



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Mhandisi Enterprises Limited v Chimwega & 8 others (Environment and Land Case 37 of 2021) [2026] KEELC 440 (KLR) (3 February 2026) (Ruling)

Neutral citation: [2026] KEELC 440 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT AND LAND CASE 37 OF 2021
LL NAIKUNI, J
FEBRUARY 3, 2026

BETWEEN

MHANDISI ENTERPRISES LIMITED PLAINTIFF

AND

RAMA OMARI CHIMWEGA 1ST DEFENDANT

DISTRICT LAND REGISTRAR[KWALE] 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

MOHAMMED SWALEHE MWAJEMBE 4TH DEFENDANT

MARY NDALE KAI 5TH DEFENDANT

OMAR ATHUMANI 6TH DEFENDANT

ATHUMANI JUMA 7TH DEFENDANT

MOHAMMED SWALEHE 8TH DEFENDANT

KWALE DISTRICT SURVEY OFFICER 9TH DEFENDANT

RULING

I. Introduction

1. The Honourable Court was called upon to make a determination of the Notice of Motion application dated 22nd May 2025. It was instituted by the Mhandisi Enterprises Limited, the Plaintiff/ADecree Holder herein under certificate of urgency. The application was brought under the dint of the provision of Section 38 of the *Civil Procedure Act*, Cap. 21, Order 22 Rule 18 and Order 51 of the Civil Procedure Rules, 2010.



2. Upon service, the application was opposed through filing of Grounds of Opposition dated 25th July 2025, a Notice of Preliminary Objection dated 25th July 2025 and a joint Replying Affidavit sworn by Mohammed Swallehe Mwajembe and Rama Omari Chimwenga, the 1st and 2nd Respondents/ Judgement Debtors herein respectively. The Honourable Court will be highlighting the contents of these pleadings later on in this ruling whatsoever.

II. The case by the Plaintiff/Applicant/Decree Holder

3. The Plaintiff/Applicant/Decree Holder sought for the following orders before court:-
 - a. That Mohammed Swallehe Mwajembe and Rama Omari Chimwenga, the 1st and 2nd Judgement Debtors herein be arrested and sentenced to serve a prison term of upto 6 months
 - b. That costs of this application be provided for.
4. The application was premised upon grounds, testimonial facts and the averment made out under the 10 Paragraphed supporting affidavit sworn by John Morrison Litondo and annexures marked as "JML – 1" annexed hereto. He averred as follows that:-
 - a. He was a Director of the Plaintiff and hence conversant and competent to swear this affidavit on its behalf.
 - b. This Honourable Court had delivered its Judgement on 12th October 2022 by ordering as follows:-
 - i. A declaration is issued hereby that the Plaintiff is the registered proprietor of a parcel of land known as LR No Kwale/Diani Beach Block/653
 - ii. The title of the 1st and 2nd Defendants is hereby cancelled and their names removed from the register for LR No Kwale/Diani Beach Block/653
 - iii. An order of eviction is hereby issued requiring the 1st and 2nd Defendants, their agents, servants, relatives and or any other person claiming under them to vacate the land known as LR No Kwale/Diani Beach Block/653 within 90 days from today
 - iv. An order of permanent injunction restraining the 1st and 2nd Defendants from in anyway interfering, surveying, taking possession, developing, constructing, cultivating, subdividing, alienating, encumbering, disposing off, transferring, charging or in any manner so dealing with the parcel of land known as LR No Kwale/Diani Beach Block/653.
 - v. The Plaintiff shall have the costs of this suit
 - c. Despite of the existence of the Judgement and which had not been appealed, set aside, stayed or varied the Judgement Debtors had wilfully refused to comply with the orders of the court.
 - d. Subsequently, the Honourable Court issued a Certificate of Costs dated 5th April 2024 in the sum of Kenya Shillings Three Million Five Hundred and Fourty Nine Thousand Eight Nineteen Hundred (Kshs. 3,549,819/-)
 - e. The Honourable Court ultimately issued warrants of attachment to Messrs. Kameta Enterprises Auctioneers for the afore - stated decretal sum.



- f. The Judgement Debtors had threatened to use violence on any attempts to evict them and hence the application to have then comply with the Judgement of the court and the decretal amount in terms of costs.
- g. All efforts to compel the Judgement debtors herein to comply with the orders of the Court had been met by threats of violence to the Auctioneers.
- h. Having regard of the conduct of the Judgement Debtors herein, it was only reasonable that the application and the orders sought herein be allowed to enable the Decree Holder enjoy the fruits of its Judgement.

III. The responses by the 1st and 2nd Defendant/Respondents and Judgement Debtors.

- 5. As already indicated, the 1st & 2nd Defendants/Respondents and as the Judgement debtors herein filed their responses in form of Grounds of Opposition, Replying Affidavit and a raised a Preliminary Objection herein.
- 6. For good order and ease of reference, the Honourable Court shall be dealing with each one of these pleadings separately and distinctly as follows.
- 7. The Notice of Preliminary Objection:- It was dated 25th July 2025 raising the following grounds:-
 - a. That the application was bad in law and a non-starter having been canvassed under the wrong provisions of the law namely Order 22 Rule 18, Order 51 of the Civil Procedure Rules as read together with Section 38 of the Civil Procedure Act.
 - b. That this being a serious application touching on the right to liberty of an individual, the framing of the application is anathemic to justice under Article 48 of the Constitution of Kenya 2010, as it essentially invites the court to exercise its discretionary power under law in specie the broader Section 38 of the Civil Procedure Act to commit a party to jail absent proper grounding of orders sought.
- 8. The Grounds of Opposition: Further, the 1st and 2nd Defendants/Respondents – Judgement Debtors filed grounds of opposition dated 25th July 2025 and listed the following grounds:-
 - i. The application was incurably defective, bad in law and an abuse of the court process because the Applicant herein had failed to establish proof of service of court[execution]process or any attempts thereupon the respondents herein to warrant the grant of orders sought in the application
 - ii. The application was an abuse of the court process as it sought to commit the Respondents herein to civil jail without following due process as required under law.
 - iii. The circumstances surrounding the application never met the legal threshold such as to enable this Honourable Court grant the orders sought herein.
 - iv. The application lacked merit and should be dismissed with costs to the respondent
 - v. The orders sought were far-fetched and unavailable to the Applicant.
- 9. The Replying Affidavit:- The 1st and 2nd Defendants filed a 13 Paragraphed Joint Replying Affidavit sworn on 27th July 2025 by Mohammed Swallehe Mwajembe & Rama Omari Chimwenga respectively together with an annexure marked as “MSM” annexed thereto. They averred as follows that:-



- a. They were the 1st and 2nd Defendant/Respondents herein and therefore well conversant with the matters in issue and the application filed by the Plaintiff/Applicant herein.
- b. They were a farmer and businessman respectively residing and operating within the County of Kwale.
- c. The application as presented before court was an abuse of the court process as it sought to commit them to civil jail on account of eviction orders hitherto unbeknown to them as they were unable to know which cause of action they were defending.
- d. The causes of action for recovery of money and immovable property ought to be pursued separately as both constitute separate causes of action under the Civil Procedure Rules.
- e. At no one time were they served either by their Advocates or the Applicant with the complaint and /or the Decree.
- f. Further that to date they were not aware of the ruling on taxation as they never participated in it.
- g. Indeed, they instructed their previous Advocates to institute an appeal against the Judgement and this was done by way of filing a Notice of Appeal dated 24th October 2022 having been filed 12 days after the entry of Judgement. Annexed hereto and marked as “MSM – 1” was a copy of the said Notice of Appeal to the Court of Appeal.
- h. They had been under the impression that an appeal was being taken up and there were orders stopping their eviction.
- i. Despite not being served with any notice of eviction; they had further never seen anyone on the ground claiming to evict them.
- j. They maintained that the application was a serious ambush upon them and urged the court not to allow it.

