



**Wanyiri v Eldoret Small Claims Court & 2 others; Wanjohi (Interested Party) (Constitutional Petition 21 of 2023) [2024] KEHC 10845 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 10845 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CONSTITUTIONAL PETITION 21 OF 2023  
JRA WANANDA, J  
SEPTEMBER 20, 2024**

**IN THE MATTER OF ARTICLES 2(2), 3(1), 19(3)(C), 21(1), 24, 27(1), 28, 29(A) AND (F), 50(1), 94(5) AND 159(2)(E) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA AND IN THE MATTER OF THE THREATENED CONTRAVENTION OF THE PETITIONER’S FUNDAMENTAL RIGHTS AND FREEDOM UNDER ARTICLES 27(1), 28, 29(A) AND (F) AND 50(1) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**BETWEEN**

**RUTH WAHU WANYIRI ..... PETITIONER**

**AND**

**ELDORET SMALL CLAIMS COURT ..... 1<sup>ST</sup> RESPONDENT**

**THE ELDORET COURT BAILIFF ..... 2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**LUCY NJERI WANJOHI ..... INTERESTED PARTY**

**RULING**

1. On 8/03/2023, the Interested Party filed a suit, namely, Eldoret Small Claims Court Case No. SCCCOMM/E187/2023 against the Petitioner. The suit was heard and determined and Judgment entered against the Petitioner on 15/09/2023 for the sum of Kshs 330,000/- plus costs and interest. It appears that the Petitioner made a part-payment in settlement of the Decree but failed to liquidate the balance whereof, upon the Interested Party’s application, the Small Claims Court (1<sup>st</sup> Respondent) issued a warrant of arrest against the Petitioner which according to the Petitioner, signified an intention to commit her to civil jail. Pursuant thereto, the Petitioner, through Messrs Kamau Lagat & Co. Advocates filed this Petition alleging that issuance of the warrants of arrest amounted to a violation of



her constitutional rights. She prayed for various declarations and orders but particularly, she has sought for a declaration that the Small Claims Court has no jurisdiction to order the execution of its decree by way of arrest and/or detention of the judgment-debtor in prison or civil jail. Consequently, she has sought for an order of Certiorari to quash the warrant of arrest.

2. Together with the Petition, the Petitioner also filed the Application the subject of this Ruling, namely, the Notice of Motion dated 13/12/2023. The prayers still pending are as follows:

“ .....

- iv. An interim conservatory order be and is hereby issued restraining the 2<sup>nd</sup> Respondent from arresting the Petitioner in execution of the Decree and orders issued in Eldoret Small Claims Court Case No. SCCCOMM/E187/2023 Lucy Njeri Wanjohi v Ruth Wahu Wanyiri, pending the hearing and determination of this Petition.
  - iv. An interim conservatory order be and is hereby issued restraining the 1<sup>st</sup> Respondent from ordering the detention of the Petitioner in prison or civil jail execution of the Decree issued in Eldoret Small Claims Court Case No. SCCCOMM/E187/2023 Lucy Njeri Wanjohi v Ruth Wahu Wanyiri, pending the hearing and determination of this Petition
  - iv. Costs be in the Cause.”
3. In her Affidavit in support of the Application, the Petitioner deponed that already, her freedom of movement as set out under Article 39(1) of the Constitution has been violated because, with the warrant hanging over her head, she cannot move freely for fear of arrest, that there is a real danger that she will suffer prejudice as a result of the violation of the Constitution, and that once she is arrested and committed to civil jail, the substratum of the Petition herein will be rendered nugatory and will be overtaken by events. She deponed further that she has a prima facie case with a high likelihood of success, that bearing in mind the public interest and the fact that no prejudice will be suffered by any other party if the Application is allowed, the same ought to be granted, that she intends to settle the decree but if the Interested Party is impatient, then she is be precluded from pursuing other lawful modes of execution hence the principal of proportionality plays in favour of an interim conservatory order being granted as she is not seeking a blanket stay of execution.

### **Interested Party’s Response**

4. In opposition to the Application, the Interested Party, through Messrs Oduor, Munyua & Gerald Attorneys at Law LLP filed brief Grounds of Opposition on 8/01/2024. It was averred, on her behalf, that the law does not envisage or have provisions for a party to sue another in a suit as an interested party, and that Rule 25(1) of the Small Claims Court Rules, 2019 provides for the enforcement of any order or decree arising from the Small Claims Court in accordance with the Civil Procedure Rules.

