



**Mutua v Attorney General & another (Judicial Review 2 of 2020)
[2022] KEHC 16080 (KLR) (28 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 16080 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
JUDICIAL REVIEW 2 OF 2020**

RK LIMO, J

NOVEMBER 28, 2022

**IN THE MATTER OF AN APPLICATION BY MONICAH MUTUA
FOR JUDICIAL REVIEW FOR AN ORDER OF MANDAMUS**

AND

IN THE MATTER OF THE GOVERNMENT PROCEEDINGS CAP 40 LAWS OF KENYA

AND

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACT, 2015 AND
IN THE MATTER OF SECTION 8 & 9 OF THE LAW REFORM ACT**

BETWEEN

MONICAH MUTUA APPLICANT

AND

ATTORNEY GENERAL 1ST RESPONDENT

**PERMANENT SECRETARY, MINISTRY OF CULTURE AND SOCIAL
SERVICES 2ND RESPONDENT**

RULING

1. Before Me, is a Notice of Motion dated 6th October, 2022 lodged by the 1st and 2nd Respondents who are the applicants herein seeking the following Orders/reliefs: -
 - i. Spent
 - ii. Spent
 - iii. This Court be pleased to set aside in two Orders issued on 23rd August, 2022 by the Deputy Registrar.



- iv. This Hon. Court do stay Orders issued on 23rd of August, 2022 pending the determination of this application.
 - v. That costs be provided.
2. The grounds upon which the applicants have moved this court are listed on the face of the application as follows: -
- i. That this Honourable Court has the jurisdiction to set aside its orders ex-debito justitiae
 - ii. That the ex-parte Applicant filed the instant Judicial Review Application vide a chamber summons application dated 30th January 2020
 - iii. That the Respondent (ex parte applicant) was granted leave on 13th October, 2020 to file substantive motion to compel them pay/satisfy a Court decree in Kitui Senior Principal Magistrate Court Civil Case No. 20 of 2003.
 - iv. That the exparte applicant filed the substantive motion on 8th April, 2020 outside the 21st day period given.
 - v. That the applicants herein filed their grounds dated 21st October, 2021 pointing out the shortcoming.
 - vi. That the exparte applicant sought leave for extension of time which was granted on 15th June, 2021.
 - vii. That the Respondent opposed the said Notice of Motion by filing Grounds of Opposition filed on 22nd October 2020.
 - viii. That the applicant will suffer no prejudice if the application if allowed.
3. This application is supported by the affidavit of Annette Kerubo, the State Counsel from Attorney General's Office where she has reiterated the grounds listed above.
4. In her written submissions dated 7th November 2022, State Counsel submits that the Deputy Registrar lacked jurisdiction to hear the Notice to Show Cause and issue warrants of arrest on 3rd August 2022 as the Notice to Show Cause was brought under Order 22 rule 18 of the Civil Procedure Rules. Counsel has relied on the case of *Humphrey Mbaka Nandi vs Jennifer Nyambura Kamau* (2013) eKLR and *David Gitau Thairu vs County Government of Machakos & 2 Others* (2022) eKLR.
5. Counsel has also submitted that the 2nd Respondent was not personally served with Notice to Show Cause. She has submitted that the email which the ex-parte applicant used did not belong to the 2nd Respondent as such the Permanent Secretary did not receive the notice. Further, that the contemnor was not named in the warrants dated 3rd October 2022.
6. State Counsel Annette Nyakora filed a Further Affidavit sworn on 7th November 2022 on 9th November 2022 on behalf of the 1st and 2nd Applicants. Counsel averred that the ex-parte applicant was paid through counsel a total sum of Kshs 815,775/- in settlement of the decretal amount on 23rd September 2022 Counsel avers that the warrants of arrest issued for Kshs 1,611,594/- were irregular as the amount owed was Kshs 990,617.80/- as at 11th July 2017. She avers that the warrants reflected the wrong amount and further, that they do not bear the name of the Permanent Secretary who is to be arrested.



