



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 2086 OF 1997**

**LANG’O ODHIAMBO .....PLAINTIFF**

**VERSUS**

**1. WILSON NDOLO AYAH .....1<sup>ST</sup> DEFENDANT**

**2. JOSEPH KAMOTHO.....2<sup>ND</sup> DEFENDANT**

**3. JAPHETH LIJODI .....3<sup>RD</sup> DEFENDANT**

**4. JOHN KIPLANGAT CHERUIYOT).....4<sup>TH</sup> DEFENDANT**

**RULING OF THE COURT**

Before me for determination is the 4<sup>th</sup> defendant’s application brought by way of Notice of Motion under the provisions of Article 159(2)(d) of the Constitution Section 1A, 1B and 3A of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules and “all other enabling provisions of the Law.”

The applicant John Kiplangat Cheruiyot seeks from this court orders:

1. Spent
2. A production order do issue for the production of the applicant in court on the date fixed for the hearing of the application.
3. There be stay and a suspension of the orders of committal made by the Deputy Registrar on 24<sup>th</sup> August 2015 committing the applicant to civil jail pending the hearing and determination of this application.
4. There be stay and or suspension of the orders of committal made by the Deputy Registrar on 24<sup>th</sup> August 2015 committing the applicant to civil jail pending the hearing and determination of the applicant’s appeal dated 31<sup>st</sup> August 2015.
5. Costs be provided for.

The application is supported by the affidavit of the John Kiplangat Cheruiyot and on the grounds that the applicant was on 24<sup>th</sup> August 2015 committed to civil jail for a period of 6 months by the Deputy Registrar for his inability to satisfy decree and judgment of this court and that being dissatisfied with the said committal order he has preferred an appeal to this court (judge) which appeal is arguable and has high chances of success.

The applicant contends that should the application not be granted, the appeal shall be rendered nugatory as he would have served the prison term since it is highly unlikely that the appeal will be heard and determined before the applicant fully serves the civil jail term, and that he will suffer irreparably as there is no way to compensate for jail term that would have been served. The applicant also avers that the order committing him to civil jail is manifestly unjust as the plaintiff did not pursue any alternative means of enforcing the decree; and that the Deputy Registrar wrongly exercised discretion where there was none and where it was improper to do so.

In his supporting affidavit, the applicant deposed that he has no means of income to settle decree as he is retired and that the civil jail option is an improper way of enforcing a decree where a judgment debtor is unable to pay as opposed to refusal to pay, civil jail being a last resort remedy. He further deposes that the decree holder has not demonstrated that he has exhausted all other modes of enforcing decree before resorting to committal to civil jail. Further, that he is an old man of declining health and therefore his committal to jail is grossly oppressive and would adversely affect him since his appeal, has high chances of success. The applicant also accuses the Deputy Registrar of failing to exercise her discretion correctly by failing to take into account several factors including constitutional safeguards that are inherent in proceedings for committing a judgment debtor to civil jail. He annexed copy of his Memorandum of Appeal dated 31<sup>st</sup> August 2015 challenging the decision of the Deputy Registrar Honourable Mutuku(Mrs) made on 24<sup>th</sup> August 2015 and a copy of defence in this suit.

The respondent/plaintiff opposes the application. His counsel filed grounds of opposition dated 8<sup>th</sup> September 2015 contending that the application is frivolous, vexatious an abuse of the court process, incompetent and should be dismissed or struck out with costs to the decree holder. The respondent also avers that the judgment debtor/applicant's filed application, supporting affidavit are all undated and hence they are incurably defective and should be struck out. Further, that no leave has been applied for and no valid Notice of Appeal has been filed against the judgment or decree delivered on 5<sup>th</sup> February 1999 hence no valid grounds exist to dispute the lawful court order dated 24<sup>th</sup> August 2015 in execution thereon.

The respondent further states that the valid court order of the Deputy Registrar in execution dated 24<sup>th</sup> August 2015 should be affirmed and that the applicant has failed to make any reasonable offer to settle the debt for the court's consideration as shown by a copy of proposal dated 15<sup>th</sup> December 2012 which he failed to honour.

The parties respective advocates appeared before me on 9<sup>th</sup> September 2015 and urged their respective client's positions orally, restating what is contained in the application and grounds of opposition, with the applicant's counsel citing authorities in support of his client's case for the orders sought herein.

