



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CENTRAL REGISTRY

PETITION NO 51 OF 2010

JAYNE WANGUI GACHOKAPETITIONER

AND

KENYA COMMERCIAL BANK LIMITEDRESPONDENT

JUDGMENT

Introduction

1. The petitioner filed her petition together with a Chamber Summons application dated 19th February 2010 seeking to stop her arrest and committal to civil jail for non-payment of a civil debt. She asked the court to stay the warrants of arrest and committal to civil jail issued on 18th February 2010 pending the hearing and determination of this petition. Gacheche J granted temporary orders of stay subject to the petitioner depositing in court the sum of Kshs 8,000,000.00.

Background

2. The facts giving rise to this petition are that in 2006, the respondent filed **Milimani HCCC No 104 of 2006 – Kenya Commercial Bank Limited -vs Zuwenya Limited and Jane Wangui Gachoka**. An application for summary judgment was heard and determined in favour of the respondent, and a decree issued directing the petitioner to pay the respondent the sum of Ksh16,616,204.63 together with interest thereon and costs. The petitioner having failed to satisfy the decree, a Notice to Show Cause was issued against her, and subsequently, an order for her committal to civil jail was issued by the Deputy Registrar. It is this order that precipitated the filing of this petition.

The Petition

3. In the petition dated 19th February 2010 and supported by an affidavit sworn by the petitioner on the same date, the petitioner seeks the following orders:

1. THAT this Honourable Court be pleased to make interim/conservatory orders that the Warrants for the Arrest of Jayne Wangui Gachoka and her committal to civil jail for a period of six months issued by the Honourable Deputy Registrar on Thursday 18th February 2010 be stayed/lifted and or vacated pending hearing and determination of the Petition filed appurtenant hereto.

2. THAT the Court do declare that Sections 38(d) and 40 of the Civil Procedure Act and Order

XX1 Rules 32,33,34 and 35 of the Civil Procedure rules chapter 21 of the Laws of Kenya being rules made under Section 81 of the Civil Procedure Act are unconstitutional and therefore void.

3. A declaration that the committal to civil jail of the Petitioner for failure to settle the decretal amount in the High Court Civil Case No 104 of 2006 – Milimani commercial Courts infringes on the Petitioner’s constitutional right to personal liberty provided under Section 72 of the Constitution of the Republic of Kenya.

4. THAT the court does declare that committing the applicant to civil jail for non-payment of a debt is archaic and unconstitutional as it deprives her of liberty.

5. THAT the costs of this Petition be provided for.

The Petitioner’s Case

4. In presenting the case for the petitioner, Mr. Kamande relied on the affidavit sworn by the petitioner in support of the petition dated 19th February 2010, the further affidavit also sworn by the petitioner on 12th August 2010, and the written submissions dated 9th November 2010.

5. According to the petitioner, the respondent commenced High Court Civil Case No. 104 of 2006 against her and Zuwenya Limited on or about 17th February 2006 claiming the sum of kshs16,616,204.63 plus interests and costs. Judgment was entered against them on 15th April 2008. The petitioner contends that she instructed her then Advocates to appeal against the judgment and they lodged a notice of appeal on or about 28th April 2008. It is not clear from her pleadings whether an appeal against the judgment was actually lodged.

6. The petitioner avers that when the matter came up for Notice to Show Cause why she should not be committed to civil jail on 21st January 2010 before the Deputy Registrar at the Milimani Commercial Courts, she indicated that she intended to raise substantive constitutional issues with regard to the intention to commit her to civil jail and that she asked the Registrar to place the file before the Duty Judge for directions. She contends that the Notice to Show Cause was not argued on that day as the Deputy Registrar indicated that he would read his ruling on the matters raised by the petitioner on 18th February 2010.

7. She contends that she was therefore shocked when, on 18th February 2010, the Deputy Registrar issued orders that she be committed to civil jail for a period of six months despite her concerns about the legality of the punishment. She contends further that she was perplexed at the turn of events as she was of the view that the hearing of the Notice to Show Cause had been deferred pending argument on the constitutionality of the committal of civil debtors to jail.

8. The petitioner argues that committal to civil jail for the genuine inability to pay a civil debt infringes the right to personal liberty enshrined under section 72 of the former constitution; that it is archaic and offends against the law; and that Order XX1 Rules 32, 33, 34 and 35 of the Civil Procedure Rules violate Section 70 and 72 of the former constitution and should be declared unconstitutional.

9. The petitioner contends that her situation does not fall within the exceptions set out in section 72(1) of the former constitution as the Notice to Show Cause unprocedurally and unconstitutionally shifts the evidential burden on the petitioner as it requires her to provide evidence that she has not deliberately or by employing dishonest means failed to pay the decretal sum; that the provisions of Order 21 Rule 35(2) of the Civil Procedure Rules are unreasonably wide and punitive; and that the procedure of committal to civil jail makes no provision for a right of appeal once an order for committal has been made, thus offending against the guarantees provided by the constitution.

