



**Kailikia v M’Thiringi & 2 others (Civil Appeal E017 of 2024)  
[2024] KEHC 5860 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5860 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E017 OF 2024  
EM MURIITHI, J  
MAY 23, 2024**

**BETWEEN**

**JULIUS KAILIKIA ..... APPELLANT**

**AND**

**TARTISIO GITUMA M’THIRINGI ..... 1<sup>ST</sup> RESPONDENT**

**OBRAIN SUPER MOTORS LTD ..... 2<sup>ND</sup> RESPONDENT**

**JAMES MUTEMBEI ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The suit before the trial court where the 1<sup>st</sup> Respondent herein, the Plaintiff in the trial court, sued the Appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents was heard on merits and a judgment entered for the 1<sup>st</sup> Respondent against the Appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents on 21/11/2018 for the sum of Ksh.600,750 together with costs and interest at court rates.
2. On 5/2/2024, the trial court was told by counsel for the 1<sup>st</sup> Respondent/Decree Holder that the Appellant/Judgment Debtor had not expended a single coin towards the settlement of the decretal sum and therefore they sought to have him committed to civil jail. In quick rejoinder, counsel for the Appellant made a proposal to pay Ksh.50,000 and the balance to be paid in monthly instalments of Ksh.5,000. That proposal was vehemently resisted by counsel for the Decree Holder who insisted on the Appellant’s committal to civil jail.
3. The trial court ruled that, “Given that the Judgment Debtor has never made any payment since Judgment was filed and the proposal given by counsel for the Judgment Debtor is opposed by counsel for the Judgment Debtor, this court finds it reasonable that Judgment Debtor be committed to civil jail for one month starting today. The Judgment Creditor to pay for subsistence of the Judgment Debtor. Mention on 5<sup>th</sup> March 2024.”



## The Appeal

4. On appeal, the Appellant vide his memorandum of appeal filed on 6/2/2024 set out 1 ground of appeal as follows:
  1. That the learned trial magistrate erred in law and fact in committing the Appellant to Civil jail without satisfying itself that the conditions stipulated in section 38 of the *Civil Procedure Act* and Order 22 Rule 34 (2) of the Civil Procedure Rules had been met.

## Duty of Court

5. This being a first appeal, this court is required to consider the evidence adduced, evaluate it and draw its own conclusions bearing in mind that it did not hear and see the witnesses who testified. (See *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123). Also in *Williamson Diamonds Ltd and another v Brown* [1970] EA 1, the court held that:

“An appeal from the High Court to this Court is by way of a retrial, and as this Court is often pointed out, it is not bound necessarily to accept the findings of fact by the Court below, but this Court must re-consider the evidence and make its own evaluation and draw its own conclusions although always bearing in mind that it has not had the advantage of the trial judge in seeing and hearing the witnesses.”
6. The appeal was urged by oral submissions in court and judgment was reserved.

## Determination

7. The singular issue for determination is whether the Appellant’s committal to civil jail was proper.
8. Section 38 of the *Civil Procedure Act* empowers the court upon application by a Decree Holder, in this case, the 1<sup>st</sup> Respondent, to order execution and one of the means of execution is arrest and detention of the Judgment Debtor in prison. That section provides as follows;

“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 22 Rule 34 of the Civil Procedure Rules provides that:

- “(1) Where a judgment-debtor appears before the court in obedience to a notice issued under rule 31, or is brought before the court after being arrested in execution of a decree for the payment of money, and it appears to the court that the judgment-debtor is unable, from poverty or other sufficient cause, to pay the amount of the decree, or, if that amount is payable by instalments, the amount of any instalment thereof, the court may, upon such terms as it thinks fit, make an order disallowing the application for his arrest and detention or directing his release, as the case may be.
- (2) Before making an order for the committal of the judgment-debtor to prison, the court, for reasons to be recorded in writing, shall be 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 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.”

10. In *Charles Lutta Kasamani v Concord Insurance Co Ltd & Deputy Registrar Milimani High Court Commercial and Admiralty Division* [2018] eKLR, the court (C. Mwita J.) said:

“37. 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....

42. 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.”

