultant decree the interested party obtained a warrant of attachment and sale of the applicant's plot number 1190 (16-061) Muka-Mukuu Society. The attempts by the applicant to stop the said sale did not succeed with the consequence that the said attachment remained in force. However, during the pendency of the said attachment, the 1st Respondent issued a concurrent execution vide a warrant of arrest to be executed by the 2nd Respondent's Flying Squad. It was therefore the applicant's case that the two modes of execution have subjected him to double jeopardy and violated the rules of natural justice and further that the execution by the Flying Squad as opposed to regular police depicts an ulterior motive.

3. The application was however opposed by the Interested Party. According to him, he filed Civil Suit No.72 of 2016 against the Applicant before the Kangundo Senior Principal Magistrate's Court 3 years ago on 21st June, 2016 and extracted the summons to enter appearance which was served upon the *ex parte* applicant herein but he deliberately failed to enter appearance. Having failed to enter appearance and/or file defence within the time prescribed on the summons to enter appearance, the Interested Party proceeded to request for a default judgment and the 1st Respondent entered judgment in his favour after satisfying itself that the Applicant was duly served with the summons to enter appearance but failed to file his response within the stipulated time or at all. As a result, the Interested Party obtained a decree of Kshs.2, 028,706.80 from the 1st Respondent and commenced the process of execution of the same against the two Defendants jointly and severally.

4. It was averred that the 2nd Defendant, one **Daniel Muoka Mwalabu**, made an application to stay the execution proceedings and defend the suit which application is still pending before the 1st Respondent.

5. The Interested Party subsequently applied for the attachment and sale of the Applicant's Property Number 1190(16-061) Muka Mukaa Society Limited. However, in the process of looking for a buyer and retaining an auctioneer, the Applicant made an application before the 1st Respondent alleging that this was a matrimonial property and it was subject to proceedings before the High Court and the 1st Respondent in its ruling agreed with the Applicant and noted that the property was a subject of other proceedings in a higher court and stopped the intended sale of the property. However, the 1st Respondent expressly stated that the Interested Party was at liberty to resort to any other legal means of execution.

6. Consequently, the Interested Party extracted a fresh Notice to Show Cause as against the Applicant and the same was served on him but he failed to appear in court on the date of the Notice to Show Cause thereof. The 1st Respondent having satisfied itself that proper service for the Notice to Show Cause was duly effected as against the Applicant, and having not paid the decretal amount, issued a warrant of arrest against him dated 17th January, 2019 to be executed by the Flying Squad, which a unit under the Kenya Police Service.

7. It was therefore contended that the contents of the supporting affidavit are false and are intended to mislead this Court so as to seek sympathy in order to obtained unjustified orders. It was the Interested Party's case that if the applicant is unsatisfied with the judgement and/or orders of the 1st Respondent the correct procedure would have been to challenge the decision through an appellate system. The Court was therefore urged to dismiss the application.

8. It was submitted on behalf of the applicant that Judicial Review proceedings are governed by Article 165(6)(7) of the Constitution as read with Article 47(1) & (2) thereof and the provisions of the ***Fair Administrative Action Act***. According to the applicant, the High Court has been mandated by the Constitution to protect and prohibit any tribunal or authority from acting contrary to the rules of natural justice. While appreciating that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process, it was submitted that its purpose is to ensure that the person concerned is given fair treatment by the authority to which he has been subjected. In this regard the applicant relied on **Bahajj Holdings Ltd vs Abdo Mohammed Bahajj & Company Ltd & Another Civil Application No. Nai. 97 of 1998** and **Republic vs. The Commissioner of Lands Ex parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998.** It was therefore submitted that that this court has jurisdiction to entertain the present application despite the fact that there are other appellate procedures in the High Court and reliance is placed in the case of **Republic vs. Chief Magistrate Milimani Commercial Courts & Another Ex Parte Joseph Mbote Karwenji [2015] eKLR.**