Submissions

10. On 11th November 2025 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 22nd May 2025 and the notice of preliminary objection dated 25th July 2025 disposed of by way of written submissions. Unfortunately, at the time of preparing this ruling only the Plaintiff/Applicant had complied. Pursuant to that, the Honourable Court reserved 2nd February 2025 as the date for delivering of the Ruling.

A. The Written Submissions by the Plaintiff/Applicant/Decree Holders

11. The Plaintiff/Applicant/Decree Holder through the Law firm of Messrs. Wangalwa Oundo & Co Advocates filed their written submissions dated 14th October, 2025. Mr. Wangalwa Advocates on behalf of the Plaintiff/Applicant herein commenced his submissions by providing the Honourable Court with a brief background of the matter. The Learned Counsel stated that it was not in dispute that there existed a Judgement dated 12th October 2022 and a Certificate of Costs for a sum of Kenya Shillings Three Million Nine Fifty Six Thousand Seven Twenty Four Hundred (Kshs. 3,956,724/-) issued by this Court on 5th April 2024. Despite of the Judgement being in favour of the Applicant but the 1st and 2nd Defendants/Respondents/Judgement Debtors had failed to comply with it by not vacating the property.



12. It was submitted that the 1st and 2nd Defendants/Respondents were in contempt of the court orders as the last day to vacate the suit premises was 10th January 2023. That instead the 1st & 2nd Defendants/Respondents had resorted to issuing threats to violence in the event that they would be forced to vacate the premises. It was submitted that the 1st and 2nd Defendants/Respondents had previous records of disobeying court orders and had previously been committed to civil jail. That as stated the suit which commenced in the year 2011 at “High Court Mombasa, as Civil Case ELC No. 126 (B) of 2011” had 9 Defendants and out of which upon the delivery of the Judgement herein, the 6th, 7th and 8th Defendants had substantially complied with the orders of the court and had voluntarily granted vacant possession of the suit property.
13. The Learned Counsel averred that vide the Judgement of the Court, it had specifically directed as follows:-

“An order of eviction is hereby issued requiring the 1st and 2nd Defendants, their agents, servants, relatives or any other person claiming under them to vacate the land known as LR. No. Kwale/Diani Beach Block 653 within 90 days from today”
14. Despite of the Court assessing and taxing costs, issuing of the warrant of attachment the 1st and 2nd Defendants/Respondents were in contempt of the Court orders. It was the contention by the Learned Counsel that the 1st and 2nd Respondents had never denied the existence of the Judgement and the Decree, nor ever appealed against, set it aside nor varied it.
15. According to the Learned Counsel, the 1st and 2nd Defendants/Respondents had not given proper reason as to why they were not in compliance with the orders of the court.
16. That they were not remorseful and had not sought to purge the contempt of the orders of the court earlier granted. The court was asked to proceed and grant the orders sought.

IV. Analysis and Determination

17. I have keenly assessed and read through the pleadings filed by both the Plaintiff/Applicant/Decree Holder and the 1st and 2nd Defendants/Respondents/Judgement Holders herein, the written submissions by the Plaintiff/Applicant, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
18. For the Honourable Court to arrive at an informed, just, fair and reasonable decision, it has crystallized the subject matter emanating from the filed Notice of Motion application dated 22nd May 2025 by the Plaintiff/Applicant and the Preliminary objection by the 1st & 2nd Defendants/Respondents dated 25th July 2025 into the following four (4) salient issues for its determination. These are:-
 - a. Whether the Preliminary objection raised by the 1st & 2nd Defendants/Respondents/Judgement Debtors dated 25th July 2025 meets the laid -down threshold for such objection based on Law and precedents.
 - b. Whether the Preliminary objection raised by the 1st & 2nd Defendants/Respondents/Judgement Debtors dated 25th July 2025 is meritorious.
 - c. Whether the Notice of Motion application dated 22nd May, 2025 by the Plaintiff/Applicant meets the threshold for the arrest and committal to civil jail as per provisions of the law.
 - d. Who will bear the Costs of the Notice of Motion application dated 22nd May 2025 and preliminary objection dated 25th July 2025.



