



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW MISC. APPLICATION NO. 240 OF 2015**

REPUBLIC.....  
.....APPLICANT

VERSUS

THE CHIEF MAGISTRATE

COMMERCIAL COURTS.....  
.....RESPONDENT

AND

SOUTHERN CREDIT BANKING CORPORATION  
LTD.....INTERESTED PARTY

EX PARTE : JOSEPH MBOTE KARWENJI

**JUDGEMENT**

**Introduction**

1. By a Notice of Motion dated 5<sup>th</sup> August, 2015, the ex parte applicants herein, **Joseph Mbote Karwenji**, seeks the following orders:
1. That an order of Certiorari do issue to remove into this honourable court and quash the decision of M. Chesang (Mrs) RM contained in the warrant of committal of Joseph Mbote Karwenji to jail dated 16<sup>th</sup> July 2015 committing the Applicant into civil prison and keep him imprisoned therein for a period not exceeding six months.
2. That an order of Prohibition do issue against the Respondent prohibiting her from further incarceration of the Applicant in civil prison.
3. That all necessary and consequential orders be made that meet the ends of justice in the circumstances of this case.
4. That costs hereof be provided for.

**Ex Parte Applicant's Case**

2. According to the Applicant, these proceedings emanate from the proceedings of the respondent in Milimani commercial courts CMCC NO. 749 OF 2008 in which the interested party

- herein is the plaintiff/decreed-holder and the applicant is the defendant/judgement debtor.
3. According to him, on 16<sup>th</sup> July 2015, at about 7.30 am, a court bailiff visited his home at Thimbigua Kiambu and indicated that the purpose of his visit was to execute a warrant of arrest against him for falling to pay Kenya shillings one million one hundred and eighty seven thousand eight hundred and seventy four and eighty cents (1,187,874.80/=) to the interested party. He however indicated to the court bailiff that there was no notice to show cause which was served upon him and upon calling his advocates, he confirmed that they were similarly not served.
  4. The applicant averred that he was presented to the respondent's court on the same aforesaid date in the afternoon but despite his advocates on record appraising the honourable court that neither them or the applicant was aware or ever at all served with the notice to show cause the respondent's magistrate presiding over the case proceeded to commit him to civil jail.
  5. It was the applicant's case that it was unfair to be condemned unheard.
  6. The applicant further averred that the same day, 16<sup>th</sup> July 2015, at about 4.30pm his advocates on record were served with copies of notice to show cause why execution should not issue dated 7<sup>th</sup> May 2015 and an affidavit of service sworn by one **Dickson Musyimi** and dated 20<sup>th</sup> May 2015, in the applicant's presence by the advocate for the decree-holder after he was committed to civil jail by the respondent Court. From the said notice to show cause why execution should not issue it was categorical (sic) clear the same required him to appear before in chambers on the 12<sup>th</sup> June 2015 in person or by an advocate, or agent duly authorized and instructed to show cause, if any, why execution should not be granted.
  7. It was averred that contemporaneously after the order for committal were pronounced the applicant's said advocates made an application for copies of proceedings and ruling and/order and on 17<sup>th</sup> July 2015 served a letter dated 16<sup>th</sup> July 2015 to the executive officer for the aforesaid respondent requesting to be supplied with certified proceedings as from 7<sup>th</sup> May 2015 to when committal ruling and/order was made which letter was stamped received at the registry. However on the same day, they managed to be supplied with the requested proceedings from which it was apparent that there were no proceedings conducted on the 12<sup>th</sup> June 2015. Despite that, the respondent proceeded to commit him into civil jail on the 16<sup>th</sup> July 2015 without serving him with necessary court processes and according him a hearing. It was therefore the applicant's case that his right to natural justice was breached because the proceedings thereof and subsequent order was given without service on him of the necessary court process.
  8. The applicant further contented that the respondent court did not even entertain his advocates when he tried to explain to court that service of the NTSC was not affected and more so the affidavit of service was suspect. To the applicant, there was biasness (sic) against him since it was clear from the proceedings of the respondent in CMCC No. 749 of 2008.
  9. It was submitted on behalf of the applicant that from a reading of section 38 of the **Civil Procedure Act**, it is clear that where the decree is for payment of money, execution by detention in prison shall not be ordered unless after giving the judgement debtor an opportunity of showing cause why he should not be committed. It was submitted that it is a conditional precedent that before committal to prison, the judgement debtor ought to be afforded a hearing. It was further submitted that the decision to commit the applicant to civil jail was contrary to the applicant's legitimate expectation that the respondent would arrive at a fair hearing. However the provisions of section 38 of the **Civil Procedure Act** was not followed hence the application ought to be allowed.