9. It was submitted that in the instant matter, the Applicant's main concern is that he is being subjected to double jeopardy in that in execution of the court's decree in Kangundo civil suit No. 72 of 2016 resultant decree, his Plot No. 1190 (16-061) at Muka-Mukuu Society was duly attached and terms and conditions of sale duly settled and while the said attachment subsisted the 1st Respondent proceeded to entertain the Interested Party's second application for execution and duly issued a warrant of arrest against the Applicant. The applicant reiterated that his application to stop the sale of his property was declined with the result that to date the attachment remains in force. It was submitted that, by entertaining the second mode of execution, the court subjected the Applicant to a double jeopardy which offends the rules of natural justice. Further the manner in which the arrest is/was to be made coupled with the fact that the Flying Squad who in pursuit of the Applicant broke his residence at Woodley Estate Nairobi confirms that the whole exercise was laced with ulterior motive but not meant to dispense justice.

10. It was submitted that the notice to show cause was not accompanied by a formal application supported by an affidavit to which the judgment debtor ought to have responded so that the Court can make a determination as to whether the case is one fit or the invocation of the drastic remedy of arrest through flying squad for subsequent committal to civil jail. Ordering the arrest with a view to commit him in a civil jail is a very drastic remedy that ought to be granted only in cases where there is strict compliance with the provisions of the law. Accordingly, it was submitted that the orders of the 1st Respondent dated 17th January 2019 ordering the arrest of the Applicant by OCS, Flying Squad Nairobi were un procedurally issued and the Court was invited to note the Procedural impropriety and forthwith quash the said decision.

11. According to the applicant, the Applicant had a legitimate expectation that the court would not have entertained the second application for execution and issue a warrant of arrest against him which arrest orders are draconian. The applicant therefore contended that the conduct of the whole matter calls for this Court's intervention for justice to be done or to be seen to be done. I submit that the decision sought to be quashed is plainly oppressive and out rightly illegal. The 1st Respondent's actions complained of are contrary to the rules of natural justice and improper and is amenable to the judicial review orders. It was therefore the applicant's case that this judicial review application has merit and the Court was urged to issue the orders sought with costs.

12. On behalf of the Interested Party, reliance was placed on **Republic vs. Public Procurement Administrative Review Board & 3 Others Ex-Parte Saracen Media Limited [2018] eKLR** and it was submitted that the Applicant has totally misrepresented the true position of this matter.

13. According to the Interested Party, the procedure for issuance of execution orders is provided under the section 38 of the ***Civil Procedure***

Act. To him, what comes out clearly from the foregoing is that a person who fails to satisfy a monetary decree may, if the conditions stipulated in section 38 of the ***Civil Procedure Act***, are satisfied be committed to jail. It was contended that the trial court issued the warrant of arrest dated 17th January, 2019 after the 1st Respondent had satisfied the conditions. While reiterating the contents of the replying affidavit, it was submitted that following the ruling setting aside the sale of the applicant's property, a reasonable and prudent person would have thought, at that particular time the Ex-parte Applicant would have taken steps to defend the suit by making an application for stay of the execution and filing statements of defence. However, the Applicant was not interested in defending the suit and went to sleep again waiting to make a next application so as to ensure the Interested Party does not enjoy the fruits of the judgment. The Interested Party cited the case of **Republic v Public Procurement Administrative Review Board & 3 Others *Ex-Parte* Saracen Media Limited [2018] eKLR** where the High Court observed that judicial intervention in Judicial Review matters is limited to cases where the decision was arrived at arbitrarily, capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose, or where the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter. According to the Interested Party, the facts of this case do not show procedural impropriety on the part of the 1st Respondent hence the Substantive Judicial Review application fails under this ground.