Mr Ataka representing the applicant judgment debtor emphasized that his client was unable to settle decree herein as he has no means, and not that he has refused to settle. In addition, counsel for the applicant submitted that Section 38 of the Civil Procedure Act and Order 22 Rule 34 of the Civil Procedure Rules are clear as to the circumstances under which a judgment debtor can be committed to civil jail for nonpayment of decretal sum, which circumstances were not proved to exist at the time the Deputy Registrar made the order committing the applicant to civil jail for a period of 6 months.

On the application for stay of enforcement of the order of the Deputy Registrar pending appeal. Mr Ataka submitted that the applicant's appeal was arguable and had high chances of success which appeal shall be rendered nugatory unless the orders herein sought are granted. Further, it was submitted on behalf of the applicant that the decree holder did not satisfy the Deputy Registrar during the hearing of the Notice to show cause for committal, that the judgment debtor/applicant had means, was evading to settle decree or that he was about to leave the jurisdiction of the court or was transferring his property. Mr Ataka relied on two decisions **Beatrice Wanjiku & Another V The Honourable Attorney General & Another, HC Constitution Petition No. 190/2011** and **HCCA 238/2013 Nelson Njuguna Kiiru & Another V Jesse Muthiga** in support of his client's propositions. He also relied on the provisions of the International Covenant on Civil and Political Rights as applicable by dint of

Article 2 (5) of the Constitution of Kenya as relied on by Majanja J in the **Beatrice Wanjiku** (supra) case.

Mt Ataka urged the court to order for the release of the appellant pending hearing and determination of the appeal as filed, noting that the applicant could still be ordered to serve the jail term if the appeal is dismissed.

In opposing the application, Mr Anyango Ogutu advocate for the respondent /decree holder submitted, relying on the filled grounds of objection dated 8<sup>th</sup> September 2015 as detailed above and maintained that there is no appeal filed in respect of the Deputy Registrar's decision since no Notice of Appeal was filed and or served upon the concerned parties in the matter. Further that in the absence of the appeal filed against the judgment and decree of this court passed in 1999, the application herein cannot stand. Mr Onyango Ogutu further submitted that no reference was filed before this court and hence all documents filed are incompetent, frivolous and should be dismissed.

Mr Onyango advocate also submitted that execution by way of attachment and sale of the judgment debtor's movable properties was levied but no property was found capable of settling decree hence the resort to Notice to show cause. He also submitted that the Judgment debtor was once declared bankrupt and the respondent only moved the court for execution by way of Notice to show cause after the Judgment debtor was discharged from bankruptcy. It was also submitted on behalf of the respondent that the allegation that the judgment debtor is unable to pay decretal sum so he cannot pay is untenable since he executed a proposal on 15<sup>th</sup> December 2012 to settle the decretal sum by monthly installments of kshs 50,000 which he has never honoured and that he had changed advocates severally. Further, that the Deputy Registrar was satisfied that the judgment debtor is a difficult person before committing him to civil jail and after he was brought to court under a warrant of arrest from Nandi. Mr Onyango urged the court to dismiss the application with costs.

In brief rejoinder, Mr Ataka submitted that the decision of the Deputy Registrar in execution under Order 22 of the Civil Procedure Rule is appealable as of right under Order 49 of the CPR and that no proposals for settlement have been made by the applicant as he is unable to raise any money hence the application, in order not to defeat the ends of justice.

I have carefully considered the application by the applicant/4<sup>th</sup> defendant/judgment debtor/appellant, his grounds and supporting affidavit coupled with the able submissions by his counsel Mr Ataka and the authorities relied on. I have also considered the respondent, plaintiff/decree holder/respondent's grounds of opposition and the able submissions by his counsel Mr Onyango Ogutu.

The only issue for determination in my view, is whether the applicant has made out a case for stay of or suspension of enforcement of the order of the Deputy Registrar on 24<sup>th</sup> August 2015 committing the Judgment debtor to civil jail, pending hearing and determination of an appeal against the Deputy Registrar's decision.

