



Republic v County Executive Committee Member , Department of Finance, Economic Planning & ICT, The County Government of Meru & another; Mithika (Interested Party); DKK (Exparte); Kathono & another (Applicant); Republic & another (Respondent) (Judicial Review Application E005 of 2021) [2023] KEHC 21955 (KLR) (31 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21955 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
JUDICIAL REVIEW APPLICATION E005 OF 2021**

EM MURIITHI, J

AUGUST 31, 2023

IN THE MATTER OF MAUA CHIEF MAGISTRATES COURT CIVIL CASE NO.

15B OF 2013 (DKK V. THE COUNTY GOVERNMENT OF

MERU)

AND

IN THE MATTER OF SECTIONS 8 & 9 OF THE LAW REFORM ACT CAP 26 OF

THE LAWS OF KENYA

BETWEEN

REPUBLIC APPLICANT

AND

THE COUNTY EXECUTIVE COMMITTEE MEMBER , DEPARTMENT OF FINANCE, ECONOMIC PLANNING & ICT, THE COUNTY GOVERNMENT OF MERU 1ST RESPONDENT

THE CHIEF OFFICER, DEPARTMENT OF FINANCE, ECONOMIC PLANNING & ICT, THE COUNTY GOVERNMENT OF MERU 2ND RESPONDENT

AND

JOHN MITHIKA INTERESTED PARTY

AND

DKK EXPARTE

AND



MONICA KAITHIORI KATHONO APPLICANT

CHARLES MWENDA KAIBIRIA APPLICANT

AND

REPUBLIC RESPONDENT

**DKK (SUING AS NEXT FRIEND ON BEHALF OF HIS MINOR SON
HM) RESPONDENT**

RULING

Introduction

1. Before the Court is an application dated for specific reliefs as follows:

- “ 1. That this application be certified urgent and the orders sought be granted ex-parte to avert the imminent arrest of the applicants which could lead to an interruption in the service delivery to the people in the County of Meru.
2. That an order do issue suspending, lifting and/or staying execution of warrant of arrest issued on April 13, 2023 against the applicants and staying execution of the decrees issued in Maua Civil Case Number 15B of 2013 pending the hearing and determination of this application.
3. That an Order of Prohibition be issued to the Sub-County police commander Imenti North prohibiting him/her from further enforcement of the warrants of arrest dated April 13, 2023 and/or incarceration of the applicants arising out of the same facts and proceedings in Civil Suit No 15b of 2013 at Maua and the current Judicial review No 5 of 2021 at Meru.
4. Costs of this application be provided for.”

2. The application is based on grounds set out in the application as follows:

“Which application is based on the following grounds:-

- a) The applicants are officials of the Meru County Government who took their oath of office hardly a year now to serve the people of Meru in the offices of the County. Executive Committee Member, Department Of Finance Economic Planning & Ict and The Chief Officer, Department Of Finance, Economic Planning & Ict in The County Government of Meru Respectively.
- b) The applicants have since learned of Warrants of arrest in circulation dated April 13, 2023 seeking their arrest unless they pay a total sum of Ksh 7,436,146.26/- to one David Kinyua Kimani an identity and person who is alien to the applicants.
- c) It would be a travesty of Justice if the applicants are arrested for facts and contents of the proceedings and decree emanating from Civil Suit No 158 of 2013 at Maua without allowing them a chance to be heard since the said arrest warrants are a result of the said suit.



