



Chege & 2 others (In Their capacity as the officials of Thome V Residents Welfare Association) v Njeru Nyaga & Co Advocates (Environment & Land Miscellaneous Case E037 of 2021) [2024] KEELC 6649 (KLR) (24 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6649 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND MISCELLANEOUS CASE E037 OF 2021
MD MWANGI, J
SEPTEMBER 24, 2024**

BETWEEN

**ARTHUR CHEGE 1ST APPLICANT
DAVID NJUGUNA 2ND APPLICANT
KIMANI MBUGUA MAGUTA 3RD APPLICANT
IN THEIR CAPACITY AS THE OFFICIALS OF THOME V RESIDENTS
WELFARE ASSOCIATION**

AND

NJERU NYAGA & CO ADVOCATES RESPONDENT

RULING

Background

1. The Notice of Motion application dated 18th July, 2024 is brought pursuant to the provisions of Order 22 Rules 31 & 34, Order 49 Rule 5 & 7, Sections 3A, 34, 38 of the *Civil Procedure Act* and Article 159 of the *Constitution*. The applicants pray for orders that;
 - a. Spent;
 - b. Spent;
 - c. At the Inter-partes hearing the order given by the Deputy Registrar on 17th July 2024 directing the arrest of the applicants in this case be set aside.
 - d. In its place this court deem it fit to make a determination under Section 34 of the *Civil Procedure Act* as read with Order 22, rules 34 & 35 of the *Civil Procedure Rules* on the persons required to pay the decretal sum.



- e. This Honourable court do make such order or alternative orders as will meet the interests of justice.
 - f. The costs of the application be provided for.
2. The application is premised on the grounds on the face of it and supported by the affidavit of Arthur Chege, the Secretary of Thome v Residents Welfare Association, deposed on the 18th July, 2024. The deponent avers that he was elected to the said office in the year 2022 and has no proprietary interest over the assets of the society. He states that he was duly informed by the former officials on the contested fees by Advocate, which matter is headed to the Court of Appeal.
 3. The deponent states that by a Notice to Show Cause dated 2nd May 2024, Thome v Residents' Association was summoned to court to show cause why it should not be committed to civil jail for the aforesaid debt. That during the hearing of the Notice to Show Cause on 5th June 2024, the advocates on record for the society did raise a Preliminary Objection as to the irregular nature of the orders sought by the Respondent. He states that the Advocate previously on record for the Applicants did also file a Replying Affidavit in objection to the Notice.
 4. He argues that the society is a corporate entity and its officials are not personally liable for the debts incurred by such a society. The said notice to show cause was therefore unlawful and irregular.
 5. He states that on 17th July 2024 the Deputy Registrar Hon. Vincent Kiplagat issued warrants of arrests against him and the other officials; Kimani Mbugua Maguta and David Njuguna without making a determination on the objection. However, they have lodged an appeal before this Court.
 6. The deponent avers that unless an order of stay of arrest and execution is granted to them, they stand a grave risk of being arrested and confined to civil jail for a debt they had nothing to do with.

Respondent's Grounds of Opposition

7. The Respondent opposed the application vide the grounds of opposition dated 29th July, 2024 arguing that the application is mischievous, frivolous and is otherwise an abuse of the process of the court. The Respondent argues that the application is incompetent and incapable of being granted. Further, that the decree of this court is final and cannot be appealed against.

Court's Directions

8. The Court issued directions on 29th July, 2024 directing that the application be canvassed by way of written submissions. None of the parties had complied as directed despite the lapse of the period granted to do so.

Issues for Determination

9. I have considered the application and the grounds of opposition in response thereto, the issues for determination are;
 - a. Whether the Court should set aside the warrants of arrest issued on 17/7/2024 against the Applicants herein.
 - b. Which orders should the court issue?



Analysis and Determination

Whether the Court should set aside the warrants of arrest issued on 17/7/2024 against the Applicants herein.

