

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
MISC CIVIL APPLICATION NO.E096 OF 2025

WILLIAM CHEMWENOAPPLICANT

VERSUS

JOHN

R.

CHEMOIYWO

.....RESPONDENT

RULING

1. Before this Court is the Application brought by way of a Notice of Motion dated 17th April 2025, seeking the following orders:

1) Spent.

2) That the Honourable Court be pleased to call and place before it the proceedings before the Subordinate Court in the Chief Magistrate Court Case No.1146 of 2004, John R. Chemoiywo vs. William Chemweno for purposes of interrogating the correctness and propriety of the proceedings and make any appropriate order/directions to ensure fair administration of justice.

3) That the warrants of arrest issued against William Chemweno be set aside.

4) Costs be provided for.

2. The Application is filed through **Messrs Ham & Hamsley Advocates** and is stated to be premised on **Sections 1A, 3, 3A and 43** of the **Civil Procedure Act**. The Grounds of the Application are as set out on the face thereof and the same is supported by the Affidavit sworn by the Applicant, **William Chemweno**.
3. He deposed that the Hon. Court in **Chief Magistrate Court Case No.1146 of 2004 John R. Chemoiywo vs William Chemweno**, on 5th September 2024 issued a decree against the applicant herein ordering him to pay the Respondent the sum of Kshs. 156,100/= as costs. That the Respondent then made an application to execute the decree by having him committed to civil jail until payment in full and that he was arrested from his work place and brought before the Court in execution of the warrant.
4. He contended that despite his advanced age of 65 years and being of ill health, the trial Court ordered that the he be committed to civil jail in execution of the decree. He deposed further that his health has significantly deteriorated during his stint in jail and that considering the difficulty he has been having raising funds to settle the decree there is significant risk of developing major health complications in civil jail that portend great danger to his life.
5. The Applicant urged that the Honorable Court should urgently intervene and cancel the warrants of arrest on account of his ill health.

Response

6. In Response to the Application, the Respondent filed the Preliminary Objection dated 10/06/2025, premised on the following grounds:

1) That the application offends the provisions of Order 9 Rule 9 of the Civil Procedure Rules.

2) The application is an abuse of Court process.

7. The Respondent also filed a Replying Affidavit dated 10th June 2025. In both the Preliminary Objection and the Replying Affidavit, the main thrust is that the application is incompetent frivolous, vexatious and an abuse of the process for reasons that there is no leave obtained by the firm of Ham & Hamsley Advocates to come on record in place of the firm of Ngigi Mbugua Advocates contrary to the provisions of **Order 9 Rule 9 of the Civil Procedure Rules** and the provisions of the **Advocates Practice Rules**.

8. That under these provisions, if the firm of Ham & Hamsley Advocates intended to come on record to act alongside the firm of Ngigi Mbugua & Company Advocates, under the Advocates Practice Rules, they needed the consent of that firm to act alongside but if not, they needed the leave of the court under the above cited Order 9. That no Notice of Appointment of Advocate, Notice of Change of Advocate or anything else to show representation has been filed and served upon my Advocates on record.

9. It is deposed that the Applicant has not made any precise prayer to this Court that this Court can address and that Article 165 of the constitution is all about the jurisdiction of the high Court and even if the Applicant intended to invoke the powers of the Court to revise proceeding no law has been cited which the subordinate Court has misapplied. He deposed further that the age

and the physical health of the Applicant are not materials that this honourable Court can consider to revise a decision of the lower Court.

10.He contended that the jurisdiction of this Court has been wrongly invoked in this matter for reasons that this Court cannot set aside warrants which have been lawfully issued by a Court of competent jurisdiction and that the issue outstanding is one relating to costs and as per the Applicants annexure WC-1 which costs were assessed at Ks. 156,100/-. That as per the Applicant's annexure CW-5 upon the Applicant's arrest, he paid up leaving a balance of Ks. 50,000/- which he consented to clear by 10th April 2025. That the Applicant has not paid up the Ks. 50,000/- upon which condition the court had released him.

