



**Mobil Oil Kenya v Njiru (Civil Case 53 of 2003)  
[2024] KEHC 3163 (KLR) (Commercial and Tax) (4 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3163 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 53 OF 2003**

**PM MULWA, J**

**APRIL 4, 2024**

**BETWEEN**

**MOBIL OIL KENYA ..... PLAINTIFF**

**AND**

**NEWTON MUNENE NJIRU ..... DEFENDANT**

**RULING**

1. The defendant/applicant has filed the Notice of Motion dated 11<sup>th</sup> October 2022, brought under Orders 49 Rules 5 and 6, and 22 Rules 31, 34 and 35 of the Civil Procedure Rules, seeking the following orders:
  - a. That a declaration and/ or order be issued that the word “Court” as used/ applied in the *Civil Procedure Act* means a judge of the High Court (as opposed to the Honourable Deputy Registrar) or a Subordinate Court acting in the exercise of its Civil Jurisdiction.
  - b. That the proceedings undertaken before the Honourable Deputy Registrar purporting to hear and dispose of the Notice to Show Cause be set aside by reason of lack of ultra vires and/or absence of jurisdiction.
  - c. That the Defendant/ Judgment Debtor be permitted and ordered at the first instance to settle the decretal sum in instalments of Kshs. 45,000/- per month but these instalments be subject to periodic review.
  - d. That the costs of this application be in the cause.
2. The application is supported by the grounds on its face, the annexed and supplementary affidavits sworn by the defendant on 11<sup>th</sup> October 2022 and 15<sup>th</sup> February 2023 respectively and written



submissions dated 4<sup>th</sup> April 2023 and supplementary submissions and list of authorities dated 26<sup>th</sup> October 2023.

3. While acknowledging that the provisions of the *Civil Procedure Rules* do give power to the Deputy Registrar to order arrest and committal to civil jail, the applicant contended that this power is ultra vires and a usurpation of the authority of parliament. The applicant also contended that the fundamental act of an order by Court for arrest and committal to civil jail of a citizen cannot be a 'ministerial act' as provided under order 49 rule 1 of the *Civil Procedure Rules*. The applicant placed reliance on section 40 as read with section 2 of the *Civil Procedure Act* which do not mention the Deputy Registrar at all. The applicant further submitted that if parliament had intended to give the Deputy Registrar powers to arrest and detain a judgment debtor, nothing would have been easier than for it to say so rather than leaving that to the Rules Committee and that the Rules Committee cannot purport to speak for parliament. When the Rules Committee came up with order 22 rules 31, 34 and 35, it usurped the authority of parliament by giving the Deputy Registrar power given to the Court by Section 2 of the *Civil Procedure Act* which defines 'Court'. The interpretation given under the statute must be respected and must prevail.
4. The applicant faulted the Deputy Registrar for condemning him to civil jail for the sole reason that he did not avail copies of pay slips without ordering him to furnish them and for taking away his liberty without following the letter and spirit of the law as per order 22 rule 34 of the *Civil Procedure Rules*. As such, the Deputy Registrar had no reason of knowing that his offer to pay Kshs. 45,000/- per month was reasonable. It was decried that the denial of the opportunity to pay the decretal sum by instalments was unfair, unreasonable and unjust. The applicant also lamented that no reasons whatsoever were recorded as required under Order 22 Rule 34. Furthermore, the applicant submitted that under section 40 of the Act, arrest and committal is an interim measure to persuade settlement of a decree rather than a punishment for committing a wrong against the society or community or the public.

### **Response**

5. In opposing the application, the plaintiff/respondent put in a replying affidavit sworn by Benedicta Kirimi, its legal counsel, on 31<sup>st</sup> December 2022 together with written submissions and a list and bundle of authorities dated 30<sup>th</sup> May 2023. It was the respondent's case that the Deputy Registrar is endowed with the jurisdiction to commit a judgment debtor to civil jail under section 38 of the *Civil Procedure Act* read together with order 49 rule 5 and rule 7 of the *Civil Procedure Rules*. The respondent also contended that the defendant has not given sufficient reasons why the decree should not be executed against him by way of committal to civil jail. For these reasons, the respondent urged the Court to dismiss the defendant's motion with costs.

### **Analysis and Determination**

6. I have considered the application, the grounds, the parties' respective affidavits, submissions and authorities. The issues for determination are:-
  1. Whether the Deputy Registrar has the jurisdiction to issue execution orders by way of committal to civil jail.
  2. Whether the Court ought to set aside the proceedings undertaken before the Honourable Deputy Registrar purporting to hear and dispose of the Notice to Show Cause be set aside by reason of being ultra vires and/or absence of jurisdiction.



