



REPUBLIC OF KENYA



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Ruga v Wangeci (Suing as the Personal Representative of the Estate of Ruga Gituku - Deceased) & 2 others (Environment and Land Appeal E020 of 2024) [2025] KEELC 4672 (KLR) (19 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4672 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E020 OF 2024
LC KOMINGOI, J
JUNE 19, 2025

BETWEEN

HANNAH GATHONI RUGA APPELLANT

AND

JOYCE WANGECI (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF RUGA GITUKU - DECEASED) 1ST RESPONDENT

PHILIP OLE SIRONKA 2ND RESPONDENT

HON ATTORNEY GENERAL 3RD RESPONDENT

(Being an Appeal against the Ruling of Hon. J. Kamau in Kajiado Misc. Civil Application No. E019 of 2021 delivered on 8th April 2024)

JUDGMENT

1. In the Ruling delivered on 8th April 2024 in Kajiado Misc. Civil App. No. E019 of 2023, the learned Hon. J. Kamau declined to grant the Appellant’s application seeking that a Warrant of arrest be issued against the 1st Respondent.
2. Aggrieved by this decision, the Appellant appealed against seeking for its setting aside with an order that the 1st Respondent does pay Kshs. 753, 783 on the grounds that:
 - i. The Learned trial Magistrate erred in both law and in fact by dismissing the Appellant’s application dated 28th November 2023 without considering in totality the grounds in the application and supporting affidavit thereof.



- ii. The Learned Magistrate erred in law and fact in not finding that the orders issued on 1st November 2023 are incapable of being executed in the manner directed by the Honourable Court and therefore in vain.
 - iii. The learned Magistrate erred in law and fact by failing to analyse and find that the only method of execution available to the Appellant is through issuance of warrants of arrest.
 - iv. The Learned Trial Magistrate erred in law and in fact in failing to be guided by law and procedure outlined under Order 22 rule 31 of the Civil Procedure Rules, 2010 in determining the matter and issuing her Ruling dated the 8th April 2024 and therefore arriving at a wrong conclusion.
 - v. The Learned Magistrate erred in law and fact in finding that the Appellant's application was premature.
3. This Appeal was canvassed by way of written submissions.

Submissions of the Appellant/Applicant.

4. Counsel submitted that the firm of P. Sang & Co. Advocates instructed Direct Auctioneers on behalf of the 2nd Defendant to execute the Certificate of Costs dated 10th September 2021. Based on these instructions, the Court issued warrants of attachment and sale dated 7th February 2023 to Direct Auctioneers. In a report dated 23rd March 2023 filed in Court, the said auctioneers indicated that they could not trace any property belonging to the Plaintiff. This necessitated the filing of the Notice to Show Cause dated 14th February 2023. On 1st November 2023 the Trial Court partly allowed the Notice to Show Cause by directing that the Respondent's properties be attached but declined to issue warrants of arrest. In the Application dated 28th November 2023, the Appellant informed the Court that the order dated 1st November 2023 could not be executed because there were no traceable properties belonging to the Plaintiff. As such, the only method of execution available was through issuance of warrants of arrest and the Order should be reviewed. The Respondent neither filed a response or appeared in Court. On 8th April 2024, the Court in its Ruling rendered that the Application was premature and that led to this instant Appeal with the following as the issues for determination.
5. On whether the Orders issued on 1st November 2023 are incapable of being executed in the manner directed and therefore in vain and should be reviewed, counsel submitted that from the foregoing, it was clear that there was no traceable properties belonging to the Plaintiff as per the auctioneers report. Therefore, without setting aside the Ruling dated 8th April 2024 and allowing for a review of the orders issued on 1st November 2023, the Ruling of the Court dated 30th August 2021 cannot be executed and will thus be rendered nugatory. Counsel submitted that Section 80 of the *Civil Procedure Act* allowed for review of a Judgement and in this case due to discovery of new evidence which was not within the knowledge of the aggrieved person at the time the decree was passed as espoused under Order 45 Rule 1 of the Civil Procedure Rules with reference to Sanitam Services EA Ltd vs Rentokil (K) Ltd & another (2019) eKLR.
6. On whether the learned Magistrate ignored the provisions of Order 22 Rule 32 of the Civil procedure Rules in determining the matter and hence arriving at a wrong decision, it was submitted that Section 38 of the *Civil Procedure Act* provided for committal of a judgement debtor to civil jail to enforce execution. Counsel submitted that the Appellant had adhered to these provisions but the Respondent continued to willingly disobey court orders and the decree issued in 2021 and had not undertaken any steps to settle the debt owed. Therefore, following the report that there was no property traceable for



