

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW MISC. APPLICATION NO. E023 OF 2026

EUNICE NYAMBURA MAINA.....APPLICANT

VERSUS

FESTUS GAKUOH.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

AND

THE MILIMANI SMALL CLAIMS COURT.....INTERESTED PARTY

RULING

1. The applicant Eunice Nyambura Maina vide her chamber summons dated 16/2/2026 and supported by a statutory statement and affidavit sworn by herself on the even date seeks leave of court to apply for Judicial Review orders of certiorari to remove into this court and quash the execution proceedings pending before the Small Claims Court at Nairobi vide SCC COOMM E10736/2024 which proceedings seek out the applicant judgment debtor to show cause why she cannot be committed to civil jail for failure to settle decree of that court.
2. According to the applicant, the Small Claims Court is devoid of any jurisdiction to entertain such proceedings and make such orders in

execution of decree, which Notice to Show Cause and or civil jail orders can only be issued buy a civil court via the **Civil Procedure Rules** and not the Small Claims Court which has its own Rules of Procedure.

3. I have heard Mr. Mariaria Advocate for the applicant this afternoon, arguing the application on behalf of the applicant, *exparte* under **Order 53 Rules 1 (1) and (2) of the Civil Procedure Rules**. I have also perused the applicable law, being the Small Claims Court Act and the Rules made thereunder.

4. Section 17 of the Act on Procedure of the Court provides that:

17. Procedure of Small Claims Court

Subject to this Act and Rules, the Court shall have control of its own procedure in the determination of claims before it and, in the exercise of that control, the Court shall have regard to the principles of natural justice.

5. Additionally, **section 39 of the Act under PART V provides for Execution of Decrees** as follows:

39. Procedure for execution

Where a judgment debtor fails to pay to the decree holder any sum specified in a decree or order, the Court may—

(a)where the judgment debtor's movable property is insufficient to satisfy the decree, order execution by attachment and sale of the judgment debtor's immovable property;

(b) order the attachment of the salary of the judgement debtor; or
(c) suspend the execution of the warrant and the order either wholly or in part on such conditions as to security or otherwise as the Court may determine.

6. **Section 50 of the Act** empowers the Chief Justice to make Rules for the Court. The section outlines that:

50. Power to make Rules

(1) The Chief Justice may make Rules of practice and procedure for the better functioning of the Court.

(2) For the purpose of Article 94(6) of the Constitution—

(a) the purpose and objective of the delegation under this section is to enable the Chief Justice to make rules to provide for the better carrying into effect the provisions of this Act;

(b) the authority of the Chief Justice to make Rules under this Act shall be limited to bringing into effect the provisions of this Act and fulfilment of the objectives specified under this section;

(c) the principles and standards applicable to the Rules made under this section are those set out in the Interpretation and General Provisions Act (Cap. 2) and the Statutory Instruments Act (Cap. 2A).

7. Pursuant to the above provisions of the Act on the power to make Rules of the Court, the **Small Claims Rules, 2019**, promulgated vide **Legal**

Notice No. 145 of 2019 and which came into effect on 30/8/2019 provide the procedure to be applied in matters filed before the Small Claims Court; right from filing to execution process.

8. This Court's attention is drawn to **Rule 25** of the Rules which provide for procedure for enforcement of orders and decrees. The Rule provides:

(1) Any order or decree of the court shall be enforceable in accordance with the Civil Procedure Rules.

(2)

9. Under **Rule 26**, on effect of non-compliance, the Rule provides that:

Where a debtor fails to satisfy the payment schedule on acts in breach of the proposal to comply with a court order given under this Rule, the payment is recoverable, and the order is enforceable in accordance with the Civil Procedure Rules.

10. The applicable Civil Procedure Rules on execution of decrees and orders is **Order 22 of the Civil Procedure Rules**. One of the modes of execution of decree under **Order 22 Rule 31** is by way of Notice to show cause. A judgment debtor may be issued with notice to show cause why they cannot be taken into detention in prison, while **Order 22 Rule 32** provides for a warrant of arrest to direct a judgment debtor to be brought up to Court unless the amount which he has been ordered to pay together with interest and costs if any to which he is liable has been paid sooner.

