REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ELCLMISC APPLICATION NO E034 OF 2025

JAMES OKEMWA SURUMO……………………………………….......APPLICANT

VERSUS

DANIEL NYANGANA MIRAMBO………………………………….RESPONDENT

RULING

1. This ruling is in respect of the Applicant's Notice of Motion application dated 3rd May, 2025, which seeks the following orders:

    a) ***Spent***

    b) ***Spent***

    c) ***THAT an order be and is hereby issued by this Honourable Court reviewing and setting aside the Order of HON PRISCAH NYOTAH (DR-ELC) in NAKURU CMELC No 374 of 2018- parties DANIEL NYANGANA MIRAMBO VERSUS JAMES OKEMWA SURUMO issued on 28/10/2024 and 27/01/2025 and in its part direct that a due process was not followed before such drastic orders were given.***

    d) ***THAT a declaration be made and is hereby made since the Applicant has served civil jail for three (3) months on the same subject matter herein and the Applicant cannot be re-arrested of the same facts.***

e) ***THAT a declaration that the procedure in execution was never followed by the Respondent for committing the applicant herein in civil jail hence the applicant herein was seriously prejudiced.***

f) ***THAT Costs of this Application be provided for.***

2. The application is supported by the annexed affidavit of James Okemwa Surumo, sworn on 3rd May, 2025, where he deponed that on 13th September, 2017 he was sued by the Plaintiff for a sum of Ksh 620,000/- plus interest and 10% damages. He stated that he filed a Memorandum of Appearance and Statement of Defence dated 28th March, 2018, and judgment was delivered on 22nd February, 2022.

3. The Applicant also deponed that the court issued a decree dated 20th June, 2022, which was served upon him and another decree dated 26th October, 2022, whose source was not indicated. It was his testimony that on 28th October, 2024, he was arrested and arraigned before the court pursuant to a warrant of arrest issued and an application for committal to civil jail. He further stated that on 28th October, 2024, he was sent to prison where he stayed for three months until 27th January, 2025.

4. The Applicant deponed that the orders given on 28th October, 2024, were ambiguous as he when he read the orders as drawn, he realized that he was not actually committed to civil jail. It was his testimony that he was not given time to raise bond terms or to show cause why he should

not be committed to civil jail, but was punished for being poor. He urged the court to set him free.

5. Daniel Nyangana Mirambo, the Respondent, filed a Replying Affidavit sworn on 9th June, 2025, and deponed that the application is an abuse of court process as it ought to be made before the court which passed the decree. He deponed that it contravenes provisions of Order 45 of the Civil Procedure Rules, 2010, and urged the court to dismiss the application with costs.

6. James Okemwa Surumo, filed a Further Affidavit sworn on 3rd June, 2025, and deponed that he has since served civil jail for three months and was released on 27th January, 2025.

APPLICANT'S SUBMISSIONS

7. Mr. Machage, counsel for the Applicant, filed submissions dated 16th July, 2025, and submitted that the Applicant is invoking the supervisory powers of this court on the conduct of subordinate court execution proceedings. Counsel submitted that the applicant was initially arrested on 28th October, 2024, and committed to civil jail for a period of three months and subsequently released on 27th January, 2025.

8. Counsel submitted that the applicant cannot therefore be lawfully rearrested and re-committed to civil jail in execution of the same decree, and urged the court to allow the prayers sought in the application.

ANALYSIS AND DETERMINATION

9. The issue for determination is whether this court should set aside the order of HON PRISCAH NYOTAH (DR-ELC) in NAKURU CMELC No 374 of 2018 issued on 28th October, 2024, and 27th January, 2025.

10. In the case of **National Social Security Fund v Sokomania Ltd & Another [2021] eKLR** the court held that the court's supervisory jurisdiction should be exercised sparingly and only in exceptional circumstances and that power should not be exercised where there is an alternative remedy including the right of appeal.

11. 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) - (c) --------------------------;

(d) by arrest and detention in prison of any person;

(e) - (f) --------------------------

provided that where the decree is for the 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 to prison, the court, for reasons to be recorded in writing, is satisfied –

(a) that the judgement-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 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, 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"

12. The procedure for committal to civil jail of a judgment debtor is well laid out under Section 38, Order 22 Rule 34(1) and 35 of the Civil Procedure Act and Civil Procedure Rules. The rules must be adhered to, and the Judgment debtor must be given an opportunity to show cause, why he/she should not be committed to civil jail for non- payment of the debt. The Applicant contends that the lower court made orders on 28th October, 2024, which he was not given time to comply with and stayed in prison for three months until 27th January, 2025. It is the Applicant's case that he cannot lawfully be rearrested and re-committed to civil jail in execution of the same decree.

13. Counsel for the Applicant faulted the Respondent for not demonstrating that the applicant was a man of means, would abscond or leave the local limits of the jurisdiction of the court and that committal to civil jail should have been the last option.