11.He urged that the Applicant, prima facie is in contempt of a Court order upon which the Court issued a warrant for his arrest and he has not given any explanation or shown sufficient cause why he has not paid Kshs. 50,000/- as ordered by the Court.

Submissions

12.The court directed that both the Preliminary Objection and Application be canvassed by way of written Submissions and pursuant thereto, the Applicant filed submissions dated 10th July 2025 and the Respondent filed submissions dated 25th June 2025.

The Applicant's Submissions

13.On the Preliminary Objection raised by the Respondent, Counsel for the Applicant confirmed that Ngigi Mbugua & Company Advocates did indeed represent the Applicant in proceedings before the Subordinate Court and that

the firm of Ham & Hamsley Advocates did not seek leave before this Court nor record a consent to come on record in place of the firm of Ngigi Mbugua and urged that there was no need for either of the two.

14. Counsel submitted that Learned Counsel for the Respondent has misinterpreted and wrongly applied the provisions of **Order 9 Rule 9** of the **Civil Procedure Rules** which he reproduced as hereunder;

when there is change of Advocate, or when a party decided to act in person having previously engaged an Advocate, after judgement has been passed, such change or intention to act in person shall not be effected without an order of the Court.

15. Counsel maintained that this appeal wishes to invoke the Supervisory Jurisdiction of the High Court over the Subordinate Courts through a Miscellaneous Application. That these proceedings are fresh or new, and are before a Superior Court, and in this regard and a party, including both the Appellant or Respondent, are at liberty to change or instruct a new set of Counsel to represent them without obtaining the leave of the court.

16. Counsel urged that applying the canons of statutory interpretation to the provisions of **Order 9 Rule 9** of the **Civil Procedure Rules** it certainly cannot be literally interpreted that the provisions are to apply to proceedings that are fresh or new, and are before a Superior Court for reasons that there has been no judgement before the Superior Court. That the golden rule is not also applicable as modifying the literal words would only lead to an absurdity.

17. Counsel maintained that certainly, the only recourse is to fall back upon the mischief rule and decipher if the intention of the drafters was to include appeals under this rule it would have been so stated. Counsel submitted that **Order 9 Rule 9** of the **Civil Procedure Rules** envisages a situation where after judgment has been entered, a new advocate desires to come on record for purposes of applying for stay of execution or to proceed with execution proceedings in that same suit.
18. That the intention of the drafters was to cure the mischief of litigants sacking their advocates at the execution stage or at the point of filing their bill of costs thus denying their advocates their hard-earned fees. Counsel urged that had this court been the first port of call, certainly after judgement has been rendered, leave would have to be sought from the same Court or a consent recorded to come on record.
19. Counsel placed reliance on the case of **Stanley Mugambi & another v John Kiraithe [2005] KEHC 2046 (KLR); African Inland Church (Maungu) & 3 others v Mzame & another [2024] KEELC 4731 (KLR) and Tobias M. Wafubwa v Ben Butali [2017] KECA 142 (KLR).**
20. On the Application, Counsel in his submissions reiterated the facts of the case as already herein summarized and I need therefore not rehash the same save in effecting the warrant of arrest, Counsel submitted that the Applicant was arrested from his work place and brought before the subordinate Court and that despite the Applicant's advanced age of 65 years and his ill health the trial court ordered that the Applicant be committed to civil jail in execution of the decree.

21. Counsel submitted that the Applicant averred that his health significantly deteriorated during his stint in jail and that considering the difficulty he's had in raising funds to settle the decree there is significant risk of the Applicant developing major health complications in civil jail that portend great danger to his life and he therefore applied to the High Court for his release under the provisions of **Section 43 of Civil Procedure Act**, which grants the High Court powers to release a judgement debtor committed to civil jail on the ground that he is suffering from a serious illness.

22. Counsel urged that Applicant has tendered evidence before this Honorable Court to the effect that he is a senior citizen of advanced age and suffering from hypertension commonly referred to as high blood pressure and reiterated that the detention in civil jail led to a severe deterioration in his health exposing him to the risk of complications from heart disease, stroke, kidney damage and vision loss.

