REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 298 OF 2013

KENYARIRI & ASSOCIATES ADVOCATES………ADVOCATE/APPLICANT

VERSUS

HANS JUERGEN LANGER……......................................CLIENT/RESPONDENT

RULING NO.2

1. This Ruling is in relation to 2 applications.

2. In the application dated 1st September 2016, the Judgment-Debtor, **HANS JUERGEN LANGER** sought stay of execution pending the hearing and determination of a case which he and 3 other parties had filed against the Decree-Holder, **CHRISTOPHER ORINA KENYARIRI Trading As KANYARIRI & ASSOCIATES ADVOCATES, HIGH COURT of KENYA AT MALINDI, Hccc No. 20 of 2015.**

3. By that application, the applicants also asked this court to declare that before exhausting all other available and existing modes of execution, the process of seeking his arrest and detention in prison was unreasonable and unjustifiable discrimination.

4. The applicant deems the proposed arrest and detention in prison as constituting an arbitrary deprivation of freedom.

5. In the opinion of the applicant, the process of execution ought not to proceed before apportionment of the decretal amount amongst the various Judgment-debtors. Therefore, the applicant invited this court to apportion liability amongst the Judgement-debtors, so as to afford him the rights of equal protection and equal benefit of the law, as provided for by Article 27 (1), (4) and (5) of the Constitution.

6. The other limb of the application is a request that this court do declare as Unlawful and Unconstitutional, the provisions of the law which make it possible for a Judgment-debtor to be arrested and detained in prison.

7. Meanwhile, the Decree-holder also filed his own application, dated 9th September 2016. That application asks the court to order the Judgment-debtor to deposit the decretal amount in court or in an interest-earning account.

8. According to the Decree-holder, his attempts to execute the Decree have been unsuccessful due to various factors.

9. The Judgment-Debtor had complained that he had never been served with a Notice To Show Cause, prior to the court issuing warrants for his arrest.

10. In my considered opinion, this court need not make a determination on the issue of service, because it is a moot point.

11. Why do I say so?

12. It is because, on the day when the Judgment-debtor was required to show cause, he was represented in court, by his advocate. If the Judgment-debtor had been completely unaware of what was to transpire, as even the date when he was required to show cause, he could not have instructed his advocate to attend court, on that particular date.

13. The second issue which can be resolved quickly relates to the request that the liability of the various Judgment-debtors be apportioned.

14. That issue could only have been determined at the time when the court was entering judgement against the judgment-debtors.

15. If any or all the said judgement-debtors believed that he or they were not liable for the full taxed costs, the onus was upon them to persuade the court, about the extent of their respective liabilities.

16. Once the court had entered judgment against all the Judgment-debtors, **JOINTLY** and **SEVERALLY,** that settled the question.

17. In other words, there is one decretal amount. The Decree-Holder is entitled to recover the said Decretal amount from any one or more of the Judgment-debtors.

18. Once the decretal amount was paid to the Judgment-Creditor, that is the end of the matter, as far as the Decree-Holder was concerned.

19. If the Judgment-debtors choose to make separate contributions, they may do so. However, the fact that the judgment-debtors had, between themselves, resolved how to apportion liability for the decretal amount, cannot be binding on the Decree-Holder. He can still choose one or another of the Judgment-debtors, as the persons against whom to levy execution.

20. The choice of one or more judgment-debtors as the person against who execution would be levied, is not discriminatory. It is an entitlement flowing from the court's verdict, that liability would be Joint and Several.

21. On the question regarding when a decree-holder may apply for execution through the arrest and imprisonment of a judgment-debtor, the courts have generally emphasized that other modes of execution ought to be tried first.

22. In this case, it is common ground that the Decree-holder had made other attempts to execute the Decree. He did not first seek the arrest and imprisonment of the judgment-debtor.

23. It is common ground that the judgment-debtor is a German citizen. He described himself as an investor in both Germany and Kenya. He also said that he resides at both Watamu in Kenya, and in Germany.

24. Notwithstanding those facts, the Decree-holder deponed that he had been unable to trace any assets in Kenya, which belong to the Judgment-debtor.

25. In my considered view, when a Decree-holder demonstrates that, he had unsuccessfully tried other modes of execution, especially through attachment of the Judgment-debtor's assets, he cannot be deemed

to be acting either unreasonably or in an unjustifiable manner.

26. When a person is arrested and held in prison, it is a fact that he would have been deprived of his freedom.

27. But when the arrest and detention in jail happens after due process, it cannot be termed as arbitrary.

28. As Regards the request that this court declares as unconstitutional, the provisions in the Civil Procedure Act and in the Civil Procedure Rules, the Judgment-debtor has provided this court with several authorities.

29. In **BEATRICE WANJIKU & ANOTHER Vs ATTORNEY GENERAL & ANOTHER, PETITION No. 190 of 2011,** Njagi J. rejected the argument that sections 38 and 40 of the Civil Procedure Act, as well as Order 22 Rules 32 and 34 of the Civil Procedure Rules were unconstitutional.

