

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**MISC. CIVIL APPLI. NO. E039 OF 2026**

**BARNABA NGENO ..... APPLICANT**

**VERSUS**

**WILLIAM BARMASAI KANGOGO ..... RESPONDENT**

**Coram: Before Hon. R. Nyakundi**

**M/S Wambua Kigamwa & Co. Advocates**

**M/S Kiboi Tuwai & Co. Advocates**

**RULING**

1. Before this Court is an application dated 18<sup>th</sup> February 2026 in which the Applicant is seeking the following orders:-

- a. *That service of the application be dispensed with in the first instance.*
- b. *That there be a stay of further execution of the ex - parte judgment pending the hearing and determination of this application in Eldoret Small Claims Court Civil Case no. E612 of 2024 - William Barmasai Kangogo v Barnaba Ngeno and the applicant be released from Eldoret G. K. Prison in the first instance.*
- c. *That the High Court in exercise of its supervisory jurisdiction be pleased to call for the original record in Eldoret Small Claims Court Civil Case no. E612 of 2024 - William Barmasai Kangogo v Barnaba Ngeno and examine it for the purpose of satisfying itself as to the correctness, legality or propriety of the findings or orders recorded or passed, and as to the regularity of any proceedings of the Court in the matter.*
- d. *That the High Court in exercise of the supervisory jurisdiction be pleased to:*
  - i. *Examine the legality, correctness and propriety of the failure to grant ex - tempore stay of execution orders coupled with*

*the release of the applicant from Civil Jail as sought in the applicant's motion dated the 5th February, 2026 and grants the order as sought in prayer 2 of the motion therein.*

- ii. *Examine the legality, correctness and propriety of the order fixing the applicant's motion dated the 5th February, 2026 brought under certificate of urgency for ruling on the 6th March, 2026 while the same was unopposed and alters/reverses the decision by allowing the same or in lieu thereof issues directions for expedited disposal.* iii. *Examine the legality, correctness and propriety of the order for extended committal to Civil Jail abiding the ruling on the applicant's motion dated the 5th February, 2026 brought under certificate of urgency for ruling on the 6th March, 2026.*

e. *That the costs of this application be provided for.*

2. The Application is made on the following grounds;

- i. That the applicant filed a motion before the Small Claims Court seeking to set aside an ex - parte judgment, challenge the execution proceedings and sought orders for stay of execution, release from Civil Jail and admission of the motion to urgency.
- ii. That the motion was considered by the Learned Adjudicator who did not grant ex parte relief and directed service for inter - parties to be done for the 16th February, 2026.
- iii. That service was effected and a certificate of service filed on the inter - parties date.
- iv. That the claimant's advocate was absent from Court on the inter parties date and no response had been made to the application.
- v. That the Adjudicator fixed the matter for ruling on the 6th March, 2026 and committed the applicant to Civil Jail despite no application having been made by the respondent's advocate who was absent from court.

- vi. That the Adjudicator failed to consider that the Court was bereft of jurisdiction to make the committal order based on a pronouncement of the superior Court that had been drawn to the attention of the court.
  - vii. That the Court has supervisory jurisdiction to address the issues raised by the applicant.
  - viii. That the applicant is being deprived of his right to liberty.
3. The application is supported by an affidavit sworn by the Applicant who deposes as follows:
- a) That I am the applicant in this matter hence competent to swear this affidavit and currently incarcerated in Civil Jail at the Eldoret G. K. Prison.
  - b) That I am the respondent Eldoret Small Claims Court Civil Case No. E612 of 2024 — William Barmasai Kaggogo v Barnaba Ngeno.
  - c) That on the 5<sup>th</sup> February, 2026 I filed an application under certificate of urgency seeking to set aside an ex — parte judgment entered against me in the and also sought interim orders abiding the outcome of the motion.
  - d) That the matter was considered by the Learned Adjudicator on the 6<sup>th</sup> February, 2026 who made an order that the application be served within 3 days for inter —parties hearing on the 16<sup>th</sup> February, 2026.
  - e) That the application was duly served and a certificate of service lodged with the court.
  - f) That on the date of inter —parties, the respondent's advocate did not attend court.
  - g) That my advocate sought to have the application allowed as it was unopposed which the Court declined and gave a ruling date for the 6<sup>th</sup> March, 2026.

- h) That my advocates sought to have prayer 2 of the application abiding the delivery of ruling whereby a stay of further execution of the impugned judgment was to be granted and my release from Civil Jail which were declined.
- i) That the Adjudicator *suo moto* there being no application from the respondent's advocate who was absent proceeded to order my further incarceration in Civil Jail until the 6<sup>th</sup> March, 2026.
- j) That the order as made was done without jurisdiction and despite the attention of the Adjudicator having been drawn to the fact that the Court had been deprived of jurisdiction to undertake committal to Civil Jail by a pronouncement of the Superior Court.
- k) That I have moved this Honourable Court to invoke its supervisory jurisdiction to call for the original record in Eldoret Small Claims Court Civil Case no. E612 of 2024 — William Barmasai Kangogo v Barnaba Ngeno and examine it for the purpose of satisfying itself as to the correctness, legality or propriety of the findings or orders recorded or passed, and as to the regularity of any proceedings of the Court in the matter.
- l) That I seek that the High Court in exercise of the supervisory jurisdiction be pleased to:
  - i. Examine the legality, correctness and propriety of the failure to grant ex - tempore stay of execution orders coupled with the release of the applicant from Civil Jail as sought in the applicant's motion dated the 5<sup>h</sup> February, 2026 and grants the order as sought in prayer 2 of the motion therein.
  - ii. Examine the legality, correctness and propriety of the order fixing the applicant's motion dated the 5<sup>th</sup> February, 2026 brought under certificate of urgency for ruling on the 6<sup>th</sup> March, 2026 while the same was unopposed and alters/ reverses the decision by allowing the same or in lieu thereof issues directions for expedited disposal.
  - iii. Examine the legality, correctness and propriety of the order for extended committal to Civil Jail abiding

the ruling on the applicant's motion dated the 5th February, 2026 brought under certificate of urgency for ruling on the 6th March, 2026.

m) That I pray that the execution of the judgment be stayed and I be released from Civil Jail awaiting the determination of this application as an irregular execution is being carried out.

n) That in invoking the supervisory jurisdiction I also rely in the authority in Mombasa High Court Misc. Application No. E005 of 2020 — Mapenzi Mohamed v Mvita Service Station Ltd.

### **Decision**

4. This application has been outstanding for sometime now without the rejoinder affidavit from the Respondent and therefore the principles of natural justice be and are hereby modified to exclude the Respondents from these proceedings under the doctrine of necessity. It is well established in Kenya that where a right to a prior notice and an opportunity to be heard has been extended to an adverse party or the Defendant to a proceedings and he/she fails to take any positive steps as prompt as it is necessary, that right expires.
5. In this context, the argument being advanced by the Applicant through his learned Counsel is to the effect that the orders made of committal to Civil Jail of the Applicant were illegal, irregular, unjust, improper and wrong exercise of discretion by the Learned Trial Adjudicator in Civil Suit No. 612 of 2024.
6. On perusal of the record, the Applicant was committed to Civil Jail and there are no reasons given in exercising that discretion by the Learned Trial Adjudicator. Nevertheless, there is a committal warrant which provides tangible evidence that the Applicant was placed in custody and he may or must be in the aforesaid facilities serving sentence. The record of the trial Court does not show whether the committal to civil

custody was in regard with the provisions of Section 38 of the Civil Procedure Act which provides as follows:

***Powers of Court to enforce execution***

*Subject to such conditions and limitations as may be prescribed the Court may, on the application of the decree holder, order execution of the decree- (a) By delivery of any property specifically decreed.*

*(b) By attachment and sale, or by sale without attachment, or any property;*

*(c) By attachment of debts;*

*(d) By arrest and detention to prison of any person;*

*(e) By appointing a receiver; or*

*(f) In such other manner as the nature of the relief granted may require:*

*Provided that where the decree is for the payment of money, execution by the detention in prison shall not be ordered unless, after giving the judgmentdebtor an opportunity of showing cause why he should not be committed to prison, the court, for reasons to be recorded in writing, is satisfied -*

