



REPUBLIC OF KENYA



Wambua v Mutiso (Civil Case 171 of 2015) [2025] KEMC 63 (KLR) (14 April 2025) (Ruling)

Neutral citation: [2025] KEMC 63 (KLR)

**REPUBLIC OF KENYA
IN THE MAKINDU LAW COURTS
CIVIL CASE 171 OF 2015
YA SHIKANDA, SPM
APRIL 14, 2025**

BETWEEN

THOMAS NDAMBUKI WAMBUA PLAINTIFF

AND

JOHNSTON MUTISO DEFENDANT

RULING

The Application

1. Before me is an application dated 20/1/2025 brought by Johnston Mutiso (hereinafter referred to as the Judgment-debtor) under a certificate of urgency. The application seeks the following main orders:
 1. The orders committing the Judgment Debtor/Applicant herein one Johnson Kimau Mutiso to civil jail for a period of six months and all its subsequent consequences be hereby stayed / reviewed / set aside;
 2. The judgement debtor having deposited a whopping Kshs.800,000/= out of the decretal amount be released forthwith from prison;
 3. The Judgement debtor be allowed to spread/pay the balance of the decretal amount to be reconciled by this Honourable court within the next one year;
 4. Costs be in the cause.
2. The application is supported by an affidavit sworn by the Judgment-debtor.
3. In the affidavit in support of the application, the Judgment-debtor deposed that he had a wife and three children plus two other dependants. That he would adhere to any directions that may be given by the court.



The Plaintiff's Response

4. The plaintiff opposed the application by filing a Replying affidavit sworn on 14/3/2025 as well as Grounds of opposition dated. He opposed the application on the following grounds:
 1. The application is an abuse of the court process as the Judgment-debtor has repeatedly failed to comply with court orders regarding payment of the decretal sum;
 2. There is an outstanding balance of Ksh. 700,000/=;
 3. The Judgment-debtor has not demonstrated any lawful reason for failing to settle the remaining balance;
 4. The Judgment-debtor had ample time to settle the decretal sum but failed to do so;
 5. The affidavit in support of the application does not disclose any sufficient cause to warrant the orders sought;
 6. Granting the orders sought would prejudice the decree-holder who has waited for years to enjoy the fruits of his judgment;
 7. The application is merely intended to delay the execution process and frustrate the enforcement of the decree.

Main Issues For Determination

5. In my opinion, the main issues for determination are as follows:
 - i. Whether there are sufficient grounds to set aside or stay the orders committing the Judgment-debtor to civil jail;
 - ii. Whether the Judgment-debtor should be released from civil jail and allowed to settle the balance of the decretal sum in instalments for a period of one year.

The Judgment-debtor's Submissions

6. The judgment-debtor made brief oral submissions. He reiterated that he had paid Ksh. 800,000/= and urged the court to release him from custody so that he can look for the balance. He submitted that his family member had met the Decree-holder and agreed that if he paid Ksh. 1,000,000/=, the claim would be settled. That an agreement was prepared but the Decree-holder declined to sign. The Judgment-debtor submitted that he was the breadwinner of his family. He prayed to be released on the earlier bond terms and to be given one year to settle the balance.

Submissions On Behalf Of The Decree-holder

7. Ms. Kanyangi, learned Counsel for the Decree-holder opposed the application. Counsel submitted that they had struggled with the Judgment-debtor for long and that it was not easy to trace him. That the Judgment-debtor made promises before but never fulfilled them. It was submitted that if released, the Judgment-debtor would abscond.

Rejoinder By The Judgment-debtor

8. The Judgment-debtor submitted that his wife and family members were ready to stand surety for him. That the last time he had gone to look for money and that he would not abscond.