- d) The said impending arrest if not halted by this honourable has an effect of stagnating the operation of the Whole County operations at the detriment of the vast population of the People living and working within Meru County since the two officers/applicants are at the pivot and/or fulcrum of the daily and day-to-day operations and running of the county.
- e) The said warrants of arrest were issued against the applicants which warrant did not impugn any charge or sentence against themselves.
- f) This, in the eyes of the Applicants is unfair as the Applicants were neither parties to the proceedings in Maua Civil Case No 158 of 2013 or even Parties to the On-going judicial Review in Meru
- g) The applicants were never afforded an opportunity of being heard before the said warrants were issued and/or extracted contrary to Articles 47 and 50 of the Constitution.
- h) The aftermath of the August 2022 General Election, Meru County underwent a change in administration and the applicants subsequently took over the current offices of County Executive Committee Member, Department Of Finance Economic Planning & Ict and The Chief Officer, Department of Finance, Economic Planning & Ict in The County Government of Meru Respectively as such, the applicants couldn't have been privy to the execution and court proceedings arising from Maua civil case No 158 of 2013 save to add that then the said arrest warrants had been issued irregularly against the applicants as opposed to stating the exact name of the person against whom the arrest was to be effected going by the proceedings of 2013.
- i) Indeed the Respondent's actions and decisions as a whole were not only unfair, but they are against the established principles of natural justice and are stained with illegality, unfairness and/or irrationality warranting grant of the prayers sought in the extant application.
- j) The warrants of arrest dated April 13, 2023 against the applicants, who are the current office holders of the County Executive Committee Member, Department of Finance Economic Planning & Ict and The Chief Officer, Department Of Finance, Economic Planning & Ict in The County Government of Meru Respectively on the basis of court proceedings initiated and concluded against their predecessors, the Respondent is in breach of the rules of natural justice.
- k) The respondents are guilty of procedural ultra vires and/or error of the law and its desire to execute against the applicants are unreasonable, improper, invalid and illogical.
- l) The Respondents have breached the rules of natural justice and statutory procedure and further contravened the Applicants' legitimate expectation and fair administrative action in failing to grant the Applicant an opportunity to be heard before a decision to issue warrants of arrest against them.
- m) It is clear the official who was served with court process on this matter was one Hon Titus Ntuchiu and never were the current applicants served. The



Respondents have not discharged the burden that the decree has been brought to the attention of the applicants whom they now seek to have arrested.

- n) Indeed, when all is said and done it is trite law that all rights and obligations, however arising, of the Government or the Republic and subsisting immediately before the effective date of the implementation of the constitution shall continue as rights and obligations of the national government or the Republic as provided for under the Constitution. It thus goes without say that the proper party to bare the brunt of the litigation result emanating from Maua CMCC No 15B of 2013 is the National Government other than County Government.”

3. The facts relied on are set out in the supporting affidavits of the applicants, respectively, the County Executive Committee Member Finance and the Chief Officer, Department of Finance, Economic Planning & Ict in the County Government of Meru, sworn on June 30, 2023 in substantially the same facts as follows:

- “2. That as at August 24, 2021, when the Judicial Review was filed by the applicant, I was not in office. I was only appointed to the position of The Chief Officer, Department Of Finance, Economic Planning & Ict in The County Government of Meru under the new regime on Annexed is a COPY of the appointment letter marked "CMK 1".
3. That as such, I believe I would not be in a position to defy a court decree and orders, which I had no ounce of knowledge of. The previous office holders are no longer in office. It is only the previous office holders in the previous regime, who would have been in a position to adequately show cause why they had not settled the decretal amount if any as at the date for the application seeking mandatory orders which have since resulted to the prevailing warrants of arrest that now hang over my head.
4. That I have since learned of Warrants of arrest in circulation dated April 13, 2023 seeking my arrest unless they pay a total sum of Ksh 7,436,146.26/- to one David Kinyua Kimami an identity and person who is alien to me.
5. That It would be a travesty of Justice if I am arrested for facts and contents of the proceedings and decree emanating from Civil Suit No 158 of 2013 at Maua without allowing' me a chance to be heard since the said arrest warrants are a result of the said suit.
6. That the said impending arrest if not halted by this honourable has an effect of stagnating the operation of the Whole County operations at the detriment of the vast population of the People living and working within Meru County since the my office in all honesty together with the Chief officers office are at the very pivot and/or fulcrum of the daily and day-to-day operations and running of the county.
7. That the said warrants of arrest were issued against me albeit the warrants not impugning any charge or sentence against myself.



