



**County Government of Marsabit & another v Lochich (Miscellaneous Application E005 of 2024) [2024] KEELC 5734 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5734 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO  
MISCELLANEOUS APPLICATION E005 OF 2024**

**CK NZILI, J  
JULY 31, 2024**

**BETWEEN**

**COUNTY GOVERNMENT OF MARSABIT ..... 1<sup>ST</sup> APPLICANT  
ADAN KANANO. CECM, FINANCE ANDECONOMIC PLANNING .... 2<sup>ND</sup>  
APPLICANT**

**AND**

**PETRO NAMWENI LOCHICH ..... RESPONDENT**

**JUDGMENT**

1. What is before the court is the application dated July 30, 2024 seeking the court to stay, discharge, vacate and or set aside the orders made on 30<sup>th</sup> July 2024. The first prayer is to release Mr. Adan Kanano CECM Finance. The reasons are that on 30<sup>th</sup> July 2024, the said CECM Finance was convicted & and sentenced to civil jail for failing to make payment pursuant to a decree issued on 31<sup>st</sup> January 2020 in Marsabit SPM ELC No. 21 of 2015, Petro Namweni Lochich vs County Government of Marsabit.
2. It is averred that the committal followed a warrant of arrest issued on 8<sup>th</sup> July 2024 which is said to have been defective. It is also averred that the trial court did not appreciate the explanation given that the CECM Finance under Section 21(3) of the [Government Proceedings Act](#) was unable to pay the money because he was not the accounting officer.
3. Further, is averred that the trial court had no jurisdiction to issue an order of committal under Order 29 Rule 2(2) (b) [Civil Procedure Act](#) as read together with Section 21(4) of the [Government Proceedings Act](#), otherwise once the decree was issued on 31<sup>st</sup> January 2020, the trial court should have downed its tools and allowed the respondent to pursue execution in line with the [Government Proceedings Act](#).
4. The applicants term the order of ultra vires, untenable and unenforceable. The application is supported by an affidavit of Hussein Tarry Sasura, the County Secretary sworn on 30<sup>th</sup> July 2024.



5. It is averred that several explanations were given for non-payment of the decretal amount, including the fact that the said CECM was not the accounting officer within the County Government of Marsabit.
6. The deponent averred that to protect the onslaught of execution likely to paralyze government operations, allowing such orders would not only be dangerous, unlawful and lead to bankruptcy but paralyze the delivery services, turning to anarchy and breakdown of the rule of law.
7. Again, the deponent reiterated that the procedure for execution of decree, against the government is governed by statutes. Reliance was placed on *Five Star Agencies Ltd v NLC & another* [2024] KECA 439 KLR. The deponent averred that detaining a Senior County Official who plays a crucial role in the running of the County Government of Marsabit has the potential of paralyzing several county operations. Similarly, the deponent averred that the trial court should have been aware of who is the accounting officer and hence violated its fiduciary duty to uphold the rule of law. In his reply, the respondent told the court that the application was a delaying tactic, he has waited for the County Government to pay the decretal amount since 2019 when the County Officers took away his land and developed it despite injunction orders and protestations from him, he is elderly, sickly and suffering out of endless litigation yet the county has been taking him round and round. There is no willingness from the county to settle the decree, it cannot hide under an excuse of lack of budgetary allocation, yet they have been aware of the decretal sum since 2019, the county is running a polytechnic on his land and he has served the county with the decree, certificate of cost and a notice to show cause. He used to have a lawyer but withdrew from representing him and it is not in the interest of justice to keep him in court forever. Additionally, the respondent told the court that the warrant of arrest was issued after the 2<sup>nd</sup> applicant failed to attend court or settle the decree as he had promised in May 2024.
8. The respondent further told the court that despite several meetings with the counsel to settle the matter, they have failed to honour their promises. About the proposed security by Miss Gekone Advocate, the respondent urged the court to order that all the decretal amount be paid at once. The respondent confirmed that apart from the decree, there were no other proceedings filed to compel the applicants to honour the decree.
9. In a rejoinder Miss Gekone learned counsel for the applicants submitted that without prejudice to what the applicants and their lawyers told the trial court during the proceedings leading to the notice to show cause and the issuance of the committal order, still the law had to be followed by the respondent as well as the trial court.
10. Learned counsel emphasized that whereas it was conceded that no appeal has been filed or an application to quash the decree still the committal orders were irregular and offensive as per Section 21(4) of the *Government Proceedings Act*. Further, counsel submitted that the 2<sup>nd</sup> applicant should not suffer a civil jail term when he is not the accounting officer and when he was unlawfully committed to civil jail.
11. Similarly, learned counsel submitted that the application before the court was unique in the sense that the respondent is elderly, sickly and illiterate yet, the law must be followed to the letter on execution against the County Government.
12. Additionally, the counsel submitted that whereas the applicants are not disputing the decree and to be fair to the respondent they were willing to deposit a reasonable security proposed at Kshs. 500,000/= since they had just uploaded their annual budget. Subsequently, learned counsel urged the court to release the 2<sup>nd</sup> applicant from civil jail.
13. The issues calling for my determination are;