11. **Rule 33** then provides for payment of subsistence allowance before any judgment debtor is committed to civil jail. The entire **Order 22 of the Civil procedure Rules** provides an elaborate procedure for execution of decrees and orders including attachment and sale of movable property of the judgment debtor.
12. The question to be answered in the present case, therefore, is whether the applicant has demonstrated that she has a *prima facie* arguable case that the Small Claims Court has jurisdiction to hear and determine a Notice to Show Cause which may lead to arrest and committal of a Judgment Debtor to prison for non-settlement of decree.
13. From my above analysis, it appears as if the Small Claims Court has jurisdiction to enforce its decrees or orders in the manner provided for under **Order 22 of the Civil Procedure Rules** which includes Notice to Show Cause and arrest and committal to civil jail.
14. However, **Rule 25** of the Rules made under the **Small Claims Court Act** has since been declared to be inconsistent with the parent Act by a three Judge Bench of the High Court comprising Justices Ogola, Mabeya and Nyakundi in **Gathaiya v Attorney General & 2 others; & 176 Interested Parties (Petition E008 & E010 of 2024 (Consolidated)) [2026] KEHC 290 (KLR) (22 January 2026) (Judgment)** wherein the petitioner challenged jurisdiction of the Small Claims Court in personal injury claims arising from road traffic accidents and in the process, also

challenged the constitutionality of some sections of the Act and the Rules made thereunder.

15. In that petition, one of the arguments by the petitioner was that regarding the power of that Court to issue warrants of arrest and committal to Civil Jail, **Rule 25(1) of the Small Claims Court Procedure Rules** imports the Civil Procedure Rules on execution. That Sections 38 and 40 of the Civil Procedure Act together with **Order 22 Rules 31 and 32 of the Civil Procedure Rules 2010**, empowers that Court to arrest and commit Judgment Debtors in appropriate cases.

16. According to the petitioner, these provisions in the Rules are inconsistent with the Act and therefore unconstitutional. In their judgment after hearing the merits of the petition, the Bench stated as follows:

82. Committal is a coercive process targeting a contumacious debtor, not a penalty for poverty. In the circumstances of the Small Claims Court, there are processes that are set out in Section 37 of the Act which when complied with, they end up with the application of Section 40 of the Act and not otherwise.

83. In view of the foregoing, we are of the view and so hold that, rule 25 of the rules is in breach of Article 24 (2) (a), (b) and (c) of the Constitution of Kenya for incorporating the provisions for arrest and committal to civil jail under the Civil Procedure Act. It is therefore unconstitutional and ultra vires Sections 37,

39 and 40 of the Act as read together with Article 94(6) of the Constitution of Kenya.

17. In the end, the bench issued the following declaration:

A declaration hereby issues that rule 25 of the of the Small Claims Rules is in breach of Article 24 (2) (a), (b) and (c) of the Constitution of Kenya for incorporating the provisions for arrest and committal to civil jail under the Civil Procedure Act . It is therefore unconstitutional and ultra vires Sections 37, 39 and 40 of the Act as read together with Article 94(6) of the Constitution of Kenya.

18. It is important to note that the above decision by the three-judge bench though recent, was only hyped for its finding and holding that the small claims Court has no jurisdiction to hear and determine claims of personal injuries. It is for that reason that this Court had initially found that the Court had jurisdiction to order for execution of decree by way of Notice To Show Cause and arrest and committal to civil jail, by a plain reading of the Act and Rules made thereunder, until it discovered shortly thereafter that the Rule had since been invalidated by a court of competent jurisdiction in the above cited petition.

19. This Court had to quickly invoke the residual jurisdiction vested in it under Section 3A of the Civil Procedure Act which provides that ***nothing in this Act shall limit or otherwise affect the inherent power of the court***

to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court and the principles espoused in Article 159 of the Constitution, among them, at Article 159 (2) (d) which provides that (d) justice shall be administered without undue regard to procedural technicalities. This exceptional invocation of section 3A of the Civil procedure Act and Article 159 of the Constitution is intended to correct errors, prevent abuse of the process and address grave injustices without violating the doctrine of *functus officio*, primarily from the Court's inherent powers to do justice, by expeditiously recalling the ruling which was made *ex parte* and reviewing the same in the presence of the *ex parte* applicant's counsel, who had in the first instance appeared *ex parte*.

20. The power to review a ruling particularly one that is apparently *per incuriam* is vested in this Court to be exercised in exceptional circumstances for the ends of justice to be met.

