



**Ouma & 5 others v Kenya Corporation Airways & 3 others (Petition E035 of 2021)  
[2025] KEHC 13927 (KLR) (Constitutional and Human Rights) (3 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 13927 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION E035 OF 2021**

**EC MWITA, J**

**OCTOBER 3, 2025**

**BETWEEN**

**TOBIAS ONGANY OUMA ..... 1<sup>ST</sup> PETITIONER  
AARON MUISYO MWAILU ..... 2<sup>ND</sup> PETITIONER  
WALTER OJWANG AWICH ..... 3<sup>RD</sup> PETITIONER  
FIDELIS NTHUNTHI ..... 4<sup>TH</sup> PETITIONER  
JOHN WILLIS OTIENO OWILI ..... 5<sup>TH</sup> PETITIONER  
HENRY MUNENE ..... 6<sup>TH</sup> PETITIONER**

**AND**

**KENYA CORPORATION AIRWAYS ..... 1<sup>ST</sup> RESPONDENT  
DEPUTY REGISTRAR (MILIMANI CIVIL) ..... 2<sup>ND</sup> RESPONDENT  
COMMISSIONER ..... 3<sup>RD</sup> RESPONDENT  
ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. On 18<sup>th</sup> February 2021, the Deputy Registrar issued warrants of arrest and committal to civil jail against the petitioners in execution of a decree of the court. The petitioners being dissatisfied with that decision filed this petition challenging the Constitutionality of the warrants issued against them and sought various declarations and orders. The petition was supported by an affidavit sworn by John Owili Otieno, the 5<sup>th</sup> petitioner and written submissions.



2. The facts giving rise to this litigation, were that the petitioners were former employees of the 1<sup>st</sup> respondent. When their contract(s) of service were terminated, they instituted a representative suit in High Court Civil Case No. 4434 of 1992; Tobias Ogany Ouma & others v Kenya Airways Corporation Limited and obtained judgment in their favour.
3. The 1<sup>st</sup> respondent lodged an appeal in the Court of Appeal - Civil Appeal No. 350 of 2002-Kenya Airways Corporation v Tobias Ogany Ouma & others. In a judgment delivered on 23<sup>rd</sup> November 2007, the Court of Appeal allowed the appeal and set aside the judgment of the High Court and granted costs of appeal to the 1<sup>st</sup> respondent.
4. The 1<sup>st</sup> respondent filed bills of costs which was taxed by the Deputy Registrar and allowed it at Kshs. 9, 705,267 and 753, 154.50 respectively making a total of Kshs. 10,473, 421. 50 in favour of the 1<sup>st</sup> respondent. It was in the process of executing for the costs that warrants of arrest and committal to civil jail were issued.
5. The petitioners argued that they could not appeal against the judgment of the Court of Appeal because the Supreme Court had not been established and, therefore, they were bound by the judgment of the Court of Appeal. The petitioners contended that the bill of costs was irregularly taxed by the Deputy Registrar because the court had no jurisdiction. They also contended that the Court of Appeal judgment was impractical, irrational and punitive because the court failed to consider that they had not secured employment and any order for costs was made in futility.
6. The petitioner asserted that they were surprised in 2017 to be served with a notice to show cause as to why they should not be committed to civil jail. They contended that there is no justifiable reasons for the delay in instituting execution process and their case having been a representative suit, some of the employees had passed on and some relocated to other parts of the county making it difficult to raise money to pay costs.
7. The petitioners stated that due to their low financial status, warrants of arrest had been issued against them and they face a real danger of being arrested and sent to civil jail.
8. The petitioners stated that the law allowing arrest because of a civil debt is archaic and fails the modern test and infringes on the right against cruel treatment and torture. The petitioners further stated that most of them are elderly and committing them to civil jail will threaten their right to life. Committal to civil jail is also against international law.
9. The petitioners contended that the law on committal to civil jail is only invoked if a person is able to pay the decree and, in their circumstances, it would be against the spirit of *akn ke act 2010 constitution the Constitution*. They asserted that this is a civil debt arising from a civil claim and it is illegal for them to be committed to civil jail as it will amount to criminalization of poverty.
10. The petitioners went on to state that the 1<sup>st</sup> respondent as a state corporation is not in dire need of the money. The warrants of arrests are malicious and only meant to subject them to ridicule and embarrassment. The warrants of arrests are also irregular considering that some of them have died thus, the debt is unenforceable.
11. The petitioners contended that the respondents' actions of curtaining their right to freedom, dignity and life protected in *akn ke act 2010 constitution the Constitution* is derogatory, discriminative and inhuman.