### **Hearing of the Appeal**

5. Although there is an Affidavit of Service on record indicating that all the 3 Respondents, were served, there is no indication that they filed any Responses. I note however that there is on record, the Memorandum of Appearance filed by the Attorney General (3<sup>rd</sup> Respondent) on 20/12/2023 and also that Counsel Mr. Ogeto appeared for the Attorney General in Court once and informed the Court that the Attorney General is not opposed to the Application.
6. Be that as it may, the Application was canvassed by way of written Submissions. Pursuant thereto, the Petitioner filed her Submissions on 18/12/2023, while the Interested Party filed on 8/01/2024.



## Petitioner's Submissions

7. The Petitioner's Counsel submitted that the Petition raises arguable issues, namely, whether the Small Claims Court has jurisdiction to order limitation of the Petitioner's fundamental rights vide an order for committal to civil jail in the absence of a statutory provision in the *Small Claims Act* similar to Section 38(d) of the *Civil Procedure Act*, and whether Rule 25 of the *Small Claims Court Rules* authorizes arrest of a judgment debtor taking into account that subsidiary legislation cannot override a substantive statute. He further submitted that Section 39 and 40 of the *Small Claims Court Act* which deal with execution of decrees do not have any provision authorizing the arrest and detention of a judgment debtor in civil jail in execution of a decree. As a further arguable point therefore, Counsel posed the question whether subsidiary legislation (Rule 25 aforesaid) can be interpreted to introduce jurisdiction to order arrest and committal to civil jail taking into account that the *Civil Procedure Act* does not apply to proceedings before the Small Claims Court. According to him therefore, there is a prima facie case to warrant consideration by the Court.
8. Counsel submitted further that if conservatory orders are not granted, the substratum of the Petition will be rendered nugatory since there is a warrant of arrest in force. He cited the case of *Isaiah Luyara Odando & Another v Kenya Revenue Authority & 6 Others; Nairobi Branch Law Society of Kenya (Interested Party) (Interested Party) [2022] eKLR*.

## Interested Party's Submissions

9. On her part, in respect to whether the Small Claims Court Adjudicator has the jurisdiction to order for the execution of a Decree through arrest and detention of a judgment-debtor, Counsel for the Interested Party submitted that the validity of any Preliminary Objection is gauged against the requirement that it must raise pure issues of law capable of disposing of a dispute at once. She cited the case of *Mukisa Biscuit Manufactures Ltd v Westend Distributors Ltd (1969) E.A.* She then submitted that Rule 25 of the *Small Claims Court Rules*, 2019 provides for the procedure that "any order or decree of the Court shall be enforceable in accordance with the *Civil Procedure Rules*", that the procedure for execution under the *Civil Procedure Act* is specifically provided for under Section 38 thereof which allows arrest and detention in prison.
10. On the issue of joinder of the Interested Party, Counsel submitted that the same was done suo motu by the Petitioner, and that the norm has been that an Interested Party should file an Application to be joined in the Petition and demonstrate the kind of interest he/she has, before the Court can allow him to be joined. According to Counsel therefore, the Interested Party ought to have been sued as a Respondent and not an "Interested Party" since our law does not envisage a situation whereby a Petitioner joins a party suo motu as an Interested Party.

## Determination

11. The issue for determination herein is evidently "whether conservatory orders should be issued staying the warrants of arrest issued by the Small Claims Court.



12. As regards “conservatory orders”, I refer to the definition given in the case of Nairobi Civil Appeal 151 of 2011 *Invesco Assurance Co. Ltd v. MW (Minor suing thro' next friend and mother (HW))* [2016] eKLR where Mulwa J expressed herself as follows: -

“A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter”

13. Regarding the nature and application of conservatory orders, the Supreme Court, in Civil Application No. 5 of 2014 *Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others* (2014) eKLR, stated as follows:

“(86) “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the Applicant’s case for orders of stay.

14. Further, in *Judicial Service Commission v. Speaker of the National Assembly & Another* [2013] eKLR, Odunga G.V. (as he then was), expressed himself as follows:

“Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the *Constitution*, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.

15. Conservatory orders are therefore aimed at preserving the substratum of the matter pending the determination of the main issues in dispute (see also Ruling of Mrima J in *Damour Florian Emmeric v Director of Immigration Services* [2022] eKLR.

