



**Multichoice Kenya Limited v Mainkam Limited & another (Civil Case 492 of 2012)  
[2024] KEHC 13215 (KLR) (Commercial and Tax) (28 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13215 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 492 OF 2012  
JWW MONG'ARE, J  
OCTOBER 28, 2024**

**BETWEEN**

**MULTICHOICE KENYA LIMITED ..... PLAINTIFF**

**AND**

**MAINKAM LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**JAMES MAINA KAMAU ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Defendants filed a Notice of Motion application dated September 23, 2022, seeking a declaration that committal to civil jail for inability to pay a civil debt is unconstitutional and against the *International Covenant on Civil and Political Rights*.
2. The application is supported by the grounds on its face, the annexed affidavit sworn by the 2<sup>nd</sup> defendant on the 23<sup>rd</sup> September 2022 and written submissions dated 14<sup>th</sup> November 2023.
3. The application is opposed by the Plaintiff through a replying affidavit sworn by its financial director, Ruth Omondi, on 18<sup>th</sup> September 2023 and written submissions dated 11<sup>th</sup> March 2024.
4. The background is that on 24<sup>th</sup> September 2019, the Court entered Judgment for the Plaintiff jointly and severally against the Defendants in the amount of Kshs 153,457,809.00/= together with interest thereon at court rates from the date of filing until payment in full. The Court found that the 2<sup>nd</sup> Defendant participated in a fraud precipitated by the 1<sup>st</sup> Defendant, which was used as a shell company for his fraudulent purpose.
5. The Plaintiff sought to execute the Judgment through a Notice to Show Cause (NTSC) dated 10<sup>th</sup> June 2021 seeking committal of the 2<sup>nd</sup> Defendant to civil jail. This was on the basis that he had failed to settle the decretal sum despite several opportunities given to do so. The 2<sup>nd</sup> Defendant opposed the



NTSC through a Replying Affidavit stating that he was willing to pay and sought indulgence from the Plaintiff.

6. The NTSC was heard on 31<sup>st</sup> August 2022. The Deputy Registrar issued the Ruling on 7<sup>th</sup> October 2022 directing the 2<sup>nd</sup> Defendant to pay the Plaintiff the sum of Kshs 5,000,000/= within thirty (30) days and to furnish a proposal to the Plaintiff for payment of the balance before the next mention date slated for 1<sup>st</sup> December 2022.

### **Analysis and Determination**

7. I have considered the application, the grounds, the rival affidavits, submissions and authorities. The issue for determination is committal to civil jail for refusal to pay a civil debt is unconstitutional and against the *International Covenant on Civil and Political Rights*.

8. Section 38 of the *Civil Procedure Act* 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) by appointing a receiver; or
- (f) in such other manner as the nature of the relief granted may require:

Provided that where the decree is for the 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; or
- (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 for which the judgment-debtor was bound in a fiduciary capacity to account.”

9. Section 40 of the *Civil Procedure Act* provides:-

“ 40. Arrest and detention

- (1) A judgment-debtor may be arrested in execution of a decree at any hour and on any day, and shall as soon as practicable be brought before the court, and his detention may be in any prison of the district in which the court ordering the detention is situate, or, if such prison does not afford suitable accommodation, in any other place which the Minister may appoint for the detention of persons ordered by the courts of such district to be detained:

Provided that—

- (i) for the purpose of making an arrest under this section, no dwellinghouse shall be entered after sunset and before sunrise;
- (ii) no outer door of a dwelling-house shall be broken open unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto; but when the officer authorized to make the arrest has duly gained access to any dwellinghouse he may break open the door of any room in which he has reason to believe the judgment-debtor is to be found;
- (iii) if the room is in the actual occupancy of a woman who is not the judgment-debtor, and who according to the custom of her community does not appear in public, the officer authorized to make the arrest shall give notice to her that she is at liberty to withdraw and, after allowing a reasonable time for her to withdraw and giving her reasonable facility for withdrawing, may enter the room for the purpose of making the arrest;
- (iv) where the decree in execution of which a judgment-debtor is arrested is a decree for the payment of money and the judgment-debtor pays the amount of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him.
- (2) The Minister may, by notice in the Gazette, declare that any person or class of persons whose arrest might be attended with danger or inconvenience to the public shall not be liable to arrest in execution of a decree otherwise than in accordance with such procedure as he may direct.”



10. Section 11 of the *International Convention on Civil and Political Rights* states as follows:-
- “No one should be imprisoned merely on the ground of inability to fulfil a contractual obligation.”
11. The Defendant relied on *In Re The Matter of Zipporah Wambui Mathara* [2010] eKLR, where Hon. Koome J. (as she then was) held that:-
- “...An order of imprisonment in civil jail is meant to punish, humiliate and subject the debtor to shame and indignity due to failure to pay a civil debt. That goes against the International Covenant on civil and political rights that guarantee parties basic freedoms of movement and of pursuing economic social and cultural development.”
12. In *Wanjiku & another v Attorney General & another; Muna & another (Interested Parties)* (Petition 190 of 2011) [2012] KEHC 5410 (KLR) (Constitutional and Human Rights) (23 July 2012) (Judgment), cited by both sides, the late Hon. Majanja J., observed that:-
- “7. The *Civil Procedure Act* and the Rules provided a legal regime for arrest and committal as a means of enforcement of a judgment debt. Article 11 of the Covenant stated that, no one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation. The word “merely” as used in article 11 meant that one could not be imprisoned for the sole reason of inability to fulfill a contractual obligation. It meant that additional reasons other than inability to pay should exist for one to be imprisoned. Article 11 recognised that in fact there may be instances where imprisonment for inability to fulfill a contractual obligation may be permitted. As there was no inconsistency between article 11 and the general tenor of the committal regime under the *Civil Procedure Act* and the Rules, the provisions of article 11 were at best an interpretative aid.”
13. The same position was adopted by Hon. Mumbi Ngugi J. (as she then was) in *Jayne Wangui Gachoka v Kenya Commercial Bank Limited* [2013] eKLR where it was held that:-
- “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.” See also *George Arab Muli Mwalabu v Senior Resident Magistrate Kangundo & 2 others; Festus Mbai Mbonye (Interested Party)* [2019] eKLR.
14. Accordingly, I find and hold that the committal to civil jail for the refusal to pay a civil debt is constitutional and in line with the International Covenant on Civil and Political Rights as long as there is strict adherence to the procedures laid down in the *Civil Procedure Act* and Rules.
15. There is no order for committal of the 2<sup>nd</sup> Defendant to civil jail for refusal to pay debts. Therefore, as submitted by the Plaintiff, the Court cannot address the issue of whether the 2<sup>nd</sup> Defendant should



be committed to civil jail for refusal to pay debts at this stage. It is upon the Plaintiff to first move the Court appropriately.

16. In the upshot, the Defendants' application dated September 23, 2022 is dismissed with costs for want of merit.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28<sup>TH</sup> DAY OF OCTOBER 2024**

**J.W.W. MONG'ARE**

**JUDGE**

In the presence of:-

Mr. Omondi for the Defendants/ Applicant.

Mr. Darr for Plaintiff.

Godfrey - Court Assistant