### **Respondent's Case**

10. In response to the application, the Respondent filed the following grounds of opposition:

1. **That the Respondent had requisite jurisdiction to determine the matter at hand and the Applicant has not demonstrated any case as to why an order of certiorari should be issued against the Respondent.**
2. **That the matter is not within the purview of Judicial Review Court neither does it meet the basic tenets of judicial review application. Judicial review deals with procedure of decision making and not the merit or substance.**

3. That the Applicant has not demonstrated sufficient cause for grounds upon which the court can grant the orders sought.

4. That judicial review are discretionary in nature and are not guaranteed.

5. That the application is an abuse of court process and lacks merit.

6. That in the circumstances and based on the foregoing reasons the notice of motion is therefore baseless, misconceived and devoid of any merit and orders sought should not be granted.

11. It was submitted on behalf of the Respondent that the applicant is challenging the merit of the decision of the 1st Respondent hence this is an appeal through judicial review.

12. It was therefore submitted that the applicant has not demonstrated sufficient cause for the grant of the orders sought hence the application is an abuse of the court process.

### **Interested Party's Case**

13. On its part the interested party responded by outlining the history of the litigation and averred that in the years 2013 the Interested Party managed to trace the Ex parte Applicant's whereabouts and applied for a notice to show cause why execution of decree should not issue against the Ex parte Applicant. It was averred that the Ex parte Applicant was served with the notice to show cause on the 7th May, 2013 but he declined to acknowledge service. However on the 17th July, 2013 when the notice to show cause came up for hearing he instructed **Mr. Lakicha** Advocate who applied for an adjournment to enable the Ex parte Applicant to give proposals on how to liquidate the decretal amount by which the ex parte applicant proposed to pay the sum of Kshs. 200,000/= all inclusive which proposal was rejected by the Interested Party and the court finally allowed the execution of the decree to proceed and the Ex parte Applicant's goods were proclaimed by auctioneers on the 19/12/2013. However when the auctioneers went back to collect the proclaimed goods, they found that the Ex parte Applicant had already shifted from the house and the proclaimed goods were not there. After investigations the auctioneers managed to trace the Ex parte Applicant in his new residence and after proclamation they attached his motor vehicle KAJ 789X. The Ex parte Applicant then gave the auctioneers two (2) cheques for Kshs 200,000/= and Kshs 100,000/= and moved the court by filing an application for injunction and stay of execution and which application was dismissed by the court. Another application was filed by an objector who claimed ownership of the motor vehicle which objection was allowed and the attached motor vehicle released. However, that Ex parte Applicant filed another of the numerous appeals in the High Court against the refusal of the application for injunction and which appeal is also pending.

14. It was disclosed that after attempts to execute the decree by attachment of the Ex parte Applicant's assets failed the Interested Party applied for a notice to show cause why the Ex parte Applicant should not be arrested and committed to civil jail for failing to pay the decretal amount and that the Ex parte Applicant was personally served with the notice to show cause and accepted service but he declined to acknowledge receipt. On the 12th June, 2015 the Ex parte Applicant failed to appear in court as had been ordered to show cause and a warrant was issued for his arrest pursuant to which he was arrested on the 15/7/2015 by the court bailiffs and taken to court where he was joined by his advocate **Mr. Lakicha**.

