Agui v CM (Suing as the Father and Next Friend SA (Minor) & 2 others (Miscellaneous Civil Application E240 of 2024) [2024] KEHC 13475 (KLR) (30 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13475 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

MISCELLANEOUS CIVIL APPLICATION E240 OF 2024

E OMINDE, J

OCTOBER 30, 2024

BETWEEN

WILLIAM AGUI ..... APPLICANT

AND

CM (SUING AS THE FATHER AND NEXT FRIEND SA (MINOR) ..... 1ST RESPONDENT

NEHEIAH KIPKOGEI LETING ..... 2ND RESPONDENT

RIGHTWAYS TRADING ..... 3RD RESPONDENT

RULING

1. By a Notice of Motion dated 16/9/2024 brought under Article 165(6) of *the Constitution*, Section 80 of the *Civil Procedure Act*, Cap 21, Order 45 Rule 1 and Order 50 Rule 1 of the Civil Procedure Rules, the Applicant seeks the following orders:

    1. Spent.

    2. Spent.

    3. Spent.

    4. The Honourable Court be pleased to issue an order calling for the Court file and proceeding in Eldoret MCCC No. 309 of 2016; CM (Suing as the father and next friend of SA Minor) Vs. William Agui & 2 Others, for further directions in the exercise of its supervisory jurisdiction pursuant to Article 165 (6) for further direction.

    5. That this Honourable Court be pleased to discharge and/or set aside the warrant of arrest dated 21/2/2024 and consequently order unconditional release of William Agui, the Applicant herein.

6. The cost of this Application be provided for.

2. The Application is premised on the grounds on the face of it and is further supported by the Affidavit sworn by the Applicant on the same date.

3. In the Affidavit, he deposed that on or about 28/8/2024, persons who identified themselves as police from Eldoret Central Police Station visited his home with the sole purpose of arresting him pursuant to warrants of arrest order issued on 21/2/2024 arising from Eldoret MCCC No. 309 of 2016; CM (Suing as the father and next friend of SA Minor) Vs. William Agui & 2 Others, and he was taken aback as he was not privy to the proceedings in Eldoret MCCC No. 309 of 2016; CM (Suing as the father and next friend of SA Minor) Vs. William Agui & 2 Others.

4. That upon perusal of the said warrants of arrest order, he discovered that the said order commanded the Officer Commanding Station, Eldoret Police Station to arrest one, Simon Lekinoi and not him, that nonetheless, he was informed that the issue of varying names in the warrants of arrest was typographical error, however as a law abiding citizen he accompanied the said police officers to Eldoret Police Station where he was held in custody and later on 3/9/2024 presented before the Subordinate Court wherein he was committed to civil jail for a period of thirty (30) days.

5. The Applicant further deposed that the impugned warrants of arrest preceding his arbitrary detention were obtained through non-disclosure of the fact he was not the beneficial owner of the motor vehicle that caused the accident that is subject of the suit in Eldoret MCCC No. 309 of 2016; CM (Suing as the father and next friend of SA Minor) Vs. William Agui & 2 Others.

6. The Applicant wants this Court to call for the proceedings in the lower Court so as to satisfy itself of the facts giving rise to the suit and for purposes of giving further directions. The Applicant maintained that unless this Application is allowed, he will be greatly prejudiced. He added that he is 75 years old, of frail health and in need of urgent medical care and therefore his continued detention in prison considering his medical condition is an affront to his right to access the highest standards of healthcare.

The Reply by the Respondent

7. The Application is opposed vide the Replying Affidavit sworn by 1st Respondent, CM on 22/9/2024.

8. In the Affidavit, he deposed that Application is not urgent in anyway, is incompetent, is an afterthought, misadvised, baseless, frivolous, scandalous, misconceived, lacks merit and is an abuse of the Court process as the same does not disclose any reasonable legal and/or factual ground to warrant this Court to grant the prayers sought, that when he instituted Eldoret CMCC NO.309 OF 2016 and that the Applicant, the 2nd Respondent and the 3rd Respondent were duly served with all Court pleadings being summons to enter appearance, Plaint, Plaintiff's list of documents, Plaintiff's list of witnesses, Plaintiff's witnesses statement which service was acknowledged by the Applicant and this fact is not disputed by the Applicant.

9. That the esteemed firm of J.M Kimani & Co. Advocates entered appearance for the Applicant, the 2nd Respondent and the 3rd Respondent on behalf of Invesco Assurance Company limited the insurer of the suit motor vehicle belonging to the Applicant, the 2nd Respondent and the 3rd Respondent and that the very firm has not sworn any affidavit disputing that they entered appearance for the Applicant, the 2nd Respondent and the 3rd Respondent herein and/or any instruction letter from Invesco advising them to enter appearance for either the Applicant, the 2nd Respondent and the 3rd Respondent and as such the Application hereto is a mischievous one aimed at taking the Respondent in circles and prevent him from enjoying fruits of litigation herein.