10. According to Mr. Kamande, Kenya was lagging behind with regard to the committal of debtors to civil jail as other jurisdictions have moved away from the practice; that the provisions of the Civil

Procedure Act committing an individual to civil jail is archaic and primitive. Mr. Kamande contended that the term civil jail means prison, yet there are no provisions for civil jail in the Prisons Act; that the Prison Department has been hiring out government facilities to those who can afford them; and that those who cannot afford to cannot commit another to civil jail.

11. The petitioner relied on the decision of Koome, J (as she then was) in **In The Matter of Zipporah Wambui Mathara Bankruptcy Cause No 19 of 2010** and submitted that the Learned judge, in dealing with a challenge to section 38(d) and 40 of the Civil Procedure Act, stated that it is Kenyan law, as a signatory to ICCPR to which it became a signatory in 1972, that no one should be imprisoned merely on inability to pay a debt. The petitioner also relied on the decision of the Constitutional Court of South Africa in **Farieda Coetzee v The Government of the Republic of South Africa** Case No CCT 19/94 in which it was held that legislation for committal to civil jail was overbroad, and asked the court to grant the orders sought and declare the impugned provisions of the Civil Procedure Act unconstitutional.

The Respondent's Case

12. Mr. Mutua, Counsel for the respondent, relied on the replying affidavit sworn by **Chris Theuri**, the respondent's Relationship Manager, Credit Support Unit, sworn on 12th March 2010 and their written submissions in this matter. The respondent agrees in general terms with the facts leading to the filing of this petition: that the respondent filed **Milimani HCCC No 104 of 2006 – Kenya Commercial Bank Limited –vs- Zuwenya Limited and Jane Wangui Gachoka**; that judgment was entered in the matter; and that a Notice to Show Cause was issued in the process of execution, leading to the petition now before the court.

13. The position taken by the respondent is that there is no valid constitutional issue raised in this petition; the proceedings are entirely misconceived, incompetent and an abuse of the court process as, in so far as the petition seeks to stop the execution process already underway in HCCC No 104 of 2006 Milimani, it is in violation of the provisions of section 34 of the Civil Procedure Act.

14. With regard to the prayer that certain provisions of the Civil Procedure Act and rules should be declared unconstitutional, the respondent contends that the petitioner, who has invoked the jurisdiction of the court under Section 84 of the former constitution, is outside the ambit of that provision as the court's power to declare a statute or any written law unconstitutional and void is donated by section 67 of the former constitution, which the petitioner has not invoked.

15. The respondent contends further that it is the Attorney General who should have been made a respondent to this petition as the said office is the proper respondent in proceedings seeking to have a statute or any part thereof declared unconstitutional. The respondent submits also that in the context of constitutional theory and practice, the respondent, being a private juristic person, cannot in any be said to be a guarantor of the petitioner's constitutional rights and freedoms; that the constitution provides the basic principles that regulate the relationship between the governor and the governed but not between private individuals or citizens. The respondent relied in this regard on the decision in **Kenya Bus Services & 2 Others -V- A.G & 2 Others and Teitinnang -V- Aning & Others**.

16. With regard to the contention that the execution of the decree against the petitioner by way of committal to civil jail is unconstitutional, the respondent submitted that such arrest and committal is in no way unconstitutional and has a juridical foundation in section 72(1)(c) and (d) of the constitution.

17. The respondent contended further that the petitioner did not, if dissatisfied with the ruling of the Deputy Registrar, file an appeal against the said ruling which she was entitled to with the leave of the court as provided under the provisions of the Civil Procedure Rules, contrary to her allegation in these proceedings that there is no avenue for appeal against the ruling of the Deputy Registrar.

18. The respondent therefore submitted that the proceedings before the court in this petition are just a way for the petitioner to frustrate the respondent's right to realize the decree granted in its favour in Milimani HCCC No 104 of 2006 and are without merit, noting that the petitioner had not complied with the orders

upon which the Court had issued interim orders, namely the deposit of Kshs 8,000,000.00 in court.

19. The respondent relied on the case of **Braeburn Ltd -Vs- Gachoka & another (2007) 2 EA 67** and submitted that the two judge bench that determined the matter was clear that there was nothing unconstitutional about section 38, 40 and 42 of the Civil Procedure Act and Rules 32 and 35 of order 21 (now order 22).

20. Mr. Mutua contended that the distinction between the decisions from foreign jurisdictions referred to by the petitioner is that there were insufficient safeguards, which is not the case here. In particular, he cited the decision of the court in **Farieda Coetzee -v- The Government of the Republic of South Africa** (supra) and submitted that what was under challenge in that case was not the provisions in law allowing committal to civil jail, but whether or not the process would allow for a fair trial. On the decision of Koome J in **In the matter of Zipporah Wambui**, Mr. Mutua distinguished it on the basis that the Learned Judges remarks with regard to Article 11 of the ICCPR were per incurium as the matter before the court was in respect of a receiving order and were obiter. He therefore asked the court to find that the proceedings do not raise any constitutional issues and the petitioner should be left to the safeguards provided in Article 38 and 40 of the Civil Procedure Act.

Determination

21. The parties to the petition have in their respective pleadings and submission raised several issues pertaining to the matter in dispute. However, in my view, this petition turns on two issues: First, are the provisions of Sections 38 and 40 of the Civil Procedure Act a limitation or violation of the right to liberty of a debtor? If the answer to this question is in the positive, is such limitation justifiable under the Constitution or the provisions of Article 11 of the ICCPR?

22. The petitioner contends that the arrest and committal of a debtor to prison for inability to pay a civil debt is a violation of the fundamental right to liberty as guaranteed under Article 11 of the International Convention on Civil and Political Rights. She has placed reliance in this regard on the decision of Koome J (as she then was) in **Re Zipporah Wambui Mathara Milimani BC Cause 19 of 2010 (Unreported)** in which the Learned Judge had observed as follows:

“There are several methods of enforcing a civil debt such as attachment of property. The respondent claims that the debtor has money in the bank, that money can also be garnished. An order or 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.”

23. The petitioner has also relied on the decision of the Constitutional Court of South Africa in **Farieda Coetzee -v- Republic of South Africa (supra)** at para. 44:

“There can be no doubt that committing someone to prison involves a severe curtailment of that person's freedom and personal security. Indeed, the very purpose of committal is to limit the freedom of the person concerned. Given the manifest and substantial invasion of personal freedom thus involved, the real issue that we have to decide is whether such infringement can be justified in terms of the general limitations on rights permitted by Section 33 of the Constitution. This is the nub of the problem before us.”

24. The petitioner impugns the provisions of Section 38 of the Civil Procedure Act, which provide as follows:

38. 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) – (c)

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

(e) - (f)

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 to 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.

(b) Is likely to abscond or leave the local limits of the jurisdiction of the court; or

(c) 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

(d) 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 exempted from attachment in execution of the decree; or

(e) That the decree is for a sum for which the judgment debtor was bound in a fiduciary capacity to account.

25. She also argues that the provisions of Article 40 are unconstitutional. The provisions of this section are in the following terms:

40. (1) A judgment-debtor may be arrested in execution of a decree at any hour and on any day, and shall as soon as practicable be brought before the court, and his detention may be in any prison of the district in which the court ordering the detention is situate, or, if such prison does not afford suitable accommodation, in any other place which the Minister may appoint for the detention of persons ordered by the courts of such district to be detained:

Provided that –

(i) for the purpose of making an arrest under this section, no dwelling-house shall be entered after sunset and before sunrise;

(ii) no outer door of a dwelling-house shall be broken open unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto; but when the officer authorized to make the arrest has duly gained access to any dwelling-house he may break open the door of any room in which he has reason to believe the judgment-debtor is to be found;

(iii) if the room is in the actual occupancy of a woman who is not the judgment-debtor, and who according to the custom of her community does not appear in public, the officer authorized to make the arrest shall give notice to her that she is at liberty to withdraw and, after allowing a reasonable time for her to withdraw and giving her reasonable facility for withdrawing, may enter the room for the purpose of making the arrest;

(iv) Where the decree in execution of which a judgment-debtor is arrested is a decree for the payment of money and the judgment-debtor pays the amount of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him.

(2) The Minister may, by notice in the Gazette, declare that any person or class of persons whose arrest might be attended with danger or inconvenience to the public shall not be liable to arrest in execution of a decree otherwise than in accordance with such procedure as he may direct.

26. In my view, these provisions offend neither the Constitution nor the provisions of Article 11 of the International Convention on Civil and Political Rights, setting out, as they do, such clear provisions with regard to the procedure to be followed in their application. Article 11 of the ICCPR provides that

“No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.”

27. To my mind, the use of the word ‘merely’ in this Article implies that the inability to fulfil a contractual obligation cannot be the sole ground or reason for committing a debtor to prison. There must be another reason, for instance, that the debtor is able but unwilling to meet his or her contractual obligation. I find support for this view in several decisions of this court. In **Rosanna Pluda Moi v Philip Kipchirir Moi, Nairobi Divorce Cause No. 154 of 2008 (Unreported)** Justice G.B.M. Kariuki, J. (as he then was) stated as follows:

‘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. The thesis by the Honourable Justice Nambuye in her Ruling delivered on 24th May 2010 clearly shows that the Respondent possesses resources from which he can, if he so wishes, pay the money he owes by way of maintenance.’

28. The constitutionality of the process of arrest and committal for a judgment debt was also considered in the case of **Mohammed & Muigai Advocates v Samuel Kamau Macharia & Another Milimani HCCC 1158 of 2002 (Unreported)**. In that case, the judgment debtor, like the petitioner in this case, argued that a Notice to Show Cause was contrary to **section 72** of the former constitution and that **Order 22 rules 7 and 32** permitted deprivation of liberty before due process of law had been observed and were therefore contrary to **section 77(a)** of the former Constitution. Emukule J, however, held that a Notice to Show Cause why Execution should not issue is a condition precedent to some form of inquiry prescribed by **section 38 and Order 22** as to what property or means of satisfying the decree the judgment debtor may have, and that the procedure prescribed, if followed, could not violate the requirement for a fair hearing.

29. Similarly, in the case of **Braeburn Limited –vs- Gachoka & Another (2007)EA 67** relied on by the respondent, in which the issue of the constitutionality of section 38 and 40 of the Civil Procedure Act had also been raised, the court (Emukule and Wendoh, JJ), held as follows

‘Having examined in detail the impugned provisions of the Civil Procedure Act (Sections 38, 40 and 42) and the rules (32 and 35 of Order XXI) of the Civil Procedure Rules, we are of the considered view and hold further that the said provisions are neither inconsistent with the provisions of the relevant provisions of the constitution or nor are they in conflict with any of the provisions of the International Bill of Human Rights. We further hold that provided the procedure under the Civil Procedure Act and Order XXI 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.’

30. In the case of **Beatrice Wanjiku & Others –vs- The Attorney General & Others High Court Petition No. 190 of 2011** Majanja J, after considering various cases, among them the cases set out above on the issue of Section 38 and 40 of the Civil Procedure Act, observed as follows:

‘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 fulfill 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 fulfill 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 fulfill a contractual obligation may be permitted.’

31. As the court also observed in the case of **Beatrice Wanjiku & Others -vs- The Attorney General & Others (supra)**, committal of a debtor to civil jail does amount to a limitation of fundamental rights and freedoms, in this case the right to liberty. However, such limitation is permissible in accordance with the provisions of Article 24 of the Constitution, more so because there are legislative safeguards before a party can be committed to civil jail for non-payment of a debt. As Majanja J also observed in the said case:

‘The manner of depriving a person of liberty is prescribed by section 38 of the Civil Procedure Act as set out above. In cases where the decree is for payment of money, the person or judgment debtor will not be committed to detention in prison unless he is first given an opportunity of showing cause why he should not be committed to prison. The procedure for giving the judgment-debtor an opportunity to show cause why he should not be committed to detention in prison is prescribed by Order 22 rules 7, 31, 32 and 35 of the Civil Procedure Rules’

32. Majanja J went on to observe as follows:

Where the Court however finds that the judgment debtor should be committed to detention in prison it must satisfy itself that the conditions for committal to prison in respect of a money decree are strictly fulfilled, and the court must take a record in writing of its findings before such committal. These conditions are set out in the proviso to section 38 of the Civil Procedure Act, and are repeated in Order 22 rule 34 (2).

Section 40 of the Civil Procedure Act is not to be read in isolation. It is a consequence of section 38. It regulates the manner in which arrest and committal is effected in accordance with section 38 and Order 22 of the Rules. Thus the reference to “a judgment-debtor may be arrested” does not refer to the court’s power or judgment-creditor to effect arrest at anytime but rather that the power of arrest is consequent upon the court following the procedure prescribed by section 38 and the rules promulgated for that purpose.

33. I agree fully with the sentiments expressed by my brother and sister judges in the above matters. 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.

34. I therefore find and hold that there has been no violation of the petitioner’s constitutional rights in the process of execution of the decree against her in respect of High Court Civil Case No 104 of 2006. Save that the provisions set out in the Act and Rules must be adhered to, the process of execution should continue. In the event that the petitioner is not satisfied with the process or decision relating to the execution process, then she is at liberty, as provided in the Civil Procedure Rules, to lodge an appeal in the usual manner.

35. This petition is therefore dismissed with costs to the respondent.

Dated, Delivered and Signed at Nairobi this 5th day of July 2013

MUMBI NGUGI

JUDGE

Mr. Kamande instructed by the firm of Muriithi, Oonge & Co. Advocates for the Petitioner

Mr. Mutua instructed by the firm of Macharia Mwangi & Njeru Advocates for the Respondent