



REPUBLIC OF KENYA



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**Njendu t/a Gitutho Associates & 3 others v Multiple ICD (K) Limited & another
(Civil Suit 521 of 2011) [2025] KEHC 12126 (KLR) (30 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 12126 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 521 OF 2011
F WANGARI, J
JUNE 30, 2025**

BETWEEN

**KAMAU JAMES GITUTHO NJENDU T/A GITUTHO
ASSOCIATES 1ST PLAINTIFF
HARRY NJOROGE GAKUYA T/A GAKUYA ASSOCIATES 2ND PLAINTIFF
MAXCAD CONSULTING ENGINEERS LIMITED 3RD PLAINTIFF
PRIMCONSULT ENGINEERS LIMITED 4TH PLAINTIFF

AND

MULTIPLE ICD (K) LIMITED 1ST DEFENDANT
MULTIPLE HAULIERS (EA) LIMITED 2ND DEFENDANT**

RULING

1. The application subject of this ruling is the one dated 18th December, 2024 which is brought under the provisions sections 1A and 3A of the [Civil Procedure Act](#) and Order 51 Rule 1 of the Civil Procedure Rules. The orders being sought are: -
 - a. Spent;
 - b. That the order given ex-parte on 14th November, 2024 for the arrest and committal of the 1st Plaintiff/Judgement Debtor be set aside;
 - c. Spent;
2. The grounds in support are that the order for the arrest and committal of the Judgement Debtors to civil jail runs afoul of the provisions of section 38 of the [Civil Procedure Act](#) especially the proviso thereto and must be set aside ex debito justitiae. It is contended that the order of stay of execution



pending appeal given on 18th March, 2024 is still in place in regards to the 1st Plaintiff who is said to have satisfied the conditions given by the court as regards his portion of the decretal amount.

3. The application is supported by the affidavit of the 1st Plaintiff/Judgment Debtor of even date. In a 25 paragraphed affidavit, the 1st Plaintiff gives the genesis of this suit before this court, the Court of Appeal and back to this court. In relation to the court's ruling of 18th March, 2024, he deposed that he had fully complied with the orders therein as he submitted valuation reports as well as searches for the parcels he was offering as security.
4. He adds that the order for arrest and committal to civil jail was made in error as the Defendants/Decree Holders did not present to court any material or evidence as required by section 38 of the Civil Procedure Act. He enumerates what needs to be complied with under the said section before an order for arrest and committal to civil jail can ensue. For the said non-compliance, he asks the court to set aside the order for arrest and committal to civil jail ex debito justitiae.
5. He further deposes that he is 75 years old and of poor health. He states that he is not likely to abscond or leave the local limits of the court's jurisdiction save for the short trips abroad to seek medical attention and occasional visit to family members living abroad. He thus urges the court to allow his application.
6. The application is strenuously resisted first through grounds of objection dated 18th February, 2025 and a replying affidavit dated 6th May, 2025. In the grounds, the Decree Holder posits that prayer (1) of the application amounts to appeal challenging the merits of the decision. As such, it is urged that the court does not have jurisdiction to hear an appeal against its own orders. The allegation that there was an order of stay as of 14th November, 2024 is said to be incorrect and dishonest.
7. The Decree Holders' reasons are that the stay order of 15th March, 2024 was conditional on the 1st Plaintiff's/Decree Holder furnishing the court with valuation reports and recent searches for the plots he was offering as security within thirty (30) days. Accordingly, this condition was not complied and therefore, the stay lapsed.
8. On the medical report, the same is said to be inadmissible for among other reasons the deponent of the affidavit is not the maker of the document in issue. They then refer the court the various instances the Plaintiffs have applied for and obtained stay since 28th July, 2020 to 20th December, 2024. They conclude that the Plaintiffs have for four (4) years now evaded refunding or paying them a single shilling.
9. They urge the court to strike a balance between the perpetual stays enjoyed by the Applicant and the Respondents' right to be refunded the decretal sum. They urge the court to dismiss the application with costs. The replying affidavit restates more or less the grounds save for a few averments such as that the Applicant has had the means to pay the decretal sum but has mischievously refused to pay the same. They refer the court to the admissions in the supporting affidavit.
10. They add that the Applicant may have dishonestly transferred or concealed his properties for among other reasons that an architect of over forty (40) years does not have a single motor vehicle or house registered in his name. They thus sought for the application be dismissed with costs.
11. The 1st Plaintiff/Applicant filed a further affidavit dated 15th May, 2025. He refuted the claims among them of concealing or transferring any of his properties to defeat the Decree Holders' claim. He also denied being a director of the entity called Gitutho Architects and Planners Limited. He urged the court to allow his application.
12. Directions were taken to have the application canvassed by way of written submissions. Both disputants duly filed their respective submissions. The Applicant's submissions are dated 6th May,



