



Republic v County Secretary (County Government of Trans-Nzoia & another; Lesma Engineering Limited (Ex parte Applicant) (Miscellaneous Application 7 of 2019) [2025] KEHC 16105 (KLR) (7 November 2025) (Ruling)

Neutral citation: [2025] KEHC 16105 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
MISCELLANEOUS APPLICATION 7 OF 2019
PJO OTIENO, J
NOVEMBER 7, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY SECRETARY (COUNTY GOVERNMENT OF TRANS-NZOIA) 1ST RESPONDENT

CHIEF EXECUTIVE OFFICER, COUNTY GOVERNMENT OF TRANS-NZOIA 2ND RESPONDENT

AND

LESMA ENGINEERING LIMITED EX PARTE APPLICANT

RULING

Introduction

1. Before the court for determination is a Notice of Motion Application dated May 28, 2025 by the Respondents/judgment debtor ((hereinafter referred to as “the Applicants”) and brought under Article 159(2)(D) of *the Constitution* of Kenya, 2010, Sections 1A, 3A, and 80 of the *Civil Procedure Act*, Cap 21 Laws of Kenya, and Order 45 of the Civil Procedure Rules, filed by both the 1st and 2nd Respondents. The Application seeks judicial intervention, specifically praying for orders that the orders issued on the 20.05.2025 be reviewed, varied, and/or set aside and the implementation thereof be lifted and stayed
2. The genesis of this execution proceeding lies in the enforcement of a judgment debt obtained by the Ex-Parte Applicant, Lesma Engineering Limited, in Kitale CMCC No. 142 of 2018. The Court, in its supervisory jurisdiction, issued a binding order of Mandamus on January 29, 2024, directing the



County Government officials to pay the full decretal sum of Kshs. 5,779,192.70/- within sixty (60) days. The County Government remitted a partial payment of Kshs. 4,928,256.65/- on December 24, 2024, leaving an outstanding balance of Kshs 577,919.30/- That action prompted the Ex-Parte Applicant to apply for Notices to Show Cause. Upon the non-appearance of the designated officials on the scheduled date, May 20, 2025, the Court proceeded to issue Warrants of Arrest against the Applicants on the basis of defying a court order.

3. The grounds upon which the Application is premised found in the face of the Application and reiterated in the Supporting Affidavit sworn by Walioli Charles Wabwoba. The grounds are that there was;

- (i) procedural defects and non-service of the notice to show cause;
- (ii) justifiable absence; and,
- (iii) compliance and good faith. On procedural defects and non-service, the Applicants claim that the Notices to Show Cause (NTSC) were never served upon them. They assert that the subsequent issuance of Warrants of Arrest was therefore irregular and unlawful.

They point to a fatal flaw in the documentary evidence provided by the Ex-Parte Applicant to prove service including the Ex-Parte Applicant's Affidavit of Service sworn on May 9, 2025, the NTSC was issued by the Deputy Registrar on May 8, 2025 and the annexed payment receipt (SN-1) for the AOS filing fees dated May 7, 2025.

4. The Applicants submit that, the sequence of the dates constitutes a chronological impossibility, demonstrating total impossibilities and manifestations of the fabrications and false utterances aimed at misleading the Court, thereby impeaching the procedural integrity of the entire execution process.
5. On justifiable absence, it is submitted that their non-attendance on May 20, 2025, was not willful or contumacious but justifiable for reasons that the 1st Respondent, Truphosa Amere, was out of office due to impeachment proceedings. The Applicants aver that the 2nd Respondent, Emmanuel Masungu, was arrested and detained by the Ethics and Anti-Corruption Commission (EACC) in Nairobi on the morning of May 20, 2025, the very date of the hearing.
6. The Applicants contend that the decree was substantially settled, having paid Kshs. 4,928,256.65/. The remaining Kshs. 577,919.30/- was retained on account of retention and statutory deduction, which the Applicants believed was legally permissible. They argue that this demonstrates an absence of ill will, stubbornness and or deliberate disregard required for quasi-criminal contempt.
7. In response to the Application, the Ex-Parte Applicant swore a Replying Affidavit on 9th June 2025. The Ex-Parte Applicant maintains that the Notices to Show Cause, dated May 8, 2025, were properly served on the County Government officials through the legal clerk at the County Attorney's office. They rely on the Affidavit of Service sworn by Pella Amugune Tsisaga on May 9, 2025, as sufficient proof. Citing the case of Shadrack Arap Baiwo vs Bodi Bach, they argue that there is a presumption of service, and the Applicants have failed to discharge the heavy burden of proof required to show the return of service is incorrect.
8. The Ex-Parte Applicant dismisses the Applicants' excuses for non-attendance as unsubstantiated with reasons that the Applicants' reliance on an online article regarding the 1st Applicant's impeachment is inconclusive and lacks official records. Further, that the letter provided regarding the 2nd Applicant's alleged arrest only mentions investigations and not the provision of a certified Charge Sheet, Summons, or OB entry. The claim of arrest on May 20, 2025, is thus unverified and unreliable.



9. It is the Ex-parte Applicant's case that the deduction of Kshs. 577,919.30/- labelled as retention is unjustified and lacking any legal basis, constituting an unlawful withholding of funds. Furthermore, the Ex-Parte Applicant asserts that the debt arose from a final judgment, and any issues concerning contractual terms, such as retention clauses, were already adjudicated upon by the trial court and as such the County Government cannot unilaterally vary the decree.

Analysis and Determination

10. Having carefully considered the grounds raised in the Application, the response to the Application as well as the respective parties' written submissions, the Court frames the determination of the Application around two issues:
- (i) whether there was service of the Notice to Show Cause to justify the ex-parte proceedings and the subsequent issuance of Warrants of Arrest; and
 - (ii) whether there are sufficient grounds to set aside the order made on May 20, 2025.
11. Service of court process flow from the right to be heard. It is thus mandatory that every litigant is granted the opportunity to heard in a matter they are cited or likely to be affected by the orders to be issued. It is thus established that where there is no service or effective service then the court will set aside the proceedings as of right. However, even if the service was effective but the affected party demonstrates a plausible reason for failure to attend or just demonstrates that there is an arguable point that if argued would justify relooking the ex-parte order, the court would still, in the interests of substantial justice, set aside to accept material that would help it reach a just and fair decision.
12. The court's power to enforce compliance and satisfaction of its orders are purposed to preserve the dignity of the court as the bastion of protection of rights even where such portend legal limitation of the right to liberty. Where contempt is alleged, proceedings take quasi-criminal face in nature and demands strict adherence to procedural fairness. Because the standard of proof for contempt is higher than the balance of probabilities, almost but not exactly, beyond reasonable doubt, even the duty to effect effective and proper service is more enhanced.
13. In this matter, while he Ex-Parte Applicant correctly relies on the legal principle that an Affidavit of Service carries a presumption of regularity, placing the onus on the Applicants to rebut this presumption, the Applicants in the Court's mind have successfully discharged this burden by pointing to a patent anomaly in the documents exhibited to prove service. It is to the court anomalous that filing fee receipt (SN-1) paid for the Affidavit of Service is dated May 7, 2025 when the Notices to Show Cause (NTSC) was issued by the Deputy Registrar on May 8, 2025 and, the Affidavit of Service was sworn on May 9, 2025, claiming service on May 8, 2025. It creates a doubt if in deed there was service aft effected after the affidavit of service had been paid for before being sworn. The court finds that doubt sufficient a reason to set aside the proceedings.
14. The second reason the court deems it just to set aside is the assertion by the applicant that the retained money consisted of among other things tax obligations met on account and behalf of the decree-holder. The court considers that if any tax was indeed due and was retained then it must have been remitted to the Authority which remittance should be easy to prove. The absence of the officers from the court on the fateful day should not be the only reason to burden the county government with the task of paying the decree-holder it has used to meet its tax obligations. The court finds that it is only by setting aside and allowing the named officers to offer an explanation that the ends of justice would be met.



15. In upshot, the court finds and holds that the interests of substantial justice would be best served by setting aside the proceedings leading to the issuance of the Warrants of Arrest on May 20, 2025. Let the Deputy registrar appoint a date when the notice would be heard and notify the parties.
16. Because it was the default of the applicants to attend court, even by counsel, if the named officers were indeed unavailable, this is not a case in which the applicant can be awarded costs even when successful. Let each party bear own costs.

DATED, SIGNED AND DELIVERED, VIRTUALLY, AT LODWAR THIS 7TH DAY OF NOVEMBER, 2025.

PATRICK J O OTIENO

JUDGE

