



Wanderi v Mamboleo t/a Nyamweya Mamboleo Advocates & 7 others (Environment & Land Case 194 of 2018) [2023] KEELC 19168 (KLR) (28 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19168 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 194 OF 2018**

**A OMBWAYO, J
JULY 28, 2023**

BETWEEN

MARY NJERI WANDERI APPLICANT

AND

**JAMES NYAMWEYA MAMBOLEO T/A NYAMWEYA MAMBOLEO
ADVOCATES & 7 OTHERS RESPONDENT**

RULING

Introduction

1. Mary Njeri Wanderi has come to this court with the application dated June 13, 2023 asking for orders that this court issues a declaration that to the extent that the 4th and 5th respondents have not exhausted the less restrictive means of execution of the decree, the notice to show cause taken out by the respondents against the applicants contravenes the provisions of article 24(1) € of the [Constitution of Kenya 2010](#) . That the notice to show cause be set aside and that the respondents be directed to use the less restrictive means of execution of the decree as set out at section 38 of the [civil procedure Act](#).
2. Which application is premised on the following grounds;
 - a. That this court entered judgment against the applicant herein dismissing her case together with the counterclaim. The Court further directed the applicant to pay costs of the suit and the cost of the counterclaim. The 4th and 5th Defendants (now Respondents) herein taxed their costs in the sum of Ksh 8,088,867/= and a certificate of cost was issued.
 - b. That the 4th and 5th Defendants (now Respondents) choose to take out a notice to show cause as their preferred mode of execution. A notice to show cause potentially involves arrest and detention in the event that the applicant is unable to pay the decretal sum. Arrest and detention as a mode of execution of a decree involves limitation of personal liberty as guaranteed under



the Constitution. Such limitation is subject to the provisions of Article 24 (1) (e) to the extent that less restrictive measures of enforcement of the decree ought to be employed.

- c. That in the interpretation of the provisions of Section 38 of the Civil Procedure Act and Order 22 of the Civil Procedure Rules and Section 38 of the Civil Procedure Act, the Court is enjoined to take into account the national values and principles of governance set out at article 10. In this regard the rule of law and right to dignity.
- d. That the notice to show cause taken out by the 4th and 5th Respondents does not pass the muster of Article 24 of the to the extent that the respondents have not applied less restrictive means of execution of the decree. The same ought to be set aside and the respondents directed to apply less restrictive means of execution of the decree.

Factual Back Ground

3. The Applicant filed a Notice of Motion Application dated June 13, 2023 seeking the following orders;
 - a. That for reasons set out on the certificate of urgency, this application be certified as urgent and the same be heard on a priority basis.
 - b. That in the first instance the notice to show cause issued against the applicant be stayed pending the determination of this application.
 - c. That this court issues a declaration that, to the extent that the 4th and 5th Respondents have not exhausted less restrictive means of execution of the decree, the notice to show cause taken out by the 4th and 5th Respondents against the applicant contravenes the provisions of Articles 24 (1) (e) of the Constitution.
 - d. That the notice to show cause taken out by the 4th and 5th Respondents against the Applicant be set aside and they be directed to use less restrictive means of execution of the decree as set out at section 38 of the Civil Procedure Act.
 - e. That Costs of the Application be borne by the Respondents.
4. The Respondent through the 4th Defendant filed a replying Affidavit dated July 14, 2023 sworn by Ndirangu Njenga where he states that the Application is downright malicious, a charade and an abuse of the court process as it attempts to frustrate the Respondents (the 4th and 5th Defendants) from enjoying the fruits of the judgment
5. The Respondent also states that the Application is made deliberately to steal a match and delay the execution of the decree as indeed they have exhausted all reasonable means to have the Plaintiff comply with the decretal sum as awarded by the Honourable court.
6. The Respondent states that their advocate on record did write to the Plaintiff's advocate to make payment of the decretal sum on September 29, 2021 and the said letter was duly received and they did not get a response from the Plaintiff nor her advocate.
7. The deponent also states that despite granting the Plaintiff/Applicant time to honour the court order, the Respondents had no option but to instruct their advocate to institute execution proceedings against the Plaintiff to recover the decretal sum and costs.
8. The Respondent states that indeed warrant of sale of property in execution of decree money and warrant of attachment of movable property in execution of decree for money and warrant of



attachment of movable property in execution of decree for money were issued by this Honourable court on October 22, 2021 as against the Applicant.