Analysis And Determination

9. I have carefully considered the application and given due regard to the submissions made by the parties. The application was made by the Judgment-debtor in person yet there is an advocate for him on record. It is not clear why the Judgment-debtor opted to make the application in person. He did not follow the correct procedure to enable him act in person. However, it would appear that the Decree-holder had no problem with the procedure adopted by the Judgment-debtor. No objection was raised in respect thereof. In the circumstances, and pursuant to the provisions of Article 159(2) (d) of the Constitution of Kenya, I will overlook the procedural technicality and focus on substantive justice.
10. Section 42 of the Civil Procedure Act provides:
- “(1) Every person detained in prison in execution of a decree shall be so detained—
- (a) where the decree is for the payment of a sum of money exceeding one hundred shillings, for a period not exceeding six months; and
- (b) in any other case, for a period not exceeding six weeks:
11. Provided that he shall be released from such detention before the expiration of the said period of six months or six weeks, as the case may be—
- i. on the amount mentioned in the warrant for his detention being paid to the officer in charge of the prison; or
- ii. on the decree against him being otherwise fully satisfied, if the court so orders; or
- iii. on the request of the person on whose application he has been so detained, if the court so orders; or
- iv. on the omission of the person, on whose application he has been so detained, to pay subsistence allowance.
- (2) A judgment-debtor released from detention under this section shall not merely by reason of his release be discharged from his debt, but he shall not be liable to be rearrested under the decree in execution of which he was detained in prison.”
12. Section 43 of the Civil Procedure Act provides in part as follows:
- “(3) Where a judgment-debtor has been committed to prison, he may be released therefrom—
- (a) by the superintendent of the prison in which he is confined on the grounds of the existence of any infectious or contagious disease; or
- (b) by the committing court or the High Court on the ground of his suffering from any serious illness.
- (4) A judgment-debtor released under this section may be rearrested, but the period of his detention in prison shall not in the aggregate exceed that prescribed by section 42 of this Act.”



13. From the foregoing provisions, it would appear that the circumstances under which a Judgment-debtor may be released from civil jail before the expiration of the period committed are:
 1. When he pays the full decretal sum;
 2. When the court orders that the decree has been fully satisfied;
 3. When the decree-holder requests for his release;
 4. When the decree-holder fails to pay subsistence allowance;
 5. Existence of any infectious or contagious disease at the prison facility where he is held;
 6. By the court on the ground that the judgment-debtor is suffering from a serious illness.
14. The Act does not expressly provide that the Judgment-debtor may be released from civil jail if he makes part payment. In the same breath, the law does not prohibit the court from releasing a judgment-debtor who has made part payment. In my view, the court has discretion to release a judgment-debtor who has made part payment upon such terms as the court may deem fit. Such decision ought to be exercised judiciously in accordance with established principles of what is fair and reasonable. It is not in dispute that the judgment-debtor has since paid a sum of Ksh. 800,000/= towards settlement of the decretal sum. It is said that the balance is Ksh. 700,000/=.
15. The judgment-debtor has asked the court to release him so that he can look for the balance. He has also asked the court to allow him to defray the balance within a period of one year. The record is clear that the judgment-debtor was once arrested but was released on bond. He was given time to settle the decretal sum but instead, he absconded and went into hiding for a period of over one year. The record also shows that the judgment-debtor has made promises before but never fulfilled them. He made a proposal before but the same was rejected by the Decree-holder as well as the court. In the instant application, the judgment-debtor has requested for one year to settle the balance of the decretal sum but has not given a clear proposal of how he will settle the amount. For instance, he has not stated how much he will be paying per month and when he expects to pay the 1st instalment.
16. It is a good thing that the judgment-debtor has made part payment. However, given his past history, the court would be slow to release him without a proper and clear proposal on his part. It is not enough for the judgment-debtor to ask for one year. He must clearly state how he intends to clear the balance in the period requested for. Without a clear and acceptable proposal, it would be difficult for the court to exercise its discretion in favour of the judgment-debtor. The judgment-debtor was released before upon presenting a surety but he still absconded. In his submissions, the judgment-debtor stated that his wife and family members were ready to stand surety for him.
17. None of the family members swore and filed an affidavit to confirm and assure the court that they are willing to stand surety for the judgment-debtor and ensure that he settles the balance. In my view, given the previous conduct of the judgment-debtor, the court must be cautious of making orders that would embarrass or prejudice the decree-holder. This is an old matter. Judgment herein was entered on 12/9/2018. It was not until recently that the judgment-debtor made his first payment in settlement of the claim. I do not think it would be prudent to release the judgment-debtor from civil jail without him giving a clear and acceptable proposal on how he intends to settle the balance.
18. It is not clear where the judgment-debtor is going to look for the money. He alleges that the last time he disappeared for over one year, he had gone to look for money. Surprisingly, he did not return with any money. There is no guarantee that if the judgment-debtor is released, he will get the money and pay. He might as well look for money in the wrong places like the last time. The judgment-debtor seems



to be gambling with the court process. In as much as I may be sympathetic to the judgment-debtor, I find no sufficient grounds to warrant his release from custody at this stage.

Disposition

19. In view of the foregoing, I find that the application dated 20/1/2025 is devoid of merit. I proceed to dismiss it with costs to the decree-holder. The judgment-debtor to settle the balance of the decretal sum. He also has the option of entering into a consent with the decree-holder or moving the court with a proper proposal on how to defray the balance.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 14TH DAY OF APRIL, 2025.

HON Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE

