



**Nyongesa v Chief Magistrates Court, Kakamega Law Courts &  
2 others; Musi (Proposed Interested Party) (Petition 4 of 2023)  
[2024] KEHC 11340 (KLR) (27 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11340 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
PETITION 4 OF 2023  
AC BETT, J  
SEPTEMBER 27, 2024**

**IN THE MATTER OF ALLEGED VIOLATION, INFRINGEMENT  
OF AND/OR THREAT TO RIGHTS OR FUNDAMENTAL  
FREEDOMS UNDER ARTICLES 2, 3,10,19, 20(1)-(4),  
22(1),23,24,25(A) & C), 27,28,29(A, B, D & F), 39(1), 45, 46,  
47(1), 48, 50(1)(2 B, C & K), 51(1), (2), 159, 165(3), 258  
AND 259 OF THE CONSTITUTION**

**BETWEEN**

**AMINA NELIMA NYONGESA ..... PETITIONER**

**AND**

**CHIEF MAGISTRATES COURT, KAKAMEGA LAW COURTS .... 1<sup>ST</sup>  
RESPONDENT**

**AGRICULTURE FISHERIES AND FOOD AUTHORITY ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**VICTOR MANGOLI MUSI ..... PROPOSED INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. The Petitioner vide her Petition dated 11<sup>th</sup> April, 2023 seeks the following reliefs:



- i. That a declaration be and is hereby issued that the action of the Respondent to sanction and order the arrest, re-arrest, committal to civil jail and detention of the Petitioner were made in violation of Articles 2,3,10, 19,20(1)-(4), 22(1), 23, 24, 25(a) & (c),27,28,29(a, d & f),39(1),45,46, 47(1), 48, 50(1),(2),258 and 259 of *the Constitution* and Section 42(2) of the *Civil Procedure Act* CAP 21 Laws and Respondent's decision made on 16<sup>th</sup> February, 2023 and 16<sup>th</sup> March, 2023 are therefore ,unlawful, unconstitutional, invalid and void ab initio.
  - ii. That a declaration be and is hereby issued that the manner in which the Respondent and the Interested Party conducted themselves resulting to the arrest, re-arrest, committal to civil jail and detention of the Petitioner were done in violation of the rule of law and in direct contravention of the provisions of *the Constitution* that guide the Respondent.
  - iii. That a declaration be and is hereby issued that arresting, re-arresting and detaining the Petitioner without following due process of the law and holding her in deplorable and inhumane conditions, was a violation of the Petitioner's rights protected in Articles 25(a & c), 27,28,29(a, d & f), 39(1), 45, 46,47(1),48,50(1),(2), 258 & 259.
  - iv. That a declaration be and is hereby issued that the Respondent violated the Petitioner's rights guaranteed under Articles 2,3,10,19, 20(1)-(4),22(1),23,24, 25(a & c),27, 28, 29(a, d & f),39(1),45, 46,47(1),48,50(1), 258 & 259 of *the Constitution*.
  - v. That a declaration be and is hereby issued that Order 22 Rule 31 Sub-rule 1 of the Civil Procedure Rules is unconstitutional to the extent that it is inconsistent with Article 32(a) of *the Constitution* of Kenya, 2010.
  - vi. That an order of Certiorari be and is hereby issued removing into this Court and quashing the entire proceedings in execution of judgment against the Petitioner before the Chief Magistrates Court at Kakamega Law Courts in Civil Suit No. E27 of 2020, Victor Mangoli Musi-vs-Amina Nelima Nyongesa.
  - vii. That an order for exemplary and punitive damages be and is hereby issued against the Respondent on account of its gross violation of the Petitioner's fundamental freedoms and rights as enumerated in the Petition.
  - viii. That the Respondent be and are (sic) hereby directed to bear costs of this Petition.
  - ix. That this honourable court be pleased to grant such further order or Orders as may be just and appropriate.
2. Even though the Respondent entered appearance on 25<sup>th</sup> April, 2024, no Reply to the Petition nor Submissions were filed on its behalf, in compliance with the directions of the Court issued on 25/05/2024.
  3. The Interested Party did file a Reply to Petition dated 1<sup>st</sup> September, 2023 and Written Submissions of even date. The Petitioner also filed her written submissions dated 26<sup>th</sup> July, 2023.
  4. On 29<sup>th</sup> July, 2024, the Petitioner and the Interested Party appeared before me and highlighted their submissions whereupon this matter was set down for Judgment on 29<sup>th</sup> September, 2024.