10. He further deposed that on 20/4/2021 consent on liability was entered into between his Advocate and Applicant, the 2nd Respondent and the 3rd Respondent Counsel in the ratio of 15%:85 % in his favour as against the Applicant, the 2nd Respondent and the 3rd Respondent which consent the Applicant insinuates that he was not aware of for ulterior motives.

11. He contended that it is trite law that a consent order having been adopted as an order of the Court can only be set aside on grounds that would allow for a contract to be vitiated which include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to policy of the Court, absent of material facts and ignorance of material facts which grounds the Applicant has not demonstrated in any way.

12. That the consent on liability entered into between the parties in Eldoret CMCC No.309 of 2016 was not an error on the face of the record so as to meet the threshold for review of the judgment in Eldoret CMCC No.309 of 2016.

13. He maintained that as adopted from the common law, an advocate who is duly instructed to act on behalf of his client has authority to act in every single thing that pertains to that matter and even enter into consents in his or her behalf and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other.

14. That in the instant case there was no notice that the J.M Kimani-previous counsel on record for the Applicant in Eldoret CMCC No.309 OF 2016 had no authority to record consent on liability thus the judgement and the consent on liability in Eldoret CMCC No.309 of 2016 are binding.

15. He further deposed that the motor vehicle search that was produced in Court and the abstract respectively reveal that the suit motor vehicle belonged to the Applicant, the 2nd Respondent and the 3rd Respondent.

16. According to the 1st Respondent, the instant Application hereto is only aimed at subjecting this honourable Court to double work in a matter where judgement was validly entered in his favour in Eldoret CMCC No.309 of 2016 after the Court found that he had a reasonable course of action against the Applicant, the 2nd Respondent and the 3rd Respondent.

17. That the Applicant has approached this honourable Court with unclean hands and is guilty of material non-disclosure and has breached section 1A,1B and 3A of the *Civil Procedure Act* and thus is undeserving of the orders sought since it is trite law that a party seeking to benefit from discretionary power of the Court must approach the Court with clean hands, move the Court diligently and must be ready to and willing to abide with preconditions the Court may impose.

18. That the Applicant herein is dishonest and has suppressed material facts hence cannot benefit from the discretionary powers of the Court and in particular the Applicant has not disclosed to the honourable Court the following:

    a. That the Applicant has not disclosed to this honourable Court that there is a duly executed consent by himself, the firm of J.M Kimani, firm of Mukabane & Kagunza Advocates where the Applicant consented to settle the decretal amount hereto in instalments of Kshs.100, 000/ = per month until payment in full and in default of any instalment the Applicant shall be at liberty to proceed with execution.

    b. That arising from the said consent on settlement of the decretal amount, the Applicant has not revealed to the honourable Court that he has already paid the 1st Instalment of Kshs. 100,000/

= for which he was issued with a receipt and so in essence he is estopped from denying liability and/or otherwise.

c. That it is strange for the Applicant to claim that he did not instruct the firm of J.M Kimani to record consent on liability but at the same time executes a settlement agreement prepared by the very firm he claims he never gave instructions to.

d. That the Applicant has not disclosed to this honourable Court that he filed an Application dated 9/5/2022 for review of judgment in Eldoret CMCC No.309 of 2016 and that the said Application was also dismissed on 28/10/2022.

e. That the Applicant has not disclosed to the honourable Court that he filed another Application dated 26/8/2024 for setting aside of judgement Eldoret CMCC No.309 of 2016 and the said Application was also dismissed on 19/9/2024.

f. That the Applicant has not disclosed to this honourable Court that he has never lodged any appeal arising from decisions of the said Applications dated 9/5/ 2022 and 26/8/2024, in Eldoret CMCC No.309 of 2016 and in abuse of the Court process has decided to file this instant Application.

19. He maintained that the Applicant having failed to disclose material facts to the Court to the above extent then the by way of this the Applicant is hell bent at frustrating the Respondent from realizing the fruits of litigation and has employed all manner of delaying tactics to drag the conclusion of this matter and the Court record in Eldoret CMCC No.309 of 2016 will bear me witness, that the Applicant's instant Application herein is made in utmost bad faith and the same is calculated at misleading the Court and delaying execution process thus preventing me from realizing and enjoying the fruits of litigation after a very long time.

