



**Mathu v Kimani (Miscellaneous Civil Application 69 of 2021)  
[2022] KEHC 15643 (KLR) (25 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 15643 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
MISCELLANEOUS CIVIL APPLICATION 69 OF 2021  
SM GITHINJI, J  
OCTOBER 25, 2022**

**BETWEEN**

**ESHPHAN NDERITU MATHU ..... APPLICANT**

**AND**

**JOYCE WAMBUI KIMANI ..... RESPONDENT**

**RULING**

1. The applicant moved this court by way of notice of motion dated October 13, 2021, seeking the following orders:
  1. Spent.
  2. Spent.
  3. That this honourable court be pleased to exercise its supervisory powers over the chief magistrate's court in Malindi Civil Suit No 1343 of 2020, and do give orders and directions that the records and proceedings in the said civil suit in respect of the proceedings and orders issued by Hon Ivy Wasike (SRM) on October 12, 2021 be availed to the high court for review and ascertaining the legality of the proceedings and the orders issued in respect of conditional lifting of civil warrant of arrest against the applicant on September 14, 2021 and directions in respect of notice of motion application dated October 12, 2021 filed under certificate of urgency by the applicant seeking stay of execution of the decree made and issued on the October 2, 2020.
  4. That upon the availing of the aforesaid impugned records and proceedings in particular the proceedings, directions and orders made and issued on the October 12, 2021, this honourable court do review the same and make any such orders or directions that the court shall consider appropriate to ensure the fair administration of justice in terms of the liberty of the applicant who is currently detained at the Malindi police station on a civil warrant.



5. That upon granting prayer 3 herein above, this honourable court be pleased to stay, vary, set aside and discharge the orders and directions issued and/or given by Hon Ivy Wasike (SRM) of granting the applicant herein a conditional stay of warrant of arrest in execution by ordering him to deposit a sum of Kshs 300,000/- in cash with the court and failing to consider the applicant application for stay of execution, and do exercise the inherent powers and order the withdrawal and transfer of Civil Suit No 134 of 2020 to this court to try and dispose of the same or transfer the matter for trial and disposal to any other subordinate court.
6. That this honourable court be pleased to make such other interlocutory orders as they may appear in court to be just and convenient.
2. The application is based on the grounds enumerated on the face of it and supported by the affidavit sworn on October 13, 2021 by Alfred Mirewa Omwancha, counsel for the applicant, who deposed that on September 14, 2021, a warrant of arrest in execution was issued against the appellant in cm's court Civil Suit No 134 of 2020 *Joyce Wambui Kimani v Eshphan Nderitu Mathu*, pursuant to an interlocutory judgment and decree issued on October 2, 2020. The applicant was subsequently presented before Hon Wasike on October 12, 2021.
3. On the said date, the applicant's counsel filed an application seeking orders inter alia stay of execution of the warrant of arrest in execution and stay of the interlocutory judgment and decree. The learned magistrate delivered her ruling on the same date directing inter alia a conditional lifting of the warrant of arrest upon depositing of security in the sum of Kshs 300,000.

The respondent opposed the application. She filed a replying affidavit on October 27, 2021 wherein she deposed that the application is predicated on falsehood and in violation of court processes.

The application was canvassed by way of written submissions.

### **The Applicant's Submissions**

4. Counsel for the applicant submitted that this court's supervisory jurisdiction over the conduct of subordinate courts is found under article 165 (6) and (7) of the *Constitution* of Kenya and that the instances when such powers could be invoked were outlined in the case of *Director of Public Prosecution v Perry Mansukh Kansangara & 8 others* [2020] eKLR.  
One of the instances being existence of special circumstances, which in this case, counsel submitted that the special circumstance is on failure to serve the notice to show cause. In the result, the applicant's right to a fair trial was infringed. That the learned magistrate was wrong to sustain the warrant of arrest even after the applicant had appeared in court to show cause.
5. Counsel further submitted that the learned magistrates' actions were not impartial as such and by dint of section 18 of the *Civil Procedure Act*, it would be fair for this court to dispose of the suit or transfer the same to a different court.  
Relying on the case of *Harish Mawjee & another v Republic* [2020] eKLR, counsel argued that the applicant's right to freedom shall continue to be infringed unless this court which is clothed with supervisory jurisdiction reviews the bond terms given by the subordinate court.

### **The Respondent's Submissions**

6. Counsel for the respondent submitted that the supervisory powers sought were not available for the applicant for failure to exhaust the available avenues which is to file an appeal or move the court by way



of a judicial review. Reliance was placed on the case of *Vincent Onkoba Maswari v Jackline Barongo Asiago (sued as legal representative of John Oriri Ayiera) & another* [2020] eKLR.

It was the respondent's submission that the applicant did not establish any reasonable grounds to warrant this court exercise its supervisory jurisdiction. To the respondent, the lower court accorded the applicant a fair chance and it was only in the best interest that security be deposited by the applicant as the lower court ordered. Reliance was placed on the case of *Asha Hamisi Nimutende V Mwaronga Nassoro & another* [2019] eKLR.

## Analysis and Determination

Whether this court has jurisdiction to grant the reliefs sought.

7. Jurisdiction of a court is the authority given to a court of law to take cognizance of matters placed before it for adjudication. It may be conferred by the *constitution*, statute or both. Whatever the case, a court can only exercise the jurisdiction conferred upon it by law.

The Supreme Court has addressed this issue in a number of decisions. In the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & another* [2012] eKLR the court stated;

“(68) A court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

8. The Supreme Court referred to its earlier decision in *the Matter of the Interim Independent Electoral Commission*, Constitutional Application Number 2 of 2011 and stated;

“Where the *Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can parliament confer jurisdiction upon a court of law beyond the scope defined by the *Constitution*. Where the *Constitution* confers power upon parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

9. This court is established under article 165(1) of the *Constitution* and its jurisdiction donated by article 165(3). Further, article 165(6) states in plain language that this court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function but not over a superior court. That sub article provides:

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

Article 165(7) further provides:

“For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”

10. In *Boniface Muli v Hannington Musyoki* [2012] eKLR, the court explained the scope of this court's supervisory jurisdiction as follows:



8. In my view, the supervisory jurisdiction of the High Court in respect of subordinate courts is that the High Court will observe, assess and ensure that the subordinate courts or tribunals are properly performing the functions for which they are established. Supervisory jurisdiction does not mean that the High Court will take over and supplant itself into a role that is to be played by a subordinate court or tribunal.

9. The *Concise Oxford English Dictionary* defines "Supervise" as follows:

Observe and direct the execution (of a task or activity) or the work of (a person)

Under the *LTSCH Act* chapter 301, the form of supervision granted to the court is by way of an appeal against any determination or order of a tribunal made on a reference...

10. As earlier stated, I hold that the High Court's supervisory jurisdiction encompasses the power of general superintendence over subordinate courts and tribunals. Through it superior courts keep subordinate courts and tribunals within their prescribed sphere and prevent usurpation. As such, the court agrees with counsel for the respondent objector that the supervisory jurisdiction of the High Court refers to the court's power to oversee tribunals' actions for mistake, error or mis-procedure and the like."

11. In the present case, although the impugned warrant was made in a civil suit, the same has penal consequences and implication on the liberty of an individual. There is therefore justification for this court to interrogate its legality, correctness and /or propriety under its supervisory jurisdiction.

The applicant's contention is that the special circumstances to warrant this court's supervision is that the notice to show cause was not served to him prior to warrants being issued.

12. I have perused the record of the subordinate court, the court observed on September 13, 2021, that the notice to show cause was served and proceeded to issue warrants of arrest. In my view the subordinate court was well within the law and procedure in giving the order as it did. I do not see any mistake, error or mis-procedure to warrant this court exercise its supervisory jurisdiction.

Further, I do not find an illegality in the learned magistrate's order directing that security be deposited and or granting a conditional stay of the warrant in execution. *Order 42 rule 6 {2}* provides for the conditions to be met prior to granting stay. That rule reads:

1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
2. No order for stay of execution shall be made under subrule (1) unless—
  - a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
  - b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.



13. In the circumstances, I find no merit in the notice of motion dated October 13, 2021. The same is dismissed with costs to the respondent.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 25<sup>TH</sup> DAY OF OCTOBER, 2022.**

.....

**S.M. GITHINJI**

**JUDGE**

**In the absence of; -**

A.M.Omwancha & Company Advocates for the Applicant

Richard O. & Company Advocates for the Respondent