12. The petitioners argued that committal to civil jail will have a negative impact on their lives and imprisonment because of a civil debt will amount to inhumane treatment negating their dignity and respect protected by *akn ke act 2010 constitution the Constitution*.
13. The petitioners relied on articles 28, 29 and 57 (c) of *akn ke act 2010 constitution the Constitution*, articles 3 and 5 of the Universal Declaration of Human Rights (UDHR), article 11 of the International Covenant on Civil and Political Rights (ICCPR) and the decisions in *Re Zipporah The Matter of Zipporah Wambui Mathara [2010] KEHC 4136 (KLR)*; *Solomon Muriithi Gitandu & another v Jared Maingi Mburu [2017] eKLR*; *Roans Plauda Moi v Philip Kipchirchir Moi Divorce case No.154 of 2008*; *Chinamora v. Angina Furnishers (Private) Ltd [1997] 1 LRC 149 (Supreme Court of Zimbabwe)* and *First National Bank v Julia Moseneke and Bank Gaborone v Thabang Mosiny (consolidated)* for the position that it is not out of mere negligence or wilful act that they are unable to settle the decree. Imposing civil jail would infringe on their basic rights and fundamental freedoms.
14. The petitioners argued that warrants of arrest for failure to pay the decree violates their fundamental rights and freedoms and the purpose for civil imprisonment is to coerce payment. The only effect the warrants will have on them is punishment, humiliation, embarrassment without satisfaction to the 1<sup>st</sup> respondent. They sought the following reliefs:
  - a. A declaration aforesaid warrants of arrest and the modes of enforcing the decree are unconstitutional, unfair and clear infraction of his right to liberty.
  - b. An order of certiorari quashing, the issuance of warrants of arrest in relation to Civil case No. 4334 of 1992 against the petitioners.
  - c. Damages.

#### **1<sup>st</sup> respondent's case**

15. The 1<sup>st</sup> respondent informed the court that it filed a replying affidavit sworn by Sarah Kabochi on 11<sup>th</sup> June 2021 in opposition to the petition. However, the affidavit is not in the court file and cannot be downloaded on the CTS portal.
16. The 1<sup>st</sup> respondent however filed written submissions and argued that the judgment of the Court of Appeal dated 23<sup>rd</sup> November 2007 and rulings of the High Court dated 14<sup>th</sup> September 2017 and 30<sup>th</sup> April 2020 were determinations by courts of competent jurisdiction and were final on the issues at hand and therefore the matter is *res judicata*. The 1<sup>st</sup> respondent relied on *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR)* on this point.
17. The 1<sup>st</sup> respondent submitted that the constitutionality of the procedure for arrest and committal to jail in execution of a decree has been settled by the courts in several decisions, including *Republic v Permanent Secretary Office of the President Ministry of internal Security & another Ex-parte Nassir Mwandishi [2014] eKLR* and *Charles Lutta Kasamani v Concord Insurance Co Ltd & Deputy Registrar Milimani High Court Commercial and Admiralty Division [2018] eKLR*.
18. The 1<sup>st</sup> respondent maintained that arrest and committal to civil jail in execution of decree under the *akn ke act 1924 3 Civil Procedure Act* and Rules is not unconstitutional as long as all the safeguards provided for in law are afforded to the judgment debtor. The 1<sup>st</sup> respondent asserted that the petition is a disguised appeal against the judgment of the Court of Appeal and the rulings of the High Court, which the petitioners did not appeal against or seek a review.



