



**Wangeci v Wangui & another (Criminal Revision E1764 of 2024)
[2025] KEHC 6926 (KLR) (Crim) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6926 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL REVISION E1764 OF 2024
AM MUTETI, J
MAY 15, 2025**

BETWEEN

JANE GICHUKI WANGECI APPELLANT

AND

BENSON GETHI WANGUI 1ST RESPONDENT

REPUBLIC 2ND RESPONDENT

RULING

1. The applicant by way of a Notice of Motion dated 6th December 2024 expressed to be brought under the provisions of Article 49 (1)(h) of *the Constitution*, Section 123(3) and Section 362 of the *Criminal Procedure Code* moved this court for the following Orders:
 - a). That this matter be certified as urgent and the same be heard ex-parte in the 1st instance.
 - b). That this Honorable Court be pleased to stay the Orders issued by Hon. Wandia Nyamu on the 5th December 2024 pending Hearing and determination of this Application.
 - c). That this Honorable Court be pleased to review and set aside the Orders issued by Hon. Wandia Nyamu on the 5th December 2024 and further order that the cash bail be refunded to the Applicant and her advocates on record.
 - d). That cost of this application be in the cause.
2. The application is supported by the affidavit of Jane Gichuki Wangeci besides the following grounds:
 - a) That the Applicant was acquitted in Criminal Case Number 1905 of 2015.



- b) That the trial court made an order that the cash bail be refunded to the Applicant and her advocates on record.
 - c) That unknown to the applicant the 1st Respondent filed an application to have the cash bail paid to himself.
 - d) That the subordinate court on the 5th December 2024 made an ex-parte Order that the cash bail be paid to the 1st Respondent.
3. The applicant in her affidavit deposed that she was acquitted in Criminal Case Number 1905 of 2015.
 4. That thereafter the court made an order for the refund of the cash bail to herself and her advocates on record.
 5. That unknown to her the 1st Respondent made an application to have the cash bail refunded to him.
 6. According to her the said Application was not served upon her and as result the matter proceeded ex-parte greatly prejudicing her.
 7. That in the event that order of the lower court is not vacated she stands to suffer immense economical hardship if the money deposited to the court as cash bail is to be paid to the 1st Respondent who is a stranger/unknown to her.
 9. That she was reliably informed that the 1st Respondent was frantically making efforts to have the money released to him and that unless this Honourable court intervenes the money will be beyond the reach of the court and herself.
 10. The applicant further urged the court to consider having the lower court order vacated in the interests of justice.
 11. In response to the application the 1st respondent by way of an affidavit sworn on 16th January 2025 deposed that together with the Applicant and 24 others were accused persons in Criminal Case Number 1905 of 2015 - Republic vs Engineer Peter Mangiti and 24 Others.
 12. THAT upon arraignment in court they were granted bail and he secured cash bail for himself.
 13. According to the 1st respondent the applicant was in remand and she couldn't afford to pay for herself the cash bail granted as she was a civil servant earning a modest salary therefore the cash bail of KES. 3,000,000/- was out of reach for her and she was stranded in remand.
 14. The 1st respondent went further to state that the Applicant reached out to him and requested him to pay for her the cash bail and committed to have the same refunded to him upon determination of the matter.
 15. The 1st respondent went on to state that on humanitarian grounds and on the basis of the aforesaid agreement with the Applicant, he sent his then driver on the 1st of December 2015, Ireri Mugo Kabua, to deposit the cash bail for the Applicant to secure her release and he did so and processed the release order to ensure the Applicant herein was released from remand and also gave her the cash bail receipt number 3449011.
 16. in support of that averment the 1st respondent attached a copy of the cash bail receipt and also the bank cash deposit slip bearing his driver's signature.
 17. the 1st respondent went further and deposed that the former driver had sworn an affidavit to this effect which he Annexed marked BGW 3.



18. The criminal case was determined resulting into his acquittal together with the applicant and others.
19. The 1st respondent went further to state that based on their agreement he filled a cash bail refund form and also a funds transfer form at the registry but upon following up payment he discovered that the applicant had dishonestly made attempts to have the said cash bail refunded to herself.
20. THAT upon the realisation of the dishonesty by the applicant, he proceeded to file an application dated 7th November 2024 in Criminal Case Number 1905 of 2015 where the Applicant was summoned by the lower court vide orders made on the 14th November 2024 and despite being duly served vide her known mobile number 0716603831 she refused to appear on the 21st of November 2024 as per the aforesaid orders.
21. The 1st respondent attached a copy of the order marked BGW5.
22. That on the 21st day of November 2024 the matter was further set down for hearing on the 5th of December 2024 and the Applicant herein was also served and she failed to appear and having satisfied the court of proper service of the Applicant herein, the court heard the 1st Respondent's application dated 7th November 2024 and granted the same in the terms contained in the court's orders of 5th December 2024.
23. The 1st respondent contended that it is untrue that service of the lower court pleadings was not effected upon the Applicant.
24. The 1st respondent urged the court to find that it is dishonest of the applicant to attempt to circumvent their agreement and to allow her to receive the refund would amount to unjust enrichment.
25. He further deposed that it is utterly dishonest of the applicant to claim court proceedings were conducted without her participation whereas she deliberately ignored to appear despite court summons and proof of service and therefore she should not be allowed to benefit from her dishonesty. The 1st respondent has attached a copy of the order by the Hon. Wendy Micheni C.M (as she then was) Marked BGW5 issued on 14th December 2024 requiring the applicant to appear before Hon. Wandia Nyamu in support of the argument that the applicant deliberately avoided to participate in the proceedings leading to the order complained of.
26. The 1st respondent urged the court to consider that the Applicant herein had not in any shape, manner or form adduced any evidence in support of her application that the funds utilized to pay for the subject cash bail belong to her nor demonstrated the source of funds given that she was in custody/remand.
27. The 1st respondent pleaded with this court not to allow the application and find that the orders issued by this court were obtained through material non disclosure of facts by the Applicant.
28. The 1st respondent urged this court to find that the Applicant has come to this honourable court with unclean hands by presenting a false claim to this honourable court having refused to attend court on two occasions to present her claim.
29. The 1st respondent went on and deposed that it is in the interest of justice that the orders he sought for release of the funds to him be affirmed.
30. The 1st respondent urged that equity does not suffer a wrong without a remedy.
31. The court has considered the rival positions taken by the respective parties in this matter. The 2nd respondent was neutral at the hearing since the matter principally concerned the applicant and the 1st respondent.