19. Before delving into determination of the application, I wish to point out that initially and as evidenced in the proceedings recorded herein, parties had agreed on dispensation of the Notice of Motion applications but with no indication as to how the preliminary objection was to be dealt with. The court notes that the preliminary objection is a response to the application and as such they are linked and ought to be dealt with concurrently.
20. However, as a matter of precedence, the Honourable Court will commence by tackling the preliminary objection as it is common knowledge that in the event the said objection is merited then it can dismiss the entire application.

Issue No. a). Whether the Preliminary objection raised by the 1st & 2nd Defendants/Respondents/ Judgement Debtors dated 25th July 2025 meets the laid -down threshold for such objection based on Law and precedents.

21. Under this Sub Heading, the Honourable Court shall be assessing the concept and the merits of a Preliminary Objection based on Law and precedence. The High Court has extensively deliberated on this subject matter and hence the Court will not be re – inventing the wheel here whatsoever. According to the Black Law Dictionary Tenth Edition at page 1371, it defines preliminary objection as follows: -

“In a case before an international tribunal, an objection that, if upheld, would render further proceedings before the tribunal impossible or unnecessary.”

22. In the now celebrated and Classicus Locus” case of “Mukisa Biscuits Manufacturing Limited – Versus - West End Distributors Limited Civil Appeal No. 9 of 1969 [1969] EA 696, Law, JA” was of the following view: -

“A preliminary objection consists of a point of law which has been pleaded, or which arises from a clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

23. Also, the court wishes to cite the case of: “Attorney General & another – Versus - Andrew Mwaura Githinji & another [2016] eKLR as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a preliminary objection “inter alia:-

- (i) A preliminary objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
- (ii) A preliminary objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
- (iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

24. In the instant case, the preliminary objection in summary, is based on the allegation that the instant application has been brought before court pursuant through wrong provisions of the law to wit the provision of Order 22 Rule 18 and Order 51 of the Civil Procedure Rules, 2010. That the application is of a serious nature as it touches on the rights and liberties of the Respondents to freedom and is an affront to the provision Article 48 of *the constitution* as related to Section 38 of the *Civil Procedure Act*, Cap. 21.



25. From the above, I am satisfied that the preliminary objection is raised on a pure point of law as it touches on the relevance of the provisions of law relied upon. This is an issue that does not need evidence to be established. Hence, I find that the objection meets the laid - down threshold

Issue No. b). Whether the Preliminary objection raised by the 1st & 2nd Defendants/Respondents/ Judgement Debtors dated 25th July 2025 is meritorious.

26. Under this Sub heading, having found that the preliminary objection is properly before court, the next issue for interrogation is whether the Objection raised by the 1st and 2nd Defendants/Respondents has any merit whatsoever. The provision of Order 22 Rule 18 of the Civil Procedure Rules, 2010 provides for the requirement for a notice to show cause when executing a decree. Further, it lays that the procedure for execution and exceptions to it. It is clear that there is no dispute as to the existence of the Judgement and Decree of the court on this matter having been previously rendered and in favour of the Plaintiff/Applicant/Decree Holder herein. The Applicant has further informed court that from the time of its delivery the said judgement on 12th October, 2022 and the Certificate of Costs issued on 5th April, 2024 has not been stayed, varied and/or set aside and neither has an appeal been preferred against it. From the record the court confirms that indeed this is the correct position.
27. In their defence, the 1st & 2nd Defendants/Respondents argue that a notice of appeal and annexed marked as “MSM – 1” dated 24th October, 2022 against the Judgement was filed before the Court of Appeal. The court notes that despite the assertion of a notice of appeal having been filed, the said appeal has clearly not been pursued from the year 2022 to date. The Respondents have not availed before court any documentation from the court of appeal halting the implementation of the Judgement specifically stay of execution.
28. By and large, the Respondents are adamant that the application is an abuse of their rights to access to justice as envisaged under the provision of Article 48 of *the Constitution* 2010 and narrow the assertion down to the fact that they were never served with a copy of the decree and neither have eviction proceedings been brought against them.
29. With all due respect to the Respondents, I find that arrest and detention is among the modes of execution especially when it contempt of court orders. Also, it is rather obvious that after a suit has been concluded, costs from the litigation arise. The provision of Order 22 of the Civil Procedure Rules, 2010 deals with the execution process and especially where time has lapsed. A notice of appeal is not an appeal and filing it before the court of appeal cannot hinder execution unless there is stay of execution orders. Consequently, the court is of the opinion that the application is premised upon the relevant provisions of the law and the preliminary objection automatically fails.

