



REPUBLIC OF KENYA



KENYA LAW
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**Panyako v Independent Electoral and Boundaries Commission & 2 others (Election
Petition 14 of 2017) [2024] KEHC 12355 (KLR) (16 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12355 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
ELECTION PETITION 14 OF 2017
S MBUNGI, J
OCTOBER 16, 2024**

BETWEEN

SETH AMBUSINI PANYAKO PETITIONER

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT**

RETURNING OFFICER, KAKAMEGA COUNTY 2ND RESPONDENT

CLEOPHAS WAKHUNGU MALALA 3RD RESPONDENT

RULING

1. The petitioner filed an application dated 15.01.2024 in this court under Certificate of Urgency, seeking the following orders: -
 - i. That the application be certified extremely urgent and be heard ex parte and notice thereof be dispensed within the first instance.
 - ii. That pending the hearing and determination of the application, this Honorable Court be pleased to grant an interim stay of execution of the ex-parte Warrants of Arrests issued on 18th August, 2022, and any other subsequent or other execution processes thereto.
 - iii. That this Honorable Court be pleased to review and/or set aside the Warrants of Arrest dated 18th August, 2022 and based on the defective/perjured application for execution filed herein.
 - iv. That upon this Honorable Court determining what is truly due taking into consideration the security sum of Kshs. 500,000/- already in court bank account, the Applicant be permitted to pay the balance by way of monthly instalments of Kshs. 20,000/- until payment in full.



- v. That in the alternative and/or in addition and without prejudice to the above, the Honorable Court be pleased to review, vary and/or set aside the ex-parte order for execution by way of Warrants of Arrest, in place thereof, direct that if any execution is taken out, then this be by way of a Notice to Show Cause being served on the applicant for hearing and determination by the Deputy Registrar.
 - vi. Such other and further protective orders as may be deemed just and expedient in the circumstances.
 - vii. Costs to follow the event.
2. The application was premised on the grounds that the warrants of arrest in execution were processed without show cause thereby denying the petitioner an opportunity to explain himself, denying the petitioner the right to fair hearing as encapsulated in article 50 of *the Constitution* of Kenya.
 3. The petitioner further averred that no notices were served on him or his advocate on record to enable him to attend court.
 4. The petitioner submitted that the computed figure of Kshs. 1,537,141/- appearing on the warrants of arrest in execution are erroneous and grossly exaggerated since at the point of filing the petition, the petitioner paid a sum of Kshs. 500,000/- which the 3rd respondent ought to access and compute costs payable thereafter.
 5. The petitioner further stated that he is financially constrained, with no reasonable source of income hence cannot raise the lump sum at once, but is committed to settling the correctly computed cost through a payment plan wherein he will make payments of Kshs. 20,000/- every month until the ultimate settlement.
 6. The application was supported by an affidavit sworn by the petitioner
 7. The court issued a stay of execution of the ex parte warrants of arrest issued on 18.08.2022 and directed that the notice of motion be served upon the respondents to enable them to file their responses to the application by the petitioner.
 8. The court directed that the application be canvassed by way of written submissions.

Applicant's submissions

9. Through his submissions dated 30.09.2024, the applicant submitted that the warrants of arrest issued on 18.09.2022 were defective as no formal application to show cause as to why he should not be arrested, or committed to civil jail was served upon him, or his advocates on record.
10. The applicant submitted that as per the law, he submitted Kshs. 500,000/- as security in this court before his election petition could be heard, and this sum has not been taken into consideration in computing the due amount, hence resulting in the grossly exaggerated amount of Kshs. 1,537,141.50/-.
11. The applicant submitted that he should be permitted to pay the balance by way of monthly installments of Kshs. 20,000/- until payment in full, stating that this is a demonstration of good faith, taking into account the harsh economic times citing the case of Braeburn Limited vs Gachoka and another(2007)eKLR.
12. The petitioner further submitted that he has not refused to pay the debt, but is unable to raise the whole amount at once and is willing to pay by way of reasonable installments of Kshs. 20,000/-.



13. The petitioner submitted that the prayers sought are unopposed and averred that no replying affidavit or Grounds of opposition, or Preliminary Objection or response whatsoever has ever been served upon the applicant.

1st and 2nd Respondents submissions.

14. The 1st and 2nd respondents, jointly filed submissions dated 25.03.2024 opposing the petitioner's notice of motion, and identified the issues of determination as follows: -

- i. Whether the applicant/petitioner has made out a good case to justify the grant of order for review and/or setting aside warrants of arrest.
- ii. Whether this court should allow the applicant to pay the decretal amount in installments.
- iii. Whether there can be *ex parte* interim stay order of execution orders.

15. They opposed the application, relying on the replying affidavit by one Grace Chepchirchir Ronoh sworn on 12.03.2024 and their list and bundle of Judicial Authorities dated and filed on 25.03.2024.

16. On whether the petitioner had made out a good case to justify the grant of orders for review and/or setting aside warrants of arrest, they submitted in the negative, stating that even though section 80 of the *Civil Procedure Act* grants the court powers to order for reviews, the applicant's reasons for prayer for review do not fall under the scope for review as stipulated under Order 45 of the Civil Procedure Rules.

