



**Wafubwa v Housing Finance Company of Kenya (Commercial Case 385 of 2011)
[2024] KEHC 14828 (KLR) (Commercial and Tax) (22 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14828 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 385 OF 2011
MN MWANGI, J
NOVEMBER 22, 2024**

BETWEEN

CAPTAIN J.N WAFUBWA PLAINTIFF

AND

HOUSING FINANCE COMPANY OF KENYA DEFENDANT

RULING

1. There are two applications before me for determination. The first one is dated 2nd January, 2024 brought under Order 45 Rule 1 of the Civil Procedure Rules, 2010, and Section 1A of the [Civil Procedure Act](#) and all enabling provisions of the law. The plaintiff seeks the following orders-
 1. Spent;
 2. That the Court be pleased to review a ruling dated 8th December, 2023 as there is an apparent error on the record that misled Lady Justice N. Mwangi, enter a decision that dismissed Civil Appeal No. 102 of 2013 (sic);
 3. That this Court in this matter is only limited to determine the issue of ownership of L.R. 209/10481/85 Nairobi after the Civil Appeal judgment stated above;
 4. That someone took advantage of the persistent reshuffling by the Chief Justice of the Judges handling this matter to introduce spurious, fake and bogus documents on record that misled Madam Lady Justice N. Mwangi to dismiss the appeal Court (sic);
 5. That the Honourable Court do order that the Sale Agreement and Transfer of property L.R. No. 209/10481/85 to John Wambua Kiilu, and further transfer to Justin Bundi is unlawful, null and avoid (sic), and the same entries made on the title be deleted for the aforesaid illegal transactions;



6. That further, the Court do order that damages of Kshs.1,131,470.00 for the illegal eviction of the plaintiff from his property be paid by the defendant;
7. That the Court do order the reinstatement of the plaintiff to his property.

In the alternative to No. 7 above;

8. That the Honourable Court do order the defendant to pay the purchase price of Kshs.75,000,000.00 of the property as is where is since the property carries sentimental values (sic) to both the defendant and the interested party; and
9. That the costs be provided for.
2. The application is supported by an affidavit sworn on 2nd January, 2024 by Captain J. N. Wafubwa, where he deposed that he was the respondent in Civil Appeal No. 102 of 2013, thus competent to swear the said affidavit. He further deposed that the defendant herein was the appellant in the said appeal where it appealed against an award of Kshs.4,500,000.00 for the 2nd unlawful sale of his property by Private Treaty.
3. The applicant contended that the bundle of the lower Court in CMCC No. 4964 of 2009 (sic) appears to have been removed from the record, and that he had uploaded the correct bundle for the Court.
4. He averred that a reading of paragraphs 26 and 27 of page 11 of the Civil Appeal judgment, together with paragraph 5 of the affidavit deposed by Mr. Joseph Lule, the Appeal Court stated that the issue of res judicata does not exist in this matter with reference to CMCC No. 4964 of 2009.
5. He further averred that the Court of Appeal went further and interpreted at pages 29 and 30 of the bundle of its own judgment wherein it clarified that the ownership of the property L.R. 207/10481/85 was not an issue before it. That from the affidavit of Mr. Joseph Lule, paragraph 6 clearly confirmed that the defendant was fully aware that Misc. 660 of 1997 had restrained it not to sell the property. He deposed that the said affidavit disclosed that the defendant was aware of the excess money of Kshs.20,662.80 from the aborted auction of 1996 was payable to him as the chargor.
6. The plaintiff expressed the belief that after the defendant received the deposit of the aborted sale, and after being left with excess money, in law, it lost further attempts to sell the plaintiff's property as a chargee, as it made full recovery of what was due with the power of sale from the charge instrument sold.
7. He stated that he believed that the charge instrument only gave the purchaser of this property, United Millers, the right to conveyance until November 2008, after 12 years under the Limitation Act.
8. He contended that the Private Treaty sale to John Wambua Kiilu was unlawful as per the judgment by Hon. Justice E. Ogolla, and as such, the injunction in Misc.660 of 1997 was properly made.
9. He further contended that the proceedings in CMMC No. 4964 of 2009 went on well until at pages 126 and 127 where the bundle reads that Counsel for John Wambua Kiilu claimed that the said person had passed on more than four (4) years before he (plaintiff) contended that the said Counsel had produced an ineligible death certificate No. 231288 as proof of John Wambua Kiilu's death.
10. The plaintiff deposed that since the defendant was determined to take his (plaintiff's) property, he offered to sell in to the defendant for Kshs.75 Million. He averred that he proceeded to investigate, and he established that the death certificate No. 231288 belonged to Kiilu Wambua, and that Joshua Muli Kiilu was given the burial permit.



