REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

PETITION NO. 3 OF 2015

AGNES MUTHONI MUTURI……..……PETITIONER

-VERSUS-

MAUREEN WACHERA MACHARIA……....RESPONDENT

RULING

The petitioner and the respondent are contestants in the **Chief Magistrates' Court Civil Case No. 434 of 2010** at Nyeri; the petitioner is the judgment debtor while the respondent holds the decree. The respondent opted to have the decree executed by way of arrest and detention of the judgment debtor in prison; it is one of the modes of execution provided for under **Order 22 rule 7(j).**

In this petition the petitioner has sought, as the principal prayer, a declaration that her detention in civil jail in execution of a decree obtained against her despite her inability to settle the decree is unconstitutional. An application for what I suppose are conservatory orders was filed alongside the petition; it is by way of a motion dated 21st January, 2015 and the orders prayed for have been listed as follows:-

> *"1. That it be declared that the threatened imprisonment of the petitioner in the civil jail is unconstitutional and in breach of the petitioner's fundamental rights.*
>
> *2. That there be a stay of execution pending the hearing and final determination of this application.*
>
> *3. That there be a stay of execution pending the hearing and final determination of this petition.*
>
> *4. That the judgment creditor be ordered to execute via less restrictive mode other than committal of the judgment debtor to civil jail.*
>
> *5. That the costs of this petition be met by the respondent."*

In the affidavit in support of the motion, the petitioner acknowledged that a decree was obtained against her in the magistrates' court for a liquidated sum and that she had been committed to civil jail on several occasions for failure to pay the decretal amount together with the interest. She applied for stay of execution in the lower court but that the application was dismissed; it is after the dismissal of the application that the petitioner lodged this petition.

The petitioner has deposed that her imprisonment in civil jail was due to her inability to pay and that her proposals to settle the debt by way of monthly instalments have been spurned by both the decree holder and the court. It is her case that her incarceration in civil jail or the threat to incarcerate her further is in

breach of her constitutional rights and in particular **articles 24 (e), 28, 29** and **50** of the **Constitution.**

The respondent opposed the application and filed a replying affidavit sworn by herself; she deposed that she is entitled to enjoy the fruits of her judgment and the applicant's reluctance to pay her has taken its toll on her health. The respondent also deposed that as at 20th May, 2015 when she swore her affidavit, the applicant had not made any efforts to pay the outstanding sum for over a year despite the fact that she had undertaken to settle the outstanding sum by way of monthly instalments.

One of the documents exhibited to the petitioner's petition is a copy of the ruling delivered by the learned magistrate on the petitioner's application in which she sought the setting aside of the order committing her to civil jail and a proposal to settle the outstanding amount by instalments. I do not have the benefit of reading the pleadings in the lower court but if the learned magistrate's ruling is anything to go by, the petitioner was called upon to appear in court and show cause why she should not committed in prison; the notice must have been issued pursuant to **order 22 rule 31** of the **Civil Procedure Rules** which requires the court to issue such a notice where execution sought is by arrest and detention in civil jail. She failed to appear and so she was subsequently arrested and committed to civil jail.

The petitioner was later released from the jail after she paid the sum of Kshs 300,000/=. She was to make some arrangements or proposal on how she would settle the balance; however, she never did and after one year, she was summoned to court again, more specifically on 25th April, 2013 but again she did not appear. The court once again issued warrants for her arrest and when she was brought to court on 25th September, 2013 the court gave her time to settle the balance. She did not pay as she undertaken and for the third time she was arrested and brought to court again on 3rd July, 2014. It is as a result of this latest arrest that the petitioner applied and sought for stay of execution and proposed to settle the outstanding amount by monthly instalments of Kshs 5,000/= per month. The learned magistrate considered the application and rendered a considered ruling in which she ordered the petitioner to provide a suitable proposal within sixty days on how she was going to settle the decretal sum failure of which the order committing her to civil jail would be revisited; the learned magistrate reckoned that if the petitioner was to pay the monthly instalments of Kshs 5,000/= as she had suggested, it would take her more than thirteen years to clear the outstanding amount due at the time of delivery of the ruling without taking into account the accruing interest.

Rather than provide the proposal the applicant moved this court on 15th February 2015 for a declaration that the order committing her to civil jail was unconstitutional and for interim orders staying the execution of the decree against her.

After considering the petitioner's application and the submissions filed by her counsel in support of that application, I note that she has not impugned any of the provisions under the Civil Procedure Rules according to which the warrant of arrest and the order committing her to civil jail were issued. If anything, the petitioner's conduct would show that she submitted herself to the execution process when she made proposals on how she was going to settle the decretal sum; such proposal is in fact contemplated under **rule 31** of the **order 22** of the rules.

As far as I can gather from the ruling delivered by the learned magistrate, the court gave its reasons why it rejected the petitioner's proposal and hence her application. If for some reason the petitioner was not satisfied with the reasons given for dismissal of her application I doubt whether the proper course open to her was to challenge the committal order rather than appeal against the ruling dismissing her application that sought to have the decretal sum settled by way of monthly instalments.

It has been held that where a particular procedure has expressly been stated, that procedure must followed; in **Methodist Church in Kenya Trustees & Another versus Rev. Jeremiah Muku & Another (2012) eKLR**, the Court of Appeal, after citing several decisions on this issue, came to the conclusion that ordinary errors made in the course of adjudication by the courts should be cured by invoking the mechanism and procedures prescribed by the ordinary law for correction of errors such as appeal or review.

The invocation of the provisions of the Constitution to allege breach of constitutional rights in addition or as an alternative to laid down procedure of seeking a particular remedy in such circumstances is considered frivolous, vexatious or an abuse of this Court's process. **Lord Diplock** made reference to this sort of proceedings in his pronouncement in **Harrikson versus Attorney General of Trinidad & Tobago (1980) AC 265** where he said:-

> ***The notion that whenever there is failure by an organ of government or public authority or public officer to comply with the law this entails contravention of some human right or fundamental freedom guaranteed to individuals by the chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6 (1), the mere allegation that a human right fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for the unlawful administrative action which involves no contravention of any human right or fundamental freedom.***

I am not prepared to conclude at this stage whether the petitioner's petition is in the category of those petitions that the learned judge had in mind when he talked of "*the mere allegation that a human right or fundamental freedom has been or is likely to be contravened*". All I can say for now is that based on what I see, the possibility of the petitioner's petition succeeding is remote; and if that be the case, there would be no point in granting conservatory orders at this stage. For this reason, I am inclined to dismiss the petitioner's motion dated 21st January, 2015. Costs will abide the outcome of the petition.

Dated, signed and delivered in open court this 15th July, 2015

Ngaah Jairus

JUDGE