20. That the Applicant's action of feigning ignorance of the proceedings in Eldoret CMCC No. 309 of 2016 and in particular the consent on liability herein is self-defeating and indeed underscores the Applicant's dishonesty on the Application herein and the same ought to be disallowed as the Applicant had a competent counsel on record and that by allowing the instant Application, the Honourable Court will only be aiding the Applicant to temporize payment of a legally accrued debt which he urged the Court to frown upon by dismissing the instant Application.

21. The 1st Respondent contends that he stands and will continue to suffer substantial loss should the instant Application be allowed noting that Eldoret CMCC No.309 of 2016 has been pending in Court since 2016 when it was initiated and that the execution process against the Applicant commenced following the entry of a regular, proper and meritorious judgment.

22. That the Applicant has not satisfied the decretal amount in Eldoret CMCC No.309 of 2016 and at the same time has never appealed against the judgement entered in favour of the Respondent on 6/8/2021 and that in the said judgement the Respondent was awarded costs of the suit which costs have also been assessed by the honourable Court and that there cannot be stay for taxed costs because once the Certificate of costs has been issued it is final and binding on the parties.

23. According to the 1st Respondent, the Applicant's instant Application is premised on falsehoods generally tainted with dishonesty and misrepresentation and is obviously a deliberate attempt to mislead the Court to grant orders sought and that it is clear from the foregoing that the Applicant's Application is an approbation and reprobation only intended to frustrate the realization of the Decree in ELDORET CMCC NO.309 OF 2016 to the detriment of the Respondent and that further, the Applicant is also culpable of indolence and the instant Application does not meet the threshold for grant of orders sought.

24. He contended that the instant Application is anchored on provisions of the law which do not donate any power to this honourable Court to grant the orders sought thus making the instant Application herein fatally defective, and that further, the Application is in breach of Sections 1A and 1B of the *Civil Procedure Act* and is underserving of the Court's discretion.

25. That it is in the interest of justice to all parties concerned, that the matter comes to finality because the 1st Respondent is apprehensive that should the Application be allowed, it is likely to cause him anxiety and cause the matter to be unreasonably protracted for a long time in Court and further delay the proceedings as a result of the unwarranted orders sought that would occasion insurmountable prejudice to him.

Re-joinder by the Applicant

26. The Applicant also filed a Supplementary Affidavit dated 1/10/2024, wherein save for reiterating the contents of his Supporting Affidavit dated 16/9/2024, he added that it is not disputed that on 5/5/2016, the firm of Daisy Chepkirui & Company Advocates came on record for him and filed a Statement of Defence dated 9/5/2016 denying ownership and possession of motor vehicle registration number KBY 634H.

27. Further, that on 19/12/2016, the firm of J.M. & Co Advocates erroneously came on record for him, the 2nd Respondent and the 3rd Respondent herein under the instructions of Invesco Assurance Company Limited, the insurer and that the Plaintiff amended his Plaint on 29/8/2016 clarifying that at all material times of the suit, the 3rd Respondent herein was the registered owner of the suit motor vehicle arising from a sale agreement dated 18/3/2014 between the 2nd and 3rd Respondents herein.

28. He contended that he is not privy to the said agreement and that as at 15/3/2016, Rightways Trading Limited, the 2nd Respondent herein was the registered owner of motor vehicle KBY 634H as evidenced by annexure CM-3annexed to the 1st Respondent's Replying Affidavit dated 26/9/2024 and neither was he the beneficial owner nor the driver of the suit motor vehicle at the time of the accident.

29. That it is not disputed that the hearing of the matter in the trial Court proceeded, witnesses testified and a judgment was delivered on 6/8/2021, that it is also not disputed that the Notice of Motion Applications dated 9/5/2022 and 26/8/2024 were filed by the firms of Kelvin Bett & Associates Advocates and Kigen Ngetich & Co Advocates respectively on his behalf, that the said Applications were heard and determined with the Court dismissing both of them; and lastly, it is not disputed that at the material time of the accident, the suit motor vehicle was insured by Invesco Assurance Company Limited as evidenced by the police abstract annexed as CM-4 in the 1st Respondent's replying affidavit dated 26/8/2024.

30. He further deposed that he was neither the driver of the suit motor vehicle at the material time of the accident, the registered owner of the vehicle nor the insured, that despite this position holding true, he remained part and parcel of the proceedings in the trial Court and his then legal counsels as well as counsel for the insurer failed, refused, ignored and/or neglected to bring this fact to the attention of the Court to have him excused from the proceedings.

31. That in the amended Plaint dated 29/8/2016, the 1st Respondent herein being the Plaintiff in the lower Court file at paragraph *5* described the 3rd Respondent herein as the registered owner of the suit motor vehicle by virtue of the a sale agreement dated 18/3/2014 between the 2nd and the 3rd Respondent herein; additionally that in the police abstract dated 10/3/2016 (annexed as CM-3), it is surprising that the police described him as the registered owner of the suit motor vehicle while the vehicle report dated

15/3/2016 annexed as CM-3 clearly identified Rightways Trading Limited as the registered owner at the time of the accident.