15. It was therefore the applicant's case that the Ex parte Applicant was not denied a chance to be heard but on the contrary he failed to indicate how he would liquidate the decretal amount and the court committed him to civil jail.

16. It was further contended that:

a. The proceedings herein are defective and bad in law.

b. The motion herein was filed and served out of the time ordered by the court.

c. The Ex parte Applicant should have challenged the orders issued in a civil court by way of

setting aside, review or appeal and not to bring separate proceedings.

d. That the order of prohibition does not lie in the first place and is not a remedy available to the Ex parte Applicant.

e. The Ex parte Applicant was given a chance to be heard right from the time the civil suit in CMCC No. 749 of 2008 was filled until the date he was committed to civil jail.

f. Contrary of what is stated by the Ex parte Applicant the court issued an order for warrant of his arrest on the 21/6/2015 and that is the reason he was arrested by the court bailiffs

g. The proceedings herein are an abuse of the court process.

h. There is no evidence or allegation put forward that the court acted without authority or exceeded its authority in its determination of the issues in CMCC 749 of 2008 and especially in the arrest and committal to civil jail of the Interested Party.

i. That the orders sought are prerogative orders but the Ex parte Applicant has not come to court with clean hands.

j. The Ex parte Applicant is guilty of concealment of material acts and attempting to mislead this honourable court.

k. There has been no violation of the Ex parte Applicant's constitutional rights as alleged or at all.

l. That the orders sought are contradictory in terms and substance.

17. To the interested party, the application herein is further attempt by the Ex parte Applicant to delay and defeat the execution of a lawful decree issued by a court of competent jurisdiction.

18. It was submitted on behalf of the interested party that the applicant was given a fair hearing and the right and legal procedure followed. To the interested party the allegations made by the applicant touch on the merits of the case and hence ought not to be entertained in judicial review proceedings.

19. It was submitted that the failure to peg the application on the substantive provisions of the **Law Reform Act** renders the application incompetent.

### **Determinations**

20. I have considered the application, the cases for the parties as adumbrated in the affidavits and the submissions.

21. It was contended that the applicant's application was defective for the failure to cite the substantive provisions of the law. However, the interested party did not expound on this position by showing how the omission to cite the said provisions prejudiced its case. In my view, in the current constitutional provisions, to dismiss an application simply because of the failure to cite the relevant provisions amounts to the elevation of procedural rules to a fetish and that is contrary to the letter and the spirit of Article 159(2)(d) of the Constitution. In my finding nothing turns on that issue.

22. It was alluded that these proceedings were instituted outside the timelines given by the Court. On 22<sup>nd</sup> July, 2015, this Court granted leave to the applicant to commence these proceedings and directed the applicant to file and serve the substantive motion within 14 days. It is true that the Motion was not filed as directed. However, on 25<sup>th</sup> August, 2015, this Court regularised the proceedings, a jurisdiction which the Court undoubtedly has.

23. Section 38 of the **Civil Procedure Act** provides as follows:

***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.*

24. What comes out clearly from the foregoing is that a person who fails to satisfy a monetary decree may, if the conditions stipulated in section 38 of the **Civil Procedure Act**, are satisfied be committed to jail. Committal to jail in such circumstances in my view is exceptional in the sense that a person's liberty is curtailed not at the instance of the State but at the instance of a private individual though the person detained, in our circumstances, is placed in the custody of the state. Under our Constitution the right to liberty is enshrined in Article 39(1) which codifies the right to freedom of movement. That right however is not one of the non-derogable rights which under Article 25 of the Constitution. Accordingly, pursuant to Article 26 of the Constitution the right to freedom of movement can be limited pursuant to Article 24 of the Constitution.
25. The Constitutionality of the remedy of committal to civil jail has been jurisprudentially analysed in this country. In **Beatrice Wanjiku & Another vs. The Attorney General** Petition 190 of 2011 it was held that:

**“Before the promulgation of the Constitution, Kenya took a dualist approach to the application of international law. A treaty or international convention which Kenya had ratified would only apply nationally if Parliament domesticated the particular treaty or convention by passing the relevant legislation. The Constitution and in particular Article 2(5) and 2(6) gave new colour to the relationship between international law and international instruments and national law. Article 2(5) provides, ‘The general rules of**

international law shall form part of the law of Kenya and Article 2(6) provides that “Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”

26. The same issue was dealt with by this Court in Diamond Trust Kenya Ltd v Daniel Mwema Mulwa HCCC No. 70 of 2002 (Unreported), in which the Court expressed itself as follows:

“We have in this country a three tier hierarchy of the law. At the apex is the Constitution of Kenya, which is the supreme law of the land, to which all other laws are subservient. Next in rank are Acts of Parliament, followed by subsidiary legislation at the bottom of the pile. The Civil Procedure Act is an Act of Parliament which provides for procedure in Civil Courts. Section 40 thereof makes provision for the arrest and detention of judgment debtors ... To the extent that this Section provides for the arrest and detention of a judgment-debtor; it is clearly in conflict with Article 11 of the [ICCPR]. The two are contradictory. This raises several issues. Can the two provisions co-exist? If so, how can they operate side by side? And if any cannot co-exist, which of them should take precedence over the other? In my view, article 11 of the [ICCPR] cannot rank *pari passu* with the Constitution. The highest rank it can possibly enjoy is that of an Act of Parliament. And even if it ranks in parity with an Act of Parliament, it cannot oust the application of section 40 of the Civil Procedure Act. Nor for that matter, can it render section 40 unconstitutional. For that reason for as long as section 40 remains in the statute book, it is not unconstitutional for a judgment-debtor to be committed to a civil jail upon his failure to pay his debts. Since, however, section 40 is at variance with the provisions of an International Convention which is part of the law of Kenya, it follows that we now have two conflicting laws, none of which is superior to the other.”

27. The Learned Judge went ahead and stated in Beatrice Wanjiku Case (supra) that:

“The Civil Procedure Act and the Rules provide a legal regime for arrest and committal as a means of enforcement of a judgment debt. Article 11 of the Convention states that, “No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.” [Emphasis mine] I read the merely as used above to mean that one cannot be imprisoned for the sole reason of inability to fulfil a contractual obligation. It means that additional reasons other than inability to pay should exist for one to be imprisoned. Article 11 recognises that in fact there may be instances where imprisonment for inability to fulfil a contractual obligation may be permitted. As there is no inconsistency between Article 11 of the Convention and the general tenor of the committal regime under Civil Procedure Act and the Rule, the provisions of Article 11 of the Convention are at best an interpretative aid.

28. In Jayne Wangui Gachoka vs. Kenya Commercial Bank Petition Number 51 of 2010 it was held:

“The deprivation of liberty sanctioned by sections 38 and 40 of the Civil Procedure Act is permissible and is not in violation of either the Constitution or the ICCPR. The caveat, however, which has been emphasized in all the cases set out above, is that before a person can be committed to civil jail for non-payment of a debt, there must be strict adherence to the procedures laid down in the Civil Procedure Act and Rules, which provide the due process safeguards essential to making the limitation of the right to liberty permitted in this case acceptable in a free and democratic society.”

29. Similarly, in Kenya Bus Services Ltd & Others vs. Attorney General and Others [2005] 1 EA 111; [2005] 1 KLR 743 it was held:

“Fundamental rights cannot be enjoyed in isolation and by selected few while they trample on others or tread upon their rights since the enjoyment of fundamental rights and freedoms contemplates mutuality and an atmosphere of respect for law and order including the rights

of others and the upholding of the public interest...The function of the Court when faced with the task of establishing or determining the rights on the one hand and determining the limitation and restrictions on the other hand is to do a balancing act and in this balancing act are principle values, objectives to be attained, a sense of proportionality and public interest and public policy considerations...There cannot be a cause of action based on a lawful exercise of the right of execution by interested parties since it is a serious contradiction to suggest that creditors who are enforcing their rights under the private law should be stopped from so doing because there are allegations of violations of the Constitution by the state or Government.”