attachment, then it the only other recourse was by incarceration. Reference was made to *Fina Bank Ltd vs Francis Gitau Komu T/A Bomas Motor Mart* [2015] eKLR and *Jedida Chepkoech Mutai* (suing as the legal representative of the Estate of Julius Kipkorir Mutai (deceased) vs Cheronon Beatrice [2018] eKLR which held that if there has been strict adherence to Section 38 and 40 of the [Civil Procedure Act](#), then a person can be committed to civil jail for non-payment of a debt.

Submissions of the 1st Respondent

7. It was submitted that the Appellant is one of the Administrators of the estate of the Late Ruga Gituku alongside the 1st Respondent. At the lower court, the 1st Respondent had sued the Appellant and the matter was determined in favour of the Appellant with costs. The Appellant moved to recover her costs and filed a Bill of Costs dated 28th April 2021 which was taxed at Kshs. 752,283. Through a Notice to Show Cause dated 14th February 2023 she sought to recover the costs and in a ruling dated 1st November 2023 the Court granted the Appellant permission to recover the costs but declined the prayer for incarceration. The Appellant sought services of auctioneers and in their report dated 23rd March 2023 indicated that they could not trace 1st Respondent's attachable property. In an application dated 28th November 2023, the Appellant sought to review the Ruling dated 1st November 2023 to allow the 1st Respondent's incarceration. However, this was declined in the ruling dated 8th April 2024 for being premature. Therefore the issues for determination were: Whether the 1st respondent should be committed to civil jail and whether the appellant had exhausted all modes of execution under Order 22(1) Rule 8, 9 and 10 of the Civil Procedure Rules.
8. On whether the 1st Respondent should be committed to civil jail, it was submitted that arrest and committal to civil jail is a last resort where the decree holder ought to demonstrate reasons such as concealment of property or outright refusal to pay despite having means. Reference was made to the following cases which held that for a judgement debtor to be committed to civil jail, there must be evidence that they had means to pay but was evading to pay, was being dishonest or fraudulent: *Pollack & another vs Sevak* [2022] KEHC 9874 (KLR), *Nakacji vs Centric Air Ambulance Ltd* [2024] KEELRC 2580 (KLR) and *SMG & another v JMM* [2020] eKLR. And that for a judgement debtor to be committed to civil jail, an applicant must satisfy that they had strictly adhered to the Civil Procedure Rules citing *Agui v CM* (Suing as the father and next friend SA (minor) & 2 others [20224] KEHC 13475 (KLR).
9. On whether the appellant had exhausted all modes of execution under Order 22(1) Rule 8, 9 and 10 of the Civil Procedure Rules, it was submitted that the auctioneers letter dated 23rd March 2023 was a mere letter without proof of effort and thus did not satisfy the threshold for exhaustion of execution. Counsel argued that a proper execution process should involve investigation, detailed inventory of efforts, places visited in search of the judgement debtor's assets, exploration of alternative modes of execution and compliance with the procedural requirements. There was therefore no evidence that the auctioneers had made reasonable efforts before concluding non traceability as espoused under Section 6 of the [Auctioneers Act](#). Counsel went on to submit that even with no tangible assets, the execution process provided for additional mechanisms to recover the judgement debt such as applying for a garnishee order under Order 23 of the Civil Procedure Rules to attach funds in the judgement debtor's accounts; to summon the judgement debtor in Court for an examination about her assets and liabilities under Order 22 Rule 35 Civil Procedure Rules; or Section 12(2) [Auctioneers Act](#) to attach alternative movable properties. Reference was made to *Wanjiku & another vs Attorney General & another; Muna & another* (Interested Parties) [2012] KEHC 5410 (KLR).
10. Therefore, the Appeal should be dismissed with costs to the 1st Respondent.



