



REPUBLIC OF KENYA



**Barus v County Assembly of Baringo & 3 others (Petition
7 of 2019) [2023] KEELRC 315 (KLR) (31 January 2023) (Ruling)**

Neutral citation: [2023] KEELRC 315 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
PETITION 7 OF 2019
HS WASILWA, J
JANUARY 31, 2023**

BETWEEN

JANE CHEPKORIR BARUS PETITIONER

AND

COUNTY ASSEMBLY OF BARINGO 1ST RESPONDENT

COUNTY ASSEMBLY OF BARINGO 2ND RESPONDENT

GOVERNOR, BARINGO COUNTY 3RD RESPONDENT

BARINGO COUNTY, PUBLIC SERVICE BOARD 4TH RESPONDENT

RULING

1. This ruling is in respect of the preliminary objection that was raised by the respondent on October 27, 2022, in response to the notice to show cause issued on October 18, 2022, for the payment of Kshs 1, 307,475 being the decretal sum plus interest, cost of execution and court collection fees. The preliminary objection is based on the following grounds;
 - 1) That the said application is incompetent, incurably defective and amounts to abuse of court process.
 - 2) The said application offends the mandatory provisions of section 21(4) of the *Government Proceedings Act*.
 - 3) That the said application should be struck out with costs.
2. The application is opposed by the petitioner who filed a replying affidavit sworn on December 13, 2022. In the said affidavit, the petitioner avers that judgement was delivered in her favour on June 25, 2021, which the Respondent was aware of. That she waited for one year for the payment of the said



sums of money till August 22, 2022 when they extracted and served a Notice to show cause upon the respondent. The service was effected through its secretary who acknowledged receipt.

3. It is stated that on October 4, 2022, the Petitioner sought more time to serve fresh notice to show cause on the new regime, which was granted by the court and they proceeded to serve the notice to show cause on the respondent, through the CEC's office which received a copy without signing on the principal copy.
4. She stated that the preliminary objection as filed is not merited and should be dismissed with costs.

Petitioner's Submissions.

5. It was submitted that the petitioner served the respondent with the notice to show cause twice on the old and new regime. It was argued that the Petitioner followed due process under Order 22 in issuing the said notice and seeking to be paid what was ordered by this court. Further that the filing of the preliminary objection based on the second service of the notice to show cause is an abuse of court process as the respondent seeks to deny her the fruits of the judgement. To support its assertions that proper process was followed in serving the notice to show cause, the petitioner relied on the case of *Grand Creek LLC & Another v Nathan Chesang Moson* [2015] eKLR where the court held that;

“In all cases where Order 22 rule 18(1) of the *Civil Procedure Rules* applies, a notice must be served upon the person against whom execution is applied requiring him to show cause, on a date to be fixed, why the decree should not be executed against him. It should be noted, however, that there must have been an application for execution of a decree for payment of money by arrest and detention in prison of a judgment-debtor. And Order 22 rule 31 will come into play where the court, instead of issuing a warrant of arrest, decides to issue a notice calling upon the judgment-debtor to appear before the court on a day to be specified in the notice and show cause why he should not be committed to prison. But where the judgment-debtor does not appear as directed in the notice, the court will issue a warrant for his arrest. This rule follows after section 38 and 40 of the *Civil Procedure Act*. The warrant of arrest is to bring the judgment-debtor to court and it is not an automatic committal to prison because the court will still be required to satisfy itself of all the requirements of Order 22 rule 33 and rule 34 of the *Civil Procedure Rules*. The proceedings under Order 22 rule 34 act as the safeguard against denial of liberty in execution of a decree without due process. And courts have comprehensively pronounced themselves on the constitutionality of the procedure of arrest and committal to jail in execution of a decree in not one case. See the cases cited by the Respondents especially National Bank of Kenya case, Jayne Wangui Gachoka, Braeburn Limited, beatrice Wanjiku and Ex parte Nassir Mwandithi. This point is settled that arrest and committal to prison in execution of a decree under the *Civil Procedure Act* and rules is not unconstitutional as long as all the safeguards provided in law are afforded to the judgment-debtor. I so hold in this matter.”

6. She also relied on the case of *Solomon Muriithi Gitandu & another v Jared Maingi Mburu* [2017] eKLR, where the court relied on the case of *Braeburn Limited v Gachoka and another* [2007] which held that;

“A person is not liable to be committed to civil jail for inability to pay a debt but a dishonest and fraudulent debtor is liable to be punished by way of arrest and committal.”

7. Accordingly, it was submitted that the preliminary objection is not merited and should be dismissed.



Respondent's Submissions.

8. The respondent on the other hand submitted that the petitioner has failed to follow due procedure under section 21 of the Government Proceeding Act, that requires a party executing against the government to first obtain a certificate of order against the Government, serve on the Government for the purposes of budgeting and eventual payment. It was argued that without following the said procedure, no execution against the government can be brought. To support this argument, they relied on the case of Nabashon Omwoha Osiako & 66 Others v Attorney General Amicus Curiae Kenya Section of International Commission of Jurists (Open Society Justice Initiative) [2017] eKLR. where the court relied on the decision by Odunga J in Republic v Attorney General & Another ex parte James Alfred Koroso NRB HC JR Misc Appl No 44 of 2012 where he observed that:

“In the present case the ex parte applicant has no other option of realizing the fruits of his judgment since he is barred from executing against the Government. Apart from mandamus, he has no option of ensuring that the judgment that he has been awarded is realized. Unless something is done he will forever be left babysitting his barren decree.”

9. I have examined all the averments and submissions of the parties herein. The execution being initiated herein is against the County Government of Baringo and other entities with the county.

10. The respondent being part of Government Proceedings of cap 40 Laws of Kenya must be followed before execution can proceed. The process to be followed is found at section 38 of cap 40 Laws of Kenya which states as follows;

“38. 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:

Provided that where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor 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 the judgment-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; 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 a fiduciary capacity to account”.

- 11. The petitioner has submitted that she followed the above process and served the respondents with notice to show cause. The respondents on their part aver that the petitioner didn't follow the said process and never obtained a certificate of order against the respondent before attempting to execute.
- 12. The petitioner has however not demonstrated to court that the application for a certificate of order was made before court and allowed.
- 13. In the circumstances of this case, the court finds that indeed the petitioner has not followed the proper process as envisaged and the preliminary objective is therefore merited and is allowed.
- 14. The petitioner is free to institute proper procedures for execution based on the law.

RULING DELIVERED VIRTUALLY THIS 31ST DAY OF JANUARY, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Awuor for Petitioner – present

Court Assistant - Fred