8. That indeed this in the eyes of justice and to myself is unfair as I was neither a party to the proceedings in Maua Civil Case No 158 of 2013 or even a Party to the On-going judicial Review in Meru
9. That indeed I was never afforded an opportunity of being heard before the said warrants were issued and/or extracted contrary to Articles 47 and 50 of the Constitution.
10. That the aftermath of the August 2022 General Election, Meru County underwent a change in administration and I subsequently took over the current offices of County Executive Committee Member, Department Of Finance Economic Planning & !et in The County Government of Meru as such, the I couldn't have been privy to the execution and court proceedings arising from Maua civil case No 158 of 2013 save to add that then the said arrest warrants had been issued irregularly against myself as opposed to stating the exact name of the person against whom the arrest was to be effected going by the proceedings of 2013.
11. That Indeed the Respondent's actions and decisions as a whole were not only unfair, but they are against the established principles of natural justice and are stained with illegality, unfairness and/or irrationality warranting grant of the prayers sought in the extant application.
12. The warrants of arrest dated April 13, 2023 against myself, which are based on the basis of court proceedings initiated and concluded against our predecessors can only be a misplaced affair by the Respondent thus making them candidates of breach of the rules of natural justice.
13. That the respondents are guilty of procedural ultra vires and/or error of the law and its desire to execute against myself are unreasonable, improper, invalid and illogical.
14. That the Respondents have breached the rules of natural justice and statutory procedure and further contravened my legitimate expectation and fair administrative action in failing to grant me an opportunity to be heard before a decision to issue warrants of arrest against myself
15. That it is clear the official who was served with court process on this matter was one HOD Titus Ntuchiu and never was I ever served in my personal capacity. The Respondents have not discharged the burden that the decree has been brought to the attention of the applicants whom they now seek to have arrested.
16. That Indeed when all is said and done it is trite law that all rights and obligations, however arising, of the Government or the Republic and subsisting immediately before the effective date of the implementation of the constitution shall continue as rights and obligations of the national government or the Republic as provided for under the Constitution. It thus goes without say that the proper party to bear the brunt of the litigation result emanating from Maua CMCC No 158 of 2013 is the National Government other than County Government.



17. That it is in the interest of justice that the above orders are granted by this honorable court to protect my interests and rights in accordance with the law.”
4. In reply the Respondent/ex parte applicant filed a Replying Affidavit sworn on July 17, 2023 setting out the history of the case as follows:
- “3. That it is not true that the Respondents are not aware of this matter and particularly the order of Mandamus dated November 15, 2021 issued by this Honourable Court on 1st December 2021 compelling the Respondents to settle the outstanding decretal amount awarded to me in Maua Chief Magistrate's Court Civil Case No 15 B of 2013 vide the court's Judgement dated 23rd October 2018 and Ruling dated 6th February 2019 as expressed in the Decree and Certificate of Costs issued on June 24, 2020 and accrued interest thereon to date.
4. That the County Government of Meru which was established in 2023 upon promulgation of the Constitution of Kenya, 2010 was the 1st Defendant in Maua Chief Magistrate's Court Civil Case No 15B of 2013 since the institution of the suit and defended the matter to its conclusion when Judgement was delivered on October 23, 2018.
5. That the County Government of Meru totally failed or refused to settle the decretal amount which necessitated me to file the application for Judicial Review in this matter seeking an order of Mandamus to compel the Respondents herein to settle the outstanding decretal amount together with accrued interest thereon which stood at KShs 7,436,164.26 as at April 6, 2023 when my Advocates applied for re-issue of the Warrants of Arrest against the Respondents pursuant to the Ruling and Order of this Honourable Court dated May 12, 2022 which was made pursuant to a Notice to Show Cause why the Respondents should not be arrested and committed to civil jail for a period of six (6) months in default of paying me the decretal amount together with costs and accrued interest.
6. That the Respondents objected to the Notice to Show Cause and fully participated in those proceedings but their objection was found to be lacking merit by this Honourable Court which dismissed the objection and allowed the Notice to Show Cause and further ordered that Warrants of Arrest in Execution of the Decree do issue against both Respondents and that the OCS, Meru Police Station to ensure compliance and in default the warrants be executed by the OCPD Meru *vide* its ruling dated May 12, 2022.
7. That pursuant to the said Ruling my Advocates applied for Warrants of Arrest to issue against the Respondents on May 15, 2022 for execution by the OCS, Meru Police Station who returned the Warrants of Arrest to the court unexecuted requesting that the same be executed by his seniors, being either the DCIO or OCPD Imenti North, Meru.
8. That thereafter my Advocates requested for re-issue of the Warrants of Arrest against the Respondents to be executed by the OCPDI Sub County Police Commander, Imenti North, Meru which were issued on 22nd June 2022 and
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served upon the Sub County Police Commander, Imenti North on June 29, 2022 for compliance.