30.The same issue was dealt with by Nyamu, J (as he then was and Wendoh, J in Braeburn Limited vs. Gachoka and Another [2007] 2 EA 67 where the Court expressed itself eloquently in my view as follows:

“To determine whether the right to liberty is limited by the law prescribed, and that the person whose liberty is circumscribed has been subjected to due process under that law an independent and impartial court established by the law as per section 77(1) and 77(7), this Court must examine the concerned law in the light of section 84(1) of the Constitution to establish that both the substantive and procedural law under which a person may be deprived of his liberty, itself meets with the constitutional safeguards under those provisions of the Constitution and in a manner justifiable in a democratic society...The provisions of sections 38, 40 and 42 of the Civil Procedure Act, and Order 21, rules 32 and 35 of the Civil Procedure Rules are neither inconsistent with the provisions of the relevant provisions of the Constitution nor are they in conflict with any of the provisions of the International Bill of Human Rights. It is further held that provided the procedure under the Civil Procedure Act and Order 21, rules 32 and 35 is followed in the manner outlined herein, the requirements of due process comparable to that in section 77(1) and 77(9) of the Constitution is guaranteed.”

31.In Republic vs. Permanent Secretary Office of the President Ministry of Internal Security & Another exp Nassir Mwandishi [2014 eKLR] this Court held that:

“It is therefore clear that even in normal execution of decrees by committal to civil jail, as long as the safeguards under the relevant provisions of the Civil Procedure Act and the Rules made thereunder are complied with an objection on the constitutionality of the procedure would not be upheld.”

32.What comes out from the foregoing is that committal to civil jail is not objectionable subject to the due process being adhered to. However, it is my view that committal to civil jail is not a means of satisfaction of a decree. Whereas it is a means by which compliance is sought to be enforced, it does not in itself amount to a satisfaction of a decree. In other words it is a means to an end rather than an end itself. That there is a distinction between the satisfaction of a decree and the committal to civil jail for failure to satisfy a decree is clearly discernible from section 42 of the *Civil Procedure Act* which provides as hereunder:

*(1) Every person detained in prison in execution of a decree*

*shall be so detained—*

*(a) where the decree is for the payment of a sum of money exceeding one hundred shillings, for a period not exceeding six months; and*

*(b) in any other case, for a period not exceeding six weeks:*

*Provided that he shall be released from such detention before the expiration of the said period of six months or six weeks, as the case may be—*

*(i) on the amount mentioned in the warrant for his detention being paid to the officer in charge of the prison; or*

*(ii) on the decree against him being otherwise fully satisfied, if the court so orders; or*

*(iii) on the request of the person on whose application he*

*has been so detained, if the court so orders; or*

*(iv) on the omission of the person, on whose application he has been so detained, to pay subsistence allowance.*

***(2) A judgment-debtor released from detention under this section shall not merely by reason of his release be discharged from his debt, but he shall not be liable to be rearrested under the decree in execution of which he was detained in prison. [Emphasis mine].***

33. This position was poetically pronounced by **Kuloba, J** in **Mbugua vs. Mbugua [1992] KLR 448** where the learned Judge expressed himself as follows:

**“The committal to civil jail will be an end in itself, serving no useful purpose. It will be for vindictiveness only; but civil justice is placatory, not retaliatory or revengeful. As Courts administering civil justice we do not sit here unleashing reprisals of vengeance to satisfy egoistic vendetta veneered with some court orders. Committal to civil jail is redressal, not merely punitive. In this case if the Court sends the defendant to jail for six months, the wrong will not have been redressed; her sojourn in jail will be punishment to her, but it will not enforce the order said to have been disobeyed.”**

