



**Kinyanjui v Kinyanjui (Civil Suit 79 of 2017)  
[2025] KEHC 19002 (KLR) (Civ) (17 December 2025) (Ruling)**

Neutral citation: [2025] KEHC 19002 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL SUIT 79 OF 2017**

**SN MUTUKU, J**

**DECEMBER 17, 2025**

**BETWEEN**

**ROSEMARY WANJIRU KUNGU ..... PLAINTIFF**

**AND**

**PETER WILLIAM KINYANJUI ..... DEFENDANT**

**RULING**

1. In the Notice of Motion dated 19<sup>th</sup> December 2024, (the Application), Peter William Kinyanjui (the Applicant) is asking the Court to lift and/or set aside ex debito justitiae the warrants of arrest issued on 17<sup>th</sup> December 2024 in the present matter and to grant him unconditional leave and opportunity to show cause in execution of the decree in this suit.
2. The Application is anchored on Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act (CPA); Order 22, Rules 18 and 19, and Order 51, Rule 1 of the Civil Procedure Rules (CPR). It is supported by the grounds laid out on its body and the in the Supporting Affidavit sworn by the Applicant on 19<sup>th</sup> December 2024.
3. The Applicant's case is that warrants of arrest were issued against him on 17<sup>th</sup> December 2024 upon his default to show cause as to why the decree herein should not be executed against him. That he was unaware of the existence of the notice to show cause which preceded the warrants of arrest for reasons that the warrants were never served upon him either personally or through his advocates on record and that he only came to learn of the warrants of arrest upon receipt of a phone call from a purported police officer on 18<sup>th</sup> December 2024 regarding the impending warrants of arrest.
4. The Applicant has stated, further, that the information conveyed to him by his advocates was that they were only served with a notice to show cause requiring them to attend court on 12<sup>th</sup> November 2024 but not the notice requiring a court attendance on 17<sup>th</sup> December 2024 to show cause. He has stated



that the affidavit of service sworn by Dominic Mutunga, the Process Server, on 14<sup>th</sup> December 2024, purporting service of the notice to show cause upon his advocates, contains falsehoods on the issue of service.

5. The Applicant claims that his right to liberty is at stake and that he stands to suffer prejudice if the order sought in this application is not granted. He has stated that he has been ailing and recuperating from a spinal surgery and hence, effecting an arrest would be detrimental to his wellbeing. He has urged the Court to grant the orders to enable him to attend court and show cause why execution should not be issued by way of arrest.

### **The Replying Affidavit**

6. Rosemary Wanjiru Kungu (the Respondent) has opposed this application through her Replying Affidavit sworn on 24<sup>th</sup> February 2025 in which she has deposed that the Applicant has all along been aware of the existence of the judgment delivered in this suit in 2018 but has never sought to challenge the same either by way of an appeal or a review and that the Applicant was served with a copy of the decree arising from the said judgment.
7. The Respondent has deposed that pursuant to a court order made on 1<sup>st</sup> September 2023 the Applicant was directed to pay a sum of Kshs. 2,000,000/- to the Respondent within 90 days from 27<sup>th</sup> July 2023, but the Applicant has not complied with the aforesaid order to date. That despite the Applicant being duly served with a copy of the notice to show cause dated 28<sup>th</sup> August 2024, accompanied by a Hearing Notice for 17<sup>th</sup> December 2024 through his advocates' official email address, neither he nor his advocates attended court to show cause why warrants of arrest should not be issued against him; that service cannot be denied and therefore, the warrants of arrest were regularly issued.
8. The Respondent has further stated that, the warrants of arrest can only be lifted upon a judgment debtor demonstrating by way of an affidavit, the reason for his or her non-attendance to show cause. That in the present instance, the Applicant herein did not swear any affidavit to that effect and therefore, the court ought to find that the Application is an abuse of the court process and thus allow execution to proceed accordingly.

### **Parties' Submissions**

9. The Motion was canvassed through written submissions. The Applicant's submissions are dated 25<sup>th</sup> June 2025. He cited Kenya Commercial Bank Ltd v Nyataige & another [1990] KEHC 50 (KLR) and Joshua Okeyo Ng'ani v Lion Motor Dealers & Technical Institute [2004] KEHC 1991 (KLR) to emphasize on the discretionary power of the courts in setting aside or varying an ex parte judgment or order.
10. The Applicant submitted that neither he nor his advocates were served with a copy of the notice to show cause preceding issuance of the warrants of arrest. That, for that reason, the Applicant did not have an opportunity to be heard before the warrants of arrest were issued against him and therefore he has satisfied the requirements for setting aside the ex parte order and for lifting the said warrants of arrest.
11. The record of the Court shows that the Respondent filed two separate written submissions, the submissions dated 2<sup>nd</sup> July 2025 and the submissions dated 4<sup>th</sup> November 2025. The record of the Court, further shows that the directions to file submissions in respect of this application were issued on 3<sup>rd</sup> November 2025. Therefore, for good order, I will only consider the submissions filed after the directions were issued by this court, the submissions dated 4<sup>th</sup> November 2025.



