



REPUBLIC OF KENYA



KENYA LAW
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**Nazir v Mughal (Civil Appeal E251 of 2024)
[2025] KEHC 2529 (KLR) (26 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2529 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E251 OF 2024
JM NANG'EA, J
FEBRUARY 26, 2025**

BETWEEN

MOHAMED NADEEM NAZIR APPELLANT

AND

MOHAMED SALIM MUGHAL RESPONDENT

RULING

1. By Notice of Motion dated 17th December 2024 the Applicant seeks these reliefs;-
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That this Honourable Court be pleased to order stay of further arrest and committal to civil jail of the Appellant pending hearing and determination of the Appeal against the Ruling of Hon. K. Kibelion delivered on 13th November 2024 in Nakuru High Court Civil Appeal No. E251 of 2024(sic).
2. The application is based on grounds as hereunder;-
 1. That on 13/11/2024 the Appellant was committed to civil jail for a period of thirty (30) days by virtue of a ruling delivered by Hon. K. Kibelion on the same date of 13/11/2024.
 2. That the said ruling of 13/11/2024 was on an application by the Decree-Holder/Respondent of a Notice to Show Cause dated 13/03/2024 in execution of a decree amount of Kshs. 13,211,107/=.



3. That the Appellant has since served the initial full jail term and on 10/12/2024 the same was extended for a further thirty (30) days without the Appellant being afforded an opportunity to be heard.
4. That the Appellant is yet to satisfy the Decree or come up with a proposal to satisfy the same as he does not have the ability to pay the Decree amount.
5. That the Appellant being dissatisfied with the said ruling of Hon. K. Kibelion; filed an Appeal to wit Nakuru High Court Civil Appeal No. E251 of 2024.
6. That unless the application, which seeks the Appellants release and a stay of further arrest and committal to civil jail of the Appellant, is heard as a matter of urgency; the Respondent is likely to apply for the arrest and extension of the committal orders against the Appellant before the substantive Appeal is heard thereby rendering the Appeal nugatory and occasioning loss, injury and prejudice to the Appellant.
7. That the Appellant has an arguable Appeal with good prospects of success for the following reasons, inter alia;-
 - a. The Learned Magistrate erred in law by considering and making a determination on an Application for Notice to Show Cause dated 13/03/2024 for a Decree Amount of Kshs. 13,211,1071/=; an amount well beyond his pecuniary jurisdiction of Principal Magistrate.
 - b. The Learned Magistrate erred in law and in fact by failing to appreciate that the Decree-Holder had failed to satisfy beyond reasonable doubt the conditions stipulated under Order 22 Rule 34(2) of the Civil Procedure Rules, 2010.
 - c. The Learned Magistrate erred in law by failing to appreciate that it was the duty of the Decree-Holder to satisfy the court that the Judgement-Debtor's inability to pay the decretal sum was not out of poverty or other sufficient cause.
 - d. The Learned Magistrate erred in law and in fact by committing the Judgement-Debtor to civil jail yet there was no proof that he had the means to satisfy the decretal amount. Conversely the Judgement-Debtor had affirmed by way of affidavit that he was a retiree with no means of income.
8. That this Appeal will be rendered nugatory if the stay is not granted as prayed for the reasons inter alia that: -
 - c. The Appellant's fundamental right to freedom is being infringed and is likely to continue being infringed by serving more jail term or serving the maximum jail term of six (6) months before the hearing and determination of the Appeal.
 - d. The Appeal is purely premised on the ruling of the court delivered on 13/11/2024 committing the Appellant to civil jail and once the maximum jail term is served then the substratum of the Appeal disappears.
9. That the balance of convenience clearly weighs in favour of the Appellant whose right to liberty is likely to be taken away while the ruling/order taking away that right is a subject of contention in Nakuru High Court Civil Appeal No. E251 of 2024 and the prejudice likely to be caused to the Appellant is enormous.