Submissions of the 2nd Respondent

11. Counsel submitted that the issue for determination was whether the Appeal was merited. It was submitted that as per the laid out provisions of Section 30, 38 and 39 of the *Civil Procedure Act* and Order 22 Rule 7, 31, 32, and 35 of the Civil Procedure Rules the Appellant had duly followed the stipulated procedure and it was on record that the 1st Respondent had willingly refused to pay the judgement debt. Whereas the Ruling held that incarceration would not be dignifying to the 1st respondent, the learned Magistrate had an obligation to enforce Section 38 *Civil Procedure Act*. The 2nd Respondent also pointed out that enforcement would be an arduous task because all the properties enjoyed by the 1st Respondent were registered under the Estate of her late father Ruga Gituku. To support this argument, reference was made to: Innocent G. Ondieki vs Julius Nakaya Kabole (2019)eKLR, Jane Wangui Gachoka v Kenya Commercial Bank Limited [2013] eKLR, Beatrice Wanjiku & Another vs Attorney General & Another (2012)eKLR and Okiya Omtatah Okoiti vs National Transport and Safety Authority & another [2021] eKLR. Therefore, committal to civil jail was a proper enforcement mechanism and the Appeal was merited. As such the Ruling dated 8th April 2024 should be set aside.

Analysis and determination

12. I have considered the grounds of Appeal, The Record of Appeal, the rival submissions, and the authorities cited. The five grounds of Appeal can be compressed into the following issues:
- i. Whether the Deputy Registrar erred in law and infact by failing to come to the conclusion that the only method of execution available to the Appellant was through the issuance of a Warrant of Arrest.
 - ii. Whether the Ruling dated 8th April 2024 should be set aside and orders issued on 1st November 2023 be reviewed.
 - iii. Who should bear costs of the Appeal?
13. This being a first Appeal, this court has a duty to evaluate a fresh the evidence adduced before the lower court in order to arrive at its own independent conclusion bearing in mind that it neither saw nor heard the witnesses and make allowance in this respect. In *Selle & Another Vs. Associated Motor Boat Co. Ltd & Others* (1968) EA 123, cited in *Barnabas Biwott Vs. Thomas Kipkorir Bundotich* (2018) eKLR this principle was enunciated thus;

“this court is not bound necessarily to accept the findings of fact by the court below. An Appeal to this 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.....”

14. In her ruling dated 1st November 2023 the Deputy Registrar observed thus:

“The Judgement Debtor has wilfully disobeyed court orders and decree since the ruling of the taxing master in the year 2021”



She went further to advise;

“It is therefore the Applicant’s responsibility to carry out a survey on how to recover the said sums instead of seeking imprisonment of the respondent.

Incarceration is not only humiliating, but will subject the respondent to shame and indignity. In this regard therefore and in conclusion, I find that the Notice to show cause dated 14th February 2023 has merit and is allowed as prayed, on condition that the respondent’s property shall be attached instead of her incarceration.”

The appellant then sought a review of the above ruling. The same was decided vide a ruling dated 8th April 2024, hence this appeal.

15. It is the Appellant’s case that she duly took out the warrants of attachment and instructed Direct “O” Auctioneers to attach the 1st Respondent’s property. By a letter dated 23rd March 2023 Direct “O” Auctioneers wrote to the Appellants’ counsel indicating that they could not trace any of the 1st Respondent’s properties. The letter reads;

“To:

& Co. Advocates

BOX 72348-00200

NAIROBI.