## The Petitioner's Case

5. The Petition herein is predicated on the provisions of articles 2, 3,10,19, 20(1)-(4), 22(1),23,24,25(a) & c), 27,28,29(a, b, d &f), 39(1),45,46,47(1), 48, 50(1)(2 b, c & k), 51(1),(2), 159, 165(3), 258 and 259 of *the Constitution*.
6. In a nutshell, the Petitioner states that on 28<sup>th</sup> July, 2022, the Respondent entered Judgment against her inter-alia for refund of Kshs. 280,000/= as well as costs and interest thereon in Kakamega CMCC No. E027 of 2020.
7. She states that on 15<sup>th</sup> December, 2022 a consent was entered between her and the Interested Party through the respective advocates wherein it was agreed that she would pay the decretal sum in instalments.
8. The Petitioner also states on 16<sup>th</sup> February, 2023 she was arrested on the strength of a warrant of arrest issued in execution of a decree and subsequently committed to civil jail for 30 (thirty) days which term she served until 15<sup>th</sup> March, 2023 when she was released.
9. That on 16<sup>th</sup> March, 2023, however, the Interested Party made an oral application in court to have her re-arrested as she attended a mention of the matter.
10. The Petitioner laments that the court did not even afford her an opportunity to respond but instead proceeded to commit her to civil jail yet again.
11. It is the Petitioner's further case that between the date of delivery of Judgment and until the date of arrest, she was never served with any notice requiring her to show cause why she should not be committed to civil jail neither was she arrested to facilitate her attendance during a show cause proceeding.
12. In view of the above, the Petitioner surmises that she fell victim to the following violations of her Constitutional Rights and Fundamental Freedoms:
  - i. To the extent that the Respondent sanctioned her arrest, re-arrest, committal to civil jail and detention without subjecting her to due process of the law and in total disregard of the provision of Chapter Four of *the Constitution* on the Bill of Rights violated the national values and principles provided for under Article 10(2)(a)(b) of *the Constitution*.
  - ii. To the extent that the Respondent issued a warrant of arrest in execution dated 13<sup>th</sup> January, 2023 and sanctioned the arrest, re-arrest, committal to civil jail and detention of the Petitioner without ensuring that the decree holder exhausted all other modes of execution of a decree before resorting to arrest and detention as a final resort violated the Petitioner's right to freedom of movement, freedom from torture and cruel, inhuman or degrading treatment or punishment guaranteed under Article 25(a).
  - iii. To the extent that the Respondent issued a warrant of arrest in execution and sanctioned her arrest, re-arrest, committal to civil jail and detention of the Petitioner herein without issuing a notice to show cause and affording her a chance to be heard violated her right to a fair trial guaranteed under Article 25(c )
  - iv. To the extent that the Respondent accorded the Interested Party (decree holder) rights to be heard in application to execute judgment arising from Kakamega Civil Case No. E 27 of 2020 and granting him a right to have orders of warrant of arrest in execution, her committal to jail and detention and failing to accord her the right to be heard, subjected to all modes of execution



before resorting to arrest and committal to civil jail, the Respondent violated her right to equality and freedom from discrimination which right includes the right to equal protection and equal benefit of the law guaranteed under Article 27(1) and (2) of *the Constitution*.