7. The Respondent has opposed this application through the Affidavit sworn by her next of friend, Monica Mutua on 16th October 2022. The Respondent avers that the judgment in the initial matter was entered more than 17 years ago on 12/7/2005 in her favour and up to date, it remains unsettled by the Respondents/Applicants. She avers that the delay triggered the filing of a Notice to Show Cause through Counsel which was served upon the Applicants but they failed to attend court on 17/7/2022 or file a written response to the same. She avers that the Notice to Show cause was heard before the Deputy Registrar who directed the Applicants to settle the decretal sum but he Applicants have failed to make full payments.
8. In her written submissions dated 16th November 2022 and were filed on the same day, the respondent submits that the Applicants were duly served with the Notice to Show Cause which was scheduled for hearing on 19/7/2022. She contends that they were served electronically through email and that even though the Applicants have disputed service of the Notice to Show Cause, she used the same email to serve the Warrants of Arrest which were received and are now being challenged.
9. The ex-parte applicant has submitted that the interest charged on the decretal sum has been accruing for the past 17 years which is the period that the judgment has remained unsettled.
10. She faults the applicants arguing that they have not explained the delay in settling the debt and they have also not made a proposal of how the same is to be settled. The ex-parte applicant has also submitted that execution can be done either through a Notice to Show Cause or through contempt proceedings and that an issue raised on the method used should be looked at as a mere technicality.
11. This Court has considered this application and the grounds raised. I have also considered the response made by the respondent. This court finds that this matter should have been settled long ago had the applicants herein been responsible in their respective duties. The issues raised in this application touches rather on the process of execution which is a technicality rather than the reasons for execution in the first place.
12. The parties herein were previously engaged in Senior Principal Magistrate Civil Case No. 516 of 2008 whereby judgment was entered in favor of the ex-parte applicant vide a decree dated 12/7/2011. in the sum of Kshs 452,500/- plus costs and interest. The Judgement debtor failed to pay as decreed.
13. The ex-parte applicant made a Judicial Review Application to this court in Judicial Review No 2 of 2020 seeking an order of Mandamus to compel the Permanent Secretary, Ministry of Culture and Social Services to settle the decretal amount. The application was uncontested and this Court allowed the same in its order issued on 17th August 2021 as follows;

That an Order of Mandamus do issue compelling the Permanent Secretary, Ministry of Culture and Social Services as the accounting officer of the ministry to pay the decretal sum in satisfaction of the judgment in SPMCC 516 of 2008 Kitui entered on 12/7/2011 in the sum of Kshs 425,500/-plus costs and interest of the suit from the date of the said judgment until payment in full.
14. The ex-parte applicant thereafter proceeded with assessment of costs and was issued a Certificate of Order for Costs against the Government for the sum of Kshs 1,497,775/- on 5th April 2022.
15. The record shows that ex-parte applicant through counsel applied for execution vide an Application for Execution of Decree filed in court on 29th June 2022. A Notice to Show Cause was thereafter issued under Order 22 rule 18 of the Civil Procedure Rules on 8th July 2022. The Notice to Show Cause indicated that the advocate for the ex-parte applicant Mulu & Co Advocates had made an application



for committal to civil jail of the 1st and 2nd Respondents/ Applicants herein. The notice also directed the 1st and 2nd Respondents/Applicants to appear in court on 19th July 2022 to show cause why the prayer for execution should not be granted.

16. The record shows that the matter was mentioned before the Deputy Registrar on 19th July 2022 where she directed that the Notice to Show Cause (herein after referred to as NTSC) would be heard on 23rd August 2022 as there was no proof of service of the same on the 1st and 2nd Applicant/Respondents.
 17. On 23rd August 2022, the Deputy Registrar being satisfied that service of the NTSC was effected issued an order for a warrant of arrest to the 2nd Respondent/Applicant
 18. The issues for determination are;
 - i. Whether the Deputy Registrar had jurisdiction to issue the warrant of arrest against the Applicants
 - ii. Whether orders issued on 23rd August 2022 should be set aside.
- (i) Whether the Deputy Registrar had jurisdiction to issue Warrant of Arrest against the applicants herein.

The power to commit a judgment-debtor to civil Jail is provided for under Section 38 of the [Civil Procedure Act](#), Cap 21, Laws of Kenya, which provides for powers of the court to enforce execution. It is provided that;

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.

- 19. The above sheet shows that a decree can be executed through arrest and detention However, the person against whom a NTSC is to be enforced must be served as stipulated under Order 22 of the [Civil Procedure Rules](#).

- 20. In the present case, the Notice to Show Cause was issued pursuant to Order 22 Rule 18 of the Civil Procedure Rules which provides;

Notice to show cause against execution in certain cases

 - i. 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
 - ii. Nothing in sub-rule (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
 - iii. 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

- 21. Order 22 rule 31 of the Civil Procedure Rules provides as follows;

Discretionary power to permit judgment-debtor to show cause against detention in prison;

 - i. 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.

- ii. 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

22. The Deputy Registrar in its administrative/execution role instead of issuing a Warrant of Arrest in the first instance, issued a notice calling upon the 2nd Respondent to appear before court and show cause why he/she should not be committed to civil jail. The question posed is, was the NTSC served? The answer going by the finding of the Deputy Registrar is in the affirmative. Did the 2nd Respondent as the Judgement Debtor appear in Court to give any explanation now being fronted by the State Counsel? The answer is in the negative. The Deputy Registrar was perfectly in order and I had the power and mandate to issue a warrant of arrest in execution of the decree against the applicants pursuant to the provisions of Order 22 Rule 28(1) of the Civil Procedure Rules because the 2nd Respondent willingly failed to pay the decretal sum.

23.

- (ii) Whether the execution Orders issued on 23rd August, 2022 were proper.

Counsel for the Applicants contend that the procedure for execution was not followed, specifically, that the 2nd Respondent was not personally served with the Notice to Show Cause. Secondly that the Deputy Registrars acted ultra vires in issuing an order for issuance of warrants of arrest against the 2nd Respondent.

24. The Applicants however are loudly silent on whether the amount in the issue has been paid in full. Though attempts were made to pay part of the decree as per the further affidavit sworn on 7th November, 2022 by Annette Nyakora, she fails to acknowledge that due to delay in payment, the Judgement sum has been accumulating interests at court rates from when the decree was passed on 12th July 2011. By failing to pay on time or at all they cannot be heard complaining against the interest accrued.

25. The Applicants in this matter have stated that the Decree Holder did not follow the right procedure in execution. The contention that execution in this instance was only tenable vide contempt proceedings is not supported by law. The provisions of Order 22 Rule 31 deals with execution process and provides that where a judgement-debtor fails to appear and show cause, a warrant of arrest can issue. I also find it a bit contradictory is that the applicants are saying they have not gotten budgetary allocation to satisfy the decree (this is a decree passed over a decade ago.) The question posed is whether the exparte applicant is entitled to enjoy fruits of judgement and for how long will she continue holding a decree in his favour in her hands without access to justice? In my view, the NTSC and the execution process will only aid her to finally access justice. This court cannot be asked to impede justice in whichever way.

26. The 2nd applicant contends that the committal to civil jail is likely to infringe his right to fair hearing because in its view that right can only be protested if contempt proceedings against his office was commenced.

I am however not convinced by that argument because it is skewed against the decree holder who has been waiting for justice since 2011 when the decree was passed. The interests of justice sways against the applicants herein because they were aware of the NTSC and the fact that the debt has been outstanding for more than a decade.



27. The Deputy Registrar stated that she was satisfied that service was properly effected following the filing of the process server's Affidavit of Service sworn on 17th August 2022. In the affidavit the Process Server deposes as follows at Paragraph 3;

That on the same day, I caused the same to be sent to the 1st Respondent via their official email address info@ag.go.ke and also the 2nd Respondent vide their official email address info@fmard.gov.ng