11. The plaintiff claimed that using the dates 22nd August, 2013 reflected on the death certificate and burial permit, the death happened in the year 2013 and since he was evicted in the year 2009, the transaction was outright fraud. The plaintiff alleged that the Sale Agreement made in the year 2009 and bringing the suit in Civil Suit CMCC 4694 of 2009 by John Wambua Kiilu, was based on fake documents, since Kiilu Wambua was still alive when his Identity Card (ID) was used in the transactions.
12. The plaintiff contended that it is indisputable in this case that the defendant gave instructions to Joshua Muli Kiilu to evict him from his property L.R. 209/10481/85 and with the said facts, the Certificate of Title should read Kiilu Wambua and not John Wambua Kiilu.
13. He deposed that since the judgment by Hon. Judge Eric Ogolla reads that the Private Treaty Sale was unlawful, and now that the purchaser is fictitious, he believes that the Certificate of Title should be corrected to show that he is the lawful owner of the property.
14. He stated that the Sale Agreement reflects that stamp duty was paid in the year 2000, when actually the Agreement was entered into in the year 2009, which he believes is quite obvious that no sale took place for the Court to enforce it in any way whatever.
15. He claimed that when he filed the documents from the lower Court on 17th July, 2019, he also demanded that the defendant should produce some documents for inspection by the Court, amongst them the receipt for stamp duty paid by John Wambua Kiilu, but up to now the receipt has never been produced.
16. He contended that Joshua Muli Kiilu is an Estate Developer for the defendant, and that the two have a civil matter in the High Court over some projects as per a google extract of the case. He stated that with the enthusiasm shown by the defendant in ignoring Court Orders, and by making the illegal transactions, the Court may allow the purchase of his property by the defendant since he was forced to give the offer price of where is as is.
17. He contended that the defendant had no power of sale of the property since the aborted auction of 1996, and there was no person by the names John Wambua Kiilu ID No. 2591235, and therefore transfer of his Title was done unlawfully, and as such the entries should be deleted by the Court.
18. In response to the plaintiff's application, the defendant filed grounds of opposition dated 13th February, 2024 to the effect that –
 - i. The application is incompetent, frivolous, and vexatious and an abuse of the Court process because the applicant is challenging the Ruling dated 8th December, 2023 through a dual process expressly detested by the provisions of Section 80 of the *Civil Procedure Act* and Order 45 Rules 1 & 2 of the Civil Procedure Rules, 2010; and
 - ii. The application discloses no grounds capable of founding a basis for review.
19. The plaintiff filed written submissions which he referred to as “plaintiff’s supplementary submissions”. A search on the CTS Portal did not yield any other submissions filed prior to the so called “plaintiff’s supplementary submissions”. The submissions dated 22nd February, 2024 cannot therefore be regarded as supplementary submissions in the true sense of the word.
20. In the said submissions, the plaintiff contended that he was not served with the affidavit which this Court relied on, and that this Court relied on the judgment of the High Court and Civil Appeal No. 102 of 2013 delivered on 28th April 2014, to arrive at its ruling. He contended that the defendant had brought a Preliminary Objection under Section 80 of the *Civil Procedure Act*.