17. The respondents submitted that as per the applicant's sworn affidavit, both parties are in agreement that the decree was borne from the two certificates of taxation, totaling to Kshs. 1,537,141.50/- They further submitted that the applicant has not paid a dime since the time the judgment was delivered in 2018, and has not explained the cause of the delay either.

18. The respondents further submitted that the notice to show cause was served upon the applicant by one Leonard Matwali and an affidavit of service filed in court. The same has not been rebutted by the applicant. The respondents submitted that upon service of the notice to show cause as to why warrants of attachment should not be issued against the judgment debtor to satisfy the taxed costs, the applicant did not turn up in court hence the warrants of arrest were rightfully issued.

19. On whether the court should allow the applicant to pay the decretal sum in installments, the respondents stated that as per Order 21 rule 12(1) of the civil procedure rules, an application for payment by installments could only be made at the passing of the decree, which the applicant did not. They further submitted that as per Order 21 Rule 12 (2) of the Civil Procedure Rules 2010, an application for paying by installments after passing of the decree can only be made with the consent of the decree holder and without the consent of the decree holder, for sufficient cause shown. They further submitted that granting this prayer would take the applicant a period of at least 65 months to pay the decretal sum, subjecting the respondents to an excruciating wait of 6 years, citing the case of *Taj Mall Limited vs Cobra Security Company Limited (2020) eKLR* and *Ouma Njoga & Company Advocates vs Joshua Ouma Ogwang(2019) eKLR*

20. The respondents submitted that there is no consent from the decree holder, and averred that the applicant had not sufficiently demonstrated any sufficient cause to warrant payment of the decretal sum in installments to invoke the court's discretion in granting the prayers by the applicant where there is no consent of the decree holder.



21. The respondents further submitted that the applicant herein had not presented any financial statements or payslips for proof of financial difficulties in support of his averment as required by law under Section 107(1) and (2) of the *Evidence Act*, Cap 80.
22. On whether there can be ex parte interim stay order of execution, the respondents submitted that the application by the petitioner was misleading, calculated and aimed at perverting the course of justice with the ultimate aim of keeping financial gain to himself. They further averred that the applicant is guilty of non-material disclosure for not telling the Honorable Court the whole truth about the backgrounds of the case for it to arrive at a just decision.
23. The respondents further averred that the application was scandalous, frivolous and vexatious to the court and an abuse to the court process, as it is based on the applicant's claims that the Kshs. 500,000/- deposited as security in court was not considered while computing the decretal sum, and that the notice to show cause was never served upon him.
24. The respondents submitted that the applicant/petitioner failed to establish a case for the prayers sought in totality and the same should be dismissed.

Analysis.

25. I have looked at the application, the supporting affidavit, the submissions. I have also looked at the replying affidavit sworn by Grace Chepchirchir Ronoh filed on 13.03.2024, the submissions by the 1st and 2nd respondents.
26. The applicant says he was not served with any response and any submissions by the 1st and 2nd respondents. The counsel for the 1st and 2nd respondents has appeared in court physically and told the court that he was served and it was the applicant who delayed in filing submissions. This court had to go out of its way to have the applicant's submissions in the court file. A look at the submissions shows the 30.09.2024 and the matter was coming up for ruling on 14.10.2024 and on that date, submissions were not in the court file. They were put later in the day. The court had to give another date for ruling for it to be able to go through the submissions. I am not convinced that the applicant was not served with the responses by the 1st and the 2nd respondents.
27. From the material before me, I isolate three issues for determination: -
 - i. Whether the applicant was served with the notice to show cause by the court before the Deputy Registrar issued the warrants of arrest.
 - ii. Has the applicant shown a sufficient cause to enable this court to exercise its discretion and allow him to pay the costs in installments of Kshs. 20,000/- per month?
 - iii. How much is outstanding as costs which the applicant should pay?

Determination

28. The applicant maintains that he was not served with a notice to show cause before the warrants of arrest were issued on 18.08.2022. The 1st and 2nd respondents relying on the replying affidavit sworn by Grace Chepchirchir Ronoh on 12.03.2024, maintain that the applicant was duly served by the process server known as Leonard M. Matwali. The said Leonard Matwali swore an affidavit on 06.06.2022 where he deponed that he served the applicant with a notice to show cause dated 19.05.2022 at Malava Constituency offices on 30.05.2022 where the applicant was scheduled to present his nomination papers as a member of parliament for Malava Constituency to the IEBC but declined to sign at the back as proof that he had been served. He further deponed that he took photographs during the exercise.



He attached four pieces of photographs in his affidavit showing him serving. The four of them have an arrow pointing to a gentleman, who to the said Leonard Matwali is the applicant.