- v. To the extent that the Respondent illegally sanctioned her arrest, re-arrest, committal to civil jail and detention, the Respondent violated her right to human dignity guaranteed under Article 28 of *the Constitution*.
- vi. To the extent that the Respondent issued a warrant of arrest in execution and sanctioned her arrest, re-arrest, committal to civil jail and detention without issuing a notice to show cause and according her a right to be heard, it violated her right not to be deprived of freedom arbitrarily and without just cause guaranteed under Article 29(a) of *the Constitution*.
- vii. To the extent that Order 22 rule 31(1) of the Civil Procedure Rules gives discretionary power to court to arbitrarily deprive freedom of movement of a judgment debtor without issuing a notice to show cause to the Judgment Debtor where an application is for execution for payment of money by arrest and detention in prison of a judgment debtor is inconsistent with Article 29(a) of *the Constitution* and thus unconstitutional.
- viii. To the extent that the Respondent sanctioned her arrest, re-arrest and detention unlawfully and without just cause her right to freedom of movement guaranteed under Article 39(1) was violated.
- ix. To the extent that the Respondent sanctioned her arrest, re-arrest, committal to civil jail and detention unlawfully and without thus separating her from her family violated her rights under Article 45 of *the Constitution*.
- x. To the extent that the Respondent failed to develop the law to the extent that it does not give effect to rights or fundamental freedoms of the Petitioner and adopt the interpretation that most favours the enforcement of a right or fundamental freedom of the petitioner violated the Petitioner's right guaranteed under Article 20(3)(a) and (b).
- xi. To the extent that the Respondent failed to ensure its service of interpreting and applying the law correctly and to the extent that it does not give effect to rights and fundamental freedoms of the Petitioner and failure to also ensure the said service meet the standard of reasonable quality that should not harm the petitioner as its consumer violated the Petitioner's consumer right guaranteed under Article 46 of *the Constitution*.
- xii. To the extent that the Respondent failed to ensure its administration of justice, in entertaining, hearing and determination of an application by interested party for execution of judgment, was procedurally fair to the Petitioner violated the Petitioner's right to fair administrative action guaranteed under Article 47(1) of *the Constitution*.
- xiii. To the extent the Respondent failed to take into consideration the fact that the Petitioner is illiterate and was not represented during the execution of judgment proceeding and that she was not informed of the proceedings thus making her vulnerable in the said proceedings violated the Petitioner's right to access to justice guaranteed under Article 48 of *the constitution*.
- xiv. To the extent that the Respondent failed to ensure the dispute between the Petitioner and the Interested Party was resolved by the application of law decided in a fair, independent and impartial manner violated the Petitioner's right to fair hearing guaranteed under Article 50(1) of *the Constitution*.



### **Petitioner's Submissions**

13. The Petitioner reiterated the foregoing in her written submissions. She further submitted that the Respondent just like any other state organ as defined under Article 260 of *the Constitution* is bound under Articles 2(1) and 21(1) of *the Constitution* to observe, protect, promote and fulfill the rights and fundamental freedoms set out in the Bill of Rights. In support of this assertion the Petitioner relied on the decision of the court in Protus Buliba Shikuku V Attorney General[2012] eKLR.
14. The Petitioner thus submitted that where a Judge or Magistrate has violated the rights of any individual such individual is entitled to approach this Court for redress.
15. The Petitioner also submitted on the legal underpinnings of committal to civil jail as a means of execution of a decree. In this regard, the Petitioner cited the provisions of Sections 38 & 40 of the *Civil Procedure Act*. She also relied on the decision of the Court in Beatrice Wanjiku & another V Attorney General & another [2012] eKLR where the court expressed itself on the procedure to be followed before a committal order is issued.
16. The Petitioner also cited the decisions of the Court in Mbugua V. Mbugua[1992]KLR, R.P.*M v PKM, Nairobi Divorce Cause No. 154 of 2008* and Zipporah Seroney & 5 Others v Attorney General[2020] eKLR.