Issue No. c. Whether the Notice of Motion application dated 22nd May, 2025 by the Plaintiff/ Applicant meets the threshold for the arrest and committal to civil jail as per provisions of the law.

30. The provision of Order 22 of the Civil Procedure Rules, 2010 deals with execution of decrees. Order 22, Rule 18(1) and (2) of the Civil Procedure Rules. Sub-rule (1) provides thus:

“Where an application for execution is made—

- a. more than one year after the date of the decree;

...



the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him ...

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him.”

Whereas Sub-rule (2) reads as follows:

“Nothing in sub-rule (1) shall be deemed to preclude the court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.”

31. A quick reading of the above provisions of law expound on the procedure for execution is in more than one year after date of the Decree. From the facts of the case, the Judgement in this matter was rendered on 12th October 2022 while the certificate of costs was issued on 5th April 2024 which was 2 years later. However, it is clear from the provisions of statute above that an application for execution ought to be made and a notice to show cause (NTSC) issued before any step for execution is taken.
32. The Respondents maintain that no application has been served upon them and neither has the notice to show cause. I fully concur as there is no proof of such steps having been taken by the Applicant herein. In my opinion this is a misstep on the part of the applicants as they have not exhausted the laid down procedure. The court can therefore not issue any orders of arrest and committal to jail as the said orders will not only be irregular but unlawful. For all odds and purposes, I need not explain further as to why the application fails.

Issue No. d. Who will bear the Costs of the Notice of Motion application dated 22nd May 2025 and preliminary objection dated 25th July 2025.

33. It is now well established that costs an issue at the discretion of the Court. Costs mean the award that is granted upon a party upon the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By the event it means the result of the said legal action and/or proceedings.
34. In this case, as Honourable Court finds that both the Plaintiff/Applicant/Decree Holder and the 1st & 2 Defendants/Judgement Debtors have not succeeded in prosecuting neither their notice of motion application nor and the preliminary objection respectively. Hence, it follows that it will be proper for each party to bear its own costs.

Conclusion and Disposition

35. Consequently, upon conducting an elaborate analysis of the issues set out herein, this Honourable Court is satisfied that the Plaintiff/Applicant has failed to established a case from the reliefs sought from the application. Thus, specifically, the Honourable Court proceeds to grant the following orders:



- a. That the Notice of Preliminary Objection dated 22nd July 2025 raised by the Respondents be and is hereby overruled for lack of merit.
- b. That the Notice of Motion application dated 22nd February, 2022 by the Plaintiff/Applicant be and is hereby dismissed for lack of merit.
- c. That each party to bear its own costs for both the application and preliminary objection.

It is ordered accordingly.

RULING DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS 3RD DAY OF FEBRUARY, 2026

.....

**HON. MR. JUSTICE L.L NAIKUNI,
ENVIRONMENT & LAND COURT**

AT

KWALE.

Ruling delivered in the presence of: -

- a. Mr. Daniel Disii, the Court Assistant.
- b. Mr. Wangalwa Advocate for the Plaintiff/Applicant/Decree Holder.
- c. Mr. Oduor Opalo Advocate for the 1st & 2nd Defendants/Respondents/ Judgement Debtors.

