



**Nduva & 3 others v Ndar & 3 others (Civil Case 24 of 2017)
[2025] KEHC 3857 (KLR) (Civ) (18 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 3857 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 24 OF 2017

SN MUTUKU, J

FEBRUARY 18, 2025

**IN THE MATTER OF ST. VINCENT DE PAUL SOCIETY
KENYA REGISTERED TRUSTEES (“THE TRUST”)**

AND

**IN THE MATTER OF THE TRUSTEES (PERPETUAL
SUCCESSION) ACT CAP 164 LAWS OF KENYA**

AND

THE TRUSTEES RULES, 1948

AND

IN THE MATTER OF THE CIVIL PROCEDURE ACT & CIVIL PROCEDURE RULES, 2010

AND

**IN THE MATTER OF CHANGE OF TRUSTEESHIP WITHIN THE SOCIETY OF ST.
VINCENT DE PAUL SOCIETY KENYA REGISTERED TRUSTEES (“THE TRUST”)**

BETWEEN

MICHAEL MUSEMBI NDUVA 1ST PLAINTIFF

MARY GORETTI GITARI MUNYI 2ND PLAINTIFF

URBANUS MUTHAI KINUTHIA 3RD PLAINTIFF

ST CATHERINE MULLIGAN 4TH PLAINTIFF

AND

JOH NDAR 1ST DEFENDANT

SUSAN NJERU 2ND DEFENDANT



RULING

The Application

1. The Notice of Motion before this court is dated 27th December, 2024 (the Motion). It was brought by John Ndar (hereafter the 1st Defendant). It seeks a substantive order for lifting of the warrants of arrest issued against him on 16th December, 2024 and a further order for leave to register a Power of Attorney, authorizing one James Muiruri Ng'ang'a to represent the 1st Defendant and act on his behalf in all matters pertaining to the present suit, during the course of his incapacitation.
2. The Motion is brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* (CPA) and Articles 48, 50 and 159 of *the Constitution*. It is supported by the grounds set out on the face of the application and in the Supporting Affidavit sworn by the 1st Defendant. He stated that the information conveyed to him by his advocates on record is that, when the matter came up before the Court (Meoli, J) on 16th December, 2024 pursuant to a Notice to Show Cause issued against him, the Learned Judge slated the same for mitigation. That he was unable to attend court for purposes of submitting his mitigation address, thereby resulting in issuance of warrants of arrest against him.
3. The 1st Defendant explained that on the aforementioned date, 16th December, 2024, he was unable to attend court due severe elevation of his blood pressure, which led to his admission at St. Mary's Hospital in Langata. He further explains that since then, he has continued to battle serious health challenges including cancer and high blood pressure, thereby requiring frequent hospital visits and medical attention. That, consequently, he has been rendered incapacitated and indisposed in respect of the matter. That in the circumstances, it is imperative that the warrants of arrest issued against him on 16th December, 2024 for want of attendance pursuant to the Notice to Show Cause previously issued on 22nd November, 2024 be lifted.
4. The 1st Defendant equally conveyed his apologies to the Court for his non-compliance with previous orders made against him and states that he is ready and willing to comply with any and all future orders deriving from the court, adding that unless the orders sought in the instant Motion are granted, he stands to suffer grave prejudice as his impending committal to civil jail will subject him to further deterioration of his health, thereby constituting a disproportionate punishment in the circumstances.
5. It is the averment by the 1st Defendant that in view of his incapacitation and inability to attend court or manage his legal affairs appropriately, it is imperative that he be granted leave to formally register a Power of Attorney in favour of James Muiruri Ng'ang'a who has consented to representing him and acting on his behalf in all matters relating to the suit, during the course of his incapacitation.
6. It is similarly the averment by the 1st Defendant that the instant Motion has been made in good faith and hence it would be in the interest of justice for the orders sought therein to be granted.

Oral Submissions

7. The Motion was canvassed by way of brief oral arguments. At the hearing thereof on 22nd January, 2025 Mr. Waigwa, counsel for Michael Musembi Nduva, Mary Goretti Gitari Munyi, Urbanus Muthai Kinuthia and St. Catherine Mulligan (hereafter the Plaintiffs) indicated that he would not be opposing



the Motion and therefore agreed to have the same compromised, particularly in terms of the order for lifting of the warrants of arrest. Nevertheless, counsel urged the court to give directions regarding the order seeking leave to register the Power of Attorney, in view of the fact that the 1st Defendant was found to be in contempt of previous court orders.