### **Interested Party's Case**

17. In his response, the Interested Party averred that on 8<sup>th</sup> December, 2022, the Petitioner appeared before court to show cause why execution should not issue against her and was afforded one week to render a proposal to settle failing which a warrant of arrest were to issue.
18. That a consent was subsequently entered between the parties on 15<sup>th</sup> December, 2022 which consent required her to settle the decretal sum in instalments.
19. The Interested Party further averred that the Petitioner never paid any single sum to defray the decretal sum hence her arrest and subsequent committal to civil jail. He also states that the Petitioner was duly served with a Notice to Show Cause on 17<sup>th</sup> November, 2022, requiring her to appear in court.
20. Further, the Interested Party asserts that due process was followed and continues to be observed in execution proceedings in Kakamega CM's Civil Case No. E027 of 2020, in which matter the Petitioner has always been represented by Counsel and fully participated in its proceedings.

### **Interested Party's Submissions**

21. In his written submissions, the Interested Party submitted that the Petitioner's contention that her committal to civil jail constitutes a violation of her constitutional rights and freedoms fails to appreciate the fact that those rights though granted by *the Constitution* are not absolute. The Interested Party cites the provisions of Article 24(1) in support of this assertion.
22. That in so far as the Petitioner does not contest that a binding court decree is in force, the rights enshrined thereof have crystallized and he is thus perfectly entitled to execute it.
23. To bolster his position, the Interested Party relied on the findings of the court in Kenya Bus Services Limited & Others vs Attorney General and Others[2005] 1EA 111;1 KLR 743 where the court inter-alia held that there cannot be a cause of action based on a lawful exercise of the right of execution by interested parties on account of allegations of violations of *the Constitution* by the state or Government.



24. The Interested Party also cited the case of Jayne Wangui Gachoka v Kenya Commercial Bank Limited[2013] eKLR where the court inter-alia held that deprivation of liberty sanctioned by sections 38 and 40 of the Civil Procedure Act is permissible and is not in violation of either the Constitution or the ICCPR.
25. In light of the foregoing, the Interested Party submitted that the instant Petition has no juridical foundation under the Constitution of Kenya.

### **Analysis and Determination**

26. In the backdrop of the foregoing, this court deduced the following issues for determination:
  - I. Whether the Petition raises purely constitutional issues ripe for determination by this honourable court; and
  - II. What remedies are available to the parties herein
27. I have carefully read the Petition and submissions filed by the parties and note from the outset that it is not in dispute that there exists an unsatisfied decree issued in Kakamega Chief Magistrates Civil Case No. E27 of 2024, issued in favor of the Interested Party. Apparently, the execution of the said decree prompted the filing of this Petition.
28. The Court has also noted that no extract of the proceedings and/impugned orders of the said Court have been annexed to the Petition and/or otherwise submitted before this Court.
29. On 29<sup>th</sup> July, 2024, when the parties appeared for highlighting submissions, the Petitioner’s Counsel confirmed this default but asserted that they were never furnished with proceedings even though they applied.
30. Be that as it may, the Petitioner has cited a litany of Constitutional provisions violated by what she terms as her unlawful arrest, re-arrest and detention in execution of the decree aforesaid.
31. In the case of Trusted Society of Human Rights Alliance Vs. Ag. & 2 Others [2012] the Court of Appeal citing Anarita Karimi Njeru v Republic [1979] eKLR held:

“...We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication; a person claiming constitutional infringement must give sufficient notice of the violations to allow her adversary to adequately prepare her case and to save the court from embarrassment on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are too insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged” (emphasis added)
32. I must however state that the mere recital of provisions of the constitution or their juxtaposition to a certain set of facts does not in itself raise a constitutional controversy to warrant intervention of this honourable court.
33. In any event, the constitutionality of the provisions of the Civil Procedure Act and the Rules regarding arrest and committal to civil jail was already decided in Beatrice Wanjiku & another v Attorney General & another [2012] eKLR where Hon. D.S Majanja J., in an erudite judgment inter-alia held that,



sections 38 and 40 of the Civil Procedure Act as well as Order 22 rules 32 and 34 of the Civil Procedure Rules are consistent with the Bill of Rights.