11. The judgment herein was passed on 21/11/2018 and the record shows that the Appellant did not make any payments. In 2023, when the Appellant was required to show cause why execution should not issue, it is alleged that he still neglected to make any payments towards settlement of the decretal sum, leaving the 1<sup>st</sup> Respondent with no option but to seek his committal to civil jail on 5/2/2024.
12. 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 1<sup>st</sup> 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.
13. 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.
14. The full record of the Court proceedings during the hearing of the Notice to Show Cause on 5/2/2024 is as follows:

“REpublic Of Kenya

In The Chief Magistrates Court at Meru

CMC. NO. 80 OF 2012

Taratsio Gituma M'thiringi.....Plaintiff/ JC

Versus

Obrain Super Motors Ltd.....1st Defendant/JD

James Mutembei .....2nd Defendant/ JD

Julius Kairikia.....3rd Defendant/ JD

5.2.2024

Before Hon. H. Nyamweya - RM

Court Assistant Kithinji

Otieno C. for the Decree Holder

Nkunja for the Judgment Debtor

Otieno: The Judgment Debtor has not paid a single coin. We pray that the Judgment Debtor be committed to civil jail. If he is committed he will pay the amount. It now stands at 1.2 Million. I am ready to pay for his subsistence.



Nkunja: The Judgment Debtor is a teacher. He is not a man of means to satisfying the court/ Judgment Debtor. He is unable to pay the decretal amount. He is offering Ksh. 50,000/= now and pay 5,000 per month. His payslip is for Ksh. 11,000/=. I pray that he is not committed to jail.

Otieno C: We oppose that application. He was supposed to pay 250,000/= and 50,000/=. He has failed to pay a single coin. Commit him to civil jail so that he pays.

#### Ruling

Given that the Judgment Debtor has never made any payment since Judgment was filed and the proposal given by counsel for the Judgment debtor is opposed by counsel for the Judgment Debtor, this court finds it reasonable that Judgment Debtor be committed to civil jail for one month- starting today. The Judgment Creditor to pay for subsistence of the Judgment Debtor. Mention on 5th March 2024.

H. Nyamweya

Resident Magistrate”

15. Where is the evidence that the applicant has means to pay and has refused to do so? Where is the finding of the trial court in that regard as required by section 38 (2) (b) of the *Civil Procedure Act*? There is nothing on record by way of “reasons to be recorded in writing” by which the court was satisfied that “before making an order for the committal of the judgment-debtor to prison” —
  - (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....”
16. It is clear from the ruling of the trial court that it made the order for committal to civil jail on the sole ground that the “Judgment Debtor has never made any payment since Judgment was [delivered] and the proposal given by counsel for the Judgment debtor is opposed by counsel for the Judgment Debtor.”
17. There is no evidence that the debtor had means and ability to pay the judgment debt as the decree-holder did not offer any rebuttal evidence upon the indication by the judgment debtor’s Counsel that the debtor was not a man of means in his proposal for instalment payments. The trial court did not comply with the requirements of section 38 of the *Civil Procedure Act* and Order 22 Rule 34 of the Civil Procedure Rules before making the order for committal to civil jail. The order for committal to civil jail is not a blackmail tool to compel compliance with, or enforcement of, a judgment. The Court is not entitled to commit a judgment debtor, as urged by Counsel for the Decree-holder to “to civil jail so that he pays”.
18. The order for committal to civil jail is a penal enforcement measure only available where the court is satisfied that the debtor is a man of the means who has refused or neglected to pay or otherwise comply with a lawful judgment. Any other use of the weapon of committal to civil jail, say for a person who is merely unable to pay, would be unlawful, and it is immaterial that the debtor in this case “has not paid a single coin” towards satisfaction of the judgment.
19. With respect, the trial court erred in its exercise of discretion in this case and consequently, the order for committal to civil jail made on 5<sup>th</sup> January 2024 shall be set aside.

#### Orders

20. Accordingly, for the reasons set out above, the Appellant’s appeal is allowed.



21. The order of the trial court made on 5<sup>th</sup> January 2024 committing the appellant to civil jail in execution of the judgment of the trial court in Meru CMCC NO. 80 of 2012 is set aside.
22. There shall be no order as to costs.

Order accordingly.

**DATED AND DELIVERED THIS 23<sup>RD</sup> DAY OF MAY, 2024.**

**EDWARD M. MURIITHI**

**JUDGE**

**APPEARANCES:**

M/S Nkunja & Co. Advocates for the Appellant.

M/S Otieno. C & Co. Advocates for the Respondent.