9. That when the Warrants of Arrest against the Respondents were initially issued, the Respondents made a similar application dated May 18, 2022 seeking the stay of the Warrants of Arrest in execution of the decree against them for failure to pay the decretal sum as ordered by the Order of Mandamus herein which the court, vide its ruling dated and delivered on July 28, 2022, found to be without merit, and in recognition of the applicants public office, the court granted them opportunity to pay before the execution may be due in accordance with the Warrants 'Which I had already served.
10. That accordingly, this Honourable Court ordered a stay of the Warrants of Arrest which had been issued for a period of fourteen (14) days only to allow the Respondents to make arrangements for the payment of the decretal amount and further ordered that in default of payment of the decretal sum, costs and interest accrued herein, the order for stay shall lapse and be of no effect. Attached hereto marked "DKK - 1" is a copy of the aforesaid ruling dated and delivered on July 28, 2022.
11. That by the time the fourteen (14) days lapsed, the general elections held on August 8, 2022 had taken place replacing the previous political administration in the County Government of Meru and a new Governor was elected who in turn appointed new County Executive Committee Members and new Chief Officers in the various County Government Departments.
12. That whereas it is true that the Applicants herein Monica Kaithiori Kathono and Charles Mwendu Kalbiria were appointed by the current Governor of Meru County early this year to the office of the 1st and 2nd Respondents herein respectively, it is not true that they are unaware of the pending payment of the outstanding decretal amount awarded to me in Maua Chief Magistrate's Court Civil Case No 15 B of 2013 and the Order of Mandamus dated November 15, 2021 issued by this Honourable Court on 1st December 2021 compelling the Respondents to settle the outstanding decretal amount awarded to me in Maua Chief Magistrate's Court Civil Case No 15 B of 2013 vide the court's Judgement dated October 23, 2018 and Ruling dated February 6, 2019 as expressed in the Decree and Certificate of Costs issued on June 24, 2020 and accrued interest thereon to date.
13. That indeed my Advocate visited the Office of the County Attorney on or around January 26, 2023 when she met the County Attorney one Dickson Munene who is also the County Executive Committee Member for Public Service Management and Legal Affairs and enquired about when the County Government of Meru would settle the outstanding decretal amount in view of this Honourable Court's Order of Mandamus aforesaid and this Honourable Court's ruling and Orders dated July 28, 2022.
14. That my Advocate Ms CK Ungu informed me that the County Attorney informed her that he would call for the file to deal with the matter and requested her to send him the relevant documents pertaining to the claim for his reference.