14. Regarding the execution through the Flying Squad, it was submitted that the Flying Squad is a unit under the Kenya Police Force and has been established by the Directorate of Criminal Investigations. In his view, the ***National Police Service Act*** provides for the functions of the Directorate of Criminal Investigations in which the Flying Squad Unit lies. Kenya police service as is established under Article 233(1) of the Constitution and therefore there is no law that expressly forbids the Flying Squad from executing a warrant of arrest of this nature. The Interested Party submitted that the 1st Respondents order that the warrant of arrest be executed by the Flying Squad does not depict any ulterior motive and there is no any illegality in the said order. Indeed it would not matter if the Ex-parte Applicant is being sought by the Flying Squad Unit since as the members of the unit are members of the Kenya Police Force and would comply with the ***National Police Service Act*** while executing the warrants of arrest.

15. The Interested Party therefore submitted that the application together with the facts as set out the Ex-parte Applicant does not warrant granting for the Orders of Judicial Review as sought and the application should be dismissed with costs to the Interested Party.

Determinations

16. I have considered the application, the cases for the parties as adumbrated in the affidavits and the submissions.

17. Section 38 of the ***Civil Procedure Act*** provides as follows:

> ***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—***
>
> ***(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 the relief granted may***
>
> ***require:***
>
> > ***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.

18. What comes out clearly from the foregoing is that a person who fails to satisfy a monetary decree may, if the conditions stipulated in section 38 of the ***Civil Procedure Act***, are satisfied be committed to jail. Committal to jail in such circumstances in my view is exceptional in the sense that a person's liberty is curtailed not at the instance of the State but at the instance of a private individual though the person detained, in our circumstances, is placed in the custody of the state. Under our Constitution the right to liberty is enshrined in Article 39(1) which codifies the right to freedom movement. That right however is not one of the non-derogable rights which under Article 25 of the Constitution. Accordingly, pursuant to Article 26 of the Constitution the right to freedom of movement can be limited pursuant to Article 24 of the Constitution.

19. The Constitutionality of the remedy of committal to civil jail has been jurisprudentially analysed in this country. In **Beatrice Wanjiku & Another vs. The Attorney General** Petition 190 of 2011 it was held that:

> **"Before the promulgation of the Constitution, Kenya took a dualist approach to the application of international law. A treaty or international convention which Kenya had ratified would only apply nationally if Parliament domesticated the particular treaty or convention by passing the relevant legislation. The Constitution and in particular Article 2(5) and 2(6) gave new colour to the relationship between international law and international instruments and national law. Article 2(5) provides, ? The general rules of international law shall form part of the law of Kenya and Article 2(6) provides that ?Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."**

20. The same issue was dealt with by this Court in **Diamond Trust Kenya Ltd v Daniel Mwema Mulwa** HCCC No. 70 of 2002 (Unreported), in which the Court expressed itself as follows:

> **"We have in this country a three tier hierarchy of the law. At the apex is the Constitution of Kenya, which is the supreme law of the land, to which all other laws are subservient. Next in rank are Acts of Parliament, followed by subsidiary legislation at the bottom of the pile. The Civil Procedure Act is an Act of Parliament which provides for procedure in Civil Courts. Section 40 thereof makes provision for the arrest and detention of judgment debtors ... To the extent that this Section provides for the arrest and detention of a judgment-debtor; it is clearly in conflict with Article 11 of the [ICCPR]. The two are contradictory. This raises several issues. Can the two provisions co-exist? If so, how can they operate side by side? And if any cannot co-exist, which of them should take precedence over the other? In my view, article 11 of the [ICCPR] cannot rank *pari passu* with the Constitution. The highest rank it can possibly enjoy is that of an Act of Parliament. And even if it ranks in parity with an Act of Parliament, it cannot oust the application of section 40 of the Civil Procedure Act. Nor for that matter, can it render section 40 unconstitutional. For that reason for as long as section 40 remains in the statute book, it is not unconstitutional for a judgment-debtor to be committed to a civil jail upon his failure to pay his debts. Since, however, section 40 is at variance with the provisions of an International Convention which is part of the law of Kenya, it follows that we now have two conflicting laws, none of which is superior to the other."**