- i. Whether the court’s jurisdiction has been properly invoked by the applicants
  - ii. Whether the proceedings for execution and committal by the trial court were in line with the law.
  - iii. If the applicants are entitled to the reliefs sought.
14. They approached this court through a miscellaneous application seeking for stay, discharge, vacation and or setting aside of the committal orders to civil jail dated 30<sup>th</sup> July 2024. Miss Flevia Gakone & Behinla learned counsels appearing for the applicants submitted that whereas the applicant has not appealed against the decree or sought for the proceedings to be quashed by this court through judicial review proceedings this court still has inherent jurisdiction under Order 50 Civil Procedure Act and Article 159 of the Constitution, to grant the orders sought in the interest of justice and for the rule of law to prevail.
  15. Article 165 (6) of the Constitution grants the High Court supervisory powers and the mandate to call for the records of any proceedings before any subordinate court and make any orders or give any direction it considers appropriate to ensure the fair administration of justice. Article 162 (2) (b) of the constitution as read together with Section 13 of the Environment and Land Court Act grants this court powers to handle environment and land disputes. The subject matter before the trial court touched on matters falling under the jurisdiction of this court on the appellate stage as per Sections 16 A and 19 of the ELC Act.
  16. The applicants urge the court to find that it has jurisdiction to call for and establish the correctness and appropriateness of the committal orders guided by the case law of Five Stars Agencies Ltd & another v National Land Commission & others (supra) and County Government of Isiolo vs Sharrif Ibrahim Farah [2019] eKLR.
  17. Article 159 of the Constitution, as read together with Sections 1A & 1B & 3A of the Civil Procedure Act, spelt out the guiding Constitutional and statutory principles to which the Judiciary has to adhere and in particular all the courts. See Republic v Chengo & others (Petition 5 of 2015) [2017] KESC 15 KLR) 26<sup>TH</sup> May 2017) Judgment.
  18. Among the principles is for the courts to be guided by ends of justice without undue regard to technicalities. The applicants urge the court notwithstanding that they have not appreciated or invoked the judicial review route to find proceedings and orders by the trial court after the decree was issued on 30<sup>th</sup> January 2020 bereft of jurisdiction, since the decree-holder ought to have obtained a certificate of costs and certificate order followed by an order of mandamus against the accounting officer of the 1<sup>st</sup> applicant. The court is asked to find that the trial court became functus officio and therefore the orders made on 30<sup>th</sup> July 2024 were nullity. The functus officio doctrine denotes finality to proceedings (see Raila Odinga & others v IEBC [2013] EKLR.
  19. In Republic v CM Milimani Law Courts DPP & 2 others (IP’s) exparte Pravian Galot [2020] eKLR, the court observed that there was a distinction between supervisory judicial review and appellate jurisdiction of the High Court. The court observed that supervisory jurisdiction refers to the power of superior courts of general superintendence over all subordinate courts with the aim to keep subordinate courts within their prescribed sphere and to prevent usurpation of powers. The court said that the power is to ensure that subordinate courts issue the necessary and appropriate writs.
  20. In NSSF vs Sokamania Ltd v another [2021] eKLR the court said that supervisory powers aimed at promoting public interest and public confidence in the courts in the administration of justice and that it is exceptionally used only where circumstances require.