32. Further that in the Amended Plaint dated 29/8/2016, the 1st Respondent/Plaintiff neither described him as a driver nor the registered owner of the suit motor vehicle and yet in the prayers, he sought judgment to be entered against him and Rightways Trading Limited jointly and severally while omitting the beneficial owner, the 3rd Respondent herein.

33. That even in the perusal of the judgment delivered on 6/8/2021, none of the witnesses identified him as having played any role in the accident whether as a driver, registered or beneficial owner of the suit motor vehicle or the insured; that furthermore, a closer look of the record of the trial Court will indicate that there was confusion as to whom the firm of J.M. Kimani represented during the course of trial.

34. That unfortunately, by the time the aforesaid facts were brought to the trial Court's attention, judgment had already been entered against him which he believes on the advice of his current legal counsel to have been entered against him per incuriam and that subsequently a decree dated 20/1/2022 that was issued against the 2nd Respondent herein and him leaving out the 3rd Respondent despite having been cited as a party in the judgment delivered by Honourable Naomi Wairimu on 6/8/2021 and him being the beneficial owner of the suit motor vehicle and the insured.

35. That there was also a consent dated 28/4/2022 purportedly entered between the firm of Mukabane Kagunza for the Plaintiff, the Plaintiff himself, J.M Kimani Advocates for the Defendant (who was not identified) and allegedly by him; that the said consent was fraudulently entered into since he did not participate in any negotiations giving rise to it and he did not sign the said consent and that the signature in the said consent is not his.

36. Additionally, that the said consent is onerous to the extent that it purported to make him liable to liquidate the decretal sum in monthly instalments of Kshs.100,000/=while the insurer and the insured were the ones liable to satisfy the decree and that at no time would a reasonable man who is neither the driver, the registered or beneficial owner nor the insured/insurer enter into such a consent.

37. That this was an open, clear and unambiguous mischief which the trial Court ought to have discovered suo moto and prevented a miscarriage of justice; that the warrants of arrest in execution dated 21/2/2024 are manifestly erroneous as they cite him as the judgment debtor on the one hand and on the other hand names Simon Lekinoi as the person subject of the arrest warrant over a judgment purportedly dated 21/3/2013.

38. That no notice to show cause was issued inviting him to show cause why execution should not issue against him before the Court proceeded to issue warrants of arrest dated 20/1/2022 and 21/2/2024 and that it is also evident from the Application dated 26/8/2024 that he disputed the signature appended on the consent dated 28/4/2022 and invited the trial Court to order a forensic examination to be conducted on the said signature to ascertain the truth but the Court never addressed its mind to that issue in its ruling dated 19/9/2024 annexed as Exhibit CM-8(b) to the 1st Respondent's Replying Affidavit dated 26/9/2024.

39. That the payment of Kshs.100,000/= purportedly made on 4/3/2022 as part payment for the decretal sum was paid by the Manager of Invesco Company Limited and not the Respondent but this notwithstanding, the 1st Respondent's Advocate purportedly and mischievously issued a receipt in his name.

40. The Applicant maintained that the circumstances giving rise to the judgment dated 6/8/2021, purported consent dated 28/4/2022, the warrants of arrest dated 21/2/2024 and orders for committal to civil jail issued on 22/8/2024 are unprocedural, irregular and illegal.

41. He further deposed that the jurisdiction of this Honourable Court has been properly invoked as *the Constitution* of Kenya bestows upon this Court supervisory jurisdiction over subordinate Court's and he has now been in prison for a period close to thirty (30) days over a civil debt which he ought not to have been liable for had the trial Court exercised its powers and discretion as per the provisions of the law.

42. In addition, he deposed that he is elderly at 75 years old and in need of medical attention therefore his continued arbitrary detention is an affront to his rights under *the Constitution* of Kenya and so the Application dated 16/9/2024 is a genuine quest for justice and is neither baseless, is not an afterthought, frivolous, scandalous, misconceived nor an abuse of the Court process.

The Submissions

43. The Application was argued orally in open Court.

44. Mr. Too, appearing for the Applicant submitted that they were relying on their Supplementary affidavit dated 1/10/2024 and the authorities they shall be citing. That from the onset, he urged the Court to find that their Application is neither an appeal nor a plea for mercy. That instead, the said Application that it raises questions on the legality and of the correctness of the proceedings of the Trial Magistrate in the Lower Court.