14. I have perused paragraph 13 of the Applicant's Supporting affidavit and note that the order impugned order date 28th October 2024, reads as follows:

> "***The judgment debtor acknowledges that he has not settled the decretal sum. He has made a proposal to pay that is not acceptable to the Decree Holder and appears to be unreasonably low. As he asks for three months to sell off the property. I will give him a chance to do so. The Judgment debtor is released on a cash bail of Kshs. 200,000/= and a bond of Kshs. 250,000/ with two sureties of similar amount. In the event of non-compliance, he will be held in custody at G K Prison at the expense of the Decree Holder until he complies with the terms of the release or settles the decretal sum.***
> ***Otherwise the Judgment debtor has three months within which to pay the decretal sum, failure to which he shall be arrested and committed to civil jail for an initial period of three months."***

15. From the above excerpt, it seems that there was already a judgment against the Applicant who was brought to court under a warrant of arrest. The Applicant was given an opportunity to explain himself,

acknowledged that he owed the debt, and gave a proposal which was not acceptable to the Judgment creditor.

16. In the case of **Innocent G. Ondiek v Julius Nakaya Kabole [2019] eKLR,** where it was held that:

> "***As stated above, the only viable ground of setting aside an order for committal to civil jail is when the respondent challenges the mode or manner in which the said orders were obtained. The respondent herein states that he was not aware of the notice to show cause proceedings against him as he was not served with the notice...It is clear that the service herein has not been successfully challenged. The Deputy Registrar considered the affidavit of service, and found and held that the service was proper. It is my holding, therefore, that the service of the notice to show cause was proper and that the respondent has not offered any sufficient reason to warrant the setting aside of the orders made on the 3rd April 2019.***"

17. Since the Applicant was brought to court under a warrant of arrest, the court granted him a cash bail or a bond with two sureties to secure his release. The Applicant gave a proposal to be allowed three months to go and sell off his parcel of land to clear the debt.

18. The Applicant has alleged that he is a man of straw, and that the Respondent should have demonstrated as much and that he would be capable of absconding from the local jurisdiction of the court. The issue

that the Applicant is raising about duress should have been handled before the lower court.

19. This is a case where the Applicant wants to reopen litigation, because the Judgment was obtained *ex-parte* and he entered into the commitment to make payment of the debt by duress. If he was dissatisfied with the Judgment, then the right process was to file an appeal. If there was any error apparent on the face of the record, then he should have approached the same court for review.

20. On the issue of whether the Applicant can be rearrested to serve civil jail in respect of the same decree which he has already served, the court will apply the principle of ***nemo debet bis vexari pro una et eadem causa (no man should be vexed twice for the same cause)*** which is a legal concept that aims to bring finality to litigation.

21. It follows that a judgment debtor cannot be committed to civil jail twice for the same act of default or the same period of default in respect of the same decree. I find that the Applicant having served the three months cannot be committed to civil jail twice in respect of the same decree.

22. In the case of **Zippora Wambui Muthara – Milimani BC Cause 19/2010 (unreported)** Justice Koome (as she then was) observed as follows:

> ***"There are several methods of enforcing a civil debt such as attachment of property. The respondent's claim that the debtor has money in the bank, that money can also be garnished. An order of imprisonment in civil jail is meant to***

punish, humiliate and subject the debtor to shame and indignity due to failure to pay a civil debt. That goes against the International Covenant on Civil and Political Rights that guarantees parties' basic freedoms of movement and of pursuing economic cultural development. It is incumbent on the party seeking to execute a civil debt by way of committal to civil prison to adhere to the legislative safeguards before a party can be committed to civil jail. In the case of Braeburn supra and Jane Wangui Gachoka-V-Kenya Commercial Bank Petition 51/2010 it was held that Section 38 and 40 of the Civil Procedure Act are neither inconsistent with the provisions of the relevant provisions of the Constitution and International Bills of Human Rights. I am persuaded to agree with the findings. However, for a judgment debtor to be committed to prison, the Court must ensure that the conditions for committal to prison on account of a money decree are strictly followed. A judgment debtor will not be committed to prison for inability to pay or to fulfill contractual obligation. There must be additional reasons and the court being satisfied after the debtor has been given notice to show cause and give reasons in writing as provided under Section 38 of Civil Procedure Act and Order 22 rule 31 (1) Civil Procedure Rules. There is also a requirement that the debtor be served with notice of entry of judgment under Order 22 rule 20. This gives the debtor opportunity to pay before the decree holder starts the execution process.'

23. The application therefore partially succeeds in respect of the principle of ***nemo debet bis vexari pro una et eadem causa*** (no man should be vexed twice for the same cause). Each party to bear their own costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 5TH DAY OF NOVEMBER 2025.

M. A. ODENY

JUDGE