2025. He places reliance of the case of *In Re Zipporah Wambui Mathara* [2010] eKLR for the proposition that they are various methods of enforcing a civil debt other than arrest and committal to civil jail.
13. The Respondents'/Decree Holders' submissions are dated 16th May, 2025. They refer to several decided cases among them *Emidan Enterprises Company Limited v Getaweru* [2023] eKLR, *Fina Bank Limited v Francis Gitau Komu t/a Bomas Motor Mart* [2015] eKLR, *George Wainaina v Clement Aboge* [2021] eKLR, *George Wangui Gachoka v Kenya Commercial Bank Limited* [2013] eKLR among several other decided cases.
 14. Among the issues the Respondents have pointed out include that the Applicant has approached court with unclean hands, that the Applicant has not established sufficient cause to warrant the setting aside of the order of 14th November, 2024, order for the warrant of arrest was made in a lawful mode or manner, that the Applicant has the means but has refused to refund and concealed his properties, the alleged poor health not proved and that arrest and committal to civil jail is lawful and constitutional. They pray that the application be dismissed with costs.
 15. Parties proceeded to orally highlight their respective submissions on 19th May, 2025.

Analysis and Determination

16. I have considered the application, the responses, parties respective rival submissions, authorities cited and the law and the issues falling for the court's determination are: -
 - a. Whether the orders issued on 14th November, 2024 ordering arrest and committal to civil jail ought to be lifted;
 - b. If so, under what conditions; and
 - c. Who bears the costs?
17. At the onset, the record reflects that on 13th November, 2024, an earlier application dated 12th November, 2024 came up for hearing and the 1st Plaintiff/Judgement Debtor was represented. The court directed that the matter be dealt with the following day on 14th November, 2024. However, on the said date, only Counsel for the Respondents/Decree Holders appeared.
18. The court having considered the application dated 12th November, 2024, it allowed the same on condition that the Plaintiffs/Judgement Debtors refund back the money they received pro-rated in terms of how each one had received their portion. However, the payment period was to be done within thirty (30) days and in default, the Plaintiffs/Judgement Debtors were to be presented before court for committal.
19. In his application, the Applicant states that the orders of 14th November, 2024 were issued without compliance with the provisions of section 38 of the *Civil Procedure Act*. This provision provides 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.”

20. Section 38 should be read together with Order 22 Rule 34 of the Civil Procedure Rules which is in pari materia with its establishing Act. In *Charles Lutta Kasamani v Concord Insurance Co Ltd & Deputy Registrar Milimani High Court Commercial and Admiralty Division [2018] eKLR*, the court held as follows: -

“...Even under sections 38 and 40 of the *Civil Procedure Act* no one should be committed to civil jail because of his or her inability to pay. In the case of an application for committal, the determining factor is always the ability to pay. Inability should be taken to mean that the judgment debtor has completely no means of settling the decree even if he was given how much time to do so. He has completely no means of paying. He is simply unable and cannot



pay... In that regard, therefore, where a party goes through legal process and obtains a decree from a competent Court, s/he has a right that has crystalized in his favour and that right is recognized in law. It can only be realized through execution including committal to civil jail which is a known legal process for enforcing that right. Such a right should not easily be defeated because a judgment debtor who though able to pay, cannot be committed to civil jail and nothing can be done about him. That would be a contradiction in the enforcement of rights where one right would be deemed superior to another. The law should be read as only protecting those who cannot genuinely pay and not otherwise...”