45. He stated that they are Court pursuant to Art. 165(6) of *the Constitution* under which they seek to invoke the Supervisory Jurisdiction of the Court which is provided to prevent the abuse of the court process and ensure that the ends of justice are met. He submitted that it was extremely necessary that the Court exercises this jurisdiction in the circumstances of this case and that pursuant to the provisions of Section 3A of the CPA, they also urged that the Court exercise's its inherent jurisdiction.

46. Counsel submitted that they take issue with the warrant of arrest which is the subject matter of this Application because the due process was not followed. That the decree the subject matter of the warrant is a money decree and under Order 22 Rule 18 provides that before a money decree is executed, a notice to show cause is issued to the judgment debtor to show cause why he should not be committed to a civil jail. Counsel submitted that the judgement debtor was not personally issued with any such Notice.

47. Counsel further submitted that contrary to this requirement, the decree was issued on 22/1/2022 and the warrants was issued on 21/2/2024, two years later. He cited the case of Rift Valley Agricultural Contractors Limited & Another Vs Hari Gakinya T/A Hari Gakinya & Company Advocates & 2 others Nakuru Misc Application 383/017 where the relevant decision was rendered in the year 2021.That at paragraph 15 thereof, the need to issue a notice to show cause before issuance of a warrant of arrest was underscored with the rationale for this set out at paragraph *17*. Counsel therefore concluded by maintaining that because no notice of show cause was issued in this case, the warrant of arrest was issued un-procedurally and irregularly.

48. Counsel submitted that it is necessary for the Court to exercise its Supervisory Jurisdiction. She relied on Kajiado JR Misc. 1/2015 Alice Sisina v The Land Registrar Kajiado & Another where the Court held that the Supervisory Jurisdiction of the High Court is to be exercised where it is necessary to ensure the ends of justice are met. He submitted that the case before the Court deserves the invocation of this jurisdiction to prevent the miscarriage of justice that has already occurred.

49. That lastly and in the interim, Counsel prayed that the Court grants orders in terms of the prayer that seeks that the Applicant, aged 75 years be released from custody to enable him seek urgent medical care.

50. Counsel Mr. Kagunza, appearing for the 1st Respondent relied on their Replying Affidavit sworn on 26/9/2024 together with all the annexures thereto and submitted that Applicant's Application herein amounts to a gross abuse of the Court process because of the following;

51. It is premised on Section 80 of the *Civil Procedure Act* and Section 45 of the Civil Procedure Rules which deals with applications for review of an Order or Judgement. That similar Applications were equally made before the Trial Court being Application dated 26/8/2024 and a similar Application filed 9/5/2022 on similar grounds and facts and both were dismissed with costs. He stated that the relevant decisions are annexed as 7a & b and 8a & b to the Replying affidavit. He added that if the applicants were dissatisfied with the finding of the Lower Court in both applications, they should have appealed. They did not.

52. That secondly, Counsel submitted that parties are bound by their own pleadings. That this instant Application of 16/9/2024 does not mention any irregularity on account of non-issuance of a notice to show cause. He urged therefore urged that the submissions along those lines ought to be expunged from the record or ignored, but that be that as it as may he submitted that a Notice to show cause dated 9/1/2024 exists in the current suit and that it is based on this that the warrants that were issued and that, this can be seen from the Lower Court record.

53. Lastly, Counsel submitted that the Applicant appeared before the Trial Court on 22/8/2024 and made an indication that he wished to make a proposal for payment and this has been his story all along. That to date he has only made payment of Kshs. 100,000/= and then thereafter proceeded to file one Application after another which is a clear abuse of the Court process.

54. Counsel told the Court that they are opposed to the interim orders being granted because executing the arrest warrants that have been issued has been very expensive and difficult and so if released chances of getting the Applicant again will be very difficult.

55. Counsel Mr. Too in reply submitted that Order 18 rule 22 provides that the notice to show cause should be served personal and the Respondent has not availed to Court any notice to show cause and/or a return of service to confirm that the Respondent had been previously served.

Analysis and Determination

56. As prayed by Counsel for the Applicant, the Lower Court filed was availed to this Court even though the same came to my attention through the Presiding Judge to whom a letter was written seeking that he calls for the Lower file which he did and when he was appraised of the fact that the matter was before me, he forwarded the same to me vide a letter dated 22nd October 2024.

57. I have considered the Application by the Applicant, the provision of the law under which it is founded to wit Article 165(6) of *the Constitution*, Section 80 of the *Civil Procedure Act*, Cap 21, Order 45 Rule 1 and Order 50 Rule 1 of the Civil Procedure Rules, The grounds in support, the facts deposed in the Affidavit in support as well as the Replying Affidavit by the Respondent.