21. The Learned Judge went ahead and stated in **Beatrice Wanjiku Case** (supra) that:

> **"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 ground of inability to fulfil a contractual obligation."[Emphasis mine]I read the merely as used above to mean that one cannot be imprisoned for the sole reason of inability to fulfil a contractual obligation. It means that additional reasons other than inability to pay should exist for one to be imprisoned. Article 11 recognises that in fact there may be instances where imprisonment for inability to fulfil a contractual obligation may be permitted. As there is no inconsistency between Article 11of the Convention and the general tenor of the committal regime under Civil Procedure Act and the Rule, the provisions of Article 11 of the Convention are at best an interpretative aid.**

22. In **Jayne Wangui Gachoka vs. Kenya Commercial Bank** Petition Number 51 of 2010 it was held:

> **"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 the 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 the limitation of the right to liberty permitted in this case acceptable in a free and democratic society**."

23. Similarly, in **Kenya Bus Services Ltd & Others vs. Attorney General and Others [2005] 1 EA 111; [2005] 1 KLR 743** it was held:

> **"Fundamental rights cannot be enjoyed in isolation and by selected few while they trample on others or tread upon their rights since the enjoyment of fundamental rights and freedoms contemplates mutuality and an atmosphere of respect for law and order including the rights of others and the upholding of the public interest…The function of the Court when faced with the task of establishing or determining the rights on the one hand and determining the limitation and restrictions on the other hand is to do a balancing act and in this balancing act are principle values, objectives to be attained, a sense of proportionality and public interest and public policy considerations…There cannot be a cause of action based on a lawful exercise of the right of execution by interested parties since it is a serious contradiction to suggest that creditors who are enforcing their rights under the private law should be stopped from so doing because there are allegations of violations of the Constitution by the state or Government."**

24. The same issue was dealt with by **Nyamu, J** (as he then was and **Wendoh, J** in **Braeburn Limited vs. Gachoka and Another [2007] 2**

EA 67 where the Court expressed itself eloquently in my view as follows:

> **"To determine whether the right to liberty is limited by the law prescribed, and that the person whose liberty is circumscribed has been subjected to due process under that 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… The provisions of sections 38, 40 and 42 of the Civil Procedure Act, and Order 21, rules 32 and 35 of the Civil Procedure Rules are neither inconsistent with the provisions of the relevant provisions of the Constitution nor are they in conflict with any of the provisions of the International Bill of Human Rights. It is further held that provided the procedure under the Civil Procedure Act and Order 21, rules 32 and 35 is followed in the manner outlined herein, the requirements of due process comparable to that in section 77(1) and 77(9) of the Constitution is guaranteed."**

25. In **Republic vs. Permanent Secretary Office of the President Ministry of Internal Security & Another exp Nassir Mwandihi [2014 eKLR** this Court held that:

> **"It is therefore clear that even in normal execution of decrees by committal to civil jail, as long as the safeguards under the relevant provisions of the Civil Procedure Act and the Rules made thereunder are complied with an objection on the constitutionality of the procedure would not be upheld."**

26. What comes out from the foregoing is that committal to civil jail is not objectionable subject to the due process being adhered to. However, it is my view that committal to civil jail is not a means of satisfaction of a decree. Whereas it is a means by which compliance is sought to be enforced, it does not in itself amount to a satisfaction of a decree. In other words, it is a means to an end rather than an end itself. That there is a distinction between the satisfaction of a decree and the committal to civil jail for failure to satisfy a decree is clearly discernible from section 42 of the ***Civil Procedure Act*** which provides as hereunder:

> ***(1) Every person detained in prison in execution of a decree shall be so detained—***
>
> ***(a) where the decree is for the payment of a sum of money exceeding one hundred shillings, for a period not exceeding six months; and***
>
> ***(b) in any other case, for a period not exceeding six weeks:***
>
> > ***Provided that he shall be released from such detention before the expiration of the said period of six months or six weeks, as the case may be—***
> >
> > ***(i) on the amount mentioned in the warrant for his detention being paid to the officer in charge of the prison; or***
> >
> > ***(ii) on the decree against him being otherwise fully satisfied, if the court so orders; or***
> >
> > ***(iii) on the request of the person on whose application he has been so detained, if the court so orders; or***
> >
> > ***(iv) on the omission of the person, on whose application he has been so detained, to pay subsistence allowance.***
>
> ***(2) A judgment-debtor released from detention under this section shall not merely by reason of his release be discharged from his debt, but he shall not be liable to be rearrested under the decree in execution of which he was detained in prison.*** [Emphasis mine].