21. Therefore, I agree with the Decree Holders position that arrest and committal to civil jail is a legal process recognized in law. However, the procedure set above must be complied with. It must be shown that the conditions under the proviso to section 38 of the Act have been met.
22. In *Kailikia v M’Thiringi & 2 others* (Civil Appeal E017 of 2024) [2024] KEHC 5860 (KLR) (23 May 2024) (Judgment), court while dealing with an almost similar application had the following to say: -

“...While there cannot be a cause of action founded on the lawful exercise of the right of execution and this court will not forestall the 1st Respondent’s efforts to realize the fruits of his judgment, there must be strict compliance with the rules of procedure applicable to execution by arrest and detention which deprives the judgment debtor of his liberty. The court has to be satisfied that the conditions set out under section 38 of the *Civil Procedure Act* were strictly adhered to – that the Appellant was accorded an opportunity to show cause why he should not be committed to civil jail, and that the applicant was established to be a person of means to pay but who had refused to pay in compliance with the judgment of the Court, before the decision to so commit him was reached...”
23. On 14th November, 2024, the matter was coming up for a notice to show cause. As the record confirms, neither the Applicant nor his Counsel were present. However, I note that the warrants of arrest were issued prematurely since the conditions under proviso to section 38 of the *Civil Procedure Act* had not been complied. Though the Decree Holders have submitted that the Applicant herein has had the means to pay but has refused to do so, I note that this court orders of 15th March, 2024 allowed stay on certain conditions.
24. The Decree Holders’ Counsel in his oral highlights confirmed that a Notice of Appeal had been filed. His only reservation was that the same had not been served upon him. Further, at paragraph 6 of his supporting affidavit, the Applicant annexed a valuation report dated 16th April, 2024 giving the value for the two (2) properties at Kshs. 12,000,000/=. According to the pro-rated amounts, the Applicant’s share is Kshs. 32,000,000/=. Simple arithmetic would show that the amount of Kshs. 12,000,000/= is more than the 30% the court had ordered.
25. The court having made an order for arrest and committal if the amounts due were not refunded within thirty (30) days, I note that the Applicant had been granted leave to appeal out of time. The court cannot give on one hand and take on the other. The error committed is of a reversible nature and the court exercises its discretion under section 3A of the *Civil Procedure Act*. This being the case, I lift the orders of 14th November, 2024 and in particular, the warrants of arrest and committal to civil jail as against the Applicant/1st Plaintiff/Judgement Debtor.
26. Having found as above, I note that the Decree Holders have been held away from enjoying the fruits of their judgement for quite a long time. It is only the Applicant who has shown some effort towards discharging his responsibility. As such, I allow the Decree Holders to proceed with execution as against



the 2nd to 4th Plaintiffs/Judgement Debtors who have nonchalantly uninvolved since the decree was passed.

27. As for the Applicant, I direct that he proceeds and file his Record of Appeal before the Court of Appeal within a reasonable time. He should pursue the proceedings as soon as is practicably possible. This court has indulged him on several times and he may not be umpteenth lucky the next time. This should deter any further delays and back and forth applications and rulings.
28. On costs, the same follows the event. However, the court retains discretion whether to award the same or not. Though the Notice of Motion dated 18th December, 2024 has succeeded, it would be onerous to condemn any party to costs. In the circumstances, I direct each party to bear own costs.
29. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
 - a. The Notice of Motion Application dated 18/12/2024 has merits and same is allowed in terms of prayer 2;
 - b. The Applicant to expeditiously proceed and file a Record of Appeal before the Court of Appeal within next 45 days;
 - c. The Respondents/Decree Holders are at liberty to proceed with execution against the 2nd to 4th Plaintiffs/Judgement Debtors; and
 - d. Each party to bear own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 30TH DAY OF JUNE, 2025.

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F. WANGARI

JUDGE

In the presence of;

Mr. Omolo Advocate for the Plaintiff.

Mr. Karina Advocate for the Defendant

Ms. Getrude, Court Assistant