The applicable law for stay of enforcement of an order or decree pending appeal is Order 42 Rule 6 of the Civil Procedure Rules, and the principles set there under guiding the grant of stay of execution pending appeal are settled. These principles are:

The court must be satisfied that substantial loss may result to the applicant unless the order is made; that the application has been made without unreasonable delay; and such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

In granting or refusing stay of execution pending appeal, the court exercises discretion which discretion must, however, be based on sound judicial principles, as espoused in Sections 1A and 1B of the Civil Procedure Act, which sections espouse the overriding objectives of the law, thereby enlarging the conditions under Order 42 Rule 6(2) of the Civil procedure Rules for stay pending appeal.

On substantial loss the applicant's counsel contended that committal to Civil Jail once served cannot be reversed or compensated by damages and that the applicant who is a retired elderly person who suffers from ill health will be prejudiced if he serves a jail term of 6 months only for this court to reverse the committal order, which will, in essence render the appeal nugatory.

The respondent on the other hand maintained that he had tried to execute decree by way of attachment of properties belonging to the applicant which bid was unsuccessful and hence, the notice to show cause. Further, that there is no notice of appeal or appeal or reference filed herein to warrant a stay of execution pending the aforesaid.

My rendition on the above issue is that Order 49 Rule 47(1) (b) (x) (2) and (3) are clear that an appeal from the decision of the Deputy Registrar under Order 22 of the Civil Procedure Rule lies to the Judge in chambers within 7 days from the date of the Deputy Registrar's decisions, by way of Memorandum of Appeal.

In this case, the decision of the Deputy Registrar committing the judgment debtor to civil Jail was made on 24<sup>th</sup> August 2015 and on 31<sup>st</sup> August he lodged a Memorandum of Appeal which is also annexed to his supporting affidavit. Effectively, the appeal filed is competent before this court and in addition, as the same was annexed to the supporting affidavit which was served upon the respondent's counsel, service did take place. There is no legal requirement for Notice of Appeal to be lodged or served upon the concerned parties. Notice of Appeal would only be required where the appeal is from the decision of this court to the Court of Appeal, which is not the case here. Equally, there is no requirement for a reference to be filed from the Deputy Registrar's order and such reference would be meaningless where the law is clear and to how the Judgment debtor can challenge the execution process as has been done in this case.

The applicant also submitted that the appeal as filed is arguable and has high chances of success. That may be so. Nonetheless, the requirement for demonstration that the appeal is arguable in order for a stay pending appeal to issue is in the Court of Appeal. It is not for this court at this stage to venture into the arguableness and or merits of the filed appeal as that would prejudice the appeal itself. However, this is not to say that this court cannot, in one sentence state whether or not the appeal as filed is frivolous. The applicant has submitted that under Section 38 of the Civil Procedure Act, execution of a money decree by way of committal to Civil Jail can only be effected if the circumstances there under are satisfied i.e that the judgment debtor is likely to leave the jurisdiction of the court or is evading to pay the decretal sum by transferring of his properties to third parties which is not the case here. It was contended that the applicant is simply not possessed of means to pay and that the Deputy Registrar should not have committed him to civil jail for his inability to settle decree but for his refusal to pay the decretal sum.

On the other hand, the respondent maintained that the applicant had refused to pay the decretal sum even after making a simple proposal on 15<sup>th</sup> December 2012 to settle decree in monthly installments of kshs 50,000 from 31<sup>st</sup> December 2015. Further, that he had been evasive and had to be dragged to court under a warrant of arrest after he failed to attend court and show cause, hence he cannot be heard to say that he is unable to settle decree herein. The respondent also contended that in any event, no appeal had been filed challenging the judgment and decree passed in 1999 hence the judgment debtor cannot escape execution.

On the issue of arguableness of the appeal, I reiterate that an applicant seeking orders of stay pending appeal from the order of the subordinate court, tribunal/body or Deputy Registrar to this court is not required to prove that they have an arguable appeal unlike if it was an application for stay pending appeal to the Court of Appeal. See **Nakuru HCC 211 of 1998 Martha Njeri Wanupite & 3 Others V Peter Machewa Mwangi & 3 Others**. Nonetheless, nothing prevents this court from establishing whether the appeal is frivolous. Order 42 Rule 6(2) gives this court in its appellate jurisdiction discretionary power to stay of execution pending appeal on sufficient cause being established by the applicant. The incidence of the legal burden of proof on matters which the applicant must prove of course, lies with the applicant. See **Jeny Luesby V Standard Group Ltd (2014) e KLR**.