15. That my said Advocate further informed me that she sent soft copies of the relevant documents to the County Attorney via WhatsApp on January 26, 2023 and delivered hard copies thereof to his office on January 27, 2023 as evident from the forwarding letter dated 28 January 2023 duly acknowledged by the Directorate of Legal Affairs, County Government of Meru, a copy of which is hereto attached and marked "DKK - 2".
16. That my said Advocate has further informed that she followed up the issue of payment with the County Attorney on phone and via WhatsApp text messages and particularly on April 5, 2023 when she sent him a WhatsApp text asking him to update her on the status of the pending claim and whether the County Government had made any arrangements to pay.
17. That when no response was forthcoming my Advocate applied to the court for re-issue of the Warrants of Arrest against the Respondents on April 6, 2023 which were issued on July 13, 2023 as evident from the said Warrants of Arrest which were served upon the Ocpdi Sub County Police Commander, Imenti North, Meru for compliance on April 13, 2023. Attached hereto marked "DKK - 3" is a copy of the said Warrants of Arrest duly acknowledged by the Sub County Police Commander, Imenti North.
18. That I have been further informed by my said Advocate that she has been consistently following up on the execution of the said Warrants of Arrest with the Ocpdi Sub County Police Commander, Imenti North, a Senior Superintendent of Police one Chepkwony by variously visiting his office, calling him on phone and sending him text messages to update her on whether he had duly complied with the court's order to execute the Warrants of Arrest.
19. That it appears that the said Ocpdi Sub County Police Commander, Imenti North has been compromised by the Respondents since instead of arresting the Respondents as ordered by the court he has informed the Respondents/Applicants about the Warrants of Arrest and it seems that he has been buying time for the Respondents to obtain an order for stay of execution of the Warrants of Arrest as he has been in possession of the said Warrants of Arrest for a period of three (3) months without executing or returning the Warrants of Arrest unexecuted to the court.
20. That in view of the foregoing it is apparent that the Respondents/Applicants are merely playing hide and seek and there is no valid reason as to why they have not paid to me the outstanding decretal amount together with costs and interest accrued to date as ordered by the court as the authorized officers of the relevant department of Finance in the County Government of Meru,
21. That the Notice of Motion dated June 30, 2023 is merely a delaying tactic by the Applicants and lacks merit and it is indeed a travesty of justice as the Respondents/Applicants and the County Government of Meru has totally failed or refused to comply with this Honourable Court's Orders to settle the outstanding decretal amount together with costs and accrued interest.



22. That my Advocate has advised me that it is a well established principle in law that whoever comes to equity must come with clean hands and it is apparent that the Respondents/Applicants herein are being dishonest and playing dirty.
 23. That I therefore urge the Honourable Court to dismiss the Respondents/Applicants' application dated June 30, 2023 with costs in the interest of justice.”
5. The applicants responded to the Replying Affidavit by Further Affidavits sworn on August 3, 2023 in terms as follows:
- “4. That indeed I have never participated in any civil suit be it the mother suit herein to Maua Civil Case No 158 of 2013 or the Instant Meru Judicial review No 5 of 2021.
 5. That the record will show that I have been included to the suit vide an irregular amendment of warrants of arrest to substitute Hon Titus Ntuchiu with myself an act that is irregular and unfounded in law.
 6. That it is clear the official who was served with court process in this matter was one Hon Titus Ntuchiu and never was I ever served in my personal capacity. Indeed the Respondent has not discharged the burden that the decree has been brought to my attention yet they now seek to have me arrested.
 7. That Respondent has admitted through out his response to my application that indeed this matter started in Maua against the County Government of Meru way back in 2013 and was concluded in Meru at the High Court some time in June 2020 a time frame I wasn't in office.
 8. That even when the warrants of arrest were being applied for on May 15, 2022. I had not yet assumed the current office thus making such warrants currently against me incompetent.
 9. That the warrants of arrest against me are a move to harass me for the wrongs of other people other than seek justice in the matter save to add that the re-issued warrants of arrest were irregularly amended to introduce new parties to a claim they never participated.
 10. That this Honorable Court should protect my interests against those of the respondents at such a time especially considering that the said orders and warrants were granted without hearing me as this will serve the best interests of Justice and allow us prosecute the tribunal matters.
 11. That indeed no prejudice will be carried on the respondent if the Orders in my application are granted.”