23. In conclusion, Counsel submitted that the Applicant has satisfied the threshold to have the High Court exercise its powers to release a judgement debtor committed to civil jail on the ground that he is suffering from a serious illness

The Respondent's Submissions

24. On his part, Counsel for the Respondent submitted that the Preliminary Objection is purely made on a point of law and does not require the ascertainment of facts as set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**.

25. Counsel cited **Order 9 Rule 9** of the **Civil Procedure Rules** and submitted that the matter at the lower Court is a concluded matter and there is a judgement. Counsel pointed out that the Applicant was represented by the firm of Ngigi Mbugua & Company Advocates. No leave has been sought by the firm of Ham & Hamsley Advocates to come on record in place of the firm of Ngigi Mbugua nor was a consent recorded by both parties.

26. Counsel urged that the absence of leave of Court nor consent as required and there being no formal application under **Order 9 Rule 10** seeking leave of the Court, the application dated 17th May 2025 is fatally defective, irregular and is improperly before Court. Counsel relied on the case of **Jackline Wakesho vs Aroma Café (2014) EKLR**. Counsel thus urged the Court to uphold the preliminary objection and to strike out the Applicant's application with costs to the Respondents.

27. In regard to the Application, Counsel submitted that the Applicant seeks to have this honourable Court call and place before it the proceedings before subordinate Court in **CMCC No.1146 of 2004** for purposes of interrogating the correctness of the proceedings and set aside the warrants to arrest issued against the Applicant. He reiterated the facts deposed in the Replying Affidavit with regard to the issuance of the warrants of arrest.

28. Further, Counsel observed that the application has been brought under **Article 165** of the **Constitution of Kenya** together with **Section 1A, 3, 3A** and **43** of the **Civil Procedure Act** and submitted that whereas the Applicant seeks to invoke the Supervisory Powers of the high Court to revise proceedings of the lower Court he has failed to cite which laws the

subordinate Court misapplied. Counsel urged that the Applicant also failed to raise any issue that warrants the intervention of this honorable Court under **Article 165 of the Constitution** and maintained that the age and the physical health of the Applicant are not material that should warrant the revision of the lower Court decision.

29.In conclusion, Counsel submitted that the application is incompetent, misconceived and bad in law, it does not meet the threshold of the invocation of the high Court's jurisdiction under **Article 165** since no violation of the constitution or fundamental rights and freedoms has been demonstrated by the Applicant.

Determination

30.The issues for determination in this matter are

- i. Whether the Preliminary Objection has merit**
- ii. Whether the orders sought by the Applicant should issue.**

31.The Supreme Court in **Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others** cited the leading decision on Preliminary Objections, *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd.* (1969) EA 696, where the Court held as follows:

“a preliminary objection consists of a point of law which has been pleaded or which arises by 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... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

32. It must be noted that the preliminary objection if allowed may dispose of the entire suit without giving parties the opportunity to be heard thus denying parties the opportunity to have their case heard and determined on its merits. The provisions of **Order 9 Rule 9** of the **Civil Procedure Rules, 2010** are as already herein cited. Further, **Order 9 Rule 10** of the **Civil Procedure Rules, 2010** provides that:

An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.

33. Having addressed my mind to the said provisions and guided by the decisions cited by the Counsel for the Applicant, I am satisfied that this provision applies to proceedings in the same case before the court in which the matter was instituted and it does not apply where the jurisdiction of a higher court has been invoked. For this reason, even as I am satisfied that the Preliminary Objection as raised has met the threshold of a preliminary objection as envisaged in the **Mukhisa Biscuit case (supra)**, it is my finding

that the same is misconceived and lacks merit and it is accordingly dismissed.

34. And now turning to the Application, **Article 165(6) and (7)** of the **Constitution** provides as follows:

“6)The High Court has supervisory jurisdiction over the subordinate Courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior Court.