34. It therefore follows that the course of committal to civil jail will only be resorted to in appropriate cases and the guidelines for determining whether a particular case is appropriate for such course must necessarily depend on whether the conditions stipulated under section 38 of the Act have been fulfilled. The course to be adopted by the Court in such circumstances was explained in **Braeburn Limited vs. Gachoka and Another** (supra) as follows:

**“Rules 18 and 32 of Order 21 of the Civil Procedure Rules do meet and in a very special way in relation to a debtor surpass the standard laid down in the Constitution for the deprivation of a person’s liberty. This is so because the deprivation of a person’s liberty whether for contempt of court (under section 72(1)(b) of the Constitution), or for default to pay a money decree, is in the nature of criminal proceedings and for a person to suffer the loss of liberty, it must be in the words of that hackneyed phrase, be proved beyond reasonable doubt, that he has the means to pay but that he has refused and/or neglected to pay...To Conform with that high standard proof, the discretion conferred upon the court to either issue a warrant of arrest and instead issue a notice calling upon the judgement 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, must be construed, strictly, that is to say mandatorily, that upon an application by a decree holder for execution of a money decree by way of arrest and committal to prison the court to which an application is made for issue of a warrant of arrest shall in the instance first issue a notice to the judgement debtor to appear in court and show cause why he should not firstly be arrested, and secondly, committed to prison. That is the first step towards the execution of a decree for payment of money...The second step is the examination of the judgement debtor when he appears in court. Of course if he does not appear, the court issuing the notice in the first instance is at liberty to issue a warrant of arrest and if arrested, the judgement debtor may be detained in prison pending his appearance in court and may be released upon provision of security to ensure his attendance or appearance in court...If however the debtor appears to the notice to show cause, which is mandatory, in terms of the said Order 21, rule 35, or pursuant to his arrest and appearance before he can be committed to prison, it is the duty of the decree holder (who has sought the arrest and committal of the**

judgement debtor to prison) to satisfy the court that the judgement debtor is not suffering from poverty or any other sufficient cause and is able to pay the decretal sum that: (i) the judgement debtor, with the object or effect of obstructing or delaying the execution of the decree: (a) is likely to abscond or leave the local limits of jurisdiction of the Court; (b) has, after the institution of the suit, in which the decree was passed, dishonestly transferred, concealed or removed any party of his property or committed any other act of bad faith in relation to his property; or (ii) the judgement-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 is exempted from attachment, in execution of the decree; or (iii) that the decree is for a sum for which the judgement-debtor was bound in a fiduciary capacity to account (trustees or persons holding moneys in a professional capacity or in trust)...In essence, the judgement debtor should be examined in the manner envisaged in Order 21, rule 36 as to the debtor's total wealth and indebtedness to determine the judgement debtor's total ability or inability to pay and whether such inability to pay is from poverty or other sufficient cause. It is only after the court is satisfied of these matters, after subjecting the judgement-debtor to due process in the manner construed, the requirements of mandatory notice, before a warrant of arrest may be issued for his arrest and compulsion to attend or appear before a court can decree for payment of a money debt be executed upon a judgement debtor by way of arrest and committal to prison...The execution of a judgement decree by way of arrest and committal to prison is extreme in nature. It deprives a citizen of his liberty, to do so, the highest standards, that is to say, the constitutional safeguards as to due process by way of notice of intended execution of the decree by way of arrest and committal be given to the judgement debtor as a first step and as a second step, a due inquiry and satisfaction to the court, by the decree holder, as to judgement debtor's ability to pay and refusal and/or neglect to pay, and therefore the necessity to punish him for contempt of a court order by depriving him of his liberty...It is clear under both section 38 of the Civil Procedure Act and Order 21, rule 35(1) that no judgement-debtor will, on account of his inability from poverty or other sufficient reason, be arrested and committed to prison...The section is not vindictive and the Court, in the exercise of its discretion would not order the imprisonment of a defaulting trustee unless it was likely to be productive of payment..."