16. On the need to observe boundaries when handling Applications for conservatory orders, in the case of *Muslim for Human Rights (Milimani) & 2 Others v Attorney General & 2 Others* (2011) eKLR, Ibrahim J, (as he then was) expressed himself as follows:

“The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-a vis the case of either parties. The principle is similar to that in temporary or interlocutory injunctive in civil matters. This is a cardinal principle and happily makes my functions and work here much easier despite walking a tight legal rope that I could easily lose balance with the slightest slip due to any laxity or being carried away by the passion or zeal of persuasion of any one side.”

17. The principles to be considered when determining whether to grant conservatory orders have been developed by the Courts over time. These principles were summarized in *Wilson Kaberia Nkunja v. The Magistrate and Judges Vetting Board and Other* Nairobi High Court Constitutional Petition



No.154 of 2016 (2016) eKLR where Lenaola J (as he then was) summarized the three principles for consideration as follows:

- (a) An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.
- (b) Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and
- (c) The public interest must be considered before grant of a conservatory order.

18. Regarding the definition of a “prima facie” case, the same was explained in the case of Mrao v. First American Bank of Kenya Limited & 2 Others (2003) KLR 125 where, in quoting the locus classicus case of Giella v Cassman Brown & Co Ltd [1973] EA 358, the Court of Appeal expressed the term to mean:

“... In a civil application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”

19. Additionally, In Re Bivac International SA (Bureau Veritas) (2005) 2 EA 43, the Court guided that “an arguable case is not ascertained by the court by tossing a coin or waving a magic wand or raising a green flag”, but instead a Court must undertake an intellectual exercise and consider, without making any findings, the scope of the remedy sought, the grounds and the possible principles of law involved.

20. Applying the above principles to the facts of this matter, I observe that the Petitioner concedes that indeed Rule 25 of the Small Claims Court Rules, 2019 provides that “any order or decree of the Court shall be enforceable in accordance with the Civil Procedure Rules”, and that under Section 38 of the Civil Procedure Act one of the modes of execution of a decree is committal to civil jail. The Petitioner’s contention is that the Small Claims Court Rules being subsidiary legislation cannot donate powers of committal to civil jail when such powers are not expressly provided in the substantive Small Claims Court Act.

21. Neither of the parties has supplied any decision so far delivered by the Courts over this issue and I have also not come across any in my research. This is therefore a matter that this Court will have to determine after hearing the substantive Petition. One of the considerations in an Application for conservatory orders of the nature herein is the arguability of the Petition, or in other words, its chances of success. Another consideration is the balance of convenience which also by extension, touches on the public interest factor.

22. While the issue of law raised is no doubt arguable, I am afraid that the Petitioner has failed to demonstrate that suspending the warrant of arrest is the remedy that will positively impact the public interest factor and that in balancing the competing interests herein, the weighing scale tilts in favour of suspending the warrant of arrest. I say so because there is a general but rebuttable presumption in law that all statutes or statutory provisions are constitutional. The burden is then on the person alleging unconstitutionality to prove that the statute or any of its provisions is constitutionally invalid. In respect to this principle, I cite the case of Kizito Mark Ngaywa v. Minister of State for Internal



Security and Provincial Administration & Another [2011] eKLR, where the High Court (Ibrahim, J (as he then was) stated the following:

“guided by the decisions of the Constitutional Court in Tanzania in *Ndyanabo –v- Attorney General* (2001) 2 EA 485 in which the said Court presided over by the Hon. Chief Justice Samatta stated as follows:

Thirdly; until the contrary is proved, a legislation is presumed to be Constitutional. It is a sound privilege of Constitutional construction that if possible, a legislation should receive such a construction as will make it operative and not inoperative.

Fourthly, since, as stated, a short while ago, there is a presumption of Constitutionality of legislation, the onus is upon those who challenge the Constitutionality of the legislation, they have to rebut the presumption. Fifthly where those supporting a restriction on a fundamental right rely on a claw back or exclusion clause in doing so, the onus is on them, they have to justify the restriction.”