Submissions

6. Counsel for the parties made oral arguments urging their respective positions at the hearing of the application on August 11, 2023 and ruling was reserved. For the applicants, counsel emphasized, in his submission, alleged misconception of the foundational suit which gave rise to the judicial review proceedings the basis of the execution proceedings herein and the apparent denial of opportunity to be heard for the new officials of the County Government which came into power after the August



2002 elections. Citing Clause 6 of the Transitional and Consequential Provisions of the Constitution of Kenya 2010, Counsel urged that the suit should have been made against the National Government and not the County Government of Meru. On the warrants of the arrest, it was urged that it was a travesty of justice that the applicants who were the newly appointed office holders under the new County Government which had only been in office for barely one year, had not been accorded an opportunity to be heard.

7. In response, the respondent's counsel urged that the judgment and orders for execution were made against the respondents in their official capacity which is the capacity in which the offices of the County Government in charge of financial matters for the implementation of the Judgment made in the trial court Maua CMCCC No 15B of 2013, DK (suing as next friend on behalf of his minor son HM) versus The County Government of Meru & John Mithika, which a judgment against the County Government of Meru. Counsel cited section 134 of the County Government Act, and submitted that under Act the County Government inherited the functions, rights and obligations of the local authorities under the repealed Local Government Act, cap 265, and Clause 6 of the Transitional and Consequential Provisions of the Constitution of Kenya 2010 did not apply in this suit.

Whether suit against County Government was competent

8. Counsel for the applicants invited the court to consider that the suit giving rise to the liability of the County Government and the subsequent judicial review proceedings was incompetent and it ought to have been field against the national Government.
9. There is no valid appeal from the Judgment of trial court made on October 23, 2018 as observed in the Court's ruling of July 28, 2022, the Memorandum of Appeal was field 3 years after the judgment in contravention of section 79 G of the Civil Procedure Act. There is no appeal from the order of Mandamus given by this court in these proceedings on November 15, 2021. The having made the order for Mandamus on November 15, 2021 and subsequently declining the application for stay of execution pending appeal in its ruling of July 28, 2022, the Court became functus officio on the question of these judicial review proceedings and application for stay of execution pending appeal.
10. The matter as to liability of the Respondent cannot be opened before this Court, which is ex officio upon issue of the over for mandamus. If it is considered that this court was wrong in granting the order for Mandamus it is a conclusion of law which cannot found a review but rather an appeal. See William Karani & 47 Ors v Michael Wamalwa Kijana & 2 Ors. (1987) KLR 557 and Njau v National Bank of Kenya Ltd. (1996) eKLR.
11. However, in deference to the argument by the Counsel for the applicant Clause 6 of the Sixth Schedule of the Constitution does not pass the obligation to meet the decree in this case to the national Government of the Republic. The Clause only applies to rights and obligations arising and subsisting immediately before the coming into effect of the new Constitution 2010. The clause, with respect, has no application to the proceedings before this court which was filed, heard and determined after the Constitution of Kenya has come entered into force.
12. Clause 6 of the Sixth Schedule on Transitional and Consequential Clauses provides as follows:
 - “6. Rights, duties and obligations of the State Except to the extent that this Constitution expressly provides to the contrary, all rights and obligations, however arising, of the Government or the Republic and subsisting immediately before the effective date shall continue as rights and obligations of the national government or the Republic under this Constitution.”



The clause leaves the responsibility to pay the decretal sum subject of these proceedings exactly where it was at the end of the trial and judgment in the trial court with the County Government of Meru which was the defendant and judgment debtor in the suit by virtue of the Judgment delivered on 23/10/2018.

13. Even if according to the judgment in Maua CMCCC No 15B of 2013, *DK (suing as next friend on behalf of his minor son HM) versus The County Government of Meru & John Mithika*, the cause of action is shown to have arisen following a motor vehicle accident on July 4, 2010 before the new Constitution came into effect, and consequently against the relevant local authority, the determination by judgment which gave rise to the obligation to pay was made on long after the new Constitution October 23, 2018 and against the respondent County Government as the 1st defendant!
14. Then there is section 134 of the [County Governments Act](#) 2012 that repealed the [Local Government Act](#) cap 265 and the county governments inherited the functions, (and I consider rights and obligations) of the local authorities previously existing before the establishment of the County Governments under the new Constitution.
15. However, this not being an appeal against the decision of the trial court and this court having already made an order for mandamus, consideration of this question is merely obiter.

