



REPUBLIC OF KENYA
IN THE KADHI'S COURT AT NAIROBI
MLIMANI COMMERCIAL COURTS
CIVIL SUIT NO. 71 OF 2014

J M H.....PLAINTIFF

-VERSUS-

I J K.....DEFENDENT

R U L I N G

The Plaintiff/s/ Applicants moved this court vide Notice to show cause dated 4th May,2015 and file on 5th May 2015 for arrest and committal of the Defendant/Judgment debtor to civil jail in execution of decree amounting to KES 240,000/.

On 11th May 2015 the Defendant/Judgment debtor file an affidavit of means dated 8th May 2015 as a ground of opposition to the NTSC application dated 4th May 2015.

The background information to this ruling is that the Plaintiff moved to this court, by way of a plaint dated 25th February 2014 and filed on the same day, where she prays for:-

- a) Dissolution of Marriage.
- b) Issuance of a divorce certificate.
- c) Maintenance of the issues.
- d) Any relief that the court may deem fit.

On 4th April 2014 this court rendered judgment in favor of the Plaintiff in the following terms:

- 1.That the marriage solemnized between the Plaintiff and Defendant be and is hereby dissolved.
- 2.That the divorce certificate to be issued forthwith.
- 3.That the Defendant to cater for the maintenance of the Issues and the modality of such maintenance to be agreed upon or ordered upon thereafter.

On 10th April 2014 subsequent orders were made by this court after parties failed to agree on the modality of maintenance, which required the Defendant to pay KES 24,000/- monthly as money towards food and shelter (maintenance).

The Defendant was also required to cater for the school fees, medical expenses and other needs, as and when they arise.

Applicant's Submissions.

The Applicant/Plaintiff submitted that in the last fifteen (15) month the Defendant has not been maintaining the children of marriage as ordered by this court and the Defendant has never bothered to assist the her in meeting numerous needs pertaining to children wellbeing , forcing her to spend a colossal amount of money for the maintenance of the minors from her meager earnings.

The Applicant further stated that the issues attending [particulars withheld] Primary School namely J, J, J are in school fees arrears amounting to KES 33,000/-.

On the issue of Kindergarten attending minor the Applicant further stated that she has arrears of school fees amounting to KES 7,000/- and that the said minor has attended school for only one week for this term due to school fees amounting to KES 15,400/-. thus the total balance due for the minor is 22,400/-.

She further submitted that the decretal amount being a children maintenance, that it will be in the best interest of the minors that this Honourable Court enforces its order and commits the Defendant/Judgement debtor to civil jail for failure to obey the order granted by this court without a justifiable cause.

Defendant's submissions.

The Defendant submitted that he has tried his best to comply with the order of the court and that he has some other responsibility towards his other family and that he asked the court to allow him paying KES 3,000/- monthly towards the maintenance of the minors.

The Defendant acknowledged the existence of unpaid maintenance for ten (10) months amounting to KES 100,000/- . He further submitted that he has been paying school fees for all issues and that the due balance amount to KES 24,000/-.

Lastly, the Defendant asked the court to divide parental responsibility on the basis that both parents have equal responsibility towards the minors and that he is willing to pay 75% of decretal amount which is equivalent to KES 60,000/- according to his calculation and prayed for non-committal.

The court has considered the submissions by learned counsels and other submissions that do not necessarily appear in this ruling.

It is obvious from the Defendant/Judgment debtor has not complied totally with the order of the court granted vide decree dated 10th April 2015, thus the Applicant is legally rightful before this court to seek for execution.

There are several modes of execution of decrees provided for under section 38 of the Civil Procedure Act which provides that:

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) by delivery of any property specifically decreed;
- (b) by attachment and sale, or by sale without attachment, of any property;
- (c) by attachment of debts;
- (d) by arrest and detention in prison of any person;

(e)

(f)

To comment briefly about this section, arrest and detention in prison of any person is one of the modes of execution of an order of the court. In addition the judgment creditor may opt to apply for the appointment of a receiver of the judgment debtors property under section 38 (e) of the CPA.

“Mulla in the Code of Civil Procedure 17th Ed. Vol 1” by S.K Sarvaria and Snigdha Sarvaria, page 791, discusses the Indian section 51, (in *pari materia* with the Kenyan S.38 of the Civil Procedure Act Cap 21) which provides:

“Subject to such conditions and limitations as the case may be prescribed, the court may, on the application of the decree-holder order execution of the decree-

(c) by arrest and detention for such period not exceeding the period specified in S. 58, where arrest and detention is permissible under that section.”

At page 795, the learned authors note that clause (c) of S. 51 of the Indian Code of Civil Procedure (equivalent of S. 38(d) provides that one of the modes of the execution of a decree is ‘arrest and detention’ of the judgment debtor in civil prison. The proviso to this section restricts the power of the executing court to direct the arrest and detention of the judgment debtor to cases of execution of a decree for payment of money.

The object of the proviso is to afford protection to indigent and honest debtors.

Mere non payment of the amount stated in the decree is not sufficient to send the judgment-debtor to prison. But if the conduct of the judgment-debtor is dishonest or contumacious he is liable to be arrested and detained.

The judgment debtor is not protected if there is element of bad faith in his conduct. If he has the means to pay and still refuses or neglects to honour his obligation under the decree, he becomes liable to imprisonment.

In short, honest judgment-debtors must be protected and dishonest ones should be punished.

In this case though the Defendant/Judgment debtor has been availed sufficient opportunity to address the court of his position. He however exhibited unwillingness to abide by the order granted by this court.

On 19th March,2015 during the hearing of NTSC he denied that he was aware of the orders granted by this court, It is much clear from the records of the court that the Defendant was in fact present at the time when this court was delivering its judgment on 4th April 2014 and when subsequent orders were issued on 10th April 2014.

Notwithstanding his denial this court went ahead adjourning the hearing of the said NTSC whilst ordering the Applicant to serve him with all requisite document; nevertheless the court granted him ten(10) days to come up with the modality of paying the decretal sum.

On 30th April 2015 the defendant failed to abide by the order granted on 19th March 2014,the court again granted the defendant another five(5) days to come up with modality of paying the decretal sum.

I am more than convinced that the intent of the Defendant/Judgement debtor is to take the court in circle without necessarily providing the information required.

Article 53(2) of the Constitution requires this court to promote the best interest of minors.

Justice is a virtue that transcends all barriers; as such it requires this court to ensure that the decree holder should not be barred by dishonest and contumacious conduct of the Defendant from enjoying the fruit of it is judgment.

A court executing a decree cannot go behind the decree, and must execute the decree as it stands. It has no power to entertain any objection as to the validity or legality of the decree.

Accordingly the application is hereby granted . The Defendant/Judgment debtor be and is hereby committed to civil jail for a period not exceeding six(6) months under section 42(1)(a) of the civil procedure act. Warrant of arrest to be issued.

Dated and delivered at Nairobi this 25th day of June 2015.

Hon. A. I . Hussein

Kadhi II

In the Presence of:

Plaintiff

Defendant