35. In this case the gravamen of the applicant's case is that he was never served with the notice to show cause before the committal order was made. The determination of that issue calls for an examination of what transpired before the trial Court that is relevant to these proceedings. According to the respondent, on 12<sup>th</sup> June, 2015 the applicant did not appear in Court pursuant to the notice to show cause and that a warrant of arrest was issued. However a copy of the proceedings filed herein paints a different picture. There were no such proceedings on 12<sup>th</sup> June, 2015. Instead on 16<sup>th</sup> July, 2015, **Mr Mutua** informed the Court that a warrant of arrest was issued and the Court proceeded to commit the applicant to jail. There are no proceedings on record during which the notice to show cause was ever heard and determined. There is even no notice to show cause as contemplated by section 38 of the *Civil Procedure Act*. What is exhibited is a copy of the notice to show cause under Order 22 rule 18 of the said *Rules*. That provision however provides for notice to show cause where the execution is for a decree more than one year; where the execution is sought against legal representative of a party to the decree and where the execution is by attachment of salary or allowance. It does not deal with situations where the execution is by way of committal to civil jail. Although the body of the form indicates that an application had been made for the arrest and committal to civil jail, it is my view and I hold that the said form is not suitable for a notice to show cause why a judgement debtor should not be committed to civil jail.
36. It ought to be appreciated that the burden falls on the decree holder to prove that the conditions in section 38 of the *Civil Procedure Act* have been fulfilled. In my view that burden can only be satisfied by way of evidence in form of an affidavit. In other words it is my view that a notice to show cause ought to be by way of a formal application supported by an affidavit to which the judgement debtor ought to respond so that the Court can make a determination as to whether the

case is one fit or the invocation of the drastic remedy of committal to civil jail.

37. Having considered the material before me I am not satisfied that the provisions of sections 38 and 40 of the **Civil Procedure Act** were complied with before the order of committal of the applicant was issued. Committal to civil jail is a very drastic remedy that ought to be granted only in cases where there is strict compliance with the provisions of the law. Before a person is committed the Court must be satisfied that that person was duly served and an opportunity of being heard afforded to him. To send a person to jail without being heard amounts to a breach of the rules of natural justice especially when the law casts the burden on the decree holder as it does in this case. As was held in in **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, procedural impropriety is one of the grounds upon which a Court would be entitled to grant judicial review orders and according to the court:

**“Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”**

38. The respondent has taken the Court through the history of the case in order to show that the applicant’s conduct is undeserving of the remedy sought. That may be so. However a right to a hearing cannot be denied simply because of the applicant’s conduct. As was held by the Court of Appeal in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** the Court of Appeal expressed itself as follows:

**“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...Denial of the right to be heard renders any decision made null and void *ab initio*.”**  
[Emphasis mine].

39. From the record placed before me it is clear that a very crucial step in the proceedings was omitted by the trial court. That omission vitiates the proceedings leading to the order of committal of the applicant to civil jail.

### **Order**

40. Consequently, I find merit in the Notice of Motion dated 5<sup>th</sup> August, 2015, and I grant the following orders:

1. **An order of certiorari is hereby issued bringing into this Court for the purposes of being quashed the decision of M. Chesang (Mrs) RM contained in the warrant of committal of Joseph Mbote Karwenji to jail dated 16<sup>th</sup> July 2015 committing the Applicant into civil prison and keep him imprisoned therein for a period not exceeding six months which decision is hereby quashed.**
2. **Having quashed the decision an order of prohibition is no longer necessary and in any case an order of prohibition in the manner sought would have the effect of permanently barring the Respondent from considering any notice to show cause however proper and hence bar**

- the Respondent from pursuing the fruits of its judgement.
3. Taking into account the applicant's conduct which I find not to be completely faultless I decline to award him the costs. Accordingly there will be no order as to costs.

Dated at Nairobi this 3<sup>rd</sup> day of December, 2015

**G V ODUNGA**

**JUDGE**

*Delivered in the absence of the parties*

**Cc Muriuki**