23RD March 2023.

Dear Sir/Madam,

Re: ELC Misc. App No. E19 of 2021

Joyce Wangeco Ruga Vs. Philipo Ole Sironka & 2 Others

The matter above refers.

We have not managed to trace moveable or immovable properties belonging to Joyce Wangeci Ruga the Plaintiff in this matter.

We hereby return the original warrants of attachment and sale to you, for onward filing in court file and recommend other forms of execution.

Thank you for your continued support.

Yours faithfully:

Geoffrey Kariuki

T/A Direct O Auctioneers”.

16. It is the Appellant’s contention therefore that she has followed all the steps in a bid to execute against the 1st Respondent.
17. The 1st Respondent on the other hand submitted that the Appellant ought to demonstrate she had the means to pay but was evading to pay, was being dishonest or fraudulent.



18. I have considered the fact that the certificate of costs was issued way back in the year 2021. To date, the 1st respondent has taken no steps to settle the debt. The Report by the Auctioneers that they could not trace any of the 1st Respondent's properties to attach has not been challenged.

How then will the Appellant "carry out a survey on how to recover the said sums?"...

19. Section 38 of the [Civil Procedure Act](#) provides 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; or
- (c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account".

20. Order 22 rule 31 of the Civil Procedure Rule provides that;

- (1) Notwithstanding anything in these Rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in prison of a judgment debtor who is liable to be arrested in pursuance of the application, the court may, instead of issuing a warrant



for his arrest, issue a notice calling upon him to appear before the court on a day to be specified in the notice and show cause why he should not be committed to prison.

- (2) Where appearance is not made in obedience to the notice, the court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor.

I am of the view that the Appellant has exhausted all the steps with a view to execution before seeking of a warrant of arrest to issue against the 1st Respondent.

21. It is on record that the 1st Respondent was served with several mentions to attend court to show cause but failed to do so.
22. The Appellant is entitled to get the sums owing as she has exhausted the stipulated procedure with respect to execution.
23. I find that the 1st Respondent has willingly refused to pay the debt.

In the case of *Braeburn Ltd Vs. Gachoka & Another* (2007) eKLR cited in *Solomon Muriithi Gitandu & Another Vs. Jared Maingi Mburu* (2017) eKLR the court held thus;

“A person is not liable to be committed to civil jail for inability to pay a debt but a dishonest and fraudulent debtor, is liable to be punished by way of arrest and committal’.

The court further observed that;

“Section 38 the *Civil Procedure Act* however provides a limitation of the court’s power to order execution of a decree by way of detention in in prison. The section prohibit the courts from making an order of execution of any decree for the payment of money unless the judgement debtor has first been given an opportunity of showing cause why he should not be committed to prison and even where the Judgement debtor has been given such notice to show cause the court must itself be satisfied and given reasons in writing for that”.

24. I am of the view that the 1st Respondent herein has been given an opportunity to show cause but she failed to do so. The Deputy Registrar observed that “the Judgement Debtor has unlawfully and disobeyed court orders and decree since the ruling of the Taxing master in that year 2012”
25. I therefore find that the Deputy Registrar erred by dismissing the Appellant’s application dated 28th November 2023 without considering in totality the grounds in the application and the supporting affidavit thereof.
26. I therefore find merit in this Appeal and the same is allowed.
27. This means;
- a. That the ruling dated 8th April 2024 is hereby set aside and substituted with an order reviewing the ruling of 1st November 2023.
 - b. That the 1st Respondent is hereby ordered to pay Kshs.753,783 within 30 days of this Judgement. In default, a Warrant of Arrest do issue.
 - c. That the costs of this appeal shall be borne by the 1st Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 19TH JUNE 2025.

L.KOMINGOI
JUDGE.



In the presence of:

Mr. Chumba for the Appellant.

Mr. Asman for Mr. Towett for the 1st Respondent.

Mr. Kipkurui for the 2nd Respondent.

Court Assistant – Mutisya.