*(a) That a judgment-debtor, with the objector or effect of obstructing or delaying the execution of the decree -*

*(i) Is likely to abscond or leave the local limits of the jurisdiction of the court; or*

*(ii) Has after the institution of the suit in which the decree was passed, dishonestly transferred, concealed or removed any part of his property, or committed any other act of bad faith in relation to his property; or*

*(b) That the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree, or some substantial part thereof, and refuses or neglects, or has refused or neglected, to pay the same, but in calculating such means there shall be left out of account any property which, by or under any law,*

*or custom having the force of law, for the time being in force, is exempt from attachment in execution of the decree; or*

*(c) That the decree is for a sum for which the judgment-debtor was bound in fiduciary capacity to account.*

7. It flows from the record of the trial Court that a statement of claim was filed by William Barmasai Kangogo with the following particulars claiming as representative through the name of Kiboi Tuwai & Company Advocates laying down the brief facts under which the dispute had arisen:

*The Respondent trespassed to the Claimant's portion of land measuring 5.0 Acres from the land parcel known as Uasin Gishu/Elgeyo Boarder Scheme/278, cut down trees and used it for his own fencing purposes without due records to the rights of the Claimant who is the owner of the same land.*

***What is the remedy/relief sought?***

- ✓ Judgment in the sum of Kshs 661,496/=*
- ✓ Compensation (to be determine by the Court)*
- ✓ Costs of the claim (to be assessed by the Court)*
- ✓ Other appropriate relief (briefly explain)*
- ✓ Interest on commercial rates from 9.2.2022 to the date of the judgment*

*By filing this claim, we Kiboi tuwai & Company Advocates hereby waive and forfeit the recovery of all sums of excess of Kshs 1,000,000, excluding costs and interest.*

8. This provision in the Civil Procedure Act is invoked now and again by trial Courts as a means of execution and enforcement of money decrees which have been confirmed at various levels. The pillars provided in the legislative scheme of Section 38 are very stringent and one of it is that emphasizes the obligation of the decree-holder to pay the subsistence allowance for substance of the Judgment Debtor

in the Civil Jail. I reiterate that no Judgment Debtor shall be executed in execution of a decree unless and until the decree holder pays into Court such sum as the Court thinks sufficient for the subsistence of the Judgment Debtor from the time of arrest until he/she can be brought before the Court for further directions or orders. This shows that the proceedings for arrest of the Judgment Debtor from the moment of disobedience of issue of notice by it for appearance before the Court commences on the expenditure by the decree holder to deposit in Court the money for subsistence and upkeep of the Judgment Debtor. It is presumed that the subsistence allowance when being fixed by Court shall be following a particular scale provided for by the State Department of Correctional Services or any such mandated Government Agency or State organ.

9. My reading of this provision on arrest and committal to Civil Jail of Judgment Debtor should be resorted to sparingly so that a decree holder with the financial capacity and muscle does not use it as a weapon to enforce the money decree by this methodology of confinement which may be threatening the infringement and violation of Article 26, 27, 28 & 29 of the Constitution.
10. I have always had the view that committal to Civil Jail of a Judgment Debtor is not a mechanism for debt recovery but a punitive measure for contumacious evasion of debt despite having the means to pay. Given our constitutional framework under Article 2(5) & (6) on Sources of International Law, the Bill of Rights in Chapter 4 and such other fundamental rights and freedoms the cornerstone of this jurisprudence is that poverty is not a crime and civil courts should not issue such orders on committal to Civil Jail against Judgment Debtors at whim, caprice and arbitrary without having at the back of their mind the constitutional imperative on the Bureau of Rights. There is no doubt that detaining an honest debtor is a violation of fundamental rights and such mode of execution is frowned at by the Constitution and Articles of the various International instruments which are part of sources of law. It is interesting that honest debtors who have no

sources of income, or no evidence of having intermeddled or hidden their assets to defeat the course of justice are sent to civil prison without a proper enquiry by the Court because they are unable to pay. This provision can only be invoked as a form of execution and enforcement by the decree holder among other things if he/she can sufficiently demonstrate that the debtor is a person of means but has willfully refused or evades payment of the money due and owing as decided by the civil court. This financial means must be current and not historical. Why is this critical? Financial status and wealth creation changes with seasons and times dependent upon the geopolitics, economic, social and cultural prosperity of a country.