10. Section 38 of the [Civil Procedure Act](#) and Order 22 rule 22 of the [Civil Procedure Rules](#) make provision for the grant of an order for arrest and detention in prison of a person in execution of judgment. Section 38(d) provides 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 –

(d) by arrest and detention in prison of any person;

Provided that where the decree is for 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 –.”

11. In [Solomon Muriithi Gitandu & Another -vs- Jared Maingi Mburu](#) [2017] eKLR, the court cited with approval the observation made in [Braeburn Limited -vs- Gachoka and Another](#) (2007) eKLR where it was held that: -

“Section 38 of the [Civil Procedure Act](#) however, provides a limitation of the courts’ power to order execution of a decree by way of detention in prison. The section prohibits the court from making an order of execution of any decree for the payment of money unless the judgment-debtor has first been given an opportunity of showing cause why he should not be committed to prison and even where the judgment debtor has been given such notice to show cause, the court must itself be satisfied and give reasons in writing for that.

These limitations are further re-stated under Order 22 rule 31 (1) [Civil Procedure Rules](#). A notice to show cause may be issued requiring the judgment debtor to show cause and where he fails to appear a warrant of arrest is issued.”

12. On the other hand, Order 49 Rule 5 of the [Civil Procedure Rules](#) provides that:

“Formal orders for attachment and sale of property and for the issue of notices to show cause on applications for arrest and imprisonment in execution of a decree of the High Court may be made by the registrar, or in a subordinate court, by an executive officer generally or specially thereunto empowered by the Chief Justice by writing under his hand, but in the event of any objection being taken to the proceedings thereunder, all further proceedings shall be before a judge.”

13. Therefore, issuance of warrants of arrest is a permitted way of executing a decree of the Court as long as the process provided in the law is strictly adhered to.

14. In the case of [Innocent G. Ondiek -vs- Julius Nakaya Kabole](#) [2019] eKLR, the Court held that:

“..... the only viable ground of setting aside an order for committal to civil jail, is when the respondent challenges the mode or manner in which the said orders were obtained.”



15. In the present case, the Applicants acknowledge that the Judgement-debtor(s) was properly served with the Notice to Show Cause. Indeed, they responded to the Notice through a Replying Affidavit sworn by Nathan Muthabuku Mwaura dated 3rd June, 2024. The Applicants further filed a Preliminary Objection dated 3rd June, 2024.
16. They however contend that the Deputy Registrar issued Warrants of Arrest against them before making a determination on the Preliminary Objection. Their contention in both the Replying Affidavit and the Preliminary Objection is that the society is a corporate entity and the officials are not personally liable for the debts incurred by such a society. They argue that the said notices to show cause were unlawful and irregular.
17. It is trite law that a society under the *Societies Act* is not a legal person with capacity to sue or be sued in its own name. A society can only sue or be sued through its office holders.
18. In the case of *African Orthodox Church of Kenya -vs- Charles Omuroka & Another* [2014] eKLR, the court held that;
- “There is no doubt therefore, that both the Plaintiff and the 2nd Defendant as societies or Associations registered under the *Societies Act* are not legal entities capable of suing and being sued in their own names. They have no legal capacity to institute proceedings in any court in their own names and cannot maintain such proceedings. They can only sue through Trustees, if they have one or in the names of their officials in a representative capacity”
- See also *Trustees Kenya Redeemed Church & Another -vs- Samuel M’Obuya Morara & 5 Others* [2011] eKLR.
19. Based on the foregoing, the court does not find any reason to set aside the warrants of arrest issued against the Applicants. The Applicants are personally liable for the debts of the society jointly and severally. The warrants do not in any way violate the rights of the Applicants as the legal procedure was followed before their issuance. The Respondent as the Decree-holder has a right to execute the decree in any manner provided for by the law.
20. In the premises, the application dated 18th July, 2024 is without merit and is dismissed with costs to the Respondent.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF SEPTEMBER 2024.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Nyambura for the Applicants/Judgement-debtors

Ms. Kirui for the Advocate-Decree-holder

Court Assistant: Yvette.

