



REPUBLIC OF KENYA



KENYA LAW
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**Mungai v Gachigi & 7 others (Civil Suit 206 of 2007)
[2024] KEHC 8366 (KLR) (5 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8366 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL SUIT 206 OF 2007**

HM NYAGA, J

JULY 5, 2024

BETWEEN

DENNIS KIMANI MUNGAI PLAINTIFF

AND

ANTHONY SABATO GACHIGI 1ST DEFENDANT

MARGARET WANJIRU MBURU 2ND DEFENDANT

ELIZABETH WAMBUI 3RD DEFENDANT

MARY NYAMBURA 4TH DEFENDANT

SALOME NJOKI 5TH DEFENDANT

ZAINABU WANJIRU GACHIGI 6TH DEFENDANT

JOSEPH GACHIGI ZAMBETAKIS 7TH DEFENDANT

JENIFFER WANJIRU ZAMBETAKIS 8TH DEFENDANT

RULING

1. The Applicants vide a Notice of Motion dated 29th March, 2023, brought under Articles 29 and 24 of the *Constitution*, Section 3A of the *Civil Procedure Act*, Order 51 Rule 1 of the Civil Procedure Rules and Section 4(4) of the *Limitation of Actions Act*, seek for orders:-
 - i. That pending the hearing and determination of this Application there be stay of execution of the decree herein.
 - ii. That pending the hearing and determination of the Application inter partes, there be a stay of execution by way of the notice to show cause issued by the registrar of the court on 5th March, 2019.



- iii. The court finds that the decree for payment of costs is statute barred under Section 4(4) of the Limitation of Action Act.
 - iv. That this court does declare that the execution of the decree by way of notice to show cause and potential arrest and detention of the applicants is an infraction of the applicants rights to liberty under Article 29 of the Constitution.
 - v. The court declares that Section 38 of the Civil Procedure Act ought to be read in the context of Article 24(1) of the Constitution.
 - vi. That the court declares that Notice to show cause, arrest and detention can only be resorted to after the less restrictive means of execution of decree have been exhausted.
 - vii. That costs of this Application be borne by the Respondent.
2. The Application is premised on the grounds on its face and supported by an affidavit of the 1st Applicant, Anthony Sabato Gachigi sworn on the even date.
 3. He deposed that the decree in the instant matter was issued in 2007 which is approximately 15 years ago and the same is statute barred under Section 4(4) of the Limitation of Action Act and it is not available for execution.
 4. He averred that the decree was supposed to be settled from one of their bank accounts of the estate from which they were entitled to a share as was recorded in court but immediately the same was extracted and served upon their erstwhile advocate, Robert Muigai Mbugua passed on before the amount in the bank could be released for distribution and at the time the funds were made available their late advocate's estate had not taken out letters of administration and therefore the funds in the said account was distributed before settlement of a decree.
 5. He deposed that later the Respondent's counsel herein raised the issue with their advocate on record, the matter was discussed and agreed between them that since the winding up process was underway, they will settle the decretal sum once their next payment was made.
 6. He deposed that the High Court has previously held that nobody should be imprisoned for failure to fulfil his contractual obligations and that an order for imprisonment to civil jail is meant to punish and humiliate and subject the debtor to shame and indignity due to failure to pay a civil debt, and that the same goes against the International Covenant on Civil and Political Rights.
 7. He averred that the court in Vijay Morjaria v Harris Horn Junior & Another Civil Case No. 285 of 2004 (UR) held that before a notice to show cause is issued the decree holder must exhaust less restrictive means of execution of a decree.
 8. He thus contended that the notice to show cause herein offends the Constitution to the extent that it has been taken out before the decree holder has exhausted the less restrictive means of execution of the decree and therefore the same should be stayed and set aside.
 9. He prayed that the Application be allowed.
 10. The Respondent opposed the application through his replying affidavit sworn on 21st November, 2023.
 11. He averred that the application has been filed in bad faith since the Applicants pleaded with him through his advocate to shelve execution proceedings against them as they pursue their entitlement as



beneficiaries in Nakuru High Court Succession Cause No. 96 Of 2000 (Estate Of The Late Rahab Wanjiru Evans-Deceased).

12. He averred that pursuant to the Applicants advocate's letter dated 21st June, 2019 they are estopped from pleading limitation of time for execution against them.
13. He prayed that the Application be dismissed with costs.
14. The Application was argued through written submissions.

Applicants' Submissions

15. The Applicants abandoned prayer 3 of the Application in their submissions. This is the prayer that this claim is barred by limitation of time.
16. On the other limb, they argued that the consideration of a notice to show cause as a means of enforcing compliance is a two-step process. Firstly, it involves determination of whether a notice to show cause is the least restrictive means of enforcing compliance and secondly, is a determination of whether a decree holder who has means has declined to meet his obligations. He urged this court to consider the first step.
17. The Applicants submitted that the provisions of Section 38 of the *Civil Procedure Act* ought to be appreciated in the context of Article 10 and 24 of the *Constitution*.
18. They posited that execution of a decree by arrest and detention entails a limitation of the liberty of judgement debtor which is permitted under the law. However, an inquiry of the propriety of a notice to show cause as the first and primary mode of execution of a court should consider the non-exhaustive circumstances provided under Article 24(1) of the *Constitution*.
19. The Applicants argued that pursuant to Article 24(3) of the *Constitution* the respondent had a burden to demonstrate that there were no less restrictive measures to execute the decree.
20. Citing the case of *Vijay Morjaria v Harris Horn Junior & Another Civil Case No. 285 of 2004 (UR)* the Applicants submitted that the desired objective in a notice to show cause is to compel the settlement of the decretal sum. Therefore, the ultimate question is whether there are less restrictive means of compelling the settlement of the same.
21. On whether the notice to show cause has met the conditions set out under Article 24 of the *Constitution*, the Applicants submitted in the negative. They posited that the respondent had the onus to demonstrate that he exhausted the less restrictive means of execution of the decree before resorting to the notice to show cause. To buttress this position, the applicants cited the case of *Andama v Director of Public Prosecutions & 2 others; Article 19 East Africa (Interested Party)* (Constitutional Petition 3 of 2019) [2021] KEHC 12538 (KLR) (Constitutional and Human Rights) (13 May 2021) (Judgment).
22. The Applicants further submitted that the respondent has not exhausted the less restrictive measures of execution of the decree herein and therefore taking out a notice of show cause against them is a limitation on their freedom and liberty and offends Article 24 (1)(e) of the *Constitution*. They urged the court to dismiss the notice to show cause.