58. From the onset, let me state that the legal provisions cited are not at all in tandem with the Applicant's application. Save for Article 165(6) of *the Constitution* which indeed deals with the Supervisory Jurisdiction of the High Court, The Order 45 Rule 1 cited deals with applications for review, Section 80 of the *Civil Procedure Act* cited deals with the Establishment of the Rules Committee whereas Order 50 Rule 1cited deals with the issue of time.

59. I note from the said application as well as the depositions made in the Affidavit in support of the Application and the submissions by Counsel that it is largely premised on decisions made by the Trial Court based on several applications made before the said Court. None of these decisions have been appealed against to warrant this Court delving into the merits and demerits of the said decisions and of course order 45 of the Civil Procedure Code is inapplicable to this Court vis a vis those decisions of the lower Court. It follows therefore that any submission made by the Applicant along these lines as well as any prayers sought premised on the same are irrelevant to these proceedings and shall therefore not be considered.

60. The above said however, in the interest of justice and by the invocation of the Court's inherent powers as set out in Section 3A of the *Civil Procedure Act*, even though the relevant legal provisions of the law have not been cited, the Court in exercise of its Supervisory Jurisdiction as provided under Article 165(6) of *the Constitution* shall proceed with the Application under Section 38 and 40 of the *Civil Procedure Act* and Order XXII Rules 32, & 33 of the Civil Procedure Rules upon which the Application ought to have been premised in the first place to satisfy itself only on the issue whether the correct procedure was followed in committing the Applicant to civil jail

61. Given my above observations then the only issue that arises for determination in is as hereunder;

> "Whether the Court should set aside the warrant of arrest dated 21/2/2024, against the Applicant and order for his unconditional release"

62. The right to commit a judgment-debtor to civil jail is provided for under Sections 38 and 40 of The *Civil Procedure Act* and Order XXII Rules 32, & 33 of the Civil Procedure Rules. Section 38 provides as follows;

> Subject to such conditions and limitations as may be prescribed, the Court may, on Application of 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) by appointing a receiver or
>
> (f) in such other manner as the nature of relief granted may require.
>
> Provided that where the decree is for payment of money, execution by detention in prison shall not be ordered unless after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the Court, for reasons to be recorded in writing is satisfied -
>
> (a) that the judgment-debtor with the object or effect of obstructing or delaying the execution of the decree –
>
> (i) is likely to abscond or leave the local limits of the jurisdiction of the Court or
>
> (ii) has after the institution of the suit in which the decree was passed, dishonestly transferred, concealed or removed any part of his

property, or committed any other act of bad faith in relation to his property.

(b) That the judgment-debtor has or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects, or has refused or neglected, to pay the same, but in calculating such means there shall be left out of account any property which by or under any law, or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree, or

c) That the decree is for a sum of money which the judgment debtor was bound in a fiduciary capacity to account.'

63. The provisions of the above Section 38 has been the subject of many Court decisions and here below, I will cite a few such decisions that are relevant to the case at hand.

64. In the case of Jedida Chepkoech Mutai (Suing as The Legal Representative of the Estate of Julius Kipkorir Mutai (Deceased) vs. Cherono Beatrice [2018] eKLR, it was stated that –

> As I understand it, the general position in law is that the arrest contemplated under section 38 and 40 of the *Civil Procedure Act* is not unconstitutional. All that is required in proceeding under the two provisions is that there has to be strict adherence to the law. [Emphasis mine]In Jane Wangui Gachoka vs Kenya Commercial Bank Limited [2013] eKLR, the petitioner asked the Court to declare sections 38(d) and 40 of the *Civil Procedure Act* and Order XX1 Rules 32,33 of the Rules which allowed for commitment to civil jail for non-payment of a debt as archaic and unconstitutional. In declining to make the declaratory orders sought by the petitioner, the Court stated as follows:
>
> [33] 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 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, [Emphasis mine] which provide the due process safeguards essential to making limitation of the right to liberty permitted in this case acceptable in a free and democratic society."

65. In the case of Charles Lutta Kasamani v Concord Insurance Co. Ltd. & Deputy Registrar Milimani High Court Commercial and Admiralty Division (2018) eKLR, Mwita J. considered at length the constitutionality or otherwise of sections 38 of the *Civil Procedure Act* and the relevant rules of the Civil procedure Rules vis a vis section 11 of the ICCPR and held that there was nothing unconstitutional in sections 38 and 40 of the CPA and further that committal to civil jail of one who is able to pay but has refused to do so is lawful and does not amount to violation of rights and fundamental freedoms in the Bill of Rights.