Procedure of arrest and detention in execution of decrees/orders of court

16. The Court may only examine whether the process for obtaining orders for the arrest and detention of persons in execution has been followed in the circumstances of this case. The Court's power to order arrest in execution is generally provided for under section 40 (1) of the [Civil Procedure Act](#) as follows:

“40(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 county 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 county to be detained.”

Facts of the case

17. On the facts of this case, the warrants were issued on May 18, 2022 following a Notice to Show Cause (NTSC) dated March 21, 2022 following an application for execution dated March 17, 2022. On application for stay of enforcement of the warrants of arrest, the court by its ruling of 28/07/22 gave the respondent CECM for Finance, Economic Planning and ICT Hon Titus Ntuchiu for 14 days to allow them make arrangements to pay.
18. By letter dated April 6, 2023, Counsel for the ex parte applicant applied for re-issue of the warrants in the following terms
“ ”
19. The deputy Registrar of the Court then issued the warrants dated April 17, 2023 which are the subject of this application. The warrants were prepared by the Counsel for the *ex parte* applicant for signature by Deputy Registrar and they were in the names of the applicants, the new officials in the respective



departmental positions of the County Government established following the 2022 elections, as the persons to be detained in execution of the decree, as shown in the Recital to the Warrant that:

“ ”

20. The only question which remains is whether the ex parte and the applicant Deputy Registrar of the Court in reissuing the warrants of arrest of the applicants in execution of the decree herein followed the provisions of the [Civil Procedure Rules](#) therefor.

The Law

21. Order 22 Rule 18 of the [Civil Procedure Rules](#) makes the following exacting procedure for notice to show cause in certain cases:

“[Order 22, rule 18.] Notice to show cause against execution in certain cases.

18.

- (1) Where an application for execution is made—
 - (a) more than one year after the date of the decree;
 - (b) against the legal representative of a party to the decree; or
 - (c) for attachment of salary or allowance of any person under rule 43,

the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him:

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him:

Provided further that no such notice shall be necessary on any application for the attachment of salary or allowance which is caused solely by reason of the judgment debtor having changed his employment since a previous order for attachment. (2) Nothing in subrule (1) shall be deemed to preclude the court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice. (3) Except as provided in rule 6 and in this rule, no notice



is required to be served on a judgment debtor before execution is issued against him.”

22. The thread that runs through the cases is expected change of circumstances with regard to time, capacity and capability to meet the decree, which could have created sufficient case against execution such as where decree is fully or partly satisfied, legal representative of the party to the decree may have and the ‘attachment of salary or allowance of any person’ is considered such a grave matter that should not be executed without notice to the affected person so that they be heard should there exist any sufficient reason against the execution by way of arrest and detention.
23. Counsel for the ex parte applicant submitted that she applied for reissue of the warrants because the judgment and orders for execution had been previously obtained against the office, not the holder of the office, of the respective respondents. The reality of the situation is however, that there has been change in government at the County Government and the officers of the County Government who hold the offices against whom the judgment and orders for execution were obtained are not the same persons. Therein lies the imperative of Order 22 Rule 18 of the *Civil Procedure Rules* to protect and give hearing to affected persons who may come into office which is loaded with obligations to pay or discharge other obligation of which he had no prior notice before assumption of office. He must be given an opportunity to relate to the obligation and seek way as to discharge the obligation before it can be said that he has refused to comply thereby defying the judgment or order of the court.
24. The Proviso against giving a Notice to Show Cause applies where there has been within one year an order against the debtor or the legal representative who is sought to be committed to jail. It does not with respect apply where there has been change of the legal representative as here, in that although it the same offices of County executive Member for Finance, Economic Planning and ICT and its Chief Executive Officer, they were not the legal representatives of the County Government in office during the previous execution orders. To proceed against them without giving them an opportunity to be heard through a Notice to Show Cause under Order 22 Rule 18 of the *Civil Procedure Rules* is in the respectful view of this court, an abuse of discretion and process of the court.
25. The method of request by letter for re-issue of warrants was appropriate in the circumstances of the case and it may have misled the court into not considering that there were different occupants in the offices of the respondent and grant opportunity to show cause as it is permitted to do under Order 22 Rule 31 of the *Civil Procedure Rules*, significantly for occasions such as the present, as follows:

“[Order 22, rule 31.] Discretionary power to permit judgment-debtor to show cause against detention in execution of decree.

31.

- (1) Notwithstanding anything in these Rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in prison of a judgment debtor who is liable to be arrested in pursuance of the application, the court may, instead of issuing a warrant for his arrest, issue a notice calling upon him 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.



- (2) Where appearance is not made in obedience to the notice, the court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor.”

26. The ‘procedure’ of the reissue of the warrants against new officials of the county government who had not had opportunity to show cause why execution should not issue against them in the context of the change of county government following an election denies the new official an opportunity to be heard and to demonstrate any sufficient cause as prescribed under Order 22 rule 34, which provides as follows:

“[Order 22, rule 34.] Proceedings on appearance of judgment-debtor in obedience to notice or after arrest.

34.

- (1) Where a judgment-debtor appears before the court in obedience issued under rule 31, or is brought before the court after being arrested in execution of a decree for the payment of money, and it appears to the court that the judgment-debtor is unable, from poverty or other sufficient cause, to pay the amount of the decree, or, if that amount is payable by instalments, the amount of any instalment thereof, the court may, upon such terms as it thinks fit, make an order disallowing the application for his arrest and detention or directing his release, as the case may be.
- (2) Before making an order for the committal of the judgment-debtor to prison, the court, for reasons to be recorded in writing, shall be 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 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.
- (3) While any of the matters mentioned in subrule (2) are being considered, the court may, in its discretion, order the judgment-debtor to be detained in prison, or leave him in the custody of an officer of the court, or release him on his furnishing security, to the satisfaction of the court, for his appearance when required by the court.
- (4) A judgment-debtor released under this rule may be rearrested.
- (5) Where the court does not make an order under subrule (1), it shall cause the judgment-debtor to be arrested, if he has not already been arrested, and, subject to the provisions of this Act, commit him to prison.”

Conclusion

27. In the circumstances of the change of County Government, it is not possible to conclude without hearing the new officials, that there is willful default to pay as required under Order 22 rule 34 (2) (b) of the Civil Procedure Rules, (highlighted above). Even though they have inherited the obligation by way of judgment in the Maua Chief Magistrate’s Court and the Order for Mandamus from this court, the County Government and its officials may have sufficient explanation for delay in effecting payment by way of any necessary budgetary arrangements and rearrangements on which they ought to be heard, even though, as regards the finding of obligation to pay the decretal sum, this court is upon the grant of mandamus and refusal of stay of execution, become *functus officio*.

Order

28. Accordingly, for the reasons set out above, the Court makes the following orders
1. The Warrant of Arrest dated April 17, 2023 issued by the Deputy Registrar on for the arrest and detention of the applicants named herein is set aside.
 2. The *ex parte* applicant decree holder is at liberty to apply for execution of the decree and order for Mandamus herein against the County Government and its new officials in accordance with the law.
 3. The Deputy Registrar is directed upon such application for execution to give a Notice to Show Cause to the respondents therein for consideration by the High Court on a date convenient to the parties and the Court in accordance with Order 22 Rule 31 of the Civil Procedure Rules.
 4. The costs of this application shall be costs in the Cause.

Order accordingly.

DATED AND DELIVERED ON THIS 31ST DAY OF AUGUST, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:



Mr. Ashaba Advocate for the Applicants.

Ms. Ungu for the Respondents.