27. This position was poetically pronounced by **Kuloba, J** in **Mbugua vs. Mbugua [1992] KLR 448** where the learned Judge expressed himself as follows:

> **"The committal to civil jail will be an end in itself, serving no useful purpose. It will be for vindictiveness only; but civil justice is placatory, not retaliatory or revengeful. As Courts administering civil justice we do not sit here unleashing reprisals of vengeance to satisfy egoistic vendetta veneered with some court orders. Committal to civil jail is redressal, not merely punitory. In this case if the Court sends the defendant to jail for six months, the wrong will not have been redressed; her sojourn in jail will be punishment to her, but it will not enforce the order said to have been disobeyed."**

28. It therefore follows that the course of committal to civil jail will only be resorted to in appropriate cases and the guidelines for determining whether a particular case is appropriate for such course must necessarily depend on whether the conditions stipulated under section 38 of the Act have been fulfilled. The course to be adopted by the Court in such circumstances was explained in **Braeburn Limited vs. Gachoka and Another [2007] 2 EA 67** as follows:

> **"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 party 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…"

29. In this case the gravamen of the applicant's case is that the Interested Party has adopted double prong approach in the execution of his judgement in that while there are in force warrants for the attachement and sale of his immovable property, the Interested Party has proceeded to issue notice to show cause why he cannot be committed to civil jail as well. The Interested Party however contends that the mode of execution by way of attachment and sale of the said immovable property was abandoned after the applicant applied for it to be stayed and the court found in favour of the applicant.

30. I have perused the said ruling dated 17th May, 2018. The learned trial magistrate, quite inappropriately, found that the action of the applicant in seeking to have the subject matrimonial property included in Nairobi High Court Matrimonial Cause No. 1318 of 1982 was intentional to deny the Respondent from using the same to satisfy the judgement of the Magistrates Court. I say inappropriately because, it was not in order for the learned trial magistrate to make adverse comments on a matter that was pending before the High Court or in any other court for that matter.

31. However, the learned trial magistrate, rightly in my view found that her hands were tied since the subject property was a subject of other proceedings before the High Court and she was obliged to allow that ground of the application and proceeded to restrain the Respondent from proceeding with the intended sale of the applicant's property. She however declined to stay the execution and stated that the Interested Party was at liberty to use any other legal means to enjoy the fruits of the judgement.

32. It is therefore clear beyond peradventure that the execution of the said decree by way of attachment and sale of the suit property has been restrained by the lower court. To therefore seek an order for judicial review based on the ground of double jeopardy is clearly mischievous on the part of the applicant. The decision whether or not to grant judicial review reliefs is no doubt exercise of discretion. As is stated in ***Halsbury's Laws of England* 4th Edn. Vol. 1(1) para 12 page 270:**

"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)…are all discretionary. *The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief*. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow 'contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders." [Emphasis added].

33. That the conduct of the applicant for judicial review is relevant in the exercise of the discretion was appreciate by **Wendoh, J** in

Republic –vs- Institute of Certified Public Secretaries of Kenya Ex-parte Mundia Njeru Getaria [2010] eKLR where it was held that:-

> **"I do agree that the conduct of a party seeking Judicial Review Orders is an important fact to consider. One who approaches this Court for Judicial Review Orders must do so with clean hands and in utmost good faith."**

34. In this case that ground must be frowned upon. In my view a default that is sought to be explained away by contrived grounds is not made *bona fide*. To my mind, favourable orders cannot be sought and obtained on the basis of an affidavit that is less than candid and is meant to mislead. In that event, the application would be refused since default ought not to be explained away by contrived grounds. See **John Kiragu Mwangi vs. Ndegwa Waigwa Civil Application No. Nai. 179 of 2000.**