8. In response, Ms. Onyiego, counsel for the 1st Defendant restated the averments earlier set out in the supporting affidavit to the Motion, save to add that the 1st Defendant has availed medical documents in support of the Application. Counsel submitted, further, that the 1st Defendant is willing to call a medical doctor to testify regarding his medical status, should the circumstances require so. That the 1st Defendant had previously filed an application dated 28th March, 2024 seeking inter alia, a stay of execution of the judgment delivered in the present suit, but which application was dismissed for want of attendance. That, consequently, the person in favour of whom the Power of Attorney is sought, is equally a Trustee to the Trust herein and therefore has capacity to represent the 1st Defendant; notwithstanding the fact that he was not a party to the suit.
9. In rejoinder, Mr. Waigwa argued that judgment has already been rendered in the matter, in effect finding the Plaintiffs herein as being the proper Trustees to the Trust herein. Furthermore, the 1st Defendant having been already found to be in contempt of court orders, cannot purport to substitute himself with a third party. That in the circumstances, the law cannot be bent to allow a third party to take the place of the 1st Defendant.

Analysis and Determination

10. I have considered the grounds set out in the Motion, the averments in the affidavit supporting the Motion and the oral arguments presented by the respective counsel.
11. To put this matter into perspective, some background is called for. The Plaintiffs herein instituted the present suit by way of a Originating Summons dated 24th January, 2017 and sought various reliefs against the 1st Defendant as well as Susan Njeru, Isaya Nyabera and Registrar of Documents (hereafter the 2nd, 3rd and 4th Defendants) in relation to St. Vincent De Paul Society Kenya Registered Trustees (the Trust). Subsequently, the Plaintiffs withdrew the case against the 3rd Defendant, purportedly upon his death. The 4th Defendant on its part did not participate in the trial. The suit was, however, challenged by the 1st Defendant.
12. The matter proceeded to trial with the testimony of the 1st Plaintiff, while the remaining Defendants did not call any rebuttal evidence. Upon close of the trial and submissions, this Court (Meoli, J) delivered judgment on 6th April, 2023 in favour of the Plaintiffs and against the 1st, 2nd and 4th Defendants, resulting in orders prohibiting the 1st, 2nd and 4th Defendants from acting as Trustees to the Trust and directing them to vacate office with immediate effect and the 1st and 2nd Defendants to hand over all official documents as well as the Original Certificate of Incorporation and the Official Seal of the Trust to the Plaintiffs. The 4th Defendant on its part was ordered to certify and register the names of the Plaintiffs as the new and rightful Trustees to the Trust. It is apparent from the record that the 2nd Plaintiff is now deceased.
13. Subsequently, the Plaintiffs filed an application dated 26th October, 2023 seeking an order that the 1st Defendant be held in contempt of the decree arising out of the aforementioned judgment, and a subsequent order directing him to purge his contempt within two (2) days by releasing the requisite documents to them in default of which a Notice to Show Cause be issued against him, requiring him to show cause as to why he should not be punished for the contempt accordingly. The 1st Defendant did not offer any response to the said application. Upon hearing the matter, the Court (Meoli, J) allowed



the application through a ruling delivered on 27th June, 2024 directing that a Notice to Show Cause be issued accordingly.

14. The record shows that the 1st Defendant thereafter filed an application dated 28th March, 2024 seeking inter alia, an order for leave to file an appeal out of time to the Court of Appeal, against the judgment delivered in the suit; and a further order for a stay of execution and/or varying and setting aside of the aforesaid judgment, pending hearing and determination of the intended appeal. It is apparent that the said application was later dismissed for non-attendance on 7th October, 2024.
15. Subsequently, the Plaintiffs herein further filed an application dated 23rd October, 2024 seeking various orders against the 1st Defendant, including an order citing him to be in further contempt of the decree arising out of the judgment delivered in the matter. Upon consideration thereof, the Court (Meoli, J) through the orders made on 20th November, 2024 partially allowed the application but held the orders pertaining to contempt of court in abeyance, pending hearing of the Notice to Show Cause. The Learned Judge further directed that the Notice to Show Cause be properly served upon the 1st Defendant in preparation for hearing on 16th December, 2024.
16. When the matter came up in court as scheduled on 16th of December, 2024 counsel for the 1st Defendant sought time to file her submissions in respect of the Notice to Show Cause, adding that her client was admitted at Langata Hospital at the time. Her application was opposed by counsel for the Plaintiffs. Upon considering the rival positions, the learned that the 1st Defendant had not attended court despite being served with several notices, further reasoning that no documentation was tendered to support the claims that the said Defendant was indisposed. In the circumstances, the Learned Judge proceeded to direct that warrants of arrest be issued against him and further directed that he files an affidavits in mitigation within seven (7) days thereof, should he wish; with the Plaintiffs being given a further seven (7) days to respond. It is apparent that the above orders triggered the instant Motion.
17. Turning to the merits of the instant Motion, it is clear that the orders sought therein are two-fold: the first being an order lifting the warrants of arrest in place and issued against the 1st Defendant on 16th December, 2024. As earlier mentioned, counsel for the Plaintiffs agreed to compromise the said order. In addition, upon perusing the annexures to the Supporting Affidavit sworn by the 1st Defendant, this Court has observed that the 1st Defendant tendered medical documents to support the averment that he was receiving medical attention and treatment on 16th December, 2024 and at all material times thereafter, which would explain his indisposition.
18. Section 3A of the [Civil Procedure Act](#) reserves the inherent power of this Court “to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court.”
19. The Court of Appeal in *Rose Njoki King’au & Another v Shaba Trustees Limited & Another* [2018] eKLR stated thus:

“ Also cited was Section 3A of the [Civil Procedure Act](#) which enshrines the inherent power of the Court to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the Court. In *Equity Bank Ltd versus West Link Mbo Limited* [2013], eKLR, Musinga, JA stated, inter alia, that, by “inherent power” it means that

“Courts of law exist to administer justice and in so doing, they must of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without its being derived from [the Constitution](#) or statute. Such power enables the judiciary to deliver on their



constitutional mandate.....inherent power is therefore the natural or essential power conferred upon the court irrespective of any conferment of discretion.”

20. The Supreme Court went a step further in the case of Board of Governors, Moi High School Kabarak and another v Malcolm Bell [2013] eKLR, to add the following:

“Inherent powers are endowments to the court as will enable it to remain standing as a constitutional authority and to ensure its internal mechanisms are functional. It includes such powers as enable the Court to regulate its intended conduct, to safeguard itself against contemplation or descriptive intrusion from elsewhere and to ensure that its mode of disclosure or duty is consumable, fair and just.” (sic)

21. In view of all the foregoing circumstances, the court in exercising its inherent powers and upon further consideration of the consensus by the Plaintiffs’ advocate, will allow the prayer for lifting of the warrants of arrest issued against the 1st Defendant on 16th December, 2024.

22. This brings me to the second prayer in the Motion which seeks leave of the court to enable the 1st Defendant to register a Power of Attorney, authorizing James Muiruri Ng’ang’a to represent him and act on his behalf in all matters pertaining to the present suit, during the course of his incapacitation.

23. The parties’ rival positions on the above prayer have already been set out hereinabove. Upon consideration thereof, it is not in dispute that judgment has already been delivered in the suit. It is equally not in dispute that what is essentially pending in this matter is the execution process of the resulting decree, hence the contempt of court proceedings which were lodged against the 1st Defendant for non-compliance with the said decree.

24. Suffice it to say that the legal position is that contempt of court proceedings are personal in nature and therefore, a contemnor cannot be heard to reassign or otherwise substitute his or her legal obligations or responsibilities in that respect, with those of a third party, as the 1st Defendant is attempting to do here. In the court’s mind, a Power of Attorney cannot be effected in contempt proceedings, since the person in favour of whom such Power is assigned cannot be obligated or called upon to perform the responsibilities of the contemnor.

25. In any event, it is apparent from the record that the 1st Defendant has at all material times been represented by a competent firm of advocates; namely the firm of Moraa Onyiego & Associates Advocates LLP, which advocates may continue to act for him in such capacity. There is nothing on the record to indicate that the 1st Defendant is so incapacitated that he cannot instruct his advocates accordingly. Furthermore, to reiterate the court’s earlier reasoning above, the suit has already been determined and what is primarily pending are the contempt proceedings.

26. Upon considering all the foregoing circumstances therefore, the court declines to grant the second order touching on leave to enable registration of the Power of Attorney.

Final Orders

27. Consequently, the Notice of Motion dated 27th December, 2024 partially succeeds in that prayers 2 and 3 of the Notice of Motion dated 27th December 2024 are hereby allowed. Prayer 4 is declined. Each party shall bear own costs of this Motion.

28. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 18TH FEBRUARY 2025.



S. N. MUTUKU
JUDGE

