



Muthiani & another v Kanyi t/a Kenya Projects Budget and Executive Homes (Commercial Arbitration Cause E001 of 2024) [2025] KEHC 12342 (KLR) (17 July 2025) (Ruling)

Neutral citation: [2025] KEHC 12342 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
COMMERCIAL ARBITRATION CAUSE E001 OF 2024**

F WANGARI, J

JULY 17, 2025

BETWEEN

MARTIN MUTINDA MUTHIANI 1ST APPLICANT

JANE WANJIKU NJUNGE 2ND APPLICANT

AND

**DAVID MUREITHI KANYI T/A KENYA PROJECTS BUDGET AND
EXECUTIVE HOMES RESPONDENT**

RULING

1. The application subject of this ruling is the Notice of Motion dated 10/01/2024 by the Judgment Debtor and the Notice of Motion dated 22/01/2025 by the Decree Holder,
2. In the application dated 10/01/2024, the Judgment Debtor sought inter-alia for stay of execution proceedings vide the Proclamation of Movable Property dated 19/11/2024 and 05/09/2024 consequent to the Warrants of Attachment of Moveable Property and Warrants of Sale of Moveable Property, and the Notice to Show Cause/ issuance of Warrant of Arrest against the Judgment Debtor, pending the hearing and determination of this application.
3. The application is based on grounds that he was never served with the Notice to Show Cause and he was never heard before the execution orders were issued. The Judgment Debtor claims that he was condemned without being heard. It is further stated that the Decree Holder is praying for his arrest and committal to civil jail yet his property has already been proclaimed and the execution process is still active.
4. The Decree Holder through the Jovan Kariuki t/a Moran Auctioneers filed a Replying Affidavit dated 22/01/2025. It was stated that the auctioneer was instructed by the Decree Holders advocates to carry out execution proceedings against the Judgment Debtor. Upon tracing the Judgment Debtor's premises, he proclaimed the properties as listed in the Proclamation Notice. When the auctioneer went



- to attach the proclaimed goods, he found that the Judgment Debtor had already moved from the premises.
5. The Judgment Debtor later reached out to the auctioneer and informed him that he was expecting to dispose off a parcel of land in Nyali for Kshs. 1,000,000/= where he would settle the decretal sum. The Judgment Debtor continued making false promises of payment, causing the auctioneer to return the Warrants of Attachment to court.
 6. The Decree Holders also filed Grounds of Opposition dated 31/01/2025. It is stated that the Judgment Debtor's application was moot having been filed against a non-existent Notice to Show Cause and Warrants of Arrest. The Judgment Debtor was also said to oppose a lawful process of execution despite his failure to make any payment towards the decretal sum. The application was said to be an abuse of the court process and ought to be dismissed with costs.
 7. The Decree Holders application dated 22/01/2025 sought to have the Judgment Debtor arrested and detained in prison as execution for Decree dated 31/07/2024 for payment of decretal sum. It was stated that the court ruled that the Decree Holders enforces their arbitral award. The Judgment Debtor has failed to settle the decretal amount and has dishonestly transferred or concealed his properties thus making it impossible for the appointed auctioneer to conduct execution, thus the application should be allowed.
 8. Directions were taken to have both applications canvassed by way of written submissions. Only the Decree Holders filed their submissions dated 05/03/2025 in support of its application and seeking to have the Judgment Debtor's application dismissed with costs.

Analysis and Determination

9. I have considered the applications, the responses, and the submissions on record, authorities cited and the law and the issues falling for the court's determination are: -
 - a. Whether the execution proceedings ought to be stayed
 - b. Whether the warrant of arrest and committal to civil jail
 - c. Who bears the costs?
10. It is not disputed by the Judgment Debtor that he is yet to settle the decretal sum. What is in dispute is the process of execution and the fact that he is under threat of double jeopardy execution process, his properties having been proclaimed and at the same time, the application to have him arrested and committed to civil jail.
11. I have perused through the court proceedings and the pleadings filed, I do confirm that no Notice to show cause was issued upon the Judgment Debtor. The Mention Notice dated 09/01/2025 indicating that the matter had been fixed for the Judgment Debtor to show cause why the warrant for arrest should not be issued. There is no Notice to Show Cause that is attached to it.
12. On the other hand, I note that the Decree Holder depones that the arrest and detention is the only option left as execution for decree as the Warrants of Attachment had been returned unexecuted. As at the time of writing this ruling, the only threat of execution of decree is by arrest and detention to prison.
13. The Judgment Debtor cannot be said that he is under double jeopardy of execution. The issue is whether the application for arrest and detention of the Judgment Debtor is merited.



14. The power of court to enforce execution is provided for under Section 38 of the *Civil Procedure Act*. This provision provides as follows: -

“38) 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.”

15. Section 38 should be read together with Order 22 Rule 34 of the Civil Procedure Rules which is in pari materia with its establishing Act. In *Charles Lutta Kasamani v Concord Insurance Co Ltd & Deputy Registrar Milimani High Court Commercial and Admiralty Division* [2018] eKLR, the court held as follows: -

“...Even under sections 38 and 40 of the *Civil Procedure Act* no one should be committed to civil jail because of his or her inability to pay. In the case of an application for committal, the determining factor is always the ability to pay. Inability should be taken to mean that the judgment debtor has completely no means of settling the decree even if he was given how much time to do so. He has completely no means of paying. He is simply unable and cannot pay... In that regard, therefore, where a party goes through legal process and obtains a decree from a competent Court, s/he has a right that has crystalized in his favour and that right is recognized in law. It can only be realized through execution including committal to civil jail which is a known legal process for enforcing that right. Such a right should not easily be defeated because a judgment debtor who though able to pay, cannot be committed to civil jail and nothing can be done about him. That would be a contradiction in the enforcement of rights where one right would be deemed superior to another. The law should be read as only protecting those who cannot genuinely pay and not otherwise...”

16. From the above, the execution mode of arrest and committal to civil jail is a legal process recognized in law. However, the procedure set above must be complied with. It must be shown that the conditions under the proviso to section 38 of the Act have been met.

17. In *Kailikia v M’Thiringi & 2 others* (Civil Appeal E017 of 2024) [2024] KEHC 5860 (KLR) (23 May 2024) (Judgment), court while dealing with an almost similar application had the following to say: -

“...While there cannot be a cause of action founded on the lawful exercise of the right of execution and this court will not forestall the 1st Respondent’s efforts to realize the fruits of his judgment, there must be strict compliance with the rules of procedure applicable to execution by arrest and detention which deprives the judgment debtor of his liberty. The court has to be satisfied that the conditions set out under section 38 of the *Civil Procedure Act* were strictly adhered to – that the Appellant was accorded an opportunity to show cause why he should not be committed to civil jail, and that the applicant was established to be a person of means to pay but who had refused to pay in compliance with the judgment of the Court, before the decision to so commit him was reached...”

18. As raised by the Judgment Debtor and admitted by the Decree Holders, the Notice to Show Cause had not been issued. This would accord the Judgment Debtor a hearing. The application to have the Judgment Debtor arrested and detained is premature. However, upon following the laid down procedure, the Decree Holders are at liberty to execute as they are entitled to the fruits of their judgment.

19. On costs, the same follows the event. However, the court retains discretion whether to award the same or not. Since both applications by the Decree Holders and Judgment Debtor fails, I direct each party to bear own costs.



20. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
- a. The Notice of Motion Application dated 10/01/2024 by the Judgment Debtor, and the Notice of Motion dated 22/01/2025 lacks merits and same are hereby dismissed.
 - b. The Decree Holders are at liberty to proceed with execution upon compliance with Section 38 of the *Civil Procedure Act*.
 - c. Each party to bear own costs.
- Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 17TH DAY OF JULY, 2025.

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HON. F. WANGARI

JUDGE

In the presence of;

N/A by the Applicant

Mr. Nding'i Advocate for the Respondent

Ms. Norah, Court Assistant