66. The Court in Grand Creek LLC & Another vs. Nathan Chesangmoson [2015] eKLR rendered itself on the procedure as provided under Order XXII Rule 18(1) of the Civil Procedure Rules that an applicant seeking to commit a judgement debtor to civil jail must strictly adhere to for such a committal to be found to have been done according to the law and therefore above board so that a Court can safely conclude that a judgement debtor's rights and fundamental freedoms that are constitutionally

guaranteed have not been infringed in any way. The said rendition is quite succinct and exhaustive and is as follows;

> In all cases where Order 22 Rule 18(1) of the Civil Procedure Rules applies, a Notice must be served upon the person against whom execution is applied requiring him to show cause, on a date to be fixed, why the decree should not be executed against him. It should be noted, however, that there must have been an Application for execution of a decree for payment of money by arrest and detention in prison of a judgment-debtor. And Order 22 rule 31 will come into play where the Court, instead of issuing a warrant of arrest, decides to issue a notice calling upon the judgment-debtor to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to prison. But where the judgment-debtor does not appear as directed in the notice, the Court will issue a warrant for his arrest. This rule follows after section 38 and 40 of the *Civil Procedure Act*. The warrant of arrest is to bring the judgment-debtor to Court and it is not an automatic committal to prison because the Court will still be required to satisfy itself of all the requirements of Order 22 rule 33 and rule 34 of the Civil Procedure Rules. The proceedings under Order 22 rule 34 act as the safeguard against denial of liberty in execution of a decree without due process. And Courts have comprehensively pronounced themselves on the constitutionality of the procedure of arrest and committal to jail in execution of a decree in not one case. See the cases cited by the Respondents, especially National Bank of Kenya case (supra), Jayne Wangui Gachoka (supra), Braeburn Limited (supra), Beatrice Wanjiku and Ex parte Nassir Mwandithi (supra). This point is settled that arrest and committal to prison in execution of a decree under the *Civil Procedure Act* and Rules is not unconstitutional as long as all the safeguards provided in law are afforded to the judgment-debtor. I so hold in this matter."

67. In Solomon Muriithi Gitandu & Another vs. Jared Maingi Mburu [2017] eKLR the Court's rendition and holding, particularly on the committal of a debtor to civil jail is also quite relevant to these proceedings. It also discusses at length the legal safeguards that a Court must take before committal. The Court therein rendered itself thus;

> In the case of Braeburn Limited -V- Gachoka and another (2007); it was held inter alia;
>
> > A person is not liable to be committed to civil jail for inability to pay a debt but a dishonest and fraudulent debtor is liable to be punished by way of arrest and committal."[Emphasis mine]
>
> The Court further observed that: -
>
> > Section 38 of the *Civil Procedure Act* however, provides a limitation of the Courts' power to order execution of a decree by way of detention in prison. The section prohibits the Court from making an order of execution of any decree for the payment of money unless the judgment-debtor has first been given an opportunity of showing cause why he should not be committed to prison and even where the judgment debtor has been given such notice to show cause, the Court must itself be satisfied and give reasons in writing for that."
>
> These limitations are further re-stated under Order 22 rule 31 (1) Civil Procedure Rules. A notice to show cause may be issued requiring the judgment debtor to show cause and where he fails to appear a warrant of arrest is issued. In the case the Court found that the requirement for Notice to Show Cause is mandatory and whether the judgment appears for notice to show cause or under warrant of arrest, it is the duty of the decree holder to satisfy

the Court that the judgment debtor is not suffering from poverty, or any other sufficient cause and is able to pay the decretal sum or proof the provisions of Order 22 rule 35 Civil Procedure Rules, that is examination of the debtor as to his property.

9. As execution by way of arrest and committal to prison deprives the debtor his liberty, the trial Court ought to have ensured strict compliance with Section 38 supra and Order 22 rule 31 (1) supra to determine the appellants' ability to pay. The Court had a duty to ensure constitutional safeguards as to due process by ensuring the notice of intended execution by way of committal was personally served and a due inquiry and satisfaction of the Court by the decree holder as to the judgment debtor's ability to pay. It is only then that the Court would rightly commit him to prison. A judgment debtor in view of the provisions of Section 38 of the Procedure Act and Order 22 rule 31 (1) will not be committed to prison on account of his inability to pay or on account of poverty.

68. Lastly, of the authorities relevant to this matter, the Court in Munyui Kahuha vs. Ng'ang'a Kahuha [2007] eKLR, held that –

> Any kind of incarceration involves the limitation of a person's liberty. Although the law permits that person's liberty may be curtailed in specified situations, the law implores upon us to ensure that "due process" is followed. That is most fundamental. [Emphasis mine] A person cannot simple be condemned or incarcerated without being heard. That is contrary to the principles of natural justice. It was completely irregular to "extend" his imprisonment at the instance of the Respondent, on a "mention" of the case. That could have only been done by way of a formal Application, giving the Judgment Debtor the opportunity to be heard.
>
> However, the Respondent's argument that once the Court had exercised its discretion to sentence him to thirty days' civil jail, the Court had no further discretion to extend time, is untenable in law. Section 42(1) of the *Civil Procedure Act* allow detention in execution of a decree "for a period not exceeding six months." That simply sets the maximum limit of detention to six months, whether it is done by way of one sentence, or several sentences, aggregating to a maximum of six months. What is important, however, is that due process must be followed.'