7. On jurisdiction, the Supreme Court pronounced itself in *Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & others* [2012] eKLR, as follows:

“A court’s jurisdiction flows from the Constitution or legislation or both thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law... Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the Constitutional limit. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers powers upon Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute.”

8. The statutory underpinning for the issuance of orders for the arrest and committal of a judgment debtor to civil jail in enforcement of execution is found under section 38 of the Civil Procedure Act, which provides that:

- “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.”

9. Order 49 Rule 5 of the [Civil Procedure Rules](#) provides:

“Formal orders for attachment and sale of property and for the issue of notices to show cause on applications for arrest and imprisonment in execution of a decree of the High Court may be made by the registrar, or in a subordinate court, by an executive officer generally or specially thereunto empowered by the Chief Justice by writing under his hand, but in the event of any objection being taken to the proceedings thereunder, all further proceedings shall be before a judge.”

10. Order 49 Rule 7 (1) (b) (x) of the [Civil Procedure Rules](#) provides as follows:

7.

- (1) The Registrar may—
  - (b) hear and determine an application made under the following Orders and rules—
    - (x) Order 22 other than under rules 28 and 75;

11. Section 18 (4) and (5) of the [High Court \(Organization and Administration\) Act](#) provides that:

- “(4) There shall be deployed a Deputy Registrar at every station and division of the Court.
- (5) In absence of the Registrar, a Deputy Registrar shall undertake the functions of the Registrar.”

12. From the above provisions, it is clear that the Deputy Registrar has the jurisdiction to commit a judgment debtor to civil jail. The Court in [Charles Lutta Kasamani v Concord Insurance Co. Ltd & Deputy Registrar Milimani High Court Commercial and Admiralty Division](#) [2018] eKLR, cited in



the respondent's submissions, which petition was brought against the Deputy Registrar of this Court who had committed the petitioner to civil jail, recognized that:-

“The Deputy Registrar was acting in his/her official capacity as the officer responsible for ensuring that the decree was executed and was the one to commit the petitioner where there was default. He/she was therefore performing judicial functions.”

13. Flowing from the above, the Deputy Registrar has the jurisdiction to issue execution orders by way of committal to civil jail which has the requisite statutory underpinning. I am not persuaded by the applicant's argument that this power is ultra vires and a usurpation of the authority of parliament.

14. I shall now consider the issue of whether the Court ought to set aside the proceedings undertaken before the Honourable Deputy Registrar purporting to hear and dispose of the Notice to Show Cause.

15. The Court in *Innocent G. Ondieki v Julius Nakaya Kabole* [2019] eKLR stated that:

“...the only viable ground for setting aside an order for committal to civil jail, is when the respondent challenges the manner in which the said orders were attained.” See also *George Wainaina v Clement Aboge* [2021] eKLR.

16. In this matter, the applicant has not challenged the manner in which the said orders were attained but has sought to set aside the order for being ultra vires and/or absence of jurisdiction.

17. The applicant also faulted the Deputy Registrar for condemning him to civil jail for the sole reason that he did not avail copies of pay slips without ordering him to furnish them. However, the applicant has not shown that he is unable to settle the decretal sum. Neither has he made any payments by way of instalments as a sign of goodwill. In the impugned ruling, the Deputy Registrar, observed that:-

“The Judgment Debtor has actively participated in the proceedings. He was duly aware of the judgment. Service of the NTSC was proper and the Judgment Debtor has not given any sufficient reason to disallow the committal to civil jail. Kshs. 45,000/- is not feasible to settle the decretal sum. He has not paid any money since 2019 as a sign of goodwill...the Judgment debtor has not given any reason to show his inability to pay the decretal sum. There was no salary slip (sic) attached to prove the alleged contract payment or any good will on his part.”

18. On the whole therefore, I find no viable ground to warrant the setting aside of proceedings the Deputy Registrar's ruling of September 30, 2022 on the notice to show cause.

19. Accordingly, the defendant/applicant's motion dated October 11, 2022 is dismissed for want of merit with costs to the plaintiff/respondent.

Orders accordingly.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 4<sup>TH</sup> DAY OF APRIL 2024.**

.....

**P. MULWA**

**JUDGE**

**In the presence of:**

Mr. Kivindy for plaintiff (DH)/respondent



N/A for defendant/applicant

Court Assistant: Carlos