21. The plaintiff stated that Civil Appeal No. 102 of 2013 needed evidence from John Wambua Kiilu from the lower Court, in order for a final decision to be given on ownership of the property. The plaintiff urged this Court to analyze the bundle from the lower Court to end litigation that has been in Court for 30 years. The plaintiff submitted that after the ruling of 8th December, 2023, he discovered that an illegal affidavit was introduced on record, provoking the present application for review which falls under Section 80 (of the *Civil Procedure Act*).
22. The rest of the submissions by the plaintiff are derived from the averments of his supporting affidavit and it would be superfluous to reproduce the same the 2nd time around.
23. In its written submissions dated 18th March, 2024, Ms Muthee, learned Counsel for the defendant gave a background of the case between the parties herein as per the judgment of the High Court, and the outcome of Civil Appeal No. 102 of 2012 before the Court of Appeal, wherein the award of Kshs.4,500,000.00 plus interest of the said amount were set aside, and the said Court upheld the High Court's award of Kshs.20,662,80 together with interest thereof, in favour of the plaintiff herein.
24. The defendant pointed out that the plaintiff's application dated 7th June, 2023 was dismissed vide a ruling delivered on 8th December, 2023, wherein this Court found the plaintiff's application to be without merits, subsequent to which the plaintiff filed a Notice of Appeal and the instant application seeking to review the ruling delivered on 8th December, 2023.
25. The defendant's Counsel urged this Court not to determine the present application in light of the Notice of Appeal filed by the plaintiff. She submitted that the instant application is an abuse of the Court process since the plaintiff has opted to challenge the ruling of 8th December, 2023 through a dual process of Appeal to the Court of Appeal, and by filing a review before this Court. Counsel for the defendant relied on the decisions in *Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 others* [2019] eKLR, and *Fahim Yasin Twaha v Timamy Issa Abdalla & 2 others* [2015] eKLR, to illustrate that a litigant cannot pursue both an appeal and a review arising from the same subject matter, but must settle for one of the said options.
26. Ms Muthee also relied on the provisions of Order 45 Rule 1 of the Civil Procedure Rules, 2010 and the case of *Leonard W. Makio (as the admin of estate of Francis M. Obale - deceased) v Dismas Omukubi Onyang'i* [2021] eKLR, to emphasize that an appeal and a review cannot be pursued simultaneously.
27. She submitted that by electing to pursue an Appeal, the plaintiff should not be allowed to come back to Court for a review of the same decision, as it would not only constitute to protracting litigation but also to defeat the whole essence of finality to litigants.
28. Ms Muthee urged this Court not to consider the application for review due to the Notice of Appeal filed by the plaintiff. She however stated that in case this Court is minded to consider the application for review, the Court should note that the said application does not meet the threshold for review as espoused in Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules, 2010. She submitted that the said provisions donate jurisdiction to the Court to review any of its decrees or orders, but the said jurisdiction may only be exercised in three (3) instances as was held in the case of *Republic v Public Procurement Administrative Review Board & 2 others* [2018] eKLR, but the plaintiff herein has not come under any of the instances provided for in law.
29. She submitted that even if it was to be regarded that the evidence the plaintiff seeks to introduce became available only after the ruling, still the application is unmeritorious because sufficient cause has not been shown.



30. She expressed the view that the application before this Court is difficult to comprehend but the plaintiff seems to be asking this Court to take new evidence as regards the sale and transfer of the suit property. Ms Muthee contended that with the main suit having been heard and determined, then the instant application is inviting this Court to reconsider its earlier wisdom, a power that this Court lacks. She prayed for the instant application to be dismissed with costs.

Determination Of The Application Dated 2nd January, 2024.

31. The issue for determination in the above application is if the plaintiff has satisfied the prerequisites for successful review. The applicable provisions for an application for review are encapsulated in Section 80 of the [Civil Procedure Act](#), which states that –

“ Any person who considers himself aggrieved –

- a. By a decree from which an appeal is allowed by this Act, but from which no appeal has been preferred or
- b. By a decree or order from which no appeal is allowed by this Act, may apply for review of judgment from the Court which passed the decree or made the order, and the Court may make such Order thereon as it thinks fit.

32. The above provisions gain traction under the provisions of Order 45 of the Civil Procedure Rules, 2010 which provides as follows-

Application for Review of decree or order.

1. any person considering himself aggrieved;
 - a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - b. By a decree or order from which no appeal is hereby allowed,

And who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
2. A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

33. In this instance, the appellant filed a Notice of Appeal and a review. I have deemed it necessary to deal with the review as it is a quicker way of dispensing justice, as an Appeal may take a few years to be heard and determined. If the plaintiff will be dissatisfied with the outcome of his application dated 2nd January, 2024, he will be at liberty to appeal. My understanding of the plaintiff's application, is that although he contends to be seeking a review on the ground of an error apparent on the face of the record, his contestation for review is that there is an “illegal affidavit” that was filed by the defendant in response to his application dated 7th June, 2023 but he was not served with the same. He claimed that the said affidavit came to his notice after the ruling of 8th December, 2023 was delivered, as the



said affidavit was mentioned in that ruling, and that it is the said affidavit that has provoked the present application. It must be noted that both the plaintiff and Ms Muthee for the defendant attended Court on 26th July, 2023. Ms Muthee informed me that both parties had complied. In response, the plaintiff said “that is the position”. I indicated that I would consider the application dated 7th June, 2023 and deliver a ruling on 1st December, 2023. I however delivered the ruling on 8th December, 2023. On 26th July, 2023, the plaintiff did not raise any issue of non-service of the “illegal affidavit” or non-compliance on the defendant’s part. The plaintiff is therefore now estopped from claiming that there was an affidavit that was relied on by the Court which he was not served with. Although the said “illegal affidavit” is the explanation given by the plaintiff for review, it does not constitute an error apparent on the face of the record.