11. What is the other key Constitutional imperative to be safeguarded when a Court is being asked to invoke the provisions of Section 38 of the Civil

Procedure Act on arrest and committal of a Judgment Debtor to Civil Jail? There is always the threshold of procedural fairness under Article 47 & 50 of the Constitution that any detention must meet the fair, just and reasonable procedure requirement. In addition, there is the constitutional provision under the Art 27 on equality and non-discrimination and Art 28 on human dignity, Art 29 on freedom and security of the person. The State and the Courts constitutionally under the ambit of fundamental rights and freedoms cannot incarcerate a person simply because of their poverty.

12. It is time to take judicial cognizance that imprisonment or incarceration is a legal punishment which mainly is imposed by the courts through the criminal adjudication process and once a trial is held and the offender is found guilty it is followed by a conviction and the prescribed sanctions by the Legislature shall apply according to the various penal provisions which governs that branch of law. It is also crucial under our constitutional premise that everyone and every citizen for that matter is guaranteed a right to life under Art 26 of the Constitution and Art 29 of the same Constitution and none has to be deprived of his life or liberty under Section 38 of the Civil Procedure

Act except through procedures established by law. This procedure under Section 38 of the Civil Procedure Act the record shows that it was violated by the trial Court and the confinement of the Applicant under this category is against the procedure as established under this enabling Statute.

13. This country within our legal system is really at the crossroad in the development of a transformative jurisprudence in this area which is clearly anchored in our constitutional democratic ideals. In this respect, one needs to answer the question; how have we fared this far?

*In **Re the matter of Zipporah Wambui Mathara** Lady Justice Koome as she then was, ruled Civil Jail as unconstitutional saying **In Re The Matter of Zipporah Wambui Mathara (2010) eKLR:** “An order of imprisonment in Civil Jail is meant to punish, humiliate and subject the debtor to shame and indignity due to failure to pay a civil debt. That goes against the International Covenant on Civil and Political Rights herein (ICCPR) that guarantees parties basic freedoms of movement and of pursuing economic, social and cultural development.”*

14. In the very same country and superior Court presided over by Justice Mwita J as he then was, delivered a dissenting judgment on the same subject matter in the case of **Kasamani v Concord Insurance Co. Ltd & Deputy Registrar Milimani High Court** in which he remarked that Civil Jail neither violates the Constitution of Kenya or Article 11 of ICCPR because there is strict adherence to procedure laid down by the Civil Procedure Act and the Civil Procedure Rules before a Court decides to commit someone to Civil Jail. In addition, the Court in **Jane Wangui Gachoka v KCB Ltd** the Petitioner asked the Court to declare Section 38 and 40 of the Civil Procedure Act and Order 40 of the Civil Procedure Act which allows for commitment to Civil Jail for non-payment of the debt as archaic and unconstitutional. The Court answered by stating that the deprivation of liberty sanctioned by

Section 38 and 40 is permissible and is not in violation of the Constitution or ICCPR.

