



**Abdi & another v Ngacha (Substituted for Ngacha Ndeiya - Deceased) (Environment and Land Miscellaneous Application 15 of 2021) [2022] KEELC 3211 (KLR) (19 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3211 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 15 OF 2021**

**JO OLOLA, J  
MAY 19, 2022**

**BETWEEN**

**MARIAM ABDI ALIAS MARIAM YUSUF ..... 1<sup>ST</sup> APPLICANT**

**FATUMA YUSUF KIHARA ALIAS FATUMA YUSUF ..... 2<sup>ND</sup> APPLICANT**

**AND**

**MARGARET WANJIRU NGACHA ..... RESPONDENT**

**SUBSTITUTED FOR NGACHA NDEIYA - DECEASED**

**RULING**

1. By the Notice of Motion dated November 2, 2021, Mariam Abdi alias Mariam Yusuf and Fatuma Yusuf Kihara alias Fatuma Yusuf (the Judgment debtors/applicants) pray for an order setting aside the warrants of arrest issued against them on October 28, 2021.
2. The application which is supported by an affidavit sworn jointly by the two applicants is premised on the grounds that:
  - (a) Due process as provided by the *Civil Procedure Act* was not followed in obtaining the warrants;
  - (b) The Applicants were not given an opportunity to show cause why they should not be committed to civil jail;
  - (c) The Respondent did not prove to the Honourable Court that the Applicants have refused or neglected to pay the decreed costs;
  - (d) There is no provision in the *Civil Procedure Act* that provides for the re-issuing of warrants of personal arrest and therefore the warrants were issued irregularly and are unlawful;



- (e) The existence of the warrants poses a threat to the liberty of the applicants as anytime they may be arrested by the Police in execution of the same;
  - (f) The applicants and the respondent varied the consent order adopted in court in May, 2019 in writing and by conduct. The respondent agreed and has allowed the applicants to pay the costs according to the amount they could afford and at a period convenient to the applicants; and
  - (g) The applicants have not refused or neglected to pay the decreed amount.
3. The decree holder is opposed to the application. In her replying affidavit sworn and filed herein on November 17, 2021, Margaret Wanjiru Ngacha (the respondent) avers that the application herein amounts to an abuse of the court process as other than seeking a stay of execution, the applicants have not sought any other relief and there is no Plaint or other pleading placed before the court for adjudication.
  4. The respondent avers that from such conduct, the only inference to be drawn is that the Applicants were avoiding the record in Nyeri ELC No. 641 of 2014 which record would reveal that the warrants of arrest were lawfully and regularly issued.
  5. The Respondent further avers that the Applicants have severally committed to settle the costs awarded in the said Nyeri ELC No. 641 of 2014 but have failed to honour their promises thereby necessitating the issuance of the warrants of arrest.
  6. I have carefully perused both the Judgment-debtors' application as well as the response thereto by the Judgment-creditor. Similarly, I have perused and considered the rival submissions and authorities placed before me by the Learned Advocates for the parties.
  7. The applicants have urged this court to set aside the warrants or arrest issued against them on October 28, 2021. It is their case that the said warrants were irregularly issued against them in Nyeri ELC 641 of 2014 and that the same are therefore unlawful.
  8. The respondent on the other hand asserts that the arrest warrants were regularly and lawfully issued as the applicants have refused and/or neglected to make good the costs awarded against themselves in the said case despite repeated requests and promises from themselves to pay the outstanding sum.
  9. The right to commit a Judgment-debtor to civil jail is provided for under section 38 of the [Civil Procedure Act](#) which grants the court powers to enforce execution of its orders. The said section provides thus:
    - “Subject to such conditions and limitations as may be prescribed, the court may, on application by 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 the property.
  - (b) That the Judgment-debtor has or had 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.
10. In the matter before me, a perusal of the proceedings in the said ELC 641 OF 2014 reveals that the respondent herein moved the court vide a letter dated October 18, 2021 authored by the respondents Advocates on record M/S Lucy Mwai & Company Advocates stating in the relevant part as follows:
- “We refer to the above matter –
- Kindly re-issue warrant of personal arrest against Mariam Abdi alias Mariam Yusuf and Fatuma Yusuf Kihara alias Fatuma Yusuf, the Judgment-debtors herein as per the court order of 25<sup>th</sup> February 2019, as follows:
- Balance owing 193,003.00.
- We undertake to pay your charges, if any.”
11. It is apparent from the record that on the basis of the said Letter, the Deputy Registrar of this court issued on the same day a warrant of arrest in execution to Messrs Hippo General Merchants commanding them to arrest the Judgment –debtors and bring them before the court with all convenient speed unless they pay to the said Hippo General Merchants the said sum of Kshs.193,003/-.
12. As can be seen from a reading of the above-cited section 38 of the *Civil Procedure Act*, the court’s power to order execution of a decree by way of detention in prison is limited. That section expressly 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.
13. Those limitations are further re-stated under Order 22 Rule 31(1) of the *Civil Procedure Rules*. A notice to show cause may be issued requiring the Judgment-debtor to show cause and where he fails to appear only then is a warrant of arrest is issued.



14. From the material placed before me, it was apparent that the said procedure had not been adhered to and that the warrants of arrest were issued prematurely and were therefore irregular.
15. While it may as well be true that the Judgment-debtors ought to have filed the present application in Nyeri ELC 641 OF 2014 instead of moving the court via a Miscellaneous application, I did not think that that was sufficient reason for the Court to close its eyes to a blatant irregularity which may as well lead to the Applicants being deprived of their liberty.
16. It follows that the court is persuaded that there is merit in the Motion, dated November 2, 2021. I allow the same and set aside the warrants of arrest issued herein on October 28, 2021.
17. In the circumstances herein each party shall bear their own costs to the application.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 19<sup>TH</sup> DAY OF MAY, 2022.**

**In the presence of:**

No appearance for the Applicants

Ms Lucy Mwai for the Respondent

Court assistant - Kendi

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**J. O. Olola**

**JUDGE**