21. Superior Courts have over time held that the court retains residual jurisdiction to depart from its own decision in order to correct a miscarriage of justice. This is the position taken in **Benjoh Amalgamated Limited & another v Kenya Commercial Bank Limited SC Application No 16 of 2012; [2014] eKLR; Deynes Muriithi & 4 Others v Law Society of Kenya & another SC Application No 12 of 2015; [2016] eKLR; and Jasbir Singh Rai & 3 others v Tarlochan**

Singh Rai & 4 others SC Petition No 4 of 2012; [2013] eKLR; as cited in *Mwambeja Ranching Company Limited & another v Kenya National Capital Corporation (Application E022 of 2023) [2024] KESC 28 (KLR) (28 June 2024) (Ruling)* that:

“6. Appreciating the provisions of section 21A of the Supreme Court Act, rule 28(5) of the Supreme Court Rules, 2020 as well as the principles established by this court in Fredrick Otieno Outa v Jared Odoyo Okello & 3 others [Supra] where the court delineated the following as exceptional circumstances which would warrant the exercise of its limited jurisdiction for review:

“ (92) ... However, in exercise of its inherent powers, this court may, upon application by a party, or on its own motion, review, any of its judgments, rulings or orders, in exceptional circumstances, so as to meet the ends of justice. Such circumstances shall be limited to situations where:

- i. the judgment, ruling, or order, is obtained, by fraud or deceit;*
- ii. the judgment, ruling, or order, is a nullity, such as, when the court itself was not competent;*
- iii. the court was misled into giving judgment, ruling or order, under a mistaken belief that the parties had consented thereto;*

iv. *the judgment or ruling, was rendered, on the basis of a repealed law, or as a result of a deliberately concealed statutory provision.*”

22. In **Mwambeja Ranching Company Ltd & another v Kenya National Capital Corporation (Civil Appeal (Application) 30 of 2018) [2023] KECA 660 (KLR)**, the Court of Appeal stated as follows regarding exercise of inherent power of the Court to review its own decision, and which holding was accepted by the Supreme Court in the above cited case between the same parties:

“In Australia, the case of Autodesk Inc v Dyason (No. 2) (1993) HCA 6; (1993) 176 CLR 300 set forth the following principles to be preferred in applications for review: i. the public interest in the finality of litigation will not preclude the exceptional step of reviewing or rehearing an issue when a court has good reason to consider that, in its earlier judgment, it has proceeded on a misapprehension as to the facts or the law; ii. as this Court is a final Court of Appeal, there is no reason for it to confine the exercise of its jurisdiction in a way that would inhibit its capacity to rectify what it perceives to be an apparent error arising from some miscarriage in its judgment; and iii. it must be emphasized, however, that the jurisdiction is not to be exercised for the purpose of re-agitating arguments already considered by

the court; nor is it to be exercised simply because the party seeking a rehearing has failed to present the argument in all its aspects or as well as it might have been put. The purpose of the jurisdiction is not to provide a back-door method by which unsuccessful litigants can seek to re- argue their cases.

38.The Supreme Court of India in Rupa Ashok Hurra v Ashok Hurra; Writ Petition (Civil) 509 of 1997 underscored the need for justice to transcend all barriers. It stated:“...Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way. The order of the Court should not be prejudicial to anyone. The rule of stare decisis is adhered to for consistency, but it is not inflexible in Administrative Law as in Public Law. Even the law bends before justice...Even when there was no statutory provision and no rules were framed by the highest court indicating the circumstances in which it could rectify its order, the courts culled out such power to avoid abuse of process or miscarriage of justice.” (Emphasis added)

39.Previously, this Court expressed the view in several cases that it had no jurisdiction to review its decisions. For example, in Rafiki Enterprises Ltd v Kingsway & Automart Ltd, Civil Application No. NAI 375 of 1996, this Court held that it had no

jurisdiction to review its own decisions. However, in 2005, in Musiara Ltd v Ntimana (2005) EA 317, this Court held that it had jurisdiction to reopen an appeal, particularly if judicial bias in the impugned proceedings is established. In 2005, in Chris Mahinda v Kenya Power & Lighting Co. Ltd, Civil Application No. NAI 174 of 2005 (unreported), this Court reiterated its position that it had residual jurisdiction to review, vary or rescind its decisions in exceptional circumstances. However, in 2007 in Jasbir Singh Rai v Tarlochan Singh Rai, Civil Application No. Nai. CA 307 of 2003 (154/2003), this Court by unanimous decision denied review jurisdiction – in effect overruling the Court’s earlier holdings in the two cases of 2005, thereby reinstating the law in the Rafiki case (i.e denial of review of jurisdiction).

40. Subsequently, in Nguruman Ltd v Shompole Group Ranch & Another (2014) eKLR, this Court placed fair hearing as the anchor of its discharge of judicial function and, therefore, ruled that it had the right to revisit its past decisions. (see also Benjoh Amalgamated Limited & Muiri Coffee Estate Limited v Kenya Commercial Bank Limited, (2014) eKLR for a similar holding).