(7)For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate Court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”

16. In the instant case, the Applicant seeks that the Court herein calls for and places before it the proceedings before the subordinate Court aforementioned for purposes of interrogating the correctness and propriety of the proceedings and make any appropriate order/directions to ensure fair administration of justice for the reasons already herein summarized.

17. **Section 43** of the **Civil Procedure Act** cited and relied upon by the Applicant provides as follows;

(1)At any time after a warrant for the arrest of a judgment-debtor has been issued, the Court may cancel it on the ground of his serious illness.

(2)Where a judgment-debtor has been arrested, the Court may release him if in its opinion he is not in a fit state of health to be detained in prison.

(3)Where a judgment-debtor has been committed to prison, he may be released therefrom—

(a)by the superintendent of the prison in which he is confined on the grounds of the existence of any infectious or contagious disease; or

(b)by the committing Court or the High Court on the ground of his suffering from any serious illness.

(4)A judgment-debtor released under this section may be rearrested, but the period of his detention in prison shall not in the aggregate exceed that prescribed by section 42 of this Act.

18.From the above provisions of the law, a person who has been committed to civil jail as a judgement debtor can indeed be released by the committing court or the High Court for the reasons therein given which include serious illness and/or poor health. It is also noted that such a person can also be released by the Superintendent of the Prison *suo moto* and without any order of the Court in the circumstances provided under the above cited provisions of **Section 43(3)(a) of the Civil Procedure Act**. However, the onus is on an Applicant to satisfy the court that he deserves to be released on either ground.

19.The Applicant herein has availed medical documentation in support of his contention that he is elderly at the age of 65 years, he is hypertensive and is on therefore treatment and his continued incarceration will only lead to a deterioration of his health. The contents of the said documents have not at all been challenged, denied, rebutted and/or controverted by the Respondent. In actual fact, the Respondents only response is that ill health is not a ground for the release of the Applicant from civil jail.

20.Even as the Respondent maintains that the right procedure was followed by the court in committing the Applicant to civil jail and that not only has the Applicant failed to invoke any provisions of the law upon which the Application is premised but has also not stated what aspect of the trial Court that this court is being asked to exercise its Supervisory jurisdiction over, the court notes that the Respondent did not annex any proceedings of the Trial Court to his Affidavit to buttress this deposition on the correctness of the procedure that was applied.

21.But of special significance is the fact that my perusal of the decree annexed by the Applicant as WC-1 shows that it arose from an order of injunction dated 5th September 2024 wherein the court gave an order restraining the Applicant and/or his agents etc, from subdividing, occupying, entering, cultivating *et al* the Respondents land. The order for costs was incidental thereto. It has been deposed that the Applicant was taken from his place of work upon his arrest which therefore means that he is gainfully employed.

22. Further, the Court notes that the Respondent did submit that the Applicant had paid part of the costs assessed at Ks. 156,100/- leaving a balance of only Ks. 50, 000/- which too means he was willing to, and was making every effort to pay the costs. In light of these observations, it is my very well considered opinion that the issue of costs could have very well been settled by other less drastic means other than committal to civil jail. This observation on the part of the court in my view would warrant an interrogation by the court of the bona fides of the committal of the Applicant to jail

23. I have considered the provisions under which the Application has been brought and Article 165 of the Constitution herein above reproduced enumerating the jurisdiction of the High Court which includes its Supervisory Jurisdiction is therein cited to warrant the orders sought. All considered therefore, I am satisfied that the Application has merit and the same is now hereby allowed as hereunder:

- 1. That this Court now hereby orders and directs that the proceedings before the Subordinate Court in Eldoret Chief Magistrate Court Case No.1146 of 2004, John R. Chemoiywo vs. William Chemweno be placed before it at the earliest opportunity for purposes of interrogating the correctness and propriety of the proceedings and to make any appropriate orders and/or give directions to ensure fair administration of justice.**

2. That the warrants of arrest issued against William Chemweno be and are now hereby set aside and the Applicant is to be released forthwith. The costs shall be in the cause.

Read date and Signed at ELDORET on 20th February 2026

**E. OMINDE
JUDGE**