



Republic v Cabinet Secretary for Land, Housing and Urban Development & 2 others; Musili & 2 others (Exparte Applicants); Maundu (Interested Party) (Environment and Land Judicial Review Miscellaneous Application 6 of 2021) [2025] KEELC 658 (KLR) (20 February 2025) (Ruling)

Neutral citation: [2025] KEELC 658 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND JUDICIAL REVIEW
MISCELLANEOUS APPLICATION 6 OF 2021**

**LG KIMANI, J
FEBRUARY 20, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

**THE CABINET SECRETARY FOR LAND, HOUSING AND URBAN
DEVELOPMENT 1ST RESPONDENT**

THE COUNTY SURVEYOR, KITUI 2ND RESPONDENT

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

AND

ONESMUS KIMANZI MUSILI EXPARTE APPLICANT

BENEDICT MWANGANGI MUSILI EXPARTE APPLICANT

HARON MUSEMBI MUSILI EXPARTE APPLICANT

AND

FRANCIS NZELI MAUNDU INTERESTED PARTY

RULING

1. This suit was instituted by way of the Notice of Motion dated 3rd January 2017 where the exparte Applicants sought to challenge the decision of the 1st Respondent dated 10th February 2016
2. The suit was heard and Judgement delivered on 20th December 2022 where the court found the suit to have no merit and the same was dismissed with costs to the Interested Party. Pursuant to the court’s



judgement, the Interested Party's Bill of Costs dated 20th June 2023 was taxed and Certificate of Taxation for a total sum of Ksh.574,000/= dated 7th November 2023 was issued.

3. The Advocates for the Interested Party, Messrs. D.M Mutinda sought to execute and recover the taxed amount. Notice to show cause issued on the 21st November 2023 and the parties were set to appear in court on 6th of December 2023.
4. The Advocates for the ex-parte applicants filed a Notice of Preliminary Objection dated 6th November 2023, opposing the Notice to Show cause stating that it was fatally defective and offends the provisions of Section 38 of the *Civil Procedure Act* as read together with Order 22 Rule 34(1),(2) and (3) of the Civil Procedure Rules. They urged the Court to strike out the said Notice to Show Cause.
5. It is the Notice of Preliminary Objection dated 6th November 2023 that is the subject of this ruling.

The Ex-parte Applicants' Submissions

6. Counsel for the ex-parte applicants challenge the execution process on the grounds that the process is taken out on the wrong law and form, and that as presented, the Notice to Show Cause is deficient.
7. It is the Ex Parte Applicants' argument that the Notice to Show Cause does not disclose under what tenet of section 38 of the *Civil Procedure Act* the notice is taken out and thus would not know what to respond to. In their reasoning, correct procedures must be implemented and enforced by the court and where a process relies on a particular form, the correct form and process must be used, particularly where it is sought to deprive a citizen of his or her right to liberty
8. Secondly, they submit that Order 22 Rule 31 presupposes a mandatory pre-requisite to file a formal application before a notice to show cause is issued. Counsel submits that the Notice to Show cause infringes on the Ex-parte applicants' right to fair administrative action enshrined in Article 47 of *the Constitution* and enacted in Section 4 of the *Fair Administrative Action Act* No.4 of 2015 as well as the protection in Article 20 of *the Constitution* on fundamental human rights.
9. It is therefore their submission that the Notice to Show Cause is premature and unfair unless facts are laid before the court and supplied to the judgment debtor who responds for the Court to establish the requirements of the law.
10. Counsel submitted that any contested matters of fact are incumbent upon the Decree-holder to prove, submitting that the burden of proof always lies with the Decree Holder. He cited and relied on the holding of Lesiit J. In *The National Bank Limited v Linus Kuria Ndung'u* (unreported) as cited with approval in *Beatrice Wanjiku & Another Vs Attorney General & Another* [2012] eKLR where it was held that the burden of proof at the Notice to Show Cause lies with the Decree Holder at all times. In the same authority, Counsel highlighted that it was held that the procedure for arrest and committal should be used as a last resort and that the rights of a judgment debtor be upheld. Counsel therefore urged the Court to find that the Notice to show Cause is defective and to dismiss it.