29. Apart from the arrow pointing at someone, there is no further description on what is happening in the photographs. In absence of any other independent evidence the court cannot tell whether the applicant is among the people captured in the photographs, or whether the photographs were taken at the place said by the process server, or whether even the process server was among those people.
30. At this era of technology, and given the nature of the matter, I think electronic service would have been more appropriate and safe.
31. There is a possibility that proper service of the notice to show cause was done, but given the nature of the matter, I will give the applicant the benefit of doubt. I will not fault the Deputy Registrar for she had satisfied herself that there was proper service before issuing the warrant of arrest for the applicant had failed to attend court to explain himself.
32. The upshot of the above is that the warrants of arrest are set aside. In any case it has not been explained why it has taken so long for the warrants of arrest to be executed since they were issued.
33. There is a consensus that there are two certificates of costs; One dated 05.07.2021 for the sum of Kshs. 216,142.50/- and another one dated 09.03.2021 for the sum of Kshs. 1,3220,999/-.
34. The issue of whether the applicant has made sufficient cause to be allowed to pay the outstanding costs in monthly installments of Kshs. 20,000/-, Order 21 rule 12(1) and (2) of the Civil Procedure Rules provides as follows: -

“Decree may direct payment by instalments [Order 21, rule 12.]

- (1) Where and in so far as a decree is for the payment of money, the court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.
 - (2) After passing of any such decree, the court may on the application of the judgmentdebtor and with the consent of the decree-holder or without the consent of the decree-holder for sufficient cause shown, order that the payment of the amount decreed be postponed or be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor or the taking of security from him, or otherwise, as it thinks fit.”
35. From the above provision, it is clear that an order to pay in installment can be granted where:
 - i. There is a consent of the decree holder. (In this case there is no such consent)
 - ii. Where there is no consent of the decree holder, the court has discretion after sufficient cause is demonstrated.
 36. Factors to be considered by the court in deciding whether to exercise its discretion to allow the settlement of a decretal sum via installments were considered in the case of Nicholas Gitonga Murongi vs Susan Wairimu & 4 others(2021)eKLR where the case of Rajabali Alidina Vs Remtulla Alidina & Another [1961] EA 565 was cited stating that an application seeking to settle the decretal sum via installments the court should be guided by the following tests:-



- a. The circumstances under which the debt was contracted.
 - b. The conduct of the debtor
 - c. His financial position, and
 - d. His bona-fides in offering to pay a fair proportion of the debt at once. of
37. In the case of Lavington Security Limited vs Nairobi City Water & Sewerage Company Limited(2014) Eklr, it was held as follows : -
- “...Of great significance in application of this nature are; the circumstances of the case; the conduct of the parties; the willingness and bona fides of the Applicant to pay a fair proportion of the debt; and of course, that the application is made without undue delay...”
38. The court in the case of Hildegard Ndelut v Letkina Dairies Ltd & another [[2005] eKLR held;
- “a judgment creditor is entitled to payment of the decretal amount, which he should receive promptly to reap the fruits of the judgment. The judgment debtor might genuinely be in a difficult position in paying the decretal amount at once. However, he has to show seriousness in paying the amount. In that event he should show his bona fides by arranging fair payment proposals to liquidate the amount.”
39. From the record, the applicant’s petition was dismissed in the year 2018, certificates on taxation were issued in the year 2021. The applicant was made aware. He never made attempts to pay.
40. Warrants of arrest were issued against him more than one year ago. Even after he had learnt about the warrant of arrest, he never made any attempt to pay.
41. As discerned from the above quoted authorities, it was incumbent upon the applicant to lay bare his current financial status / hardships before the court so that the court can assess whether he is able or not to pay the claimed amounts at once or not.
42. The applicant is said to be the chair of the Nurses Association in Kenya and constant contestant of parliamentary elections for a member of parliament in Malava Constituency, Kakamega County. Therefore on the face value he can be deemed as a man of means.
43. Therefore, in absence of any evidence to show that he is struggling financially, he should be able to pay his debts.
44. The applicant is offering to pay Kshs. 20,000/- per month. As correctly submitted by the respondents, if this is allowed, it will take a long time to have the debt paid in full , given that it has been outstanding since 2018.
45. Since now the applicant has expressed willingness to settle the outstanding amount, and this being a court of justice and equity, balancing the need for the 1st and 2nd respondents to enjoy the fruits of their litigation and the need for the applicant to be afforded a reasonable chance to pay the outstanding amount, I order as follows.
- i. The applicant to pay half of the amount 1,287,141.50/- (1,537,141.50 – 250,000(already deposited in court to be released to the applicants)) within the next 30 days from today. For avoidance of doubt, the amount to be paid within 30 days is Kshs. 643,570.75/-.



- ii. Then, the applicant will be paying Kshs. 50,000/- per month until the outstanding amount of Kshs. 643,570.75/- is paid in full. Payment to begin on 30.12.2024.
- iii. In case of default on the part of the applicant, the execution to ensue.
- iv. Since the application has partially succeeded, each party to bear its own costs of this application.
- v. Warrants of arrest issued against the applicant are set aside.

46. Right of appeal 30 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 16TH DAY OF OCTOBER, 2024.

S.N MBUNGI

JUDGE

In the presence of:

Mr. Busiega present online for the petitioner / applicant

1st Respondent – absent

2nd Respondent – absent

3rd Respondent – absent

Court Assistant – Elizabeth Angong'a

