

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**  
**ELC NO. 84 OF 2018**

**JULIUS MUTHUNGU MUKANDA .....**  
**PLAINTIFF**

**-VERSUS-**

**MBULUNGA KITUMA .....**  
**DEFENDANT**

**RULING**

1. This is a ruling in respect of a notice of motion dated 22<sup>nd</sup> May, 2025 in which the Plaintiff/Applicant seeks the following orders:

- 1) Spent
- 2) Spent
- 3) Spent
- 4) **That there be stay of execution of the taxed costs against the Applicant and the warrants of arrest which have been issued by this court be stayed.**
- 5) **That the Applicant be allowed to liquidate the taxed costs by way of monthly instalments of Kshs.5,000/=.**
- 6) **That the costs of this application be in the cause.**

2. The Applicant had filed a suit against the Defendant/Respondent in which he sought the following reliefs:

- a. **Permanent injunction restraining and barring the Defendant, his children, his family, his agents, his employees and/or his servant and or in any manner howsoever from remaining on, farming on, grazing on, building on, entering, trespassing, encroaching on and/or remaining on the Plaintiff's Land title Number Ukia/Utaati/449 (the land) and/or interfering with the Plaintiff's**

**registered, legal contractual, equitable interests and/or rights of quiet ownership, possession, occupation and enjoyment thereof.**

- b. The Defendant his children, his family, his agents, his employees and/or his servants to be evicted from the Plaintiff's land title number Ukia/Utaati/449 (the land).**
  - c. Cancellation and revocation of the land title deed number Ukia/Utaati/449 in the name of Kituma Nganda Musau and rectification of the land register and registration of the land title deed in the name of Julius Muthungu Mukanda the Plaintiff with the court's Deputy Registrar executing all the transfer documents.**
  - d. Mesne profits.**
  - e. Costs and incidental to the suit and interest at court rates.**
  - f. Any other remedy as the honourable court may deem fit and applicable in the circumstances.**
3. The Respondent raised a preliminary objection on the competence of the suit against him. In a ruling delivered on 28<sup>th</sup> January, 2020 the preliminary objection was upheld and the Applicant's suit was struck out with costs.
  4. The Respondent filed a bill of costs which was taxed at Kshs.82,950/= on 22<sup>nd</sup> July, 2020. As at 8<sup>th</sup> July, 2025 the taxed costs had accrued interest of Kshs.33,336 making a total of Kshs.126,190.20.
  5. The Respondent filed a notice to show cause but during the hearing, the Applicant did not attend and warrants of arrest were issued. It is after warrants of arrest were issued that the Applicant filed the present application in which he contends that he is unable to meet the costs due to illness and that if he were to be jailed jail will not be conducive to him owing to his condition. He prays that he be allowed to liquidate the cost by monthly installment of Kshs.5,000/=.
  6. The Applicant's application was opposed by the Respondent through a replying affidavit sworn on 8<sup>th</sup> July, 2025. The Respondent contends that the

Applicant's application is frivolous, vexatious, is an abuse of the process of court and lacks merit.

7. The Respondent states that the Applicant has been avoiding to pay the taxed costs and that his claim that he has been ailing is not supported by any evidence. He further stated that the Applicant has not exhibited any good will to settle the amount due and that it will take two years and two months to settle the costs if the Applicant were to be allowed to liquidate the costs by monthly installments of Kshs.5,000/=.
8. The Respondent states that the Applicant should settle half of the amount due and then liquidate the balance by monthly instalments of Kshs.10,000/=.
9. The parties were directed to dispose of the application by way of written submissions. The Applicant filed his submissions dated 9<sup>th</sup> July, 2025. The Respondent indicated to court on 24<sup>th</sup> September, 2025 that he did not wish to file submissions.
10. The Applicant submitted that he should not be jailed for his inability to pay the decretal sum. He relied on Article 11 of the International Covenant on Civil and Political Rights which states that no one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.
11. The Applicant further relied on the decision of Justice Koome (as she then was) in the case of **In Re Zipporah Wambui Mathara Milimani BC Cause 19 of 2010 (unreported)** where the Applicant Debtor applied to be released from civil jail on the basis that a receiving order had been made. After considering the provisions of the Bankruptcy Act, the Judge stated as follows:  
  
**“The provisions of the Constitution of Kenya 2010 invoked and this ruling would not be complete without a commentary on those submissions. Principally, I agree with counsel for the debtor that by virtue of the provisions of Section 2 (6) of the Constitution of Kenya 2010, international treaties and conventions that Kenya was ratified, are**

imported as part of the sources of the Kenya Law. Thus the provisions of Article 11 of the International Covenant on Civil and Political Rights which Kenya ratified on May, 1 1972 is part of the Kenyan Law. This covenant makes provision for the promotion and protection of human rights and recognizes that individuals are entitled to basic freedoms to seek ways and means of bettering themselves. It obviously goes without saying that a party who is deprived of their basic freedom by way of enforcement of a civil debt through imprisonment, their ability to move and even seek ways and means of repaying the debt is curtailed. For the above reasons, I will allow the application”.

12. The Applicant also relied on the case of **RPM –vs- PKM Nairobi Divorce Cause No. 154 of 2008 (unreported)** and **Elijah Momanyi t/a Anassi Momanyi and Company Advocates –vs- Bartera Maiyo HCC Eldoret Misc 149 of 2005 (unreported)**. The two cases held that civil jail should be a last resort after all other means have failed.
13. I have carefully considered the Applicant’s application as well as the opposition to the same by the Respondent. The only issue is whether warrants of arrest should be stayed or the Applicant allowed to liquidate the costs by monthly instalments of Kshs.5,000/=.
14. The Applicant’s only reason why he states that is unable to pay the costs is because he is ailing. He did not produce any evidence of the alleged ailment in form of medical reports. The Applicant has not demonstrated his inability to pay the costs. If the Applicant was committed to settle the costs, the costs should have been settled along time ago. The cases which the Applicant has cited in his submissions relate to persons who had demonstrated that they were indeed unable to pay.
15. In *Re Zipporah Wambui Waithera* the Applicant was already serving a civil jail term and had made an application to be released. This is unlike the present case where the Applicant has not demonstrated his inability to pay.

He was given an opportunity to show cause but he did not do so. He has failed to demonstrate that he is sick as he alleges. I therefore find that the Applicant's application is devoid of merit. The same is dismissed with costs to the Respondent.

It is so ordered.

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**HON. E. O. OBAGA**

**JUDGE**

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT  
TEAMS THIS 12<sup>TH</sup> DAY OF NOVEMBER, 2025.**

**IN THE PRESENCE OF:**

Mr. Odawa for Plaintiff/Applicant.

Ms. Mutua for Defendant/Respondent.

Court assistant – Steve Musyoki