41. In Standard Chartered Financial Services Limited & 2 Others v Manchester Outfitters (Suiting Division) Limited (now known

as King Woollen Mills Limited & 2 Others (Supra), this Court underscored the position that the principle of fairness and justice must take priority over the principle of finality. In addition, in Kamau James Gitutho & 3 Others v Multiple Icd (K) Limited & Another (2019) eKLR, this Court acknowledged the residual jurisdiction of this Court to re-open its own decisions. However, it stressed that such jurisdiction is to be exercised with caution and only in exceptional cases.

42. A review of this Court's post-2010 decisions shows that it has affirmed that it has residual jurisdiction to re-open its decisions. Sir Jack Jacob in The Court's Inherent Jurisdiction (1970) 23 CLP 23 defines residual power as:

"...source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them."

43. However, as was observed by this Court in Cecilia Situmai Ndeti and Michael Kyende Ndeti v Matei Julius Mulili Ndeti & Nzioki Mulili Ndeti (Administrators of the Estate of Harrison Mulili Ndeti (Deceased) & 4 Others, Civil Application No. E064 of 2019, this residual power is in the discretion, which

enables the court to confine its use to the cases in which it is appropriate for the jurisdiction to be exercised. This Court also observed that the residual powers of this Court are not an open license for the court to exercise unlimited discretion. It stated that residual powers are invoked to effect fairness between the parties where a statute falls short of doing so, or where there is a gap in the law. Further, it observed that the "residual jurisdiction" of this Court is available at a stage in which the court is normally deemed to have lost jurisdiction over the case or the subject matter involved in the appeal.

44. Similarly, this Court in AVH Legal LLP v Raballa & 8 Others Civil Appeal (Application) 117 of 2018 delivered on 3rd March, 2023, confirmed its residual jurisdiction to re-open a decided case in appropriate and exceptional cases, such as when judgment-(a) was obtained by fraud or deceit; (b) was a nullity; (c) was given under a mistaken belief that the parties consented to it; (d) was given in the absence of jurisdiction; (e) the proceedings adopted were such as to deprive the decision or judgment of the character of a legitimate adjudication; or (f) that it was rendered with fundamental irregularity.

45. As decided cases suggest, a party is not entitled to seek a review of a judgment delivered by a Court of Appeal merely for

the purpose of a rehearing and obtaining a fresh decision in the case. Departure from the general principle of finality of court decisions is justified only when circumstances of a substantial and compelling character make it necessary to do so.”

23. In the instant case, I observed that appeals from the Small Claims Court are appealable to the High Court on points of law only and an appeal to the High Court is final. However, the Small Claims Court being a subordinate Court, the High Court exercises not only appellate but also supervisory jurisdiction over the Court and therefore, as was in the instant case where the Court is said to have issued Notice to show Cause against the applicant with threats to have the applicant arrested and committed to civil Jail in execution of decree of the Court, this Court can intervene where the alleged proceedings in execution are alleged to have been initiated and conducted absence jurisdiction.

24. Accordingly, I am persuaded that the applicants' intended substantive motion is *prima facie* arguable.

25. I grant the applicant leave to apply for judicial review orders challenging the execution of decree proceedings commenced by the Small Claims Court which proceedings are based on the provisions of the Act that were recently on 22nd January, 2026 found by a three Bench Court of the High Court to be unconstitutional and struck out from the statute.

26. The substantive motion to be filed and served within 10 days of today.

27.As these proceedings are being conducted in Miscellaneous file, the applicant is directed to file the main motion in a fresh Judicial Review File.

28.The above notwithstanding, this Court believes that once the ruling herein is served upon the Adjudicator of the Small Claims Court, he will find it appropriate to examine this ruling and the ruling in the three Judge bench judgment and establish whether to decline jurisdiction or let the decree holder execute decree of that Court by way of arrest and committal to civil jail, in view of the judgment in the petition referred to in this ruling so that the applicant does not have to file the substantive motion to challenge the jurisdictional issue which has been laid bare. This will save the very precious judicial time and resources, considering that had the applicant herein approached this Court exclusively under the Fair Administrative Action Act and Rules which do not mandate the seeking of leave before filing a substantive motion.

29.I make no orders as to costs.

30.This file is hereby closed.

Dated, Signed & Delivered at Nairobi this 25th Day of February, 2026

**R.E. ABURILI
JUDGE**