

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 1502 of 1999

NDEGWA KABOGO..... PLAINTIFF

VERSUS

CO-OPERATIVE MERCHANT BANK LTD..... 1ST DEFENDANT

JULIUS MAINA..... 2^{ISD} DEFENDANT

RULING

Notice of Motion in dated 28th November 2001. It is seeking mainly one order and that is an order that the warrant issued herein be cancelled and the order for committal to prison of the Judgment Debtor be discharged. It is also seeking that costs of this application be costs in the cause. The grounds for the application are that the Judgment Debtor is seriously ill and not fit to serve a term in prison; that there is an error apparent on the face of the record in that before committing the Judgment Debtor to detention, the conditions precedent to such detention set out in Section 38 of the Civil Procedure Act Cap 21 Laws of Kenya and Order 35 Rule 2 of the Civil Procedure Rules were not satisfied, and lastly that Judgment Debtor has not refused to settle the decretal amount. The application is brought under Order 35 Rules 1, 2, and 3 Order 50 Rule 1 of the Civil Procedure Rules, Sections 3A, 38, 42 and 43 of the Civil Procedure Act Cap 21 Laws of Kenya. It is supported by an Affidavit sworn by the Plaintiff/Applicant and one annexure.

The application is opposed and the Respondent has filed grounds of Opposition in which they state that the application is misconceived; that there is no acceptable evidence of the Applicant's alleged illness; that the decree has been outstanding since 4 October 2000 and no effort had been made to settle any part of the decree; that the order committing the Applicant to civil jail has not been annexed and therefore the allegation that there is an error apparent on the face of the record is incompetent; that the Applicant was present and was fully examined by the Deputy Registrar before the order of committal was made and that the Applicant has since the passing of the decree, had means to pay some part of the Judgment debt.

First this application is brought under Order 35 Rules 1, 2 and 3 of the Civil Procedure Rules. That rule has been referred to by the Applicant in the grounds of the application and even in his Affidavit. That rule is not relevant to the circumstances of this application. That is the rule which is invoked only in summary procedure Applications. To that extent the application is incompetent and the Applicant's counsel did not salvage it by abandoning that rule after his submissions in chief and only at the time of his reply to the Respondent's submissions after his attention had been drawn to the defect. I note that in his submissions in chief he referred to the same rule twice.

Secondly, it is true that there is no medical report annexed to the application to show the present medical condition of the Applicant. What are annexed are treatment sheets which do not identify the Doctor who took care of the Applicant nor the nature of the sickness and do not state whether or not prison's conditions (civil detention) would be adverse to the Applicant's health. They cannot help the Court come to any informed conclusion as to the health condition of the Applicant and certainly one cannot conclude from the same that the Applicant is seriously sick such that he cannot withstand the prison conditions at all.

Thirdly, as to the alleged mistake on the face of the record, I do agree with the learned counsel for the

Respondent that this amounts to seeking a view of the Deputy Registrar's order. The right person to do so is the Deputy Registrar and not this Court.

Further, on that aspect there was need to annex the order that is to be reviewed. That was not done and the rule to enable me review the application was also not invoked in the application.

Lastly, the Applicant says he is unable to pay the debt because he does not have means or capacity to settle this debt. This cannot be so because he also says that he has a piece of land which he wants to sell in order to pay the debt. The debt has been outstanding since October 2000. That is now over one year back. If he was serious in selling the same piece of land, he would have by now sold it and % would have paid the outstanding amount or part of it before it increased due to interest over that period. I am not satisfied that the Applicant has no capacity to pay even a part of the debt outstanding. He talks of trying to sell property to pay the debt yet he has not filed any agreement between him and any would be purchaser of that property. I cannot treat that allegation as a serious allegation.

I note that the Applicant appeared before the learned Deputy Registrar on 26.11.2001 and gave a statement on the matter. The Advocate for the Decree holder also made submissions and the Applicant replied to those submissions. The learned Magistrate having seen the Applicant before him and having heard the Applicant's position on the matter, *it* cannot be said that he did not comply with the requirements of Section 38 or order 21 Rule 35.

This application cannot be allowed. I decline to grant it. It is dismissed with costs to the Respondent.

Orders accordingly. DATED and DELIVERED at Nairobi this 20th day of December 2001

ONYANGO OTIENO

JUDGE