34. It seems that the plaintiff is also seeking review on the ground of discovery of new and important matter or evidence which after due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed. In other words, the plaintiff is asking this Court to find that the Sale Agreement and the transfer of the property LR 209/10481/85 to John Wambua Kiilu, and the further transfer to Justin Bundi was unlawful, null and void and for the said entries on the Title to be deleted for the said illegal transactions.
35. In the instant application, the plaintiff has indeed stated that this matter is only limited to “determine the issue of ownership of LR No.209/1048/85 Nairobi”. In my considered view, that is a substantive issue that cannot be brought up in an application for review. Further, when the plaintiff sought interpretation of the judgment of the Court of Appeal, the Registrar of the said Court wrote to him informing him that the question of ownership of the property in issue was not for determination before the Court of Appeal.
36. At this juncture, it is important to look at case law on review applications. In the case of *Alpha Fine Foods Limited v Horeca Kenya Limited & 4 others* [2021] eKLR, when dismissing an application similar to the present one, the Court held that –
 - “...section 80 prescribes the power of review while Order 45 stipulates the rules. However, the rules limit the grounds for evaluating requests for review. Simply put, there are definite limits to the exercise of power of review. The rules prescribe the jurisdiction and scope of review. They limit review to the following grounds:
 - a. Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;
 - b. On account of some mistake or error apparent on the face of the record, or
 - c. For any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.”
37. As stated before, although in paragraph 2 of his application, the plaintiff has contended that he seeks review of the ruling of 8th December, 2023, in his supporting affidavit he has not disclosed what the error apparent on the face of the said ruling is.
38. In his affidavit the applicant made reference to proceedings in CMCC No. 4964 of 2009 and talked of an injunction that had been issued against the sale of his property. He contended that United Millers, the purchaser of his property was given the right to conveyance the said property in November, 2008 after 12 years under the Limitation Act.



39. It is apparent to me that the plaintiff's averments are jumbled up with proceedings that took place in the lower Court and in the High Court, and forgets that in the hierarchy of Courts, a lower Court cannot injunct the sale of a property that is or was the subject of proceedings in the High Court.
40. The plaintiff claimed that fake documents were used in the sale of his property to John Wambua Kiilu. In so doing he is trying to introduce the ground of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or the order in issue was made.
41. It is important to remind ourselves that the review being sought is of the ruling dated 8th December, 2023. As I have stated twice before, no error apparent on the face of the record was pointed out. It appears that the plaintiff is on a fishing expedition and hopes to salvage his property in so doing.
42. As was correctly submitted by Counsel for the defendant, prayers No. 5, 6 and 7 of the application dated 2nd January, 2024 is a duplication of the prayers previously sought in paragraphs 3, 4 and 5 of the application dated 7th June, 2023, which was determined vide the ruling of 8th December, 2023. Prayers No. 5, 6 and 7 are therefore res judicata having been determined in the application dated 7th June, 2023.
43. I note that paragraphs 3 and 4 of the application dated 2nd January, 2024 are mere statements as no prayers have been sought.
44. The Supreme Court of India discussed the scope of review in the case of Ajit Kumar Rath vs State of Orisa & others, 9 Supreme Court case 596 at page 608 where the said Court stated as follows –
- A review cannot be claimed or asked merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for tabling it. It may be pointed out that the expression “any other sufficient reason” means a reason sufficiently analogous to those specified in the rule. (Emphasis added).
45. From the contents of the present application and the one that forms the subject of the ruling of 8th December, 2023, it is clear to me that the plaintiff is in denial and has refused to come to the terms with the fact that his property L.R. 209/10481/85 was sold by the defendant vide Private Treaty, and his challenge of the said sale was found to be without merits in an appeal filed by the defendant herein, and determined by the Court of Appeal vide a judgment dated 28th March, 2014, in Civil Appeal No. 102 of 2013.
46. As stated in the ruling of 8th December, 2023 what is now left in the High Court is supplemental proceedings for payment of the sum of Kshs.20,662.80 to the plaintiff and interest as adjudged by Judge E. Ogola on 26th April, 2012, and as was upheld by the Court of Appeal. Having analyzed the plaintiff's assertions, no sufficient reason has been established for review of this Court's ruling of 8th December, 2023.
47. In the end, I find and hold that the application dated 2nd January, 2024 is misguided, vexatious, frivolous, and to be without merits. In the true sense of the word, it is an abuse of the Court Process. It is dismissed with costs to the defendant.