69. It is clearly apparent from all the above cited authorities that the Courts have laid great emphasis the procedure. This is fundamental and key in light of the fact that committal of a judgement debtor to civil jail essentially deprives an individual of his fundamental rights and freedoms as enshrined in the Bill of Rights.

70. That procedure as provided under Order XXII has been so well laid out in the above cited case of Grand Creek LLC & Another vs. Nathan Chesangmoson [2015] eKLR and I have herein above reproduced the relevant excerpts.

71. All that the Court needs to do in this case in determining whether the correct procedure was followed before the judgement debtor was committed to civil jail by the Trial Magistrate is simply to examine the procedure that was used and satisfy itself that it resonates with the requirements laid out above.

72. I have perused the relevant pleadings as well as the proceedings in the in Lower Court file and the following chronology of procedural facts have emerged;

i. The 1st application for execution of the decree by way of a warrant of arrest was made by the Respondent on 4th January 2022.

ii. A warrant of arrest was issued dated 3rd February 2022

iii. Following the issuance of this warrant, on 28th April 2022, a consent was entered into between the parties and was signed by the Counsel for each party and the parties themselves. The defendant was allowed to liquidate the decretal sum then amounting to Ks. 2,306,700/- in monthly instalments of Ks. 100,000/- and a receipt of Ks. 100,000/- is annexed to the consent.

iv. On 5th October 2023 Counsel for the Respondent wrote to Court seeking for a re-issue of the warrants of arrest and on 11th October 2023wrote to the Court seeking for a nearer date for the hearing of a notice to show cause why the Applicant should not be arrested and committed to civil jail.

v. The Court subsequently issued a Notice to the Applicant seeking that he appears before it on 20th February 2024and show cause why he should not be arrested and committed to civil jail upon an application by the Respondent.

vi. The Notice was served upon the Applicant by way of Registered mail on 9th January 2024 and a Certificate of Postage availed, and also personally upon the Applicant on the same day by one Morris Atilla who swore an Affidavit of Service to that effect filed on 20th February 2024.

vii. A warrant of arrest dated 21st February 2024 was subsequently issued.

viii. The proceedings of the Lower Court show that the Applicant appeared before the Trial Magistrate on 22nd August having been arrested in execution of the said warrant of arrest.

ix. The Applicant was represented by one Ms. Cherop who proceeded on his behalf and upon being committed in the morning to civil jail for not having not shown any proper cause save to dispute again the consent herein above referred to, the Applicant was brought back to Court on the same day at 3.45pm and he now stated that he was willing to pay and sought for a release on bond/bail to enable him instruct his lawyer on the repayment proposal.

x. His application was allowed and a Cash Bail of Ks. 200,000/- was granted with a mention on 3rd September 2024 to confirm settlement. Come 3rd September no payment had been made and Ms. Cherop who was present for the Applicant stated that the Applicant was ready to issue security for payment. Parties were given time to negotiate.

xi. By the allotted time no agreement had been reached and Ms. Cherop left the matter to Court. The Court extended the Applicant's bond to the next day being 4th September 2024 and, on that date, Counsel for the Respondent told the Court that they did not agree and applied that the Applicant be committed to civil jail and his application was allowed.

73. Having very carefully and critically considered the chronology of events as above summarised and having addressed my mind to the same, it is my very well considered opinion that the procedure followed therein ticks all the boxes as set out in order XXII Rules 33 and 34 of the Civil procedure Rules, and as buttressed and emphasised in all the authorities cited above the relevant portions of which I have herein above reproduced and which I need not restate.

74. I am also well satisfied that before the Applicant was incarcerated, the due process that was emphasised in the case of Munyui Kahuha vs. Ng'ang'a Kahuha [2007] eKLR was faithfully followed and adhered to a every turn and that the Applicant was given every opportunity to put forth his case before being

committed to civil jail. In this regard therefore I find the application by the Applicant to be mischievous and with no merit. I am also satisfied that it is indeed an abuse of the process of the Court process and I therefore dismiss it in its entirety with costs to the Respondent.

READ DATED AND SIGNED AT ELDORET ON 30TH OCTOBER 2024.

E. OMINDE

JUDGE