



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 81 of 1998

NATIONAL BANK.....PLAINTIFF

VERSUS

LINUS KURIA NDUNG'U.....DEFENDANT

R U L I N G

The application is the Chamber Summons dated 15th September, 2008. Even before the court allowed the Applicant's Advocate to argue the application, it was abundantly clear that the application had been brought under the wrong provisions of the law and had two titles, a petition and a chamber summons making it defective in form.

The Respondent had noted the defect and had filed a notice of preliminary objection, raising *inter alia* the issues of procedural defect. I did not allow the preliminary objection to be argued for two reasons. First of all, there was a more important matter which, if the preliminary objection was raised, was likely to be given less attention that it deserved. That was the fact that the Judgment Debtor's liberty was at stake as he was serving a 30 days civil jail term which was soon wining out. The second reason is that both under **Order L rule 12** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act** this court had power and inherent jurisdiction to entertain the application, the defect in form notwithstanding. This court proceeded to hear application challenging the order of the Deputy Registrar made on 11th September, 2008 committing the Judgment Debtor to civil jail for thirty days.

I have considered the submissions by both counsel which are on record and which I do not wish to repeat. Having perused the record of the proceedings before the Deputy Registrar, it was abundantly clear to me that the Hon. Deputy Registrar did not apply his mind to the provisions of **Order XXI Rule 35(2)** of the **Civil Procedure Rules**. For the purposes of the instant case, the applicable subrule is **rule 35(2) (b) of Order XXI** of the civil Procedure Rules which provides:

“(2) Before making an order for the committal of the judgment-debtor to prison, the court, for reasons to be recorded in writing, shall be satisfied-

(a)...

(b) 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 is exempt from attachment in execution of the decree.”

The rule is very clear concerning the issues that the court should consider and be satisfied with before making the order for committal to civil jail. First to be adhered to is the requirement that the reason which informed the Deputy Registrar to decide the way he did must be recorded in writing under Section (2) (b), the Deputy Registrar must be satisfied;

(i) That the Judgment-Debtor has, since the date of the decree, the means to pay the amount of the decree or some substantial part thereof;

(ii) and refuses or neglects or has refused or neglected to pay the same...

I will set out the ruling of the learned Deputy Registrar to demonstrate what guided or informed his decision.

“The Defendant/Judgment Debtor does not deny owing money to the Decree Holder since 21/2/08 he has not liquidated any part of the decretal sum. He has not made any proposal other than payment by monthly installments of Kshs.1000/- which is acceptable to the Decree Holder. I find and hold that the Judgment Debtor has failed to show cause why he should not be committed to civil jail for failing to liquidate the decretal sum. In the premises I hereby order that the Judgment Debtor be committed to civil jail for an initial period of 30 days from the date hereof. The Decree Holder to meet costs of his subsistence.”

It is clear that the Deputy Registrar laid great emphasis on the fact that the Judgment Debtor did not deny the debt. That is notwithstanding the fact that such a denial would be of no assistance to the Judgment Debtor, since the judgment and decree were not in issue. The Deputy Registrar also gave so much weight to the fact that the decretal sum had not been liquidated since 21st February, 2008, and that a meager Kshs.1000/- per month was a sum the Judgment Debtor offered to pay monthly in order to liquidate the decree.

Under Order XXI rule 2(b) all the issues which led to the Deputy Registrar’s decision to send the Judgment Debtor to Civil Jail are irrelevant and unnecessary at least at the state of Notice to show cause. There was no specific finding that the Judgment Debtor had or has had the means to pay any part of the decree with reasons given for that finding. Neither was there a specific finding that the Judgment Debtor had refused or neglected to pay the debt in order to satisfy the decree.

That brings me to a very important point which the Deputy Registrar did not address. The burden of proof in a Notice to Show Cause lies with the Decree Holder at all times. It is the duty and evidential burden of the Decree Holder to prove that the Judgment Debtor has or has had the means to satisfy the decree and further that the Judgment Debtor has refused or neglected to pay. Going by the tenor of the Deputy Registrar’s ruling, the Deputy Registrar misdirected himself as to the party with the onus of proof and the burden of proof. It is clear from the Deputy Registrar’s ruling that he shifted the burden of proof to the Judgment Debtor therefore failing to take into consideration serious issues as stipulated under Order XXI Rule 35 of the Civil Procedure Rules. What the learned Deputy Registrar did was to treat the matter casually. These are serious issues calling for careful and meticulous consideration. In fact the issue was serious enough for the Deputy Registrar to have required the Judgment Debtor to file an affidavit of means in order to afford to him an opportunity to adequately answer the affidavit evidence filed by the Decree Holder. The filing of the affidavit of means would not shift the onus or burden of proof against the Judgment Debtor. Rather it would serve as an enablement to the Judgment Debtor to show cause as required under the notice to show cause.

As I have stated in this ruling the procedure adopted by the learned Deputy Registrar was erroneous and the matters taken into consideration by him given greater emphasis, while the weighty issues were totally ignored as to render the final order to commit the Judgment Debtor to civil jail unlawful. For this reason, I do order that the order committing the Judgment Debtor to civil jail be and is hereby set aside together with the mention order given for 9th October, 2008. The Judgment Debtor should be set at liberty forthwith.

Dated at Nairobi this 3rd day of October, 2008.

LESIIT, J.

JUDGE *Read, Signed and delivered in the presence of:-*

Ms. Wangeci holding brief for Mr. Kurauka for the Applicant

Mr. Asitiva/Nyachoga for the Respondent

LESIIT, J

JUDGE

Order:

This ruling should be typed and supplied to the Deputy Registrars in this station for their information.

LESIIT, J.

JUDGE