The Interested Party's Submissions

11. Counsel for the Interested Party submitted that the ex-parte applicants are fully aware of the case and determination and they were required to show cause why they should not be committed to civil jail.
12. Counsel quoted section 38 of the *Civil Procedure Act* and submitted that Notice to show cause cannot be stopped in execution of a Decree for money. They relied on the authority in *Jedidah Chepkoech Mutai*(suing as the legal representative of Julius Kipkorir Mutai(deceased)) vs. *Cherono Beatrice*(2018)eKLR and *Jane Wangui Gachoka v. Kenya Commercial Bank Ltd*(2013)eKLR where



the courts held that that this provision of committal to civil jail for non-payment of a Decree was not unconstitutional.

13. They also relied on the authority in *Grand Creek LLC & Another v. Nathan Chesongmoson*(2015)eKLR and submitted that challenging the section under which the Notice to show cause brought is a legal technicality cured by Article 159 of *the Constitution*. It was submitted that execution is not ordinarily done by an application and that the rules envisaged only for a request for execution to be made and that the Notice to show cause is itself an application.

Analysis and Determination

14. The Court has considered the Preliminary Objection and the submissions made by Counsel for the parties.

15. A Preliminary Objection was described in the case of *Mukisa Biscuits Manufacturing Co. Ltd...Vs... West End Distributors Ltd* (1969) EA 696 to mean: -

“So far as I am aware, 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”.

16. Further Sir Charles Nebbold, JA stated that:-

“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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

17. In the Court’s view, the issues raised by Counsel for the ex -parte applicants are purely points of law which do not require an in-depth ascertainment of disputed facts since they are based on provisions of law.
18. Counsel for the ex-parte applicants opposes the Notice to show cause terming it fatally defective claiming that it offends the provisions of Section 38 of the *Civil Procedure Act* as read together with Order 22 Rule 34(1), (2) and (3) of the Civil Procedure Rules in the execution of the Decree which was issued on the 21st of November 2023 and that the same should be struck out.
19. Counsel for the ex-parte applicants argues that an application for execution should have been formally made, supported by an affidavit as is the normal practice in accordance with the provisions of Section 28 of the *Civil Procedure Act* CAP 21.
20. Counsel for the Interested Party, in reply, argued and submitted that challenging the section under which the Notice to show cause was brought is a legal technicality cured by Article 159 of *the Constitution*. It was submitted that execution is not ordinarily done by an application supported by affidavit. He stated that the rules envisaged only for a request for execution to be made and that the Notice to show cause is itself an application.



21. The Court has perused the Court record and noted that the Certificate of Costs was issued by the Court on 7th November 2023. The application for execution of the decree was made by the law firm of D.M. Mutinda & Co Advocates by way of an undated letter received in court on 21st November 2023 addressed to the Deputy Registrar of this court and the same is titled RE: NOTICE TO SHOW CAUSE. It states

“Please issue a Notice to Show Cause against the Ex parte Applicants in favour of the Interested Party for a sum of Kshs 574,040 (Five Hundred and Seventy Four Thousand and Forty Shillings Only) The Ex parte Applicants have been served with demand Notices but have failed to do so. We undertake to pay your costs”

22. Section 38 of the [Civil Procedure Act](#) gives the Court powers to enforce execution of a decree and states that;

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, of any property;
- c. by attachment of debts;
- d. by arrest and detention in prison of any person;
- e. by appointing a receiver; or
- (f) in such other manner as the nature of the relief granted may require:

23. Order 22, rule 7 provides for the making of oral and written applications for execution and states;

- (1) Where a decree is for the payment of money the court may, on the oral application of the decree-holder at the time of the passing of the decree, order immediate execution thereof by the arrest of the judgment-debtor, prior to the preparation of a warrant, if he is within the precincts of the court.
2. Save as otherwise provided by subrule (1) or by any other enactment or rule, every application for the execution of a decree shall be in writing, signed by the applicant or his advocate or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars—
 - a. the number of the suit;
 - b. the names of the parties;
 - c. the date of the decree;
 - d. whether any appeal has been preferred from the decree;
 - e. whether any, and, if any, what payment or other adjustment of the matter in controversy has been made between the parties subsequent to the decree;
 - f. whether any, and if any, what previous applications have been made for the execution of the decree, the dates of such applications, and their results;



- g. the amount with interest, if any, due upon the decree, or other relief granted thereby, together with particulars of any cross- decree, whether passed before or after the date of the decree sought to be executed;
- h. the amount of the costs, if any, awarded;
- i. the name of the person against whom execution of the decree is sought; and
- j. the mode in which the assistance of the court is required, whether—
 - i. by the delivery of any property specifically decreed;
 - ii. by the attachment and sale of any immovable property, or by the sale without attachment or by proclamation and sale immovable property;
 - iii. by the arrest and detention in prison of any person;
 - iv. by the appointment of a receiver;

Otherwise, as the nature of the relief granted may require.

24. Order 22 Rule 6 of the Civil Procedure Rules provides for the manner in which an application for execution is to be made. It states that;

“Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions herein before contained to another court, then to such court or to the proper officer thereof; and applications under this rule shall be in accordance with Form No. 14 of Appendix A:

Provided that, where judgment in default of appearance or defence has been entered against a defendant, no execution by payment, attachment or eviction shall issue unless not less than ten days notice of the entry of judgment has been given to him either at his address for service or served on him personally, and a copy of that notice shall be filed with the first application for execution.”

25. The court has considering the application for execution made to the court by the Counsel for the Interested Party, through the undated letter received in court on 21st November 2023. The court agrees with Counsel for the Ex parte Applicants that the form of application for execution filed in court on 21st November 2023 is defective and did not comply with the law. The application did not conform with Form No. 14 of Appendix A as required under Order 22 Rule 6 of the Civil Procedure Rules.
26. Further, the application did not provide the information required under Section 38 of the *Civil Procedure Act* as set out above and Order 22 Rule 7 of the Civil Procedure Rules. Among the requirements are inter alia whether any appeal has been preferred from the decree/taxation of costs, whether any payment or other adjustment of the matter in controversy has been made between the parties subsequent to the decree, whether any previous applications have been made for the execution of the decree, the dates of such applications, and their results, the amount with interest, if any, due upon the decree/certificate of costs.
27. Further the application did not give information on the name of the person against whom execution of the decree is sought and the mode in which the assistance of the court is required, whether—
- v. by the delivery of any property specifically decreed;



- vi. by the attachment and sale of any immovable property, or by the sale without attachment or by proclamation and sale immovable property;
 - vii. by the arrest and detention in prison of any person;
 - viii. by the appointment of a receiver
28. The Court also notes that the Notice to Show Cause issued by the Deputy Registrar did not indicate the manner in which execution would proceed if the ex parte applicants did not show sufficient cause. It is thus not clear where the Ex parte Applicants got the idea that the execution sought was by way of arrest and detention in civil jail.
29. From the foregoing, the court is satisfied that the Notice of Preliminary Objection dated 6th November 2023 has merit and the same is upheld. The court makes the following orders;
1. The application for Notice To Show Cause filed in court by the Interested Party on 21st November 2023 and the Notice to Show Cause dated 21st November 2023 issued by the Deputy Registrar of this Court are defective, they do not comply with the law and they are hereby struck out.
 2. Each Party shall bear their own costs.

READ, DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI THIS 20TH DAY OF FEBRUARY 2025.

In the presence of:

No appearance for the Applicant.

No appearance for the Respondents.

Court assistant: Michael.

HON. LADY JUSTICE L. G. KIMANI
JUDGE

