



REPUBLIC OF KENYA



**W.G. Wambugu & Co. Advocates v Wambaa & 10 others (Miscellaneous Application 174 of 2017) [2023] KEHC 19189 (KLR) (Civ) (22 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19189 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**MISCELLANEOUS APPLICATION 174 OF 2017**

**CW MEOLI, J**

**JUNE 22, 2023**

**IN THE MATTER OF THE ADVOCATES REMUNERATION**

**ORDER**

**AND**

**IN THE MATTER OF AN AGREEMENT FOR FEES BETWEEN**

**THE ADVOCATE AND THE CLIENT**

**BETWEEN**

**W.G. WAMBUGU & CO. ADVOCATES ..... APPLICANT**

**AND**

**EMMA MUTHONI WAMBAA ..... 1<sup>ST</sup> RESPONDENT**  
**WINGFRED NGANGA REGERU ..... 2<sup>ND</sup> RESPONDENT**  
**CATHERINE NYANGOI REGERU ..... 3<sup>RD</sup> RESPONDENT**  
**ESTHER WANJA REGERU ..... 4<sup>TH</sup> RESPONDENT**  
**STEPHENE KAGECE ..... 5<sup>TH</sup> RESPONDENT**  
**VIGINIA WANJIRU ..... 6<sup>TH</sup> RESPONDENT**  
**PAULINE WANJIKU ..... 7<sup>TH</sup> RESPONDENT**  
**DENIS WAMBAA REGERU ..... 8<sup>TH</sup> RESPONDENT**  
**JOSEPH KAVATI REGERU ..... 9<sup>TH</sup> RESPONDENT**  
**DANSON MUCHUGIA REGERU ..... 10<sup>TH</sup> RESPONDENT**  
**PIUS WAITHAKA REGERU ..... 11<sup>TH</sup> RESPONDENT**



*(Being an appeal from the ruling and order of Mumassabba. L, DR.  
delivered on 31st May, 2022 in HCCC Misc. Application No. 174 of 2017)*

## JUDGMENT

1. This appeal emanates from the ruling delivered on 31<sup>st</sup> May, 2022 in HCCC Misc. Application no 174 of 2017 (the present matter). The ruling was triggered by the notice of preliminary objection dated 9<sup>th</sup> March, 2021 which was filed by Emma Muthoni Wambaa, Denis Wambaa Regeru, Joseph Kavati Regeru, Danson Muchugia Regeru and Pius Waithaka Regeru (hereafter the Appellants) to challenge the Notices to show cause taken out by W.G. Wambugu & Co. Advocates (hereafter the Applicant/Respondent) requiring the Appellants and the remaining Respondents to show cause as to why execution should not issue against them, in satisfaction of the decretal sum together with incidental costs totaling the sum of ksh 4,198,450/ on unpaid legal fees.
2. The preliminary objection was opposed by the Applicant/Respondent. Upon hearing the parties, the Deputy Registrar dismissed the Appellants' preliminary objection and directed the Appellants to file their respective affidavit of means/proposal on settlement of the outstanding decretal sum.
3. Aggrieved with the aforementioned decision, the Appellant preferred this appeal by way of the memorandum of appeal dated 4<sup>th</sup> June, 2022 which is based on the following grounds:
  - “ 1. That the Honourable Deputy Registrar wholly misunderstood the case before her.
  2. That the Honourable Deputy Registrar misapprehended the nature of the Appellants' Notice of Preliminary Objection dated 9<sup>th</sup> March, 2021.
  3. That the Honourable Deputy Registrar ignored the Appellants' submissions on the Appellants' said Notice of Preliminary Objection dated 9<sup>th</sup> March, 2021.
  4. That the Honourable Deputy Registrar ignored this court's decision in *National Bank v Linus Kuria Ndungu* (2008) eKLR on the procedure applicable in notice to show cause proceedings which was binding on her.
  5. That the Honourable Deputy Registrar ignored this Honourable Court's decision delivered herein in this Cause by Hon. Justice Serگون on 13<sup>th</sup> May, 2021, in which it was held that an Applicant, who seeks committal to civil jail of a party, should discharge the burden of proof that the latter has the means to pay the entire decretal sum or some substantial part thereof and has neglected to do so.” (Sic)
4. The appeal was canvassed by way of written submissions. Counsel for the Appellant commenced his submissions by arguing that at the onset, judgment was delivered by the High Court on 17<sup>th</sup> November, 2017 in favour of the Applicant/Respondent and against the Appellants herein and Winfred Nganga Regeru, Catherine Nyangoi Regeru, Esther Wanja Regeru, Stephene Kagece, Vignia Wanjiru And Pauline Wanjiku (hereafter the 2<sup>nd</sup> to 7<sup>th</sup> Respondents) in the sum of ksh 5,000,000/- less the paid sum of ksh 50,000/-. The net sum net being ksh 4,950,000/- comprising outstanding legal fees owed by



- the Appellants and the 2<sup>nd</sup> to 6<sup>th</sup> Respondents, to the Applicant/Respondent who represented them at all material times.
5. Counsel argued that the notices to show cause which were issued solely against the Appellants are illegal and in contravention of Article 27 of *the Constitution* providing for the right to equality and freedom from discrimination. Because each of the judgment debtors is liable to settle the outstanding decretal sum in equal share, by virtue of the separate retainer agreements entered into between them and the Applicant/Respondent.
  6. Counsel cited *Kinluc Holdings Ltd v Mint Holdings Ltd & another* [1998] eKLR on the definition of a retainer agreement. Counsel likewise quoted *Sinti Maneka Gandhi v Union of India and another*, Writ Petition no 231 of 1997 wherein the Supreme Court in India considered the principles of equality before the law and arbitrariness. It was submitted that the Deputy Registrar's powers in respect to decrees were limited to execution of decrees already issued by a court and does not extend to the amendment of decrees.
  7. It was also submitted that the notices to show cause which were issued are improper and ought to be set aside to pave way for issuance of proper notices. Counsel argued that in the present instance, the burden of proof lies with the Applicant/Respondent to show that the Appellants have the means to settle the decretal sum and are only neglecting to do so, to justify the issuance of warrants of arrest. That in the present instance, the Applicant/Respondent did not discharge the burden of proof and hence the Deputy Registrar erred in issuing warrants of arrest against the Appellants.
  8. To buttress their point here, the Appellants cited the case of *National Bank v Linus Kuria Ndung'u* [2008] eKLR. Consequently, the court was urged to strike out the notices to show cause and to order the Deputy Registrar to issue proper notices to show cause against all the judgment debtors herein, pursuant to the decree issued on 17<sup>th</sup> July, 2018.
  9. The Applicant/Respondent naturally defended the ruling rendered by the Deputy Registrar and therefore opposed the appeal. Counsel for the Applicant/Respondent argued that contrary to the averments being made by the Appellants, the Deputy Registrar considered the grounds in the preliminary objection in arriving at her decision. Counsel further argued that given the fact that the finding on liability was entered against the judgment debtors jointly and severally, the Applicant/Respondent was at liberty to execute the decree against any or all of the judgment debtors, and hence the complaint concerning discrimination against the Appellants does not lie. To support his submission on joint and several liability, counsel made reference to *Kenyariri & Associates Advocates v Hans Juergen Langer* [2017] eKLR and *Mobhamed & Muigai Advocates v Samuel Kamau Macharia & another* [2005] eKLR.
  10. It was submitted that the impugned ruling was in adherence to the decision earlier made by the High Court on 13<sup>th</sup> May, 2021 and was the basis upon which the Applicant/Respondent took out fresh notices to show cause against the Appellants, in pursuit of the fruits of her judgment. It was further submitted that in opposing the preliminary objection, the Applicant/Respondent annexed relevant documents to her replying affidavit to show that the Appellants had means to satisfy the outstanding decretal amount and yet deliberately neglected to do so. She cited *Shalimar Limited v Sadrudin Kurji Khurti & another* [2016] eKLR in that regard. On that basis, the court was urged to dismiss the appeal with costs.
  11. The court has considered the memorandum of appeal, the pleadings and record of the proceedings as well as the submissions by the respective parties. This is a first appeal. The Court of Appeal for East



Africa set out the duty of the first appellate court in *Selle v Associated Motor Boat Co.* [1968] EA 123 in the following terms:

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

12. An appellate court will not ordinarily interfere with a finding of fact made by a trial court or a magistrate unless such finding was based on no evidence, or it is demonstrated that the magistrate acted on wrong principles in arriving at the finding he or she did. See *Ephantus Mwangi & another v Duncan Mwangi Wambugu* [1982 – 1988] IKAR 278.
13. Upon review of the memorandum of appeal and submissions by the respective parties before this court it is evident that the appeal is essentially challenging the decision by the Deputy Registrar to dismiss the Appellants’ preliminary objection. The court will tackle the five grounds of appeal under the two limbs below.
14. The first limb of appeal touches on whether the analysis and determination made by the Deputy Registrar in respect to the preliminary objection is correct. As earlier mentioned, the preliminary objection was raised by the Appellants to challenge the notices to show cause taken out against them by the Applicant/Respondent, in respect to the decretal sum of ksh 4,195,000/-. In their preliminary objection, the Appellants relied on the following grounds to challenge the validity of the notices to show cause on the averment that they were discriminatory and in contravention of Article 27 of *the Constitution*:

- “1). *The Constitution* protects the said Respondents (the Appellants) against discrimination in that the Applicant (the Applicant/Respondent) has chosen the said Respondents for victimization in the enforcement of the decree herein which has been issued against all the Respondents. The said Respondents belong to the 2<sup>nd</sup> house of the late Lawrence Rigeru Wambaa while the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents belong to the 1<sup>st</sup> house; previously, the Applicant has obtained orders of committal to jail against the members of the second house and none against the 1<sup>st</sup> house. Of discrimination, the Supreme Court of India has said this in *Sinti Maneka Gandhi v Union of India and another* (1997) SC 597 where a provision similar to article 27 was being interpreted, the Supreme Court of India said this of arbitrariness:-

Now the question immediately arises as to what is the requirement of article 14: what is the content and reach of the great equalizing



principle enunciated in this article? There can be no doubt that is a founding faith of Constitution. It is indeed the pillar on which rest securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions, and it cannot be imprisoned within traditional and doctrinaire limits. We must reiterate here what was pointed out by the majority in *E.P. Royappa v State of Tamil Nadu* (1974)2 SCR, 348 namely, that “from a positivistic point of view equality is antithetical to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of article 14.” Article 14 strikes arbitrariness in state action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is essential element of equality or non-arbitrariness, pervades article 14 like a brooding omnipresence and the procedure contemplated by article 21 might answer the test of reasonableness in order to be in conformity with article 14. It must be “right and fair and just and arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied.”

- 2) As held in *Omondi v National Bank of Kenya*, 2001 Vol. EACA 177; the court is entitled to look at its record when hearing the preliminary objections.
- 3). It is in the interest of justice that Kenyans be treated alike.
- 4). The rule in *Mukhisa Biscuits v West End* (1969) EA, 696, requires that the said Notices be struck out with costs.

15. The Applicant/Respondent opposed the preliminary objection by putting in the replying affidavit sworn by its proprietor, Wanja Wambugu on 25<sup>th</sup> April, 2022. Therein it was deposed that it is not in dispute that the decretal sum is owed by the Appellants and the 2<sup>nd</sup> to 7<sup>th</sup> Respondents and that contrary to the averments being made by the Appellants to the effect that they only earn about ksh 25,000/- each per month, they are persons of means and with various sources of income pursuant to the assets particularized in the replying affidavit and acquired through succession by way of the grant issued in the estate of the late Lawrence Regeru Wambaa (the deceased). That the Appellants have deliberately refused to settle the outstanding decretal amount and hence the allegation of discrimination cannot stand.
16. In her ruling, the Deputy Registrar reasoned that the notices to show cause were properly taken out in view of the ruling delivered by the High Court on 13<sup>th</sup> May, 2021 and where it found that execution is a continuous process and that the Applicant/Respondent being the decree holder, was not barred from taking out fresh warrants of arrest against the Appellants upon presenting new evidence to satisfy the court on the manner of execution sought. Consequently, the Deputy Registrar dismissed the notice of preliminary objection and upheld the notices to show cause, thereby directing the parties to file their



affidavit of means/proposals and directing that the matter be mentioned on 28<sup>th</sup> June, 2022 for further directions.

17. In the renowned case of *Mukisa Biscuit Company v West End Distributors Limited* (1969) EA 696 the court analyzed the definition of a preliminary objection in the following manner:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion.”

18. The above definition was further advanced by the Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR when it rendered itself thus:

“It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.”

19. The main preliminary issue raised before the Deputy Registrar is that the notices to show cause were discriminatory against the Appellants by virtue of being issued solely against them rather than against all the judgment debtors in the matter. From the record, it is not in dispute that judgment was entered against the Appellants as well as the 2<sup>nd</sup> to 7<sup>th</sup> Respondents on 17<sup>th</sup> November 2017 in the sum of ksh 5,000,000/- less the admitted sum of ksh 50,000/- said to have been paid to the Applicant/Respondent, bringing the remaining outstanding judgment sum to ksh 4,950,000/-.
20. Further, it is also not in dispute that part of the said decretal sum was settled by the judgment debtors, thus bringing the outstanding sum as at the time of issuance of the notices to show cause to the sum of ksh 4,195,000/-. The record shows that subsequently, an order was made on 23<sup>rd</sup> December, 2020 for issuance of warrants of arrest against the Appellants, thereby prompting them to file the application dated 13<sup>th</sup> January, 2021 seeking among others, an order for a stay of execution of the aforesaid order pending the hearing and determination of their appeal, and a further order lifting/suspending or staying the warrants until further notice.
21. The application was placed before the Seron, J who upon hearing the parties, delivered a ruling on 13<sup>th</sup> May, 2021 reasoning that the Applicant/Respondent had failed to discharge the burden of proof that the Appellants have the means to pay the entire decretal sum or some substantial part thereof but have neglected to do so. The learned judge further held that the latter fact notwithstanding, execution is a continuous process and hence the Applicant/Respondent was not barred from making a fresh application for warrants of arrest and committal of the Appellants to civil jail upon presenting new evidence to the satisfaction of the court.
22. Thereafter notices to show cause were issued against the Appellants. The court on the one part acknowledges the existing right to equality and freedom from discrimination covered under Article 27 of *the Constitution*. On the other part, from the court’s study of the record, it is apparent that the Appellants herein executed the agreement for legal services entered into between themselves and the Applicant/Respondent. There is nothing to indicate that separate retainer agreements were entered into with the Applicant/Respondent.
23. In any event, the court is of the view that nothing in the law precludes a decree holder from pursuing satisfaction of a decree against one or some of the judgment debtors and hence the decision to pursue one party cannot be deemed discriminatory. This is seen under the doctrine of “joint and several”



liability which presupposes that a decree holder is at liberty to seek payment of the entire decretal amount from all, any or one of the debtors.

24. As held in the case of *Jacob Oluochi Ondeko & 2 others v Praxedes P Mandu Okutoyi & 2 others; Madison General Insurance Kenya (Interested Party)* [2021] eKLR:

“Ringera, J (as he then was) in *Kenya Airways Limited v Mwaniki Gichobi & another* Nairobi (Milimani) HCCC no 423 of 2002 dealt with the doctrine of joint and several liability and held that:

“The concept of joint and several liability comprehends one judgement and decree against two or more persons who are liable collectively and individually to the full extent of such decree; however double compensation is not allowed and accordingly whatever portion of the decree is recovered against one of such defendant cannot be recovered from the other defendant(s).”

What I understand by that decision is that in a joint and several liability, the successful party is at liberty to either execute the decree against the judgment debtors together or only execute against one of them for the whole or part thereof save that the creditor cannot execute for the full amount against all the debtors as that would amount to double compensation. In other words, whatever is realized against one debtor must be taken into account in seeking recovery from the other debtor. In this case, the Plaintiffs are at liberty to execute against both the 1<sup>st</sup> and the 3<sup>rd</sup> Defendants at once for the whole amount or choose only one of them or execute against them for different amounts.”

25. Further to the foregoing, the court upon examining the notices to show cause, notes that they were taken out in compliance with Section 38 of the *Civil Procedure Act* which stipulates that:

“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;
- ...”

26. In her impugned ruling, the Deputy Registrar took into account the above proviso as well as the ruling delivered on 13<sup>th</sup> May, 2021 which as earlier indicated did not prevent the Applicant/Respondent from taking out fresh warrants of arrest against the Appellants upon providing sufficient reasons. On the record, is the Applicant/Respondent’s replying affidavit sworn in support of the notices to show cause and in opposition to the preliminary objection, in which patently credible documentation is exhibited in demonstration of the Appellants’ financial means enabling them to satisfy the outstanding decretal amount.
27. The Appellants did not adduce any credible evidence to counter the above averments. In view of the foregoing and in the absence of a demonstration that the Deputy Registrar overlooked the earlier decisions in the matter and/or misdirected herself on the principles pertaining to issuance of notices to show cause, the court finds no merit in the complaint relating to the first limb.
28. The second limb of the appeal relates to the complaint that the Deputy Registrar ignored the Appellants’ submissions. The court, on reviewing the record and substance of the impugned ruling, finds no justification for the complaint. Conversely, it does appear that the Deputy Registrar took into consideration all the relevant material which had been placed before her, and upon doing so, arrived at a reasonable finding.
29. The upshot therefore is that the appeal is without merit and is hereby dismissed, with costs to the Applicant/Respondent. Consequently, the ruling delivered by the Honourable Deputy Registrar on 31<sup>st</sup> May, 2022 is hereby upheld.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 22<sup>ND</sup> DAY OF JUNE 2023.**

**C.MEOLI**

**JUDGE**

**In the presence of:**

**For the Applicant/ Respondent: Mr. Mugo h/b for Mrs. Wambugu**

**For the Appellants N/A**

**C/A: Carol**