15. In our civil justice system administration the major challenge under Section 38 and 40 of the Civil Procedure Act is on arrest and committal to Civil Jail of the Judgment Debtor in the process of being arraigned in Court to satisfy the decree. The starting point is usually an application by the Decree Holder which is then followed by a notice to the Judgment Debtor to appear for a hearing to show cause why he or she should not be committed to Civil Jail for non-compliance to satisfy the Judgment money decree either in full by installment. It is after such inquiries by the Magistrate presiding over the proceedings can then make an informed decision whether to order committal to prison or make another decision to that effect unless the debtor proves at the hearing that he or she was unaware of the existence of the original judgment or the debt against him/her. In the same vein, the debtor is at liberty to explain to the court that he or she has no means of satisfying the debt. This is meant to satisfy the criteria that the debtor lacks the means and if not lacking the means he or she transferred the assets in order to evade payment of the debt.
16. In my considered view, this record at hand before the trial court doesn't show that any attempts were made by the learned Trial Magistrate to comply with the necessary protocols laid down under Section 38 and 40 of the Civil Procedure Act before committing the Applicant to Civil Jail. There is no evidence at all that an assessment of the subsistence payable in advance by the Decree Holder for the maintenance and subsistence of the Applicant during the period he was ordered to serve 30 days for failure to settle a whopping Kshs 788,961.81/=. In determining this final order to committal to Civil Jail, the issues of non-attendance and participation of the Applicant during the hearing of the statement of claim was never addressed by the Learned Trial Magistrate. It is not even clear from the record that the Applicant was aware of the existence of the Decree arising out of the

proceedings stated to have been conducted in 2024/2025 calendar year. The trial Court did not stop there. The nature and circumstances of the enquiry also demands that the debtor be given an opportunity maybe by way of an affidavit of means as to whether he or she has the resources comprising of movable or immovable assets or cash receivables to satisfy the decree of the Court. Why is this important? It is to avoid the system being used to infringe the fundamental rights and freedoms usually of those who are poor, level of legal literacy is at its lowest ebb or to avoid by Decree Holders to weaponize their debtors by seeking leave of the Court to incarcerate them not because they have not met the criteria under the law but as punitive punishment.

17. In this respect given our constitutional framework, the Court must be able to answer the question therefore before making final order for committal to civil jail whether any of the rights under Articles 25(a), 26, 27, 28 and 29 of the Constitution are limited by that very decision made under Section 38 and 40 of the Civil Procedure Act. That decision essentially to commit a debtor to Civil Jail must be screened through the

lens of Art 24 of the Constitution on the rights entrenched in our Constitution which provides as follows:

*A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-*

*(a) The nature of the right of fundamental freedom;*

*(b) The importance of the purpose of the limitation;*

*(c) The nature and extent of the limitation*

*(d) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and*

*(e)The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.*

*Despite clause (1), a provision in legislation limiting a right or fundamental freedom-*

*(a)In the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation.*

*(b)Shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and*

*(c)Shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.*

18. In making a determination especially with regard to a right as fundamental as the one in question under Article 29 which provides that; every person has the right to freedom and security of the person, which includes the right not to be- (a) deprived of freedom arbitrarily or without just cause, namely this right on personal freedom one really need not to

go beyond the test of reasonableness. In Art 28 every person has inherent dignity and the right to have that dignity respected and protected.

19. In the scheme of interpretation of the Constitution one has to seek refuge in Art 259 (1) & (2) which states as follows:

*This Constitution shall be interpreted in a manner that-*

*(a)Promotes its purposes, values and principles;*

*(b)Advances the rule of law, and the human rights and fundamental freedoms in the Bill of rights;*

*(c) Permits the development of the law; and (d) Contributes the good governance.*

*If there is a conflict between different language versions of the Constitution, the English language version prevails.*

20. I reluctantly align myself with the provisions of Section 38 and 40 of the Civil Procedure Act where the Legislature in their wisdom provided a mechanism for enforcement of civil judgment debts. It appears as a clear role or objective to ensure decrees issued by courts are honored and respected when it comes to the fruits of judgment in form of money decrees. The question which always lingers among those who are of different view to justice such as legal philosophy on the constitutionality of the aforementioned provisions is on the point of departure whether the means of arrest and committal to Civil Jail can be said to be reasonable. Am yet to find a Magistrate's Court record which is comprehensive enough in the letter, spirit and ghost of the law as envisioned by the Legislature under Section 38 and 40 of the Civil Procedure Act. I strongly hold the view that the answer to this question is clearly in the negative for the means of arrest and committal to civil jail can never be conclusively said to be reasonable for the provisions tend to have an overreach with emphasis on incarceration.
21. The case in point is the one before this court where the Applicant was imprisoned without having actual notice of the pendency of the proceedings or the original judgment which had ruled in favor of the Respondent that a sum of Kshs 788,961.81/= was due and owing by dint of a decree of the Court. The second typology to this issue is that some of the debtors who approached the Small Claims Court are not represented and therefore they have no knowledge or the application of the provisions under Section 38 and 40 of the Civil Procedure Act and any available defences which may be invoked in answer to the notice to be committed to Civil Jail. In that class of persons without