35. Parties who approach the seat of justice ought to base their application on facts which they believe are true. A party who sets out to twist the facts the way the applicant has done herein is clearly contemptuous of the court and I can do no better than to quote the case of **Matatiele Municipality & Others vs. President of the Republic of South Africa & others (1) (CCT73/05) (2006) ZACC 2: 2006 (5) BCLR (CC); 2006(5) SA 47 (CC)** that:

> **"in my view a person who deliberately either by commission or omission misleads the court and the public that a particular state of affairs exist while knowing very well that that is not the position cannot be said to be open, candid and transparent. Dishonest in my view is an Act which is antithesis to transparency and vice versa…"**

36. I associate myself with the lamentations of **Madan, J** (as he then was) in **N vs. N [1991] KLR 685** when he expressed himself in the following terms:

> **"I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence is not of high order. I wish the witness had not told me the most stupid of his lies, which both disappointed and made me feel intellectually insulted."**

37. Accordingly, I decline to grant the orders sought on that ground.

38. Regarding the order that issuing warrant of arrest against the applicant I agree with the Interested Party that if the applicant was of the view that the same ought not to have been issued there are appropriate remedies available for the applicant to deal with the same. That view was shared by this Court in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013 where it was held:

> **"…one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, *for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort* though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute. This position was re-affirmed by the Court of Appeal in Speaker of The National Assembly vs. Karume Civil Application No. Nai. 92 of 1992, where it was held that there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."** [Emphasis added].

39. However, this court cannot lose sight of the fact that the court proceeded to direct that the warrant of arrest be executed by the OCS Flying Squad Nairobi. No reason was given for invoking this dreaded mode of execution. In **Kenya Commercial Bank vs. N J B Hawala Civil Application No. 240 of 1997**, the Court of Appeal held that the Police have no legal basis for participating in an attachment. A similar view was taken in **Khaminwa & Khaminwa vs. Jubilee Insurance Co. Ltd. Nairobi HCCC No. 1304 of 1995** where the Court held that Police should not be involved in eviction. In **Kamau Mucuha vs. The Ripples Ltd. Civil Application No. Nai. 186 of 1992 [1990-1994] EA 388; [1993] KLR 35**, **Kwach, JA** expressed himself as follows:

> **"The only valid criticism of the order of the Judge as of now, but which does not swing the scale one way or the other in this application is the direction that the assistance of the police should be enlisted to secure compliance by the applicant. The police should never be involved in securing compliance with court orders as there is specific provision for the enforcement of an injunction under Order 21 rule 28 of the Civil Procedure Rules."**

40. Whereas in exceptional cases, the Court may be entitled to direct that police maintain law and order during the execution of its decisions, it is clear that the police have no role otherwise in the execution of civil process. That role is simply restricted to overseeing that peace, law and order is maintained during the process of execution which process is to be undertaken by a duly authorised court officer. It is however my view that such exceptional order ought to be granted only where there is satisfactory evidence of the likelihood of a resistance to the execution of the said decisions and ought not to be dished as a matter of course or simply for the asking. In this case no reason at all was given as to why the police and particularly the Flying Squad were being roped into the matter, a purely civil matter. There is, therefore, some merit in the applicant's position that that mode of execution was mala fides and may well have been intended to intimidate and harass the applicant. Execution of court process ought not to be used as a means of achieving collateral purposes.

41. In the premises while I decline to grant the order of certiorari removing into this Court for the purpose of being quashed and to quash the

decision of the 1st Respondent dated 17th January, 2019 ordering the arrest of the applicant I hereby set aside the directive that the warrants of arrest be executed by the OCS Flying Squad Nairobi or the any other unit of the police.

42. Each party to bear own costs of this application.

43. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 19th day of November, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

Miss Mbilo for Mr Mulu for the Interested Party.

Miss Inima for Mr Mulwa for the ex parte applicant

CA Geoffrey