12. In the Submissions dated 4<sup>th</sup> November 2025, the Respondent has argued that the Applicant has made no attempts at settling the decretal sum which now stands at approximately Kshs. 19,000,000/-. That, the court ordered the Applicant to pay a sum of Kshs. 2,000,000/- to the Respondent in part settlement of the decree, over three (3) years ago, but that there has been non-compliance.
13. On the question of service, the Respondent's contention is that the allegations by the Applicant purporting non-service of the notice to show cause are untrue, given that the record shows that service thereof was effected upon him through his advocates on record. That the service has similarly not been challenged by way of a contrary affidavit or a prayer seeking to cross-examine the process server in question.
14. The Respondent cited *Shah v Mbogo* [1967] EA 116 to support the point that the discretionary power of the court to set aside an ex parte order is intended to prevent an injustice resulting from an accident, mistake or inadvertence, but not to assist a party who deliberately disregards the authority of the court.
15. It is the submission by the Respondent that the Applicant herein has similarly failed to support his allegations of illness with proof and has therefore not tendered sufficient cause to demonstrate why he is entitled to the order presently sought. In sum, the Respondent's submission is that the Applicant has not met the threshold for setting aside the ex parte order, maintaining that that the warrants of arrest were lawfully issued and hence the Application should be dismissed with costs.

### **Analysis and Determination**

16. I have considered the application and the grounds supporting it. I have considered the Replying Affidavit in opposition and the submissions of the parties.
17. The Applicant's case is that a copy of the notice to show cause, which preceded the warrants of arrest was not served on him and that his advocates were likewise unaware of the notice to show cause. He claims that the averments made in the affidavit of service are entirely untrue. The Applicant also claims that he was unwell at all material times preceding the issuance of the warrants of arrest.
18. In contrast, the Respondent has maintained that the warrants of arrest are regular as shown by the evidence of service presented to this court that the notice to show cause was served upon the Applicant's advocates. Further, that the Applicant has not made any efforts to settle the decretal amount since delivery of judgment in 2018 and that the instant application is a mere delaying tactic and an abuse of the court process.
19. As can be seen from the record, judgment in this matter was entered pursuant to a ruling delivered on 28<sup>th</sup> February 2020 when the Applicant's statement of defence dated 5<sup>th</sup> January 2018 was struck out. Consequently, the Applicant was ordered to pay the Respondent a sum of Kshs. 12,042,157.32 being the balance of the decretal sum arising from the judgment entered in the primary suit being Civil Suit No. 145 of 2010 (*Rosemary Wanjiru Kungu v Elijah Macharia Githinji & Autoplus Used Parts Trading Company*). The record shows that the Applicant, unsuccessfully, tried to have the judgment set aside.
20. The record further shows that the Respondent thereafter filed an application dated 14<sup>th</sup> September 2021 seeking inter alia, issuance of a notice to show cause compelling the Applicant to show cause as to why he should not be arrested and committed to civil jail and an order for issuance of warrants of arrest against the Applicant for commission to civil jail. The application was opposed by the Applicant. Upon consideration thereof, the court (Deputy Registrar) deemed the application premature for want of proper procedure of execution and therefore dismissed it, vide a ruling delivered on 7<sup>th</sup> July 2022.



21. Subsequently, the Respondent took out a notice to show cause against the Applicant, which was similarly opposed. In her ruling delivered on 27<sup>th</sup> July 2023, the Deputy Registrar reasoned that the Applicant had by then paid a sum of Kshs. 2,200,000/- as part settlement of the decree and was willing to settle the outstanding amount by way of monthly instalments and that in the circumstances and declined to have the Applicant committed to civil jail at the time. The Applicant was directed to pay a sum of Kshs. 2,000,000/- to the Respondent within 90 days thereof, failing which execution would issue.
22. The record shows that the matter came up in court on various occasions thereafter, including for purposes of taxation of a Party and Party Bill of Costs dated 15<sup>th</sup> September 2022 between the parties, with the same being taxed at a sum of Kshs. 2,363,226.85 vide a taxation ruling delivered on 28<sup>th</sup> August 2024.
23. Subsequently, the matter came up in court on 21<sup>st</sup> November 2024 for hearing of the notice to show cause dated 28<sup>th</sup> August 2024. Going by the record, only the advocate for the Respondent was in attendance. The Honourable Deputy Registrar, upon determining that the affidavit of service on record was defective, directed that the notice to show cause be extended to enable proper service to be effected. Upon a subsequent court attendance on 17<sup>th</sup> December 2024 it was noted that neither the Applicant nor his advocate was present, and that no material had been filed in response to the notice to show cause. In the circumstances, an order was made for issuance of warrants of arrest against the Applicant, triggering the instant Motion.
24. From the foregoing circumstances, it is clear that the Applicant was at all material times aware of the existence of the decree in this suit. There is nothing to indicate that the decree has been set aside or otherwise varied.
25. In respect to the issue of service, the record of the court shows that an affidavit of service was sworn Dominic Mutunga, Process Server, on 4<sup>th</sup> December 2024 to the effect that he proceeded to effect service upon the Applicant's advocates through their official email address emwachiralaw@yahoo.com. A copy of the email extract is attached to the affidavit of service. The email address details set out therein have not been disputed by the Applicant or his advocates on record. I am therefore persuaded that the contents of the email communication were received by the Applicant's advocates.
26. I have considered the averments of the Applicant that his advocate claimed not to have received service of the notice to show cause or hearing notice for 17<sup>th</sup> December 2024. Since the email address is not disputed, I hold the view that the notice to show cause and the hearing notice was properly served upon the Applicant's advocates. However, there is no indication that the said advocates conveyed the contents of the email to the Applicant. Similarly, it is apparent from the record that the said advocates made no efforts to attend court to represent the Applicant's interest, on the scheduled date.
27. In the circumstances, I am persuaded that it is plausible that the Applicant had no personal knowledge of the notice to show cause issued against him to enable him avail himself to show cause.
28. On the subject of the Applicant's averments that he had been unwell at all material times, upon my perusal of the discharge summary annexed to the Supporting Affidavit and marked as Annexure "PWK 4" it is indicated that the Applicant was admitted in hospital on 2<sup>nd</sup> October 2024 and underwent a surgical procedure on 3<sup>rd</sup> October 2024 before being discharged on 10<sup>th</sup> October 2024.
29. The issue, however, is whether the Applicant knew of the notice to show cause, his health notwithstanding. I have considered the fact that personal knowledge and/or service of the notice to show cause upon the Applicant has not been clearly established by the Respondent. I have also taken



into account the Applicant's reasonable demonstration of the manner in which he would be prejudiced if the warrants of arrest are effected in that his right to liberty would be at stake. In addition, I have considered that the Applicant has in the past made certain attempts at settling the decretal amount, though there is nothing to indicate his compliance with the latest order made by the Deputy Registrar on 27.07.2023 requiring him to pay a sum of Kshs. 2,000,000/- to the Respondent within 90 days thereof. I have also considered the contrasting interests of the Respondent, who holds judgment in her favour.

30. Section 3A of the CPA reserves the inherent power of the court "to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court."

31. The Court of Appeal in *Rose Njoki King'au & Another v Shaba Trustees Limited & Another* [2018] eKLR stated thus:

"Also cited was Section 3A of the *Civil Procedure Act* which enshrines the inherent power of the Court to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the Court. In *Equity Bank Ltd versus West Link Mbo Limited* [2013], eKLR, Musinga, JA stated inter alia, that, by "inherent power" it means that

"Courts of law exist to administer justice and in so doing, they must of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without its being derived from *the Constitution* or statute. Such power enables the judiciary to deliver on their constitutional mandate.....inherent power is therefore the natural or essential power conferred upon the court irrespective of any conferment of discretion."

32. The Supreme Court went a step further in the case of *Board of Governors, Moi High School Kabarak and another v Malcolm Bell* [2013] eKLR, to add the following:

"Inherent powers are endowments to the court as will enable it to remain standing as a constitutional authority and to ensure its internal mechanisms are functional. It includes such powers as enable the Court to regulate its intended conduct, to safeguard itself against contemplation or descriptive intrusion from elsewhere and to ensure that its mode of disclosure or duty is consumable, fair and just."

33. Flowing from the foregoing, it is clear that the grant or refusal to set aside or vary an order, judgment or any consequential decree or order, is discretionary. The same position was held by the Court in *Shah v Mbogo & another* [1967] E.A 116 that:

"The discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice."

34. The principles enunciated in the above authorities, though relate to ex parte judgment, are equally applicable to a matter like this one.

35. Consequently, upon considering the circumstances of this case as well as the competing interests of the parties herein, I am persuaded to exercise my discretion in favour of the Applicant and allow the Notice of Motion dated 19<sup>th</sup> December 2024 on the following terms:



- a. The warrants of arrest issued on 17<sup>th</sup> December 2024 be and are hereby lifted.
- b. The Defendant/Applicant be and is hereby ordered to attend court on a date to be fixed in court to show cause as to why he should not be arrested and committed to civil jail for failing to pay a sum of Kshs. 2,000,000/- to the Plaintiff/Respondent pursuant to the order made on 27<sup>th</sup> July 2023, or for otherwise failing to settle the outstanding balance of the decretal sum herein.
- c. The Applicant shall bear the costs of this application.

36. Orders shall issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 17<sup>TH</sup> DECEMBER 2025.**

**S. N. MUTUKU**

**JUDGE**