necessarily sounding as if am amending the law, and the centurion common law doctrine that ignorance of the law is not defence, for them ignorance of the law should be a defence. How else can they be aware of a provision which has never been brought to their attention in their lifetime unless and until they are confronted with a decree of the Court decreeing that some money either on a friendly loan, commercial venture or in such borrowings had become a subject of a litigation in which the judgment has adverse to him or her the same is now under execution and enforcement as provided for under Section 38 and 40 of the Civil Procedure Act. That is not a question that should be wished away by the Courts of law pertaining to matters which were not within the knowledge of the debtor. If indeed we say that there are no defects in this Statute to render it unconstitutional it will continue ravaging the fundamental rights and freedoms of the Kenyan people for there are many assumptions made on its interpretation.

22. Am yet to come across a Magistrate's Court decision in which there are very clear distinctions drawn while applying these provisions under the Civil Procedure Act between those who are completely unable to pay because of being financially ruined and those who do not want to pay for being dishonest, fraudulent, stubborn including having disposed off their assets so that once the decree is out they have nothing to lay hands on to pay the debt. The committal to Civil Jail across the country is always a general classification which is in contravention of the Legislator's intention and wisdom in drafting the law on execution and enforcement of civil judgments.

i. This provision on arrest and committal to civil jail is not a carte blanche to be applied whimsically without bearing in mind the implication or the risk of infringement of the rights to freedom, liberty, dignity, and fair trial rights in the execution of the various decrees issued by the court for purposes of execution and enforcement. This model of execution should only be reserved to Judgement debtors who have the means but willfully ignore or continue to disregard the orders of the court

regarding the payment of the judgement debt. As a matter of emphasis without necessarily taking it as a repetition of what I have discussed elsewhere in this Judgement, the following condition precedent under Section 38 and 40 of the Civil Procedure Act are really followed by trial courts before committal to detention of a Judgement Debtor:

*a) That the Judgement -debtor, with the object or effect of obstructing or delaying the execution of the decree*

*(i) Is likely to abscond or leave the local limits of the jurisdiction of the court,*

*(ii) Has after the institution of the suit in which the decree was passed, dishonestly transferred concealed or removed any part of the property, or committed any other act of bad faith in relation to his property or.*

*(b) That the judgment-debtor has or has had since the date of decree the means to pay the amount of the decree or some substantial part thereof and refuses or neglects, or has refused or neglected to pay the same but in calculating such means there shall be left out of account any property which by or under any law or custom having the force of law, for the time being in force, is exempt from attachment in execution of the decree or*

*c) That the decree is for a sum for which the judgement-debtor was*

*bound in a fiduciary capacity to account.*

#### **40. Arrest and detention**

*(i) A judgement-debtor may be arrested in execution of a decree of any hour and on any day, and shall as soon as practicable be brought before the court, and this detention may be in any prison of the county in which the court ordering the detention is state, or if such prison does not afford suitable accommodation, in any other place which the*

*cabinets secretary may appoint for the detention of persons ordered by the courts of such county to be detained **Provided that:***

- i. For the purpose of making an arrest under this section no dwellinghouse shall be entered after sunset and before sunrise*
- ii. No outer door of a dwelling-house shall be broken unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto but when the officer authorized to make the arrest has duly gained access to any dwelling-house he may break open the door of any room in which he has reason to believe the judgement debtor is to be found*
- iii. If the room is in the actual occupancy of a woman who is not the judgment-debtor and who according to the custom of her community does not appear in public, the officer authorized to make the arrest shall give notice to her that she is at liberty to withdraw and*