34. In the instant case, much as the Court appreciates the issues raised by the Petitioner, it is hampered by the fact that the Petitioner never annexed extracts of the impugned proceedings and orders of the trial court for consideration by this Court.
35. This Court has thus been denied an opportunity to examine the record of the court with the view of ascertaining whether the proceedings leading to the arrest and detention of the Petitioner were taken in strict compliance with the law.
36. Be that as it may, I must however hasten to add that the doctrines of ripeness and constitutional avoidance require courts to avoid considering disputes dressed as if they raised constitutional issues especially where a legal recourse exists outside the Constitution.
37. In this regard, the Court is guided by the decision of the Court in KKB v SCM & 5 others (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR) (22 April 2022) (Ruling) where Hon. Mativo, J, succinctly held:

“...in summation, the doctrines of ripeness and constitutional avoidance shun to deal with a constitutional issue where there exists another legal course which can give the litigant the relief he seeks. In other words, a constitutional issue is not ripe for determination until the determination of the constitutional issue is the only course that can give the litigant the remedy he seeks. Both constitutional avoidance and ripeness avert the determination of the constitutional issues until it becomes very necessary to the extent that it is the only course available to assist the litigant’s cause. The exceptions to the application of the doctrine of constitutional avoidance are:-

  - i. where the constitutional violation is so clear and of direct relevance to the matter,
  - ii. in the absence of an apparent alternative form of ordinary relief and
  - iii. where it is found that it would be a waste of effort to seek a non-constitutional resolution of the dispute”(emphasis mine)
38. See also the decision of the Supreme Court in Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others (at para 256) cited in KKB v SCM & 5 others (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR) (22 April 2022) (Ruling)(supra) where the court stated that the principle of avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis.
39. In the instant case, it cannot be gainsaid that the Petitioner had a remedy on review before the trial court or even on appeal against the trial court’s pronouncements.
40. The court is thus of the opinion that this Petition offends the doctrine of ripeness and constitutional avoidance in so far as there exist remedies on appeal or review available to the Petitioner and granted that the Constitution is not the only recourse to the Petitioner’s issue.
41. Furthermore, the Petition herein does not clearly fall within the exceptions set out in KKB v SCM & 5 others (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR) (22 April 2022) (Ruling)(supra).



42. Besides, in *Jayne Wangui Gachoka v Kenya Commercial Bank Limited* [2013] eKLR, Hon. Mumbi J, as she then was; faced with a similar Petition held:

“The deprivation of liberty sanctioned by sections 38 and 40 of the *Civil Procedure Act* is permissible and is not in violation of either *the Constitution* or the ICCPR. The caveat, however, which has been emphasized in all the cases set out above, is that before a person can be committed to civil jail for non-payment of a debt, there must be strict adherence to the procedures laid down in the *Civil Procedure Act* and Rules, which provide the due process safeguards essential to making the limitation of the right to liberty permitted in this case acceptable in a free and democratic society.

I therefore find and hold that there has been no violation of the petitioner’s constitutional rights in the process of execution of the decree against her in respect of High Court Civil Case No 104 of 2006. Save that the provisions set out in the Act and Rules must be adhered to, the process of execution should continue. In the event that the Petitioner is not satisfied with the process or decision relating to the execution process, then she is at liberty, as provided in the Civil Procedure Rules, to lodge an appeal in the usual manner.” (emphasis added).

43. In the same vein, this court is of the view that the issues raised by the Petitioner regarding her arrest and committal to civil jail properly construed are purely civil in nature and in addressing them the court will inevitably be called upon to decide whether the provisions of sections 38 and 40 of the *Civil Procedure Act* and the Rules thereunder were strictly complied with.
44. Needless to state, this issue can strictly be addressed without resorting to an interpretation of *the Constitution*. As such, the Court is constrained to invoke the doctrine of constitutional avoidance and accordingly decline to entertain the matter.
45. For the above stated reasons, the Petition dated 11<sup>th</sup> April, 2023 lacks merit and is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 27<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**A. C. BETT**

**JUDGE**

**In the presence of:-**

Idi for Interested Party

No appearance for Petitioner

Court Assistant: Polycap