9. The Respondent also states that their advocate proceeded with execution to the Plaintiff/Applicant who escaped their grasp without getting anything to attach. A letter was written to the Defendants indicating that there is need to look for alternative means of execution.
10. The Respondent states that it is then that a Notice to Show Cause why execution should not issue against the Plaintiff was pursued as clearly she on being aware of the decree and the sum demanded therein choose to ignore.
11. They Respondent submits that the decretal sum emanates from a transaction in relation to property which as the time of filing the suit was worth Ksh 45,000,000/= which the Applicant intended to purchase
12. It is the Respondent's submission that the Applicant had the capacity to pay the decretal sum and costs but has chosen to ignore thus the notice to show cause being necessary in the circumstances.
13. It also the Respondent's submission that they have tried all necessary means to have the Plaintiff pay the decretal sum, which advances have been ignored with impunity by the Plaintiff.
14. The Respondent submits that the Applicant has shown capacity and means to pay the amount they are currently demanding from her and prayed that the said application be dismissed with cost and that the Respondents proceed with execution to finally realize the fruit of the judgment.

Submissions

15. The parties filed written submissions in respect of the Application dated June 13, 2023.
16. The Applicant relies on Section 38 of the [Civil Procedure Act](#) and Order 22 rule 18 of the [Civil Procedure Rules](#). It is the Applicants submission that the mode of execution carries with it the potential of incarceration of the judgment debtor if she fails to pay the judgment debt or show cause why she should not be committed to civil jail.
17. It is also the Applicants submission that this is the predicament that the Applicant faces in the instant case. She further submits that the potential for committal to civil jail or the actual committal to civil jail is a limitation of personal freedom and liberty which may be justified by the fact that the judgment debtor has failed to settle the decretal sum.
18. According to the Applicant, the provision of Section 38 of the [Civil Procedure Act](#), Order 22 rule 18 of the [Civil Procedure Rules](#) and the Choice by the defendant/respondent to elect to execute the decree by way of a notice to show cause ought to be interpreted against the backdrop of Article 24 (1) (e) of the [Constitution](#) .
19. The Applicant relies on Article 24 of the [Constitution of Kenya](#) and specifically Article 24 (1) (e), Section 38 of the [Civil Procedure Act](#) and Order 22 rule 8 of the [Civil Procedure Rules](#) to submit that the defendant's respondent has not exhausted the less restrictive means of execution of the decree.
20. The Plaintiff relies on the case of *Vijay Morjaria v Harris Horn Junior & Another* [2011] eKLR and submits that in as much as Section 38 of the [Civil Procedure Act](#) and Order 22 recognize arrest and detention of a judgment debtor as modes of execution, both provision of the law are subject to Article 24 of the [Constitution](#) .
21. It is also the Applicants submission that before a decree holder can seek to execute the decree by arrest and detention, he has the legal burden under Article 24 (3) of the [Constitution](#) to show that he has used