The Application Dated 11th April 2024.

48. The above application was filed by the defendant pursuant to the provisions of Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya, Order 42 Rule 6 of the Civil Procedure Rules, 2010 and all enabling provisions of the law. The defendant seeks the following orders –
1. Spent;
 2. Spent;
 3. That this Honourable Court be pleased to order the release of Kshs.179,388.13 to the plaintiff and the balance thereof be released to the defendant from the sum of Kshs.9,264,963.00 deposited in Consolidated Bank of Kenya, Koinange Branch A/C No.10011101011315 in the name of Captain Jammies Nyongesa Wafubwa & MMC Asafo in full and final satisfaction of decrees issued on 26th April, 2012 and 28th March, 2024.
 4. That the costs of this application be borne by the plaintiff.
49. The said application is supported by an affidavit sworn by Regina Anyika, the Director Legal and Company Secretary of the defendant. She deposed that by virtue of the Court of Appeal judgment, the dispute between the parties herein has been determined and the only outstanding issue is the release of Kshs.9,264,963.00 deposited in Consolidated Bank of Kenya, Koinange Branch to both parties herein in their respective shares but the plaintiff has frustrated the release of the said monies by flooding this Court with numerous applications.
50. Ms Anyika averred that despite the plaintiff being aware that the sum of Kshs.9,264,963.00 can satisfy the decree in his favour, he has in bad faith, proceeded to take out warrants of attachment of moveable property against the defendant for the sum of Kshs.179,388.13 as borne out in the copies of the warrants of attachment annexed to the defendant's supporting affidavit.
51. Counsel contended that unless the orders sought are granted, the defendant will be highly prejudiced as it will be condemned to pay Kshs.179,388.13 to the plaintiff although there is Kshs.9,264,963.00 that was deposited in a joint interest earning account in the name of the plaintiff and the applicant's Advocates at Consolidated Bank of Kenya, and which sum can satisfy the decree.
52. Ms Anyika implored this Court in the interest of justice to grant stay of execution of the judgment pending determination of the intended appeal.
53. The plaintiff filed a replying affidavit and a further affidavit to the two Motions sworn by himself on 17th April, 2024. In the said affidavits, the plaintiff contended that the correct decretal amount granted was Kshs.16,787,917.20 which was enough replacement for the unlawfully sold house. He further contended that the defendant and/or the Deputy Registrar is wrong and totally biased to calculate the interest for the period on a stagnant principal amount. He referred to the mortgage account which he claims shows that interest was charged daily, and passed on over to the succeeding year.
54. The plaintiff claimed that the correct amount as at March 2024 stood at Kshs.20,303,196.00. He claimed that the Kshs.9,264,196.20 deposited in Consolidated Bank is not enough to clear the Kshs.20,662.80 with interest per annum from 12th November, 1996. He claimed that the amount of Kshs.179,338.13 is a fraud since the Deputy Registrar has the mortgage statement in the file, but she did not want him to pin point it to her before releasing the warrants.
55. He concluded his affidavit by praying for the stay order granted to the defendant to be vacated, for the Court to strike out annexure JNW6 for the amount of Kshs.179,388.13 calculated by the defendant



and/or Deputy Registrar. He also urged this Court to make an order for the sum of Kshs.9,264,196.20 interest thereon to be released to him.

