



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

Civil Suit 41 of 1999

**IJAZ HUSSEIN GANIJEE.....PLAINTIFF**

**VERSUS**

**HUSSEIN M. AIDEED..... DEFENDANT**

**RULING**

The application before court is dated 31<sup>st</sup> May 2004 and seeks to review or vary orders of this court issued on the 24<sup>th</sup> May 2004. In the alternative the applicant prays for order setting aside the orders of 24<sup>th</sup> May 2004 and re-instatement of the orders of 20<sup>th</sup> May 2004 by the Deputy Registrar committing the Respondent to civil jail. The application is based on Order 44 Rule 1 (1), Order 41 Rules 4 (2) and (7), Order 50 Rule 17 of the Civil Procedure Rules and Section 3A of Civil Procedure Act.

Due to the nature of the application and the proceedings in this matter, it is necessary to set a brief background of this matter.

The Plaintiff obtained Judgment in default of Defence against the Defendant/Respondent on the 27<sup>th</sup> July 1999. Subsequently several proceedings followed but of relevance is that the Plaintiff/Applicant applied for execution of the Decree by way of arrest and committal to civil jail of the Judgment-Debtor/Respondent.

On 16<sup>th</sup> February 2004, the matter came before the Deputy Registrar for the Notice to Show Cause why the Judgment-Debtor should not be arrested and committed to civil jail. The Judgment Debtor was represented by Mr. Saende who held Mr. Mohamed's brief while the Decree-Holder was represented by Mr. Thiga. Mr. Saende's only objection was that parties were negotiating. This was disowned by Mr. Thiga who submitted that the negotiations had collapsed.

I have taken it upon myself to look at the Court record and note that as early as 9<sup>th</sup> December 1999, the Judgment-Debtor had sought to negotiate this matter. This seems to have gone on until the 16<sup>th</sup> December 2003 when the Plaintiff's Counsel indicated to the court that parties had not reached a settlement. Subsequently, the Decree-Holder opted to commence execution of his decree. On the said 16<sup>th</sup> February 2004, the Deputy Registrar was satisfied with the application and issued Warrants of Arrest.

The Judgment-Debtor was only arrested on the 20<sup>th</sup> May 2004 and brought before Meoli SPM/Deputy Registrar. Mr. Thiga was present for the Decree holder while the Judgment-Debtor present under warrant of arrest was not with Counsel. After hearing both sides, the court committed the

Judgment-Debtor to civil jail for a period of 30 days and gave right of appeal in 28 days.

On the 24<sup>th</sup> May 2004, Mr. Oseko, Learned Counsel for the Judgment Debtor obtained leave to appear for the latter in place of M/s Mohamed Muigai Advocates. He sought for an order for the Judgment-Debtor be granted bail and/or be released from civil jail pending the hearing of the Appeal filed against the Ruling (committing him to jail).

The application was brought under Order 21 Rule 35 and as usual, Section 3A of Cap 21. The application was heard ex-parte by this Court.

The Court allowed the application and released the Judgment-Debtor on the following conditions; either upon:-

- (1) The Kenya Government through Kenya's envoy to Somalia provides an undertaking or written assurance that it will ensure the appearance and attendance of the debtor in Court from time to time until the appeal is determined, or**
- (2) If this is not possible the debtor do furnish a security by depositing in Court a sum of Kshs. 5,000,000/= (Five Million Only) before his release.**
- (3) Such sum is to be held in court until the determination of the appeal or further order of the Court.**

The Plaintiff/Decree-Holder is aggrieved by the aforesaid exparte orders thus the application now before me.

Following my aforesaid orders, the Defendant elected to comply with the 1<sup>st</sup> option and the letter by the Government of Kenya, was given securing his release.

The application was argued by the late Mr. J. R. K'owade (now deceased). I had the pleasure of working with him and I am still saddened by the loss of such a great legal mind.

Mr. K'owade took great issue with the fact that the application was heard ex-parte and orders given without a return date. He submitted that Order 21 Rule 35 that the application was founded, does not have any provision for orders for stay and secondly for the order to be obtained ex-parte. "Except where a specific provision of law expressly say so, all applications must be inter partes". He continued, in this case the orders were given ex-parte. They are a nullity. That's sufficient cause for the Court to review its orders.

The Applicant also argued that there was an error on the face of the record. It was argued that there was no automatic appeal under Order 21; Orders can be appealed from only with leave of the Court. It is not as of right. The applicant maintained that the Rules committee had omitted the orders appealable as of right. He argued that Order 21 Rules 25, 57, 65 (3) and 81 are the only rules against which one can appeal as of right and the Respondent did not ask for leave before the Registrar or the High Court. And as against invoking Section 3A of Cap 21, the Learned Counsel submitted that any reference to the inherent powers of the court does not hold any water in the circumstances of this case. Court cannot exercise Section 3A where there are express provisions of law dealing expressly with the issues before the court.