23. I must confess that the many applications which come before me through this substantive law from the courts below really demonstrate non-compliance with the above procedural protocols. I also been unable to find the recourse available to the committing court or any other superior court for an aggrieved party whose rights have already been limited by dint of an order of arrest and committal to Civil Jail including even in absentia. As a consequence of this fatal defects in the statutory provisions, the orders so granted as a form of execution and enforcement of civil debts does limit constitutional rights of our fellow citizens and in my view that limitation cannot be justified as reasonable within the provisions of Art. 24 of the constitution. The good and the bad of this statutory provisions ought to be addressed by the legislature. It is the duty of the decree holder to demonstrate that

he or she has exhausted all other available lawful means that are comprehensively provided for in the Civil Procedure Act and rules before resorting for an order of arrest and committal to Civil Jail of a Judgement Debtor. On this subject matter, my philosophical mythology is more aligned with the remarks made by Thirion J, in comparative dicta in the case of **S v Motsoesoana 1986 (3) SA 350 (N) at 372F** in which it was observed both contextually and textually on this legal framework on arrest to Civil Jail of Judgement Debtors. Thus: *Imprisonment is the form of punishment which may detrimentally affect not only the offender but also his family and his employment and because of its duration it can seldom be kept from becoming general public knowledge. It ... can have a lasting demoralising effect on the character and personality of the offender. The loss of liberty, tedium, regimentation ... which prison life entails, have a greater potentiality than a whipping for destroying the offender@s self-esteem and the integrity of his character and for changing, for the worse, his way of life.*

24. In fact I consider these provisions to be dealt with in the same manner with the guidelines for contempt of court so as for the creditor to satisfy the court on the threshold that the debtor has the means to settle the decree of the court but he or she has prior carried activities or conducted him or herself in the cause of the trial and post judgement to defeat execution and enforcement of the decree. This summary trial undertaken by the trial courts under Section 38 and 40 of the Civil Procedure Act in my view is a violation of the due processes clauses under Article 47, 48, & 50 of the constitution.
25. The facts of this case are very sketchy as to what time the Applicant was notified about the existence of the hearing and subsequently the impugned judgment in which he was condemned to pay the claimant a sum of Kshs 788,961.81/= . The only statement captured by the trial court is about existence of Judgement debt followed with an order of committal to prison for 30 days. Further in the present

instance there is no evidence that the creditor had been ordered to pay the subsistence amount duly assessed by the trial court for the maintenance and sustenance of the Applicant while serving the civil Jail. This statutory scheme looked at from the various legal lens cannot pass the test of constitutionalism on a larger evaluation on the guarantees and the Bill of Rights of the Supreme Law of the Republic. This ugly feature of the Civil Procedure Act should not be left to continue infringing and violating fundamental rights and freedoms of Judgement debtors under the guise of enabling the interests of creditors.

26. The legislative intent of Section 38 and 40 of the Civil Procedure Act on arrest and detention of a debtor must be primarily ascertained from the language used in this statute itself. It is not a stand alone statute its construction and interpretation must be founded in the words used by the legislature and construed with the constitution 2010 which provides a clear road map on governance, human rights, and social justice.
27. *In this discourse I am driven purposefully by the learned author Barak in his book purposive interpretation in law in which he remarked that constitutional language like the language of any legal text plays a dual role. On the other hand it sets the limits of interpretation. The Language is not clay in the hands of the interpreter to be molded as he or she sees fit. Constitution is neither a metaphor nor a non-binding recommendation. On the other hand the language of the constitution is a source for its purpose. There are other sources, to be sure but constitutional language is an important and highly credible source of information. The fact that we may learn the purposes of constitution form sources external to it does not mean that we can give a constitution a meaning that is inconsistent with its explicit or implicit language. Interpretation cannot create a new constitutional text. Talk of the Judges amending the constitution through their interpretation of the constitution is just a metaphor. The claim that a constitutional text*