In **Absalom Dorb V Tarbo Transporters (2013) e KLR** the court held:

***“ the discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantages, but administers the justice that the case deserves this in recognition that both parties have rights, the appellant to his appeal which includes the prospects that the appeal will be rendered nugatory; and the decree holder to the decree which includes the full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination.”***

Being a discretionary power, it must therefore be exercised cautiously and judiciously and not capriciously. The applicant cannot however, in my view, hide under the provisions of the ICCPR and the Constitution to defeat a decree of a competent court of law making him liable for a contractual debt, by laying claim to protection of his civil liberty which is being limited by way of civil jail. That right which is guaranteed by the Constitution can only be enjoyed subject to the rights of others and existing laws.

The Deputy Registrar, according to record, noted the reluctance of the judgment debtor in settling the decretal sum despite promises and that conduct may have influenced her decision have him committed to civil jail. She did exercise her powers granted by Order 49 of the Civil Procedure Rules.

Nonetheless, there is a limitation on execution by way of arrest and detention in prison of any person, under the proviso of Section 38 of the Civil Procedure Act that:

***“ 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 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 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 he 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 refuse 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 which the judgment debtor was bound in a judiciary capacity to account.***

From the above proviso, a decree holder is not entitled to exercise the right to have the judgment debtor arrested and committed to civil jail for any specified period of time unless the conditions in the proviso are met.

More importantly, the Decree holder must show that the judgment debtor has means but is evading to pay the decretal sum.

I have perused the Notice to show cause proceedings for 24<sup>th</sup> August 2015 and the attendant ruling by Honourable Mutuku Deputy Registrar. The proceedings show that the decree holder's counsel submitted that the judgment debtor was declared bankrupt at one point but he was discharged after a challenge to the bankruptcy order was made albeit no such orders or proceedings were availed before

the Deputy Registrar. The proceedings also show the judgment debtor saying that he had been struggling financially and trying to get to his feet. He acknowledged the debt and begged the court to allow him time to raise money from his small scale farming venture.

From the above position on record, this court is unable to find that the appeal as filed is frivolous. The matter of inability and not refusal to pay is acknowledged by Section 38 of the Civil Procedure Act.

I note that albeit there was an attempt to execute decree by way of attachment and sale of the judgment debtor's movable property vide warrants dated 10<sup>th</sup> January 2008, the said warrants were returned to court by Intime Services (K) Ltd Auctioneers after the warrants expired before the assets of the judgment debtor's were pointed out and from there, notice to show cause proceedings were commenced against the judgment debtor. In other words, the Decree Holder has never succeeded in tracing the judgment debtor's movable or immovable property for attachment and sale to satisfy decree herein.

I also note that no affidavit has been sworn by the decree holder to indicate that indeed the judgment debtor is evasive in his refusal to pay the decretal sum. It is not disputed that the judgment debtor has not been examined on his means or otherwise to satisfy the amount of the decree. In the **Beatrice Wanjiku (supra)** case, though persuasive, I am in agreement with Majanja J that an application for committal to civil jail may be disallowed if the judgment debtor is unable to pay the judgment debt as a result of poverty or other sufficient cause.

That in itself does not however, discharge the judgment debtor from liability or from settling the judgment debt, since committal to civil jail is only one of the modes of execution of decree. It is to say that a jail term once served is irreversible and in this case, I would agree with counsel for the applicant's submissions that should the appeal succeed and the judgment debtor is found to have served a six month civil jail term, that in itself renders the appeal nugatory.

There is indeed a proposal made in 2012 to settle the decretal sum by monthly installment of kshs 50,000/- with effect from 31<sup>st</sup> December 2012 which admittedly has never been honoured to date. The respondent's counsel however submitted that that undertaking to pay by installments was made or put forward when the judgment debtor was under arrest as confirmed by the court record of 10<sup>th</sup> January 2013, an indication that the judgment debtor was hard pressed or compelled by the prevailing circumstances then, that is, the fear of going to serve a civil jail to make a proposal which he knew he was incapable of honouring at that time. This is so as it has not been shown that he had means or that he has since been possessed of the means to enable him settle decree.

In addition, the uncontested fact that the judgment debtor was adjudged bankrupt although he was discharged is in my view a clear indication of his struggles to remain a float and meet his legal obligations.