56. In support of the application dated 11th April, 2024, the defendant filed its submissions dated 23rd May 2024. Ms Muthee, learned Counsel for the defendant in supporting the defendant's prayer for stay of execution and for lifting of the warrants of execution, relied on the case of *Butt v Rent Restriction Tribunal* [1979] eKLR, and *Tawakal Airbus Limited v Irene Muthoni Njirati and another* [2020] eKLR. She submitted that in the instant application, the defendant is seeking stay of execution, and also seeks the lifting of warrants of attachment and sale issued on 4th April, 2024 because the plaintiff is the one who extracted the decree of Kshs.179,388.13 and the subsequent warrants of attachment and sale, but there is however in place Kshs.9,264,963.00 deposited in Consolidated Bank of Kenya, Koinange Branch, A/C No.10011101001315 in the name of Captain Jammies Nyongesa Wafubwa and MMC Asafo, which is sufficient to satisfy the entire sum of Kshs.179,388.13 sought by the plaintiff. She contended that it will be highly prejudicial to the defendant if execution was to proceed yet the sum of Kshs.9,264,963.00 deposited in Consolidated Bank of Kenya in the names of the plaintiff and MMC Asafo is sufficient to satisfy the entire sum of Kshs.179,388.13 sought by the plaintiff.
57. Ms. Muthee urged this Court to find the process commenced by the plaintiff as being premature, misconceived, and in bad faith, as all he could have done was to seek the release of Kshs.179,388.13 out of the sum of Kshs.9,264,963.00 deposited in the account at Consolidated Bank of Kenya. The defendant urged this Court to order the release of the sum of Kshs.179,388.13 to the plaintiff, in line with the judgment and decree issued on 26th April, 2012 and 28th March, 2014.
58. In written submissions dated 9th May, 2024, the defendant contended that before the life of the certificate of Title L.R. 209/10481/85, the charge or mortgage instrument agreed upon by the plaintiff and the defendant, and the mortgage account is brought to an end, they remain alive, until the Court gives orders on their fate.
59. The plaintiff made his own tabulation of the interest that has accrued on the sum of Kshs.20,662.80 as from 12th November, 1996, which he calculated at an interest of 27.5% per annum. He contended that it was the duty of the defendant to stop the credit balances in terms of accruing interest.
60. The plaintiff contended that the outstanding amount due to him is Kshs.20,303,196.50 less 9,264,963.00 being the amount in Consolidated Bank which should be paid to him leaving an outstanding balance of Kshs.11,038,233.50 which is due to him, and monthly interest from April 2024 should apply for execution.
61. He contended that interest of Kshs.426,212.00 should apply monthly until November 2024, when it will change. He contended that the tabulations by the Deputy Registrar and Mr. Kibett are wrong.

Determination Of The Application Dated 11th April, 2024.

62. As I said in my ruling of 8th December, 2023, the issues that needed to be determined between the plaintiff and the defendant by the Courts, were determined by Judge E. Ogolla, as the Trial Court and by the Court of Appeal, in Civil Appeal No. 102 of 2013 filed by the defendant. The decision of the Court of Appeal was final and binding to this Court. The plaintiff's property was found to have been sold upon his default in repayment of a loan he had taken from the defendant. He is therefore misguided when he requests this Court to restore the Certificate of Title to him for a property that the two Courts found had been sold. The plaintiff cannot now raise the issue of his property having been sold fraudulently 12 years after the judgment by Judge E. Ogola was rendered on 26th April, 2012. He should have pleaded fraud in the plaint filed in the High Court, or sought legal advice on how to go about the allegation of fraud now being made against the defendant.



63. What is before me for determination is whether the warrant of attachment and sale of the plaintiff's property issued on 4th April, 2024 should be lifted and for stay of execution to issue. The defendant sought the prayer for stay of execution pending the hearing and determination of this application, and not pending appeal as contended in its affidavit. It therefore follows that as soon as the ruling herein is delivered the order for stay of execution will automatically stand vacated.
64. This Court concurs with the observation made by Ms Muthee, for the defendant that the actions of the plaintiff of obtaining a warrant of attachment and sale from Court, whereas he is aware that the sum of Kshs.9,264,936.00 was deposited in an interest earning bank account in his name and MMS Asafo, is an act of bad faith. The Court of Appeal in its judgment upheld the award made by Judge E. Ogola, in the sum of Kshs.20,662.80 and interest thereon at 27.5% with effect from 12th November, 1996 until payment in full.
65. It must be noted that the Trial Court and/or the appellate Court did not grant the plaintiff compound interest which would have led to a larger amount than the one that was arrived at, after calculations were made by the Deputy Registrar. The judgments by the Court of Appeal and by Judge E. Ogola, were very clear on the terms of interest.
66. The plaintiff herein is estopped from imposing his own calculations on lawful judgments