- less restrictive means of execution of the decree. It is the Applicants submission that the Respondent has failed to discharge the burden.
22. The Applicant concludes her submission by stating that the Notice to show cause runs afoul to Article 24 (1) (e) of the Constitution and it ought to be set aside.
 23. The 4th and 5th Defendants being Respondents in the Applicants Application dated June 13, 2023 filed submissions dated July 21, 2023.
 24. It is the Respondents submission that the Applicant intends to have the Notice to show cause dismissed without giving it an opportunity to be heard and determined.
 25. It is the Respondent's submission that the Applicant has not been committed to civil jail to depone that the procedures and merit of the notice to show cause why she should not be committed to civil jail as provided for under Section 38 and 40 of the Civil Procedure Act and the guideline of Article 24 of the Constitution have been infringed.
 26. It is the Respondents submission that a Notice to show cause is a proceeding on its own and the provisions of the law as indicated above provide for guideline to the judicial officer before making the decree on commitment to civil jail. The Respondent relied on the case of Grand Creek LLC & Another vs Nathan Chesangmoson [2015] Eklr and the case of Charles Lutta Kasamani v Concord Insurance Co Ltd & Deputy Registrar Milimani High Court Commercial and Admiralty Division (2018)
 27. It is the Respondent's submission that that as per the suit, the Plaintiff (now Applicant) herein claimed to enforce a contract for property worth Ksh 45,000.000/=. According to the Respondent, this shows her capacity to pay.
 28. It is also the Respondent's submission that the Applicant was requested to pay vide a letter which was ignored. This according to the Respondents is a clear indication of ignorance of the obligation to pay.
 29. It is the Respondents submission that the Applicant was also served before issuance of the Notice to show cause with; warrant of sale and attachment which on receipt the Applicant lied to auctioneers that she paid the decretal sum and cost and disappeared making execution difficult. It is the Respondents submission that this goes to show that she can pay but has every intention and inclination to avoid.
 30. The Respondent submit that nothing is stopping the Applicant from proposing a mode or means of payment and the notice to show cause certainly provides her that avenue before committal to civil jail.
 31. The Respondents submit that during the Notice to show cause proceedings they shall demonstrate having exploited other means of execution or her capacity to pay. The Respondents submit that the Application is premature as no one has been arrested to claim that the Applicants rights to liberty have been infringed.
 32. The Respondents pray that the Application be dismissed with cost to allow determination of the Notice to Show cause as clearly the Plaintiff is using all means to avoid payment.

Analysis and Determination

33. After considering the Applicants Notice of Motion Application, the responses thereto and the submissions the only issue that arises is whether the orders sought in the Notice of Motion dated June 13, 2023 are merited and if the same should be granted by this Court.
34. The Applicants Application is premised of Section 38 of the Civil Procedure Act, Article 10 of the Constitution of Kenya 2010 and Article 24 (1) of the Constitution of Kenya 2010.



35. 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."

36. The court in the case of *Grand Creek LLC & Another vs Nathan Chesangmoson* [2015] eKLR held that -

"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. This rule follows after section 38 and 40 of the Civil Procedure Act. The warrant of arrest is to bring the judgment-debtor to court and it is not an automatic committal to prison because the court will still be required to satisfy itself of all the requirements of Order 22 rule 33 and rule 34 of the Civil Procedure Rules. The proceedings under Order 22 rule 34 act as the safeguard against denial of liberty in execution of a decree without due process. And courts have comprehensively pronounced themselves on the constitutionality of the procedure of arrest and committal to jail in execution of a decree in not one case. See the cases cited by the Respondents, especially National Bank of Kenya case (supra), Jayne Wangui Gachoka (supra), Braeburn Limited (supra), Beatrice Wanjiku and Ex parte Nassir Mwandithi (supra). This point is settled that arrest and committal to prison in execution of a decree under the Civil Procedure Act and Rules is not unconstitutional as long as all the safeguards provided in law are afforded to the judgment-debtor. I so hold in this matter."

37. Before this Court is an Application that seeks to set aside a Notice to Show Cause dated May 31, 2023. This court finds and holds that the Application is premature as the Applicant has been given an opportunity to demonstrate why the Notice to show cause dated May 31, 2018 should not be effected.
38. Further, arrest and committal to prison in execution of a decree under the *Civil Procedure Act* and Rules is not unconstitutional as long as all the safeguards provided in law are afforded to the Applicant.
39. The upshot of the foregoing is that the notice of motion application dated June 13, 2023 is unmerited and the same is dismissed with costs.
40. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU

THIS 28TH DAY OF JULY, 2023

A O OMBWAYO

JUDGE