19. The 1<sup>st</sup> respondent asserted that the petition is an abuse of the court process and is only intended to protract the matter longer than is necessary; the petitioners have filed many applications to frustrate execution proceedings since 2009 and they have never explained how they intend to satisfy the decree.
20. The 1<sup>st</sup> respondent relied on Halsbury's Laws of England 4<sup>th</sup> Edn. Vol. 1(1) para 12 page 270; Republic v Institute of Certified Public Secretaries of Kenya Exparte Mundia Njeru Geteria [2010] eKLR and Cecilia Karuri Ngayu v Barclays Bank of Kenya & another [2016] eKLR for the position that the petitioners are not entitled to the orders sought and therefore the petition should be dismissed with costs.
21. The 2<sup>nd</sup> to 4<sup>th</sup> interested parties respondents??? did not take part in these proceedings.

#### Determination

22. I have considered the petition, response and arguments by parties. I have also considered the decisions relied on. The issue for determination is whether the warrants of arrest and committal to civil jail issued against the petitioners violate the petitioners' rights and fundamental freedoms. The petitioners argued in the affirmative while the 1<sup>st</sup> respondent took the opposite view, that there is no violation of rights or fundamental freedoms.
23. The facts of this case are not disputed. The petitioners filed a case against the 1<sup>st</sup> respondent in the High Court and succeeded. On appeal, the Court of Appeal allowed the 1<sup>st</sup> respondent's appeal and set aside the judgment with costs. Thereafter, the 1<sup>st</sup> respondent filed its bills of costs which was taxed and allowed at a cumulative sum of Kshs 10, 473, 421.50 which the 1<sup>st</sup> respondent moved to execute and obtained warrants of arrest and committal to civil jail against the petitioners. The petitioners then moved this court through this petition arguing that execution of the warrants of arrest and committal to civil jail will violate various of their rights and fundamental freedoms.
24. The issue raised in this petition is whether the warrants of arrest and committal to civil jail are violative of the petitioners' rights. The petitioners did not deny that there is a valid order against them on payment of costs. They also did not deny that the 1<sup>st</sup> respondent's bills of costs was taxed against them and the taxing officer ascertained and certified the costs payable to the 1<sup>st</sup> respondent. Further still, the petitioners did not allege that costs were not certified or became enforceable against them. They did not even argue that they had moved to challenge the decision of the taxing officer and if they did not succeed, appealed against that decision. As it is, the taxing officer's decision remains unchallenged and has not been set aside.
25. Committal to civil jail is one of the means of enforcing court orders and decrees and is provided for in sections 38 and 40 of the *akn ke act 1924 3 Civil Procedure Act* and Order 21 of the Rules. That procedure has inbuilt safeguards that the court has to comply with before issuing warrants of arrest and committal to civil jail. One of the safeguards is to hear the party before issuing warrants. The petitioners did not allege that the court (Deputy Registrar) issued warrants committing them to civil jail without complying with the procedure or the law.
26. I have gone through the petition and supporting affidavit but could not find a deposition to the effect that the Deputy Registrar did not give the petitioners a hearing or acted in a manner that was violative of the petitioner's rights under the law. In other words, the petitioners did not argue that their right to fair hearing was violated or that the Deputy Registrar condemned them unheard.
27. The issue of whether warrants of arrest and committal to civil jail is constitutional has been the subject of litigation in our courts and courts have held that article 11 of ICCPR which provides that no one



should be imprisoned merely on grounds of inability to fulfil a contractual obligation is not superior to the local statutes by virtue of Article 2(6) of *akn ke act 2010 constitution the Constitution*.

28. In *Beatrice Wanjiku & another V Attorney General & another* [2012] eKLR, the court stated:

(24) The *akn ke act 1924 3 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 grounds of inability to fulfill a contractual obligation.” I read the merely as used above to mean that one cannot be imprisoned for the sole reason of inability to fulfill a contractual obligation. It means that additional reasons other than inability to pay should exist for one to be imprisoned. Article 11 recognizes that in fact there may be instances where imprisonment for inability to fulfill 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 *akn ke act 1924 3 Civil Procedure Act* and the Rules, the provisions of Article 11 of the Convention are at best an interpretive aid.

29. In *Charles Lutta Kasamani v Concord Insurance Co Ltd & Deputy Registrar Milimani High Court Commercial and Admiralty Division* [2018] KEHC 8952 (KLR) this court dealt with the same issue where a warrant of arrest committing the petitioner to civil jail had been issued. The petitioner challenged the action arguing that it violated his rights and fundamental freedoms. This court observed:

[36]. Where provisions in two statutes appear to contradict each other it is a general principle of statutory interpretation that as much as possible, the statutes should be read and interpreted in a manner that brings harmony. To my mind, therefore, I see no apparent contradiction or conflict between sections 38 and 40 of the *akn ke act 1924 3 Civil Procedure Act* and Article 11 of ICCPR. A proper reading of section 38 details circumstances under which a person can be committed to civil jail. The section is clear that it is not because someone is unable to pay but rather where one though able, refuses to pay or discharge his obligations under the decree.

[37]. Even under sections 38 and 40 of the *akn ke act 1924 3 Civil Procedure Act*, no one should be committed to civil jail because of his or her inability to pay. In the case of an application for committal, the determining factor is always the ability to pay. Inability should be taken to mean that the judgment debtor has completely no means of settling the decree even if he was given how much time to do so. He has completely no means of paying. He is simply unable and cannot pay.

30. The court went on to observe that article 11 of ICCPR and section 38 of the *akn ke act 1924 3 Civil Procedure Act* protect the dignity of those who are unable to pay but should not be taken as a blanket cover for even those who have the means but refuse to pay and instead seek refuge under article 11 of ICCPR. The court stated that giving a different interpretation to article 11, would render execution process under the *akn ke act 1924 3 Civil Procedure Act* and Rules meaningless in so far as committal to civil jail as a means of recovering money awarded in a decree is concerned.

31. In *Jayne Wangui Gachoka v Kenya Commercial Bank Limited* [2013] eKLR, the court again stated that:

(33) The deprivation of liberty sanctioned by sections 38 and 40 of the *akn ke act 1924 3 Civil Procedure Act* is permissible and is not in violation of either *akn ke act 2010 constitution the Constitution* or 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 *akn ke act 1924 3 Civil procedure*



*Act* and Rules, which provide the due process safeguards essential to making limitation of the right to liberty permitted in this case acceptable in a free and democratic society.

32. I must emphasize that Article 28 of *kenya constitution the Constitution* guarantees every person's inherent dignity and the right to have that dignity respected and protected, while Article 29 guarantees the right to freedom and security of the person, including the right not to be deprived of this freedom arbitrarily, not to be subjected to violence, not to be detained without trial and not to be treated or punished in a cruel, inhuman or degrading manner. These rights and fundamental freedoms are not however absolute and Article 24(1) permits limitation of these rights by law and where the limitation is reasonable and justifiable in an open and democratic society.
33. Regarding petitioners in this case, the limitation of their rights is by law (sections 38 and 40 of the *kenya act 1924 3 Civil Procedure Act* and Order 21 of the Rules). The limitation is also reasonable and is meant to enforce court decrees where a party though able, refuses to pay.
34. As the court again observed in the Charles Lutta Kasamani case:
  - (41) Without enforcing court decrees through committal to civil jail where one has the means but has refused to pay, would infringe on the rights of those who have successfully gone through legal processes and obtained decrees, which they cannot enforce because judgment debtors who have refused to pay would rush to court and obtain declarations of violation of fundamental rights and freedoms once they are committed to civil jail.
35. In this petition, the petitioners did not demonstrate violation of their rights and fundamental freedoms since sections 38 and 40 of the *kenya act 1924 3 Civil Procedure Act* have long been held to be constitutional. Further, committal to civil jail is a lawful process and does not, on its own, amount to violation of rights and fundamental freedoms in the Bill of Rights.
36. As already pointed out, the petitioners did not impugn the procedure followed in committing them to civil jail. If they were unable to pay, that was an issue of evidence to be addressed before the Deputy Registrar or the court that issued the decree for determination of the inability to pay as a basis for not committing them to civil jail and not in this petition.
37. In the circumstances, the petitioners did not satisfy this court that their rights and fundamental freedoms were being violated or threatened. Consequently, and for the above reasons, the petition fails and is dismissed. I make no order on costs.

**DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER 2025**

**E C MWITA**

**JUDGE**