Regrettably the respondent has not divulged much information that would assist this court in determining whether the applicant has all along since 1999 by design conducted himself in a manner inconsistent with his averments and deposition as to his capability to settle decree. The respondent has not demonstrated what means the judgment debtor has that he is hiding from the long arm of the law. This court, indeed does not make orders in vain. It is expected that court orders are enforced to the letter, but with the assistance of the beneficiary thereof.

As the applicant has approached this court by way of an appeal, It is not the intention of this court to deny the decree holder his benefit of a lawfully obtained judgment. However, the right of appeal is a fundamental right enshrined and guaranteed by the Constitution and other law (Order 49) of the Civil Procedure Rules. That right when exercised guarantees an appellant the right to access justice and it would be a travesty of justice if this court were to curtail that right thereby ousting him from the judgment seat, especially in the absence of any evidence that the judgment debtor was examined on his means and or that the decree holder exhausted all other less restrictive or extrusive remedies under

Section 38 of the Civil Procedure Act for enforcement of a monetary decree of the court.

In **Vijay Morjana V harns Horn Junior & another, HCC 285 of 2004** the court held that the decree holder who desires to have the freedom of a judgment debtor restricted must show that he has exhausted all other means to secure payment and that the only options left is incarceration.

In my view, and in view of all the above considerations, I find that the appeal, if successful, would be rendered nugatory, as the applicant would have served the entire civil jail term of 6 months since there is no guarantee that this appeal will be determined before the end of the jail term.

On the second condition under Order 42 Rule 6(2) of the Civil Procedure Rules that the application must have been filed without undue delay, I find that the order for committal to civil jail was made on 24<sup>th</sup> August 2015 and the application herein made on 1<sup>st</sup> September 2015, which was within 8 days of the order which in my view, was filed with alacrity.

The last condition to be fulfilled by the applicant to warrant a stay is that he must offer security or the court may direct the deposit of such security for the due performance of the decree or order as may ultimately be binding on the applicant.

In this case, the applicant has not offered any security. However, that failure to offer security does not preclude this court from making such order for security, since the applicant cannot have it both ways; that he is unable to settle decree and that he is unable to raise security for the due performance of decree. The applicant deposed that he is a small scale farmer and if let free, he will work on his farm and raise the required decretal sum. He did not mention what type of farming activities he is engaged in. It is also submitted that he is an old man, a retired civil servant and of poor health. No medical documents were availed to court to show his state of health.

The decree has been pending execution for over 17 years. The applicant contends that no prejudice will be suffered by the respondent since if the appeal is dismissed, the applicant can still serve the civil jail. This court notes that the respondent has already paid for the applicant's upkeep in civil jail for a period of 6 months.

This court is inclined to make orders that will meet the ends of justice and balance the interests of both parties. Since the applicant insists that he is still willing to settle decree, which is the reason for his committal to civil jail, and in view of his advanced age, I would in exercise of my discretion make the following orders:

1. That there shall be stay of enforcement of decree by way of committal of the judgment debtor /applicant to civil jail as ordered by the Deputy Registrar on 24<sup>th</sup> August 2015 pending hearing and determination of the appeal filed on 1<sup>st</sup> September 2015 on condition that :
  - a. The applicant deposits into court security for the due performance of decree, whether by way of land title or motor vehicle(s) log book(s) or bank guarantee to the value of kshs 3,000,000 (three million)Kenya shillings, which security need not be in his own name.
  - b. The applicant refunds to the respondent all the sums paid to the G.K. Prisons for his upkeep for the period of the committal to civil jail.
2. The applicant shall be released from civil jail upon executing a personal bond of kshs 500,000/- together with one surety of similar amount to enable him meet conditions 1(a) and 1(b) above within 14 days from the date hereof and in default, a warrant of arrest to issue and the suspended order of committal to civil jail shall be reinstated unless the orders herein are varied by the court.
3. The appeal to be prosecuted and concluded within 12 months of today.
4. The applicant shall pay costs of this application as it has taken him 17 years of engaging the decree holder in endless legal gymnastics, which are likely to abuse the court process..

Dated, signed and delivered at Nairobi this 10<sup>th</sup> day of September 2015.

**R.E. ABURILI**

**JUDGE**

10/9/2015

At 11.30 am

Coram R.E. Aburili J

C.A. Samuel

Mr Ataka for applicant

Mr Omollo for respondent

COURT- Ruling read and pronounced in open court as scheduled.

**R.E. ABURILI**

**JUDGE**

**10/9/2015**