30. Before arriving at that conclusion, the learned Judge conducted a detailed analysis of the law and of cases which had interpreted the issue at hand. One of the cases he discussed **was DIAMOND TRUST KENYA LTD Vs DANIEL MWEMA MULWA, Hccc No. 70 of 2002,** in which the court held as follows;

> **"In my view, Article 11 of the International Convention on Civil and Political Rights 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?.**

31. Another case which was considered by Njagi J. was **R.P.M Vs P.K.M, NBI DIVORCE CASE No. 154 of 2008.** In that case, G.B.M. Kariuki J, *(as he then was)* expressed himself thus;

> **"However, I hold the view that no one should be sent to Civil Jail for inability to pay a debt. It would be morally wrong to do so. It would, arguably also amount to discrimination against the have-nots. And it would make no sense to send to Civil Jail a person who is unable to pay. That would be malicious. In any case, it would amount to throwing away good money after bad for the creditor. Civil Jail is for those who refuse to part with their money to pay debts. The Respondent in this case is not unable to pay. He is not a man of straw".**

32. Clearly, there is a distinction between persons who were **UNABLE** to pay their debts, and those who **REFUSE** to pay their debts.

33. In this case, the Judgment-debtor has expressly said that he has the means with which the debt could be paid.

34. However, he has chosen not to pay. Indeed, there is an email which he sent to the Decree-holder, stating that he would rather spend 10 times the quantum of the decretal amount, to fight-off the attempt to recover it, than to pay-off the decretal amount.

35. If the words of Justice G.B.M Kariuki were to be adopted by this court, I would come to the conclusion that Civil Jail belongs to persons like the Judgment-debtor.

36. Meanwhile, in the case of **CNG Vs LNN, Misc CIVIL APPLICATION No.337 of 2013** *(at Nakuru)*, Emukule J. said:

> **"… inability to satisfy a decree is not on its own sufficient cause to warrant the detention of a person. There must exist further reasons to justify such arrest in order for such arrest to be**

deemed as reasonable and justifiable under Article 24 of the Constitution".

37. Bearing that in mind, the learned judge set aside the warrants of arrest, because there had been no inquiry into the means of the judgment debtor, so as to enable the court satisfy itself that he had the means to pay the decretal amount. He also noted that the court had not made a finding that the attachment of the salary of the judgment-debtor was not appropriate.

38. Of course, when it has not yet been established whether or not a judgment-debtor had ability to pay the decretal amount, it may be unjust to have him detained in Civil Jail. That is because, there was a possibility that he was unable to pay the decretal amount; in which case it would then be deemed unreasonable to condemn him simply because of his poverty.

39. In contrast to that case, the Judgment debtor herein has said that he had the ability to pay the decretal amount.

40. In the case of **RE: ZIPPORAH WAMBUI MATHARA, BANKRUPTCY CAUSE No. 19 of 2010**, Koome J. *(as she then was)* held as follows;

> **"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 guarantee parties basic freedoms of movement and of pursuing economic, social and cultural development".**

41. Once again, it is the imprisonment of somebody who has failed to settle a decretal amount which was deemed to be inconsistent with the basic freedoms as enshrined in the International Covenant on Civil and Political Rights.

42. The learned judge did not say that when a person refuses to settle a decretal amount, it would be wrong to deprive him of his freedom of movement.

43. Indeed, the court noted that;

> **"It obviously goes without saying that a party who is deprived of their basic freedom by way of enforcement of a civil debt, through imprisonment, their ability to move and even seek ways and means of repaying the debt is curtailed".**

44. A person who needs to seek ways and means of repaying his debt, is obviously not already holding funds or assets that were sufficient to settle the debt.

45. In that case, the applicant had already instituted a Bankruptcy petition, and the court had already issued a Receiving Order on 21st May 2010. Clearly, therefore, the applicant did not have ability to pay the decretal amount.

46. And it was for that reason that the applicant had made reference to Article 11 of the International Covenant on Civil and Political Rights, which provides that;

> **"No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation".**

47. Once again, the key phrase is *"inability to fulfill"* an obligation.

48. In the final analysis, I find that the provision which allow for the arrest and imprisonment of a judgment-debtor are not unconstitutional, provided that the safeguards in the Civil Procedure Act are upheld.

49. The next question that arises is whether or not the court should now order that there be a stay of

execution pending the determination of the suit which the judgment-debtor has filed against the Decree-Holder.

50. In my humble opinion, that application is the reverse side of the coin, through which the Decree-Holder has asked that the Judgment-debtor be compelled to deposit the decretal amount either in court or in an interesting-earning account.

51. If stay of execution is ordered unconditionally, the judgment-debtor would not have to deposit any money.

52. I have given careful consideration to the matters before me and have decided that justice can only be done to both parties if I grant conditional stay of execution. If that is done, neither of the parties would be placed in a situation which was prejudicial.

53. The Decree-holder would know that if the case against him failed either completely or partially he could thereafter recover what was due to him, without too much hustle.

54. Meanwhile, the judgment-debtor would secure in the knowledge that if his case succeeded against the Decree-holder, either completely or partially, he would be able to recover what was held to be due to him, without too much hustle.

55. Accordingly, I now order that;

> **(1) Within the next 30 days from today, the judgment-debtor shall pay into an interest-earning account, the whole decretal amount.**
>
> **(2) The Account shall be operated jointly by the advocate for the judgment-debtor and the law firm which is run by the Decree-holder.**
>
> **(3) Provided the decretal amount is deposited within the prescribed 30 days, there shall be a stay of execution until the court at Malindi determines the case filed by Hans Juergen Langer against Christopher Orina Kenyariri, Trading As Kenyariri & Associates Advocates.**
>
> **(4) In the event that the Judgement-debtor does not make available the decretal amount timeously, so that it can be held in the joint account within the stipulated time-span, execution may thereafter proceed.**

56. Finally, I order each party to pay the costs of his own application. I so order because each of the applications have been successful to some degree.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **16th day** of **January 2017.**

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Dr. Kenyariri for the Advocate/Applicant

Kyalo for Opulu for the Client/Respondent

Collins Odhiambo – Court clerk.