



**Ferro v Ferro (Miscellaneous Application E517 of 2019)
[2022] KEHC 16561 (KLR) (Commercial and Tax) (21 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16561 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX**

MISCELLANEOUS APPLICATION E517 OF 2019

WA OKWANY, J

DECEMBER 21, 2022

FORMERLY CIVIL SUIT NO E362 OF 2019

BETWEEN

FEDERICA MARTINA FERRO APPLICANT

AND

GABRIELLA ZOURAS FERRO RESPONDENT

RULING

1. This ruling is in respect to the application dated August 6, 2021 where the applicant seeks the following orders:-
 1. That the honourable court be pleased to strike out the notice to show cause dated July 15, 2021 lodged by the applicant.
 2. That the respondent be awarded the cost of the application.
2. The application is supported by the affidavit of Gabriella Zouras Ferro and is based on the grounds that:-
 1. The notice to show cause is procedurally defective to withstand any legal scrutiny. The said application is premised on order XXI, rule 18 of the *Civil Procedure (Revised) Rules, 1948* which rules were repealed. A valid and enforceable notice to show cause can only be competently issued under section 38 of the *Civil Procedure Act* cap 21 as read together with order 22 rules 7 and 26 of the *Civil Procedure Rules, 2010*.
 2. The notice to show cause is not valid nor is it capable of being enforced as the same is premised on a non-existent/repealed law. A valid and enforceable notice to show cause can only be



competently issued under section 38 of the [Civil Procedure Act](#) cap 21 as read together with order 22 rules 7 and 26 of the [Civil Procedure Rules, 2010](#).

3. That the nature of the application is quasi criminal in nature and the respondent cannot be arrested, detained and committed to civil jail over a nonexistent/repealed law.
 4. The notice to show cause dated July 15, 2021 is premised on order XXI, rule 18 of the [Civil Procedure \(Revised\) Rules 1948](#) which rules have since been repealed in 2010.
 5. There exists no decree capable of being executed. An application for notice to show cause under section 38 of the [Civil Procedure Act](#) as read together with order 22 of the [Civil Procedure Rules, 2010](#) can only be made by a decree holder.
 6. The decree cannot be executed under order 38 of the [Civil Procedure Act](#) as read together with order 22 rules 7,26,31 and 32 of the [Civil Procedure Rules](#) nor can it be executed by the procedure adopted since the provisions envisage the execution of money decrees and no more.
 7. The procedure adopted by the applicant purporting to issue a notice to show cause is invalid for the reasons that;
 - a. The award that seeks to be enforced was allegedly issued by the Milan Chamber of Commerce under arbitral reference number 8718 on the June 10, 2019;
 - b. Under section 825 of the [Italian Civil Procedure Code](#), the applicant was obligated to file a request to the court at the seat of the arbitration tribunal for fixing *exequatur*;
 - c. That as a matter of fact, the applicant did not file a request to the court at the seat of the arbitration tribunal for fixing *exequatur*;
 - d. No decree was issued by the courts in Italy and no execution by way of notice to show cause could therefore issue;
 - e. That even if it were to be urged *arguendo* that there was such a decree issued, it would still be unenforceable in Kenya under the [Foreign Judgments \(Reciprocal Enforcement\) Act](#) (cap 43 of the laws of Kenya) since Italy is neither a designated country under the Act nor does it have a reciprocal treaty with Kenya of reciprocal enforcement of judgments;
 8. The alleged NTSC dated July 15, 2021 was not procedurally extracted. There was no service of any decree or demand upon the respondent requiring her to pay any monies. The applicant did not at any point attempt to execute any decree.
 9. The notice to show cause dated 15th July, is not an attempt to execute but is an attempt to harass, harangue and most fundamentally violate the respondent's fundamental rights and freedoms.
3. The respondent opposed the application through the replying affidavit sworn by the decree holder attorney Mr Stefano de Bosio who states that the application is frivolous and an abuse of the court process as it seeks to delay the hearing of the notice to show cause dated July 15, 2021. He avers that the judgment debtor's advocates were present in court during at the delivery of the ruling and that a draft decree was sent to the judgment debtors advocates for approval prior to the extraction of the decree. He contends that there is no application to set aside the decree and that the notice to show cause was issued in accordance with the prescribed form and that any defect does not go to its substance. He



further avers that the judgment debtor cannot contest the execution process as he has not disclosed any assets capable of satisfying the decree.

4. The main issue for determination is whether the applicant has made out a case for striking out the notice to show cause dated July 15, 2021.
5. The applicants case was that the notice to show cause was not procedurally extracted and that it is premised on the wrong section of the law. According to the applicant the notice to show cause can only be competently issued under section 38 of the [Civil Procedure Act](#) cap 21 as read with order 22 rules 7 and 26 of the [Civil Procedure Rules](#).
6. Section 38 of the [Civil Procedure Act](#) provides that:-

"Powers of court to enforce execution 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."

7. The respondent, on his part, submitted that the applicant was aware of the decree as her advocates were in court at the delivery of the judgment and that a draft decree was also sent to the advocates for their



approval. It was submitted that the notice to show cause is in the prescribed form and that any defect does not go into its substance.

8. In *Solomon Muriithi Gitandu & another vs Jared Maingi Mburu* [2017] eKLR the court held that:-

"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."

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."

9. The issue in contest is that the notice to show cause is based on the wrong provision of the law. My view is that the substance of the document does not change. I note that the applicant was duly served and was aware that she was required to go to court to answer as to why she cannot be committed to civil jail. I do not find that the error in question goes to the root of the document so as to warrant its striking out.

10. In the upshot, I find no merit in the application and hereby dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF DECEMBER 2022.

W. A. OKWANY

JUDGE

In the presence of: -

Court Assistant- Sylvia