23. Refusal to grant the conservatory orders herein may mean that the Petitioner may well be committed to civil jail and true, she might have fully served the prison term by the time that the Petition herein will have been determined. This, I agree, may prejudice her and perhaps, even render the Petition nugatory. On the other hand, applying the doctrine of presumption of constitutionality and legality of statutes, unless Rule 25 of the Small Claims Act is proved otherwise, it is deemed constitutional and valid. Throughout Kenya, the Small Claims Court has, since its inception, been invoking and applying the power of committal of judgment-debtors to civil jail for failure to settle decrees. Granting the conservatory orders is likely to be used by other litigants as having the effect of suspending exercise of the said Rule 25 pending the hearing and determination of this single Petition. This will no doubt also prejudice decree-holders holding valid judgments. Balancing the two competing interests, in my view, it will not be in the interest of justice to grant the conservatory orders at this stage. My view is that any substantive orders should await determination of the Petition.
24. Ibrahim J, in the case of *Kizito Mark Ngaywa v. Minister of State for Internal Security* (*supra*) further stated as follows:

“I am still persuaded by the above-mentioned principles of Constitutional interpretation. In the Bishop Joseph Kimani case, the court observed as follows:

“It is a very serious legal and Constitutional step to suspend the operation of statutes and statutory provisions. The courts must wade with care, prudence and judicious wisdom. For the High Court to grant interim orders in this regard, I think one must at the interlocutory stay actually show that the operation of the legislative provision are a danger to life and limb at that very moment.”

.....

It is my view that the principle of presumption of Constitutionality of Legislation in imperative for any state that believes in democracy, the separation of powers and the Rule of Law in general. Further the courts to be able to suspend legislation during peace times where there is no national disaster or war, would in my view be interfering with the independence and supremacy of Parliament in its Constitutional duty of legislating law.”

I think that I shall hold the said views and that legislation should only be impugned in any manner only where it has been proven to be unconstitutional, null and void. Conservancy



orders to suspend operation of statutes, statutory provisions or even Regulations should be wholly avoided except where the national interest demand and the situation is certain.

I do find and hold that at this stage the presumption of Constitutionality of the Alcoholic Drinks Control Act and the Regulations still subsists and has not been rebutted. It can only be rebutted after full and fair hearing of the Petition and upon the court declaring that the said Act and regulations or parts thereof are unconstitutional. I am still of the view that “there is no place for conservatory or interim order in Petitions, which seek to nullify or declare legislation/statutes unconstitutional, null and void.” It is even more premature at this stage where the application has not been heard or is not being heard to seek such conservatory orders. The Applications must be heard first.

25. In determining whether or not to grant the orders sought the Court is enjoined to consider what has become known as the principle of proportionality. In my view, in the absence of a conclusive determination of the validity of Rule 25 aforesaid, the circumstances of this case dictate that the Small Claims Court is not frustrated in the execution of its mandate or exercise of its powers before the legality of Rule 25 is determined. In my view, allowing the Small Claims Court to continue exercising the impugned powers would be the lower risk as opposed to halting it at this stage. In the premises, it is only fair that pending the determination of the Petition, the operations of the Small Claims Court do proceed in the usual manner. I do not think that the public interest will be served by suspending the warrants of arrest herein.
26. Further, the Petitioner does not deny that she has not settled the Decree which embodies a valid Court declaration. The Interested Party therefore holds a valid decree which has not been challenged. Granting the conservatory orders before determination of the legality of Rule 25 of the Small Claims Court Rules will, in my view, serve justice.
27. I also find the Petition to be premature since all that the Small Claims Court has done so far is to issue a warrant of arrest. The Petitioner has not disclosed the circumstances under which the warrants were issued. This is relevant since the law is that before a committal to civil jail is ordered, a Notice to Show Cause would first be issued and served upon a judgment-debtor to appear in Court and show Cause why he/she should not be committed to civil jail. Only upon the Court satisfying itself that no cause has been shown would it then, as a last resort, commit a judgment-debtor to civil jail. In this case, the issuance of a warrant of arrest suggests that the Petitioner, as the judgment debtor, was summoned to appear in Court to show Cause but most probably failed to so attend. That, to me, can be the only explanation for issuance of the warrants of arrest. Under these circumstances, I do not find it fair to place further hurdles, at this interim stage, on the Interested Party’s quest to enforce her judgment.

### **Final Orders**

28. In the premises, the Notice of Motion dated 13/12/2023 seeking conservatory orders is hereby dismissed. Costs shall be in the Cause.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 20<sup>TH</sup> DAY OF SEPTEMBER 2024**

.....

**WANANDA J. R. ANURO**

**JUDGE**

Delivered in the presence of:

Kamau for Petitioner



N/A for all other parties

Court Assistant: Brian Kimathi