32. The application as presented by the applicant raises a jurisdictional question that the court must address in limine .
33. The provisions of law cited by the applicant deal with the question of the right to bail. The court that dealt with that issue in respect of the 1st respondent and the applicant was the Lower court that being so any issue touching on the bail order and any other consequential order thereto fell squarely within the jurisdiction of the magistrate's court.
34. The dispute that has brought the applicant to this court is over the cash bail deposited in the Lower court secure her freedom. The applicant has not indicated whether he has come to this court by way of an appeal or revision.
35. That therefore has left the court with arduous task of determining what it is that the applicant is seeking from the court. It is clear from the application that the applicant contends that she was not heard by the trial court on the issue of release of the cash bail to the 1st respondent. The applicant has argued that the matter was heard ex parte and she was therefore denied the opportunity to participate the proceedings leading to the impugned order. It is on that basis that the applicants has urged this court to consider reversing the magistrate's order releasing the money to the 1st respondent and order that the same be released to her.
36. The application is omnibus as presented and at best it can be described as a feeble attempt by the applicant intended to invoke either the revisionary or appellate jurisdiction of this court.
37. However, the applicant has not pointed to any illegality, incorrectness and or impropriety on the part of the court that would warrant the intervention of this court by way of revision and the applicant too does not question the merit and substance of the impugned order but basically complains about the procedure followed in granting the order. Simply put, the applicant has literally thrown the application at the face of the court to figure out how to grant her relief.
38. It is essentially an omnibus application. See what Ringera J (as he then was) said about Omni-bus applications in the case of Pyaralalmhandbheru Rajput Vs Barclays Bank And Others Civil Case No. 38 of 2004 that; "There is no doubt the application is an all-cure, omnibus application. It is a wide net cast over a large body of water, and out of all the lake or sea, creatures caught in it, there will be one or two edible crabs or fish. It is not quite so. An omnibus application is incapable of proper adjudication by the court for each of the reliefs sought apart from being governed by different rules, is also subject to long established and different judicial principles which counsel need to bring to the attention of, and the court needs to consider before granting the entire relief sought. This alone makes the plaintiff's application incurably defective, and a candidate for striking out."
39. Upon review of the affidavit filed by the applicant as well as the affidavit and annexures filed by the 1st respondent this court is inclined to find that the application is incompetent, misconceived, incurably defective and was improperly filed before this court.
40. The applicant having failed to indicate whether the application is a revision or an appeal robbed this court of the inherent power to intervene to remedy the injustice complained of arising from the order of the lower court.
41. The law on the question of jurisdiction was enunciated in the case of Owners of the Motor Vessel "Lilian S" vs Caltex Kenya Limited [1989] KLR 1 where the court held:-Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where



a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

42. Jurisdiction is a very fundamental issue that it can be raised at any time including on appeal. This principle was stated by the Court of Appeal in Kenya Ports Authority vs Modern Holding [EA] Limited [2017] eKLR as follows:-We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the court itself provided that where the court raises it suo motu parties are to be accorded the opportunity to be heard.
43. The applicant has not properly moved the court and his application can at best be described as a good attempt to set aside an ex parte order but before the wrong forum.
44. If indeed the grievance by the applicant stems from the fact of not having been served with the application leading to the order directing the funds to be released to the 1st respondent, the proper forum for such a challenge is before the court that issued the order ex parte. The court would have the opportunity to look at why she never participated and decide whether to set aside the order and grant her audience. That is a task this court cannot perform vide the instant application.
45. The applicant would only approach this court after exhausting that process either by way of a revision or appeal.
46. The High court cannot intervene where the applicant has not properly invoked its jurisdiction. The applicant clearly approached this court without moving the lower court to set aside the ex parte order she now complains about.
47. The applications is incompetent, premature and ill-conceived since this court can only adjudicate on the matter either by way of a revision or an appeal and none of that is before this court.
48. As a consequence, this court finds and holds that its jurisdiction has been improperly invoked and declines to engage in proceedings that would amount to a nullity by delving into the merits of the application.
49. This is clearly a setting aside application camouflaged in this court as a revision the court cannot accede to it because the applicant has avoided approaching the court that made the order which she seeks to have set aside. The application is a classic case of a crafty innovation by a litigant to get justice through trickery.
50. The application is struck out for want of jurisdiction. The hierarchy of courts must be respected and before a litigant approaches the High Court, he or she must give the lower court an opportunity to exercise its jurisdiction to the fullest extent. A setting aside application such as the one before this court should have been filed in the magistrate's court and not this court.
51. This court therefore downs it tools for want of jurisdiction the orders earlier on granted by the court stand vacated.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF MAY 2025.

A. M. MUTETI

JUDGE

In the presence of:



Court Assistant: Kiptoo

Gachomo for the Applicant

Njenga for the Respondent