On the final limb by the applicant's submission, the court was urged to review its orders as the Court could not give an order of stay without fulfilling the conditions required by law. In particular, the applicant argued that the Court did not consider that the Judgment - Debtor had to give sufficient security as envisaged by Order 41. The amount then was in excess of Kshs. 15,000,000/=. The applicant further urged the court to vary the order and direct deposit of security for Kshs. 15,247,617/= and in the alternative; the orders of the Registrar be re-instated committing the judgement debtor to civil jail.

The application was strenuously opposed by Mr. Oseko, Learned Counsel for the Judgment

Debtor. I thank him for his industrious and articulate submissions.

Mr. Oseko supported the orders sought to be reviewed. In opposition to the issue of whether there is an appeal, Learned Counsel submitted that the application was grounded on the misapprehension between Order 48 and 41.

Mr. Oseko took the Court through the provisions of Order 48. He submitted that Order 48 of Civil Procedure Rules grants the Registrar powers pursuant to Order 21 Rules 35. It allows the Registrar to commit to civil jail. A right of appeal is allowed directly from the decision of the Registrar.

Order 48 Rules 5 provides;

**“(2) An appeal shall be from a decision of the Registrar under the orders referred to in sub-rule (1) to a judge in chambers”**

**(5) The Memorandum of the appeal, setting out the grounds of the appeal shall be filed within seven days of the decision of the Registrar.”**

The Respondent maintained that the only recourse in the instance is to file a Memorandum of Appeal under Order 48. I am persuaded by the argument of the Respondent. An appeal against the decision of the Registrar exercising powers under Order 48 can be taken to this Court in the manner done. In any case, I note that the Deputy Registrar after her orders on 20<sup>th</sup> May 2004, gave a right of Appeal. In that regard, even if the Applicant was not persuaded that the Appeal was not under Order 48, then he should be persuaded that the Deputy Registrar gave leave to appeal. Mr. K’owade seems to have missed this point.

The Respondent’s counsel maintained that the Court could give the orders as it did *ex-parte* and argued that this was sufficient reason to review this Court’s order.

On the aspect of sufficiency of security, Mr. Oseko submitted that this Court did not interfere with the decree. The orders given *ex-parte* were only security to ensure the attendance of the Judgment-Debtor in Court. It was not in execution or satisfaction of the decree. The Judgment-Debtor argued that they were not staying execution and the decree-holder’s right remained intact.

I want to analyse briefly the effects of my orders sought to be reviewed.

The Judgment Creditor sought to execute his Decree and the mode preferred by him was committal of the Judgment-Debtor to civil jail. This was done after hearing of both parties.

Whether the Deputy Registrar was right in doing so is for the Appeal. I am reminded by the Applicant that the Appeal is not before me at this stage.

On an *ex-parte* hearing, the mode of execution of the decree sought by the Decree holder was stayed. Even though I agree with the Respondent that the orders were to secure attendance of the Judgment-Debtor, this Court cannot run away from the fact that the orders stayed a form of execution of the decree. The orders were permanent in nature and did not have a return date. The option of release preferred by the Respondent was to give the Government’s written assurance for his attendance and not deposit of the security in the sum of Kshs. 5,000,000.00/=.

I agree that the Applicant cannot execute against the surety (Kenya Government) the decretal sum of Kshs. 15,247,617.52/= on account of my order. The orders this Court gave have interfered with the Decree holder getting fruits of his judgment.

The power to review is given by Section 80 of Cap 21 and Order 44 of the Civil Procedure Rules. I have severally held that the Court has unfettered discretion under the provisions cited for review and more particularly under the provisions for “*any other sufficient reason.*”

The import of my order released the Judgment debtor on an ex parte application and were in finality. The order also did not secure security of performance of the decree. I find that justice of the matter requires that the order should be reviewed for the record to be put right.

I reiterate my previous finding in my Ruling delivered herein on the 14<sup>th</sup> of December 2005, that in securing his release, the Judgment debtor “elected to comply with the alternative security of providing an undertaking or written assurance from the Kenya Government that he would attend Court as the Judgment-debtor when so required by Court. If the Defendant absconds or defaults, the Kenya Government is liable to forfeit the bail amount of Kshs. 5,000,000/= to the Court and which can be applied as the Court deems fit including applying it towards partial satisfaction of the Decree herein

The upshot of the foregoing is that I allow the Plaintiff’s Notice of Motion application dated 31<sup>st</sup> May 2004 in terms of prayer 1 and 2. I cannot fault the efforts by the Respondent to secure his release and therefore I shall not give any orders as to costs.

Dated and SIGNED at Nairobi on this 22nd day Of August 2012.

**M. K. Ibrahim**  
**Judge**

DATED AND Delivered at Nairobi on this 2nd day of October 2012.

**w. korir**  
**Judge**  
In the presence of