Respondent's Submissions

23. The respondent submitted that Committal to civil jail is not unconstitutional and that Section 38 of the *Civil Procedure Act* remains statutory provisions of law until it is repealed.



24. The Respondent argued that under Section 38 the court can commit a judgement debtor to prison where it is satisfied that the decree is for a sum for which he was bound in a fiduciary capacity to account, where the court is satisfied that the procedure to committal to civil jail was adhered to and where the judgement debtor is in a position to pay and has refused or neglected to do so.
25. In buttressing his submissions, the Respondent relied on the following cases:-
- i. [Hussein Marshallo Guracha v Marhallo Guracha & another](#) [2021] eKLR
 - ii. [Innocent G. Ondieki v Julius Nakaya Kabole](#) [2019] eKLR
 - iii. [Mary Nduku Ndunda v Attorney General & 4 Others](#) [2016] eKLR
 - iv. [Charles Lutta Kasamani v Concord Insurance Co Ltd & Deputy Registrar Milimani High Court Commercial and Admiralty Division](#) [2018] eKLR
 - v. [Beatrice Wanjiku & another v Attorney General & another](#) [2012] eKLR

Analysis & Determination

26. I have read the application, affidavit in support of the application, replying affidavit and their accompanying annexures. I have also considered the various submissions made and the authorities cited by the parties.
27. The applicants by their own submissions, abandoned the plea of limitation. What is left is a determination on whether the notice to show cause issued against the applicants amounts to a contravention of their right to liberty, as they have averred.
28. Although the parties have not addressed this point, it appears to be a crucial issue of whether the applicant has the requisite locus standi to act in this suit.
29. The applicant has come to this court as an administrator of the estate of the late Jane Njeri Mungai, who is his mother. He has exhibited a Limited grant of letters of administration ad Litem issued by this court on 2nd February 2016.
30. The said Jane Njeri Mungai was appointed as an administrator of the estate of Robert Mungai Mbugua, Advocate by the Limited grant of letters of administration ad Litem issued on 30th October 2007,
31. It is not disputed that the late Jane Njeri passed on as she was acting as an administrator for the estate of the late Robert Mungai Mbugua. When she passed on the estate of the said Robert Mungai Mbugua was left without an administrator.
32. Once an administrator to an estate passes on, then the correct course is for another administrator to be appointed in his or her place. As has been held in many authorities such a grant becomes useless and stands to be revoked under Section 76 of the [Law of Succession Act](#).
33. In this case, when Jane Njeri Mungai passed on, no other administrator was appointed to take over the estate of the late Robert Mungai Mbugua. The grant of letters issued to Dennis Kimani Mungai was in respect to the estate of Jane Njeri Mungai and not Robert Mungai Mbugua Advocate, who was the plaintiff herein. The grant that he has, in my view does not give the said Dennis Kimani Mungai any right over the estate of the late Robert Mungai Mbugua. His rights are limited to the estate of his mother, Jane Njeri Mungai.



34. Consequently, I am of the view that Dennis Kimani Mungai has no locus standi to prosecute this suit. He would only have been entitled to proceed with this suit if it was filed by the late Jane Njeri in her personal capacity or in respect to the suit itself if a fresh grant was issued to him once the one issued to his late mother was revoked on account of her death.
35. So what is the fate of pleadings presented to court by a party without *locus standi*?
36. In *Karega & 2 others v Kiama & 2 others* (Succession Cause 6 of 2019) [2022] KEHC 9880 (KLR) Justice T. Matheka had this to say on the issue.

“It is trite law that pleadings filed in court by persons with no locus standi are void ab initio and the court does not have jurisdiction to hear and determine such matters. R. Nyakundi J in *Ibrahim v Hassan & Charles Kimenyi Macharia, Interested Party* [2019] eKLR:

“*Locus standi* is basically the right to appear or be heard in court or other proceedings. That means if one alleges the lack of the same in certain court proceedings, he means that party cannot be heard, despite whether or not he has a case worth listening. The issue herein is whether the Applicant lacks the requisite locus standi to seek relief from the court to revoke the grant in question issued to the Respondent. In my view, issues as regards locus standi are critical preliminary issues which must be dealt with and settled before dwelling into other substantive issues.”

37. I could not agree more.
38. Consequently, it is my finding that all the pleadings/documents filed by the said Dennis Kimani Mungai including the notice to show cause, are of no consequence herein and are hereby expunged from the court record.
39. Having found that the said Dennis Kimani Mungai has no *locus standi*, then it is inappropriate to proceed with any application he has filed herein.
40. There being no administrator to the estate of the late Robert Mungai Mbugua, it is upon the family to take up the necessary process in this matter.
41. Each party shall bear their own costs in respect to the present application.
42. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 5TH DAY OF JULY, 2024.

H. M. NYAGA,

JUDGE.

In the presence of;

Court Assistant Jamleck

K. Mbugua for Plaintiff/Respondent

Ms Alwala for Defendant/Applicant