28. The mode of service on the Government is provided under Order 5 rule 9 of the Civil Procedure Rules as follows;

- i. The provisions of this Order shall have effect subject to section 13 of the Government Proceedings Act (Cap. 40), which provides for the service of documents on the Government for the purpose of or in connection with civil proceedings by or against the Government
- ii. Service of a document in accordance with the said section 13 shall be effected;
 - a. by leaving the document within the prescribed hours at the office of the Attorney-General, or of any agent whom he has nominated for the purpose, but in either case with a person belonging to the office where the document is left; or
 - b. by posting it in a prepaid registered envelope addressed to the Attorney-General or any such agent as aforesaid and where service under this rule is made by post the time at which the document so posted would be delivered in the ordinary course of post shall be considered as the time of service thereof
- iii. All documents to be served on the Government for the purpose of or in connection with any civil proceedings shall be treated for the purposes of these Rules as documents in respect of which personal service is not requisite
- iv. In this rule, "document" includes writs, notices, pleadings, orders, summonses, warrants and other documents, proceedings and written communications

29. Electronic Service by email is provided for under Order 5 rule 22 (B) which provides;

- i. Summons sent by Electronic Mail Service shall be sent to the defendant's last confirmed and used E-mail address
- ii. Service shall be deemed to have been effected when the Sender receives a delivery receipt
- iii. Summons shall be deemed served on the day which it is sent; if it is sent within the official business hours on a business day in the jurisdiction sent, or and if it is sent outside of the business hours and on a day that is not a business day it shall be considered to have been served on the business day subsequent.
- iv. An officer of the court who is duly authorized to effect service shall file an Affidavit of Service attaching the Electronic Mail Service delivery receipt confirming service via electronic service is good service and the Applicants cannot validly claim non-service via electronic service is good service and the Applicants cannot validly claim non-service.

30. The 2nd Respondent has not sworn an affidavit denying service of NTSC. The 1st Respondent has also not disputed service upon her office. It apparent that they are bent on technicalities to obscure or delay the execution of judgement and hence the fruits of Judgement by the decree holder. Where a party willfully fails to pay, execution through a warrant of arrest is lawful.



31. The court in *Grand Creek LLC & Another vs. Nathan Chesangmoson* [2015] eKLR held 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.”

32. Similarly, Hon. Odunga J. (as he then was) in *Republic versus Attorney General & another Ex parte James Alfred Koroso* [2013] eKLR made the following observations regarding Public Officers disobeying court orders:-

“In the present case the ex parte applicant has no other option of realizing the fruits of his judgment since he is barred from executing against the Government. Apart from mandamus, he has no option of ensuring that the judgment that he has been awarded is realized. Unless something is done he will forever be left baby-sitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of *the Constitution* which enjoins the State to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgments have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgment due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. To deny a citizen his/her lawful rights which have been decreed by a Court of competent jurisdiction is, in my view, unacceptable in a democratic society. Public officers must remember that under Article 129 of *the Constitution* executive authority derives from the people of Kenya and is to be exercised in accordance with *the Constitution* in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.....

Where therefore a public officer declines to perform the duty after the issuance of an order of mandamus, his/her action amounts to insubordination and contempt of Court hence an action may perfectly be commenced to have him cited for such. Such contempt proceedings are no longer execution proceedings but are meant to show the Court’s displeasure at the failure by a servant of the state to comply with the directive of the Court given at the instance of the Republic, the employer of the concerned public officer and to uphold the dignity and authority of the court.”

33. This Court finds that the applicants herein, owes a duty and responsibility to obey court orders. The decree holder after the judgement asked them to pay but they failed forcing her to file Judicial Review for Orders of Mandamus against the Respondent. The Orders of mandamus were issued on 14th July, 2021. Over a year down the line, the applicants have not complied with the mandamus orders which were not appealed from or set aside. Their contention in this application is that this court should give weight to technicality rather than substantial justice which I find untenable. The 2nd Respondent is named in its official capacity and has always appeared as such. The fact that he is not named individually in my view is a mere technicality. The person currently occupying that office is the one answerable as the accounting officer.



This application in my view lacks in merit and the same is dismissed with costs. Court orders are not issued in vain. They must be obeyed and courts of law will always frown upon any disobedience in whatever form. The Warrant of Arrest shall be in force and should be executed accordingly in the interest of justice. This order to apply Mutatis mutandis to Judicial Review 3 of 2020 and Judicial Review 4 of 2020. Costs to the Respondent/exparte applicant.

DATED, SIGNED AND DELIVERED AT KITUI THIS 28TH DAY OF NOVEMBER 2022.

HON. JUSTICE R. K. LIMO

JUDGE