3. The application is also supported by the Appellant's affidavit evidence. He avers inter alia that on 13th November 2024 the lower court committed him to civil jail for 30 days following the Respondent's Notice to Show Cause dated 13th March 2024 over a decretal sum of Kshs. 13,211,107/=. He served out the jail term but on 10th December 2024 the prison term was extended for a further 30 days without him being afforded an opportunity of being heard.
4. The Appellant laments that he is yet to satisfy the decretal sum for want of financial means. Dissatisfied with the trial court's decision, he preferred this appeal and he fears that if an order prohibiting his further arrest and committal to civil jail is not issued, he is likely to be apprehended and sent to civil jail again thereby rendering his appeal nugatory to his prejudice.
5. The Appellant asserts that his appeal is arguable and thus has good prospects of success as stated in his Memorandum of Appeal exhibited.
6. The Respondent opposes the application vide affidavit evidence in reply. Responding on the basis of Power of Attorney donated to him by the Respondent, Mr. Mohammed Sajeed Salaudin avers inter alia that this application is mischievous, fatally defective, devoid of merit and otherwise an afterthought calculated to delay the Respondent's enjoyment of the fruits of litigation. The application is said to offend the provisions of Section 6 of the Civil Procedure Rules 2010 relating to the sub judice rule. The court is told that the Appellant has also filed a similar Notice of Motion dated 9th December 2024 then pending determination before the Chief Magistrate's Court at Nakuru, Civil Suit No. 349 of 2022.
7. The Respondent further contends that this application was brought after undue delay that has not been explained. The Appellant is also faulted for not offering security for the due performance of any decree that may ultimately be found binding on him in breach of a condition precedent to grant of a stay order pending appeal.
8. It is further deposed that the trial court rightly committed the appellant to civil jail for failing to satisfy the money decree issued against him. The Respondent does not believe that the Appellant is a man of straw since when he attempted to execute his decree by attachment of the Appellant's property, the Appellant through his wives lodged objection proceedings thereby bringing the execution process to a halt. It is alleged that the Appellant breached his fiduciary duty owed to the Respondent by failing to remit to the latter sale proceeds of property entrusted upon him to dispose of.
9. There is a further affidavit the Respondent filed without the court's leave, contents of which I will not set out. The affidavit is expunged from the record owing to the irregularity.
10. The Appellant filed a further affidavit to respond to the Respondent's affidavit in reply. It is clarified that although the Appellant did file a similar application dated 9th December 2024, the same was subsequently withdrawn on 14th January 2025 upon a court order. It is further explained that the delay to cause the application to be marked as withdrawn was occasioned by the lower court file going missing.
11. The Appellant's Counsel submitted that a case for stay pending appeal has been made out in the circumstances. I was referred to the judicial determination in Machakos High Court Miscellaneous Civil Application No. 175 of 2019 (George Arab Muli Mwalabu vs Senior Resident Kangundo & 2 Others [2019] eKLR where this court pronounced itself that before a judgment debtor is committed to civil jail for failing to satisfy a decree he should be examined to establish his financial ability as provided for in Order 21 Rule 36 of the Civil Procedure Rules 2010. It was further observed in that case that the law does not permit deprivation of liberty on account of failure to pay a judgment debt and that civil



jail is only resorted to if it is “likely to be productive of payment”. It is contended that the Appellant was jailed despite lack of proof of ability to satisfy the decree.

12. The Appellant also relies on the judicial determination in *Matata & Another vs Rono & Another (Civil Appeal No. E034 OF 2024)* [2024] 2024 (Ruling) in which it was observed inter alia that where “there is no other overwhelming hindrance stay of execution must be granted so that an appeal may not be rendered nugatory” should the appeal court reverse the lower court’s decision.
13. On their part the Respondent’s advocates submit that the application lacks in merit. Acknowledging that the court’s power to grant stay of execution is discretionary, Counsel assert sufficient cause must be shown. The Respondent complains that the Appellant has not even given a reasonable proposal for payment by instalments, and has not offered security for costs (see *Butt vs Rent Restriction Tribunal (1982) KLR 417* cited by Counsel).
14. Having appreciated the parties’ rival arguments, the point to determine is whether the Appellant has satisfied the court that the lower court’s order committing him to civil jail ought to be stayed pending hearing and determination of the appeal. Since this is an appeal against the order of committal to civil jail strict conditions for grant of stay under Order 42 of the Civil Procedure Rules 2010, like deposit of security for costs or proof of substantial loss do not quite apply.
15. Regarding the Respondent’s objection to the application on the ground that the Appellant had filed a similar application that was pending determination before the instant one was filed, it has been explained that the earlier application was subsequently withdrawn. The Appellant further told the court that delay to formally have the application marked as withdrawn was occasioned by the lower court file going missing which contention was not disputed by the Respondent. The lodging of the two applications in the circumstances is, in any event, a procedural technicality curable under Article 159(2) (d) which prohibits administration of justice while paying undue regard to procedural technicalities.
16. This appeal relates to the liberty of an individual which is a sacrosanct right under the *Constitution*’s Bill of Rights. As the Appellant claims that he was not heard before his imprisonment and that he doesn’t have the financial means to satisfy the lower court’s decree, I find that the appeal is arguable and that the same would be rendered nugatory if stay is not allowed. There are other means of execution available to the Respondent, for instance, attachment and sale of property. Whereas the Respondent contends that the Appellant’s wives filed objection to attachment of the Appellant’s property, no evidence of such proceedings is exhibited. The court’s determination of such objection which may or may not favour the Respondent has not been given to the court.
17. In the result, the application is allowed. Stay of further arrest and committal of the appellant to civil jail for failure to satisfy the lower court’s decree is ordered pending hearing and determination of the appeal. The costs of the application shall abide the appeal.

J. M. NANG’EA, JUDGE.

RULING DELIVERED THIS 26TH DAY OF FEBRUARY, 2025 IN THE PRESENCE OF:

Appellant’s Advocate, Mr. Osoro

Respondent’s Advocate, Ms Kimoriot

The Court Assistant (Jennifer)

J. M. NANG’EA, JUDGE.