21. In *Sammy Alex Musyemi & others v Masha Mramba Mwarogo & others* [2021] eKLR the court observed that under Article 165(6) of *the Constitution* the ELC has powers to invoke supervisory powers over Quasi Judicial Tribunals dealing with matters falling under its jurisdiction. To this end, I agree with Miss Flevia Gekone & Mr. Behalia learned counsels for the applicant that the application before me and the jurisdiction of the court is properly invoked.
22. Turning to whether the trial court usurped powers it did not have to execute, the court has looked at the lower court proceedings leading to the issuance of a warrant of arrest and committal of Mr. Adan Kanano CECM Finance to civil jail. The court has only seen a certificate of costs and a certificate of order against the CECM in line with Section 21 of the *Government Proceedings Act* and Order 29 of the Civil Procedure Rules.
23. In *Five Star Agencies Ltd & another v NLC* (supra) the court held that under Order 23 Rule 1 as read with Order 29 Rule 2(c) of the Civil Procedure Rules execution under Civil Procedure Rules including garnishee proceedings are barred in so far as government is concerned, the rationale being as held in *Kisya Investment Ltd* that the satisfaction of decree or judgment is deemed to be an expenditure by Parliament which must be justified in law and provided for in government expenditures, under Section 32 of the *Government Proceedings Act*. The court cited *Republic v Attorney General & another exparte Stephen Wanyee Roki* [2016] eKLR that after a decree, the only remedy by a decree-holder was to institute judicial review proceedings not seek an order of certiorari compelling the County Government to settle the decree in question. The court further cited *County Secretary NRB County & another Exparte Wachira Nderitu Ngugi & Co. Advocates* [2016] eKLR, that no execution can be levied against the property of the governor in settlement of a decree without an order of mandamus against a chief officer of the government as a condition precedent, before applying for committal of the chief officer if the orders of mandamus are not complied with.
24. In the proceedings before the trial court the only issue that the applicants raised was that the CECM Finance was not the accounting officer. The issue of jurisdiction was never raised by the judgment debtors. In fact, from the proceedings, Adan Kanano had sought for time to settle the decretal amount and stated that monies were available save that he could not know to whom the payment voucher should be directed to be signed. The proceedings show that the judgment debtors indicated that they were in the process of loading money to honour the decretal amount.
25. In the *County Government of Isiolo vs Shariff Ibrahim Surah* (supra) the court held that the county government of Isiolo was protested under the *Government Proceedings Act* terming the warrants of attachment as misconceived, misleading and subject to cancellation.
26. In *Kilonzo & Aziz Company Advocates v County Government of Kilifi* [2021] eKLR a consent judgment entered by parties advocates was subject to be set aside or vacated. The court observed that it was expected that as counsel acting for the appellants had both express and ostensible authority to deal with the taxation (see *KCB LTD v Specialized Engineers Co. Ltd* [1982] KLR 485) in the absence of misrepresentation, fraud or collusion as held in *Broke Bond Liebig v Mallya* [1975] EA 266 and *Flora N. Wasike v Destimo Wamboka* [1988] eKLR the court could not set aside the consent judgment.
27. In the proceedings before the trial court it was Mr. Behailu and Miss Gekone advocate who brought their client's officers to court in answer to the notice to show cause. They subjected their client's officers to the process when they were deemed to know the law on execution. See *Mohoney v East Holyfood Mining Co.* [1875] LR 7hg 869.
28. A lawyer is an officer of the court and should help a court execute its mandate. The applicants' counsels on record cannot purport to say one thing today and tomorrow say something different. They cannot



approve and reprobate at the same time. Be that as it may, the right to a fair hearing belongs to a party to a suit and not the lawyers on record. The benefit of not adhering to the law goes therefore to the applicants who should not suffer out of mistakes by counsels on record.

29. In Republic vs Principal Magistrate court at Mavoko & another exparte; Joseph Ole Lenku Governor Kajiado County & another [2018] eKLR one of the issues was whether the lower court had jurisdiction to issue a committal order and if the decision was ultra vires. The argument was that due procedure for execution of a decree against the County Government of Kajiado under Order 29 2(2)(b) & 22 Civil Procedure Rules had not been followed. The court observed that under Section 21 (1) (3) & (4) of the Government Proceedings Act a party wishing to realize the fruits of judgment against a government has to start with a certificate of costs and certificate of order against the government followed by an order of mandamus. The court cited Kenya Society for the Mentally Handicapped v A.G & others NRB Petition No. 155A of 2011 that coercive orders of the court should only be used to enforce Article 35, where a request has been made to the state or its agency and such request denied and where denied the court will interrogate the reasons and evaluate whether the reasons accord with the Constitution and when the request was neglected by a state organ, it must be given an opportunity to respond. The court held a party cannot institute contempt proceedings, in place of the requirement of Section 21 of the Government Proceedings Act.
30. Having carefully gone through the lower court proceedings, I agree with the applicants that the trial court though with good intentions to assist an unrepresented respondent who may not comprehend the law, fell into error and granted irregular warrants and committal warrants against the 2<sup>nd</sup> applicant. The warrants of arrest and the committal warrants to civil jail are hereby set aside and or vacated. The 2<sup>nd</sup> applicant is hereby set at liberty.
31. Since the decree of the lower court is not disputed by the 1<sup>st</sup> applicant, the same is hereby conditionally stayed for a period of six months, following which the respondent shall have lodged the execution process by way of judicial review proceedings. Given his age or status, he shall be assisted by the court personnel on the appropriate procedure to follow to execute the decree.
32. The 1<sup>st</sup> applicant shall in the meantime deposit Kshs. 500,000/= with the respondent as part of the decretal amount by close of business today the 2<sup>nd</sup> of August, 2024.
33. This file is marked closed.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU  
ON THIS 31st DAY OF JULY, 2024**

**In presence of**

C.A Kananu/Mukami

Court interpreter: Isaak

Miss Gekone and Mr. Behailu for the applicants

Respondent in person

**HON. C K NZILI**

**JUDGE**