*limits but does not command is true only for the limited number of cases in which after exhausting all interpretive tools we can still extract more than one legal meaning from the constitutional language and must therefore leave the final decision to judicial discretion. In these exceptional cases, language provides a general direction but does not draw a precise map on how to reach the destination. Usually however, constitutional language sets not only the limits of interpretation but also its specific content. It is a cardinal principle to all kinds of statutes that you may not any reason attach to a statutory provision a meaning of which the words of that provision cannot reasonably bear. "If there are capable of more than one meaning then you can choose between these meanings but beyond that the court must not go"*

28. What is the correct interpretation of Section 38 and 40 of the Civil Procedure Act with regard to arrest and committal to detention of a Judgement debtor is for the courts to deeply comply with the yard stick set out expressly in that statute and also to bear in mind that constitutional imperatives under Art. 25(A), 26, 27, 28, 29, 47, 48, & 50 of the constitution and with that empirical analysis ensure that there is no violation of any of the expressed provisions under the Bill of Rights and the fair trial rights. The latter on fair trial rights can never be derogated from by any independent tribunal, court, or quasi judicial tribunals involving adjudication of rights of citizens. Therefore, mere failure for a Judgement debtor to pay the amount does not justify arrest and detention in as much as he or she cannot be held to have neglected to pay the amount to a decree holder.
29. In the case at bar I echo the words in the case of **Jolly George Verghese v Bank of Cochin (1980) 2 SCC 360**. "The simple default to discharge is not enough. There must be some element of bad faith beyond mere indifference to pay, some deliberate or reculant disposition in the past or alternatively, current means to pay the decree or a substantial part of it. The provision emphasises

the need to establish not mere omission to pay but an attitude of refusal on demand verging on dishonest disowning of the obligation under the decree. Here, consideration of the debtor's other pressing needs and straitened circumstances will play prominently. We would have, by this construction, sauced law with justice, harmonised Section 51 with the covenant and the Constitution."

30. **It was ultimately propounded:**

*"It is too obvious to need elaboration that to cast a person in prison because of his poverty and consequent inability to meet his contractual liability is appalling. To be poor, in this land of daridra narayana, is no crime and to recover debts by the procedure of putting one in prison is too flagrantly violative of Article 21 unless there is proof of the minimal fairness of his wilful failure to pay in spite of his sufficient means and absence of more terribly pressing claims on his means such as medical bills to treat cancer or other grave illness. Unreasonableness and unfairness in such a procedure is inferable from Article 11 of the covenant. But this is precisely the interpretation we have put on the proviso to 51 of CPC and the lethal blow of Article 21 cannot strike down the provision, as now interpreted".*

31. The heritage of the civil procedure Act of Kenya has its roots in the common law jurisdiction of India and some of the existing provisions apply Mutatis Mutandis with India Civil Code. Therefore, the Principles from this jurisdiction cannot be said to be alien to our local circumstances and jurisprudential development. As it is generally accepted in most jurisdictions including Kenya the object of Section 38 & 40 is to prevent the vexatious forms of resistance to execution proceedings which constantly obstruct decree holders in the execution of their decrees issued by competent courts across the country. What is the lacuna in this kind or proceedings that certain key limitations in the provisions are never adhered to by the

trial courts. The execution court is mandated to follow the law and satisfy itself on any of the

grounds set out in the respective provisions and committal to a detention of a judgement debtor.

32. For those reasons, I am of the considered view that in the facts of this case, a declaration ought to issue that there is prima facie evidence that there was infringement and violation of the rights of the Applicant hinging on the application of section 38 & 40 of the Civil Procedure Act, Art. 25(A), 26, 27, 28, 29, 47, 48, & 50 of the constitution. That the proceeding which were instituted to move and arrest and subsequently commit him to Civil Jail for 30 days were illegal, irregular, and unjust the best thing is to set them aside as being voidable abinitio. It is so ordered.

**GIVEN UNDER MY HAND AND THE SEAL OF THIS COURT THIS 19<sup>TH</sup>  
DAY MARCH 2026**

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**R. NYAKUNDI**  
**JUDGE**