



**Nganga v Magambo (Civil Case 1012 of 2021) [2025] KEMC 132 (KLR) (3 June 2025) (Ruling)**

Neutral citation: [2025] KEMC 132 (KLR)

**REPUBLIC OF KENYA  
IN THE NAKURU LAW COURTS  
CIVIL CASE 1012 OF 2021  
PA NDEGE, SPM  
JUNE 3, 2025**

**BETWEEN**

**DAVID NGANGA ..... PLAINTIFF**

**AND**

**DELICAN KIOGORA MAGAMBO ..... DEFENDANT**

**RULING**

1. The matter came before the court pursuant to the Notice to Show Cause issued on 14<sup>th</sup> May 2024, requiring the defendant, delican kiogora magambo, to show cause why he should not be committed to civil jail, for his failure to settle the decretal sum herein in full as per the consent judgment/ order herein.
2. In the case of Kailikia Vs M'thiringi & 2 Others (civil Appeal E017 OF 2024), the appellate court emphasized that committal to civil jail should be a measure of last resort. In the case, the trial court had erred by ordering committal without first establishing whether the judgment-debtor had the means to pay the decretal sum. The appellate court set aside the committal order, underscoring the necessity of due process and the requirement for the court to be satisfied that the debtor is willfully refusing to pay despite having the means.
3. Learned counsel for the Plaintiff/ Judgment Creditor, Mr. Oketch referred the court to the previous two instances when the judgment debtor paid Kshs. 5,000,000/- instantly upon his arrest on 13/01/2025. Further that in a previous application by the judgment debtor dated 08/08/2024, the judgment debtor clearly deposed that he is a man of means and thus capable of satisfying the decree herein, which has remained unsatisfied for approximately 4 years now.
4. Learned counsel for the judgment debtor, Ms. Weere, on the other hand, submitted that the judgment debtor has experienced some financial challenges that has made him unable to satisfy the decree herein. She proposed a payment plan that despite several calls for clarifications by this court, still remains unintelligible to the court.



5. That notwithstanding, Mr. Oketch, for the judgment creditor, in reply, insisted that given the history of this matter, any arrangement for payment in instalment is unacceptable, given that the decree herein has remained unsettled for the last four years, despite the judgment having been entered by consent.
6. I have gone through the submissions by both counsel herein. Order 22 Rule 34 of the Civil Procedure Rules provides that:
  - (1) Where a judgment-debtor appears before the court in obedience to a notice issued under rule 31, or is brought before the court after being arrested in execution of a decree for the payment of money, and it appears to the court that the judgment-debtor is unable, from poverty or other sufficient cause, to pay the amount of the decree, or, if that amount is payable by instalments, the amount of any instalment thereof, the court may, upon such terms as it thinks fit, make an order disallowing the application for his arrest and detention or directing his release, as the case may be.
  - (2) Before making an order for the committal of the judgment-debtor to prison, the court, for reasons to be recorded in writing, shall be 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 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.
7. In *Charles Lutta Kasamani Vrs Concord Insurance Co Ltd & Deputy Registrar Milimani High Court Commercial And Admiralty Division* [2018] eKLR, the court (C. Mwita J.) said:
  37. Even under sections 38 and 40 of the *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...
  42. In that regard, therefore, where a party goes through legal process and obtains a decree from a competent Court, s/he has a right that has crystalized in his favour and that right is recognized in law. It can only be realized through execution including committal to civil jail which is a known legal process for enforcing that right. Such a right should not easily be defeated because a judgment debtor who though able to pay, cannot be committed to civil jail and nothing can be done about him. That would be a contradiction in the enforcement of rights where one right would be deemed superior to another. The law should be read as only protecting those who cannot genuinely pay and not otherwise.



8. There is a consent herein wherein the defendant/ judgment debtor, committed to pay the plaintiff/ judgment creditor a total of Kshs. 16, 210, 325.00 being the full decretal sum plus costs awarded herein in full on or before 30/10/2022. Proposal for payment by installment, or via any other arrangement, would have been made before the lapse of the period stipulated in the consent, within which full payment was to be made. As powerfully submitted by the learned counsel for the plaintiff/ judgment debtor any proposal for installment payment at this late stage shall clearly be in breach of that judgment, whose legality has not been challenged by the judgment debtor herein.
9. While there cannot be a cause of action founded on the lawful exercise of the right of execution, and this court will not forestall the Plaintiff's efforts to realize the fruits of his judgment, as aforesaid, there must be strict compliance with the rules of procedure applicable to execution by arrest and detention which deprives the judgment debtor of his liberty.
10. The court has to be satisfied that the conditions set out under section 38 of the *Civil Procedure Act* are strictly adhered to – that the judgment debtor was accorded an opportunity to show cause why he should not be committed to civil jail, and that he was established to be a person of means to pay but who had refused to pay in compliance with the judgment of the Court, before the decision to so commit him was reached.
11. I have perused the records herein and do agree with the plaintiff's counsel that the defendant herein has the means to pay the decretal sum herein in full. He has failed to do so. He paid Kshs. 5,000,000/- instantly earlier this year upon a threat of committal to civil jail. Further, he has properties which he ought to have disposed in time to settle the debt herein, but his behaviour or conduct towards the decree herein demonstrates that he is someone who is hell bent on frustrating the plaintiff herein. The totality of all these is that I do find that the judgment debtor herein has the means to pay the debt herein.
12. There is thus evidence that the debtor has means and ability to pay the judgment debt. This court having complied with the requirements of section 38 of the *Civil Procedure Act* and Order 22 Rule 34 of the Civil Procedure Rules, I am thus entitled to make an order for committal of the defendant herein to civil jail. In making the order for committal to civil jail, I am aware that the same is not a blackmail tool to compel compliance with, or enforcement of, the judgment. The Court is not entitled to commit a judgment debtor, as urged by Counsel for the Decree-holder to civil jail so that he pays.
13. The order for committal to civil jail is a penal enforcement measure only available where the court is satisfied that the debtor is a man of the means who has refused or neglected to pay or otherwise comply with a lawful judgment. Otherwise, any other use of the weapon of committal to civil jail, to force a person to pay a debt would be unlawful.
14. Accordingly, for the reasons set out above, the judgment-debtor herein is committed to civil jail for a period of 6 months. He should present himself to this court so that he begins serving the sentence within the next 24 hours, failure to which a Warrant of Arrest to issue to enable his committal to Nakuru GK prison.

Order accordingly.

**DATED AND DELIVERED THIS 03<sup>RD</sup> DAY OF JUN , 2025.**

**ALOYCE-PETER-NDEGE**

**SENIOR PRINCIPAL MAGISTRATE**

In the presence of;



Plaintiff's Counsel: Oketch

Defendant's Counsel: Weere

Plaintiff/ Decree Holder: N/A

Defendant/ Judgment Debtor: N/A

Oketch: Praying for a copy of the ruling.

CT: Certified copy of the ruling be supplied to the counsel upon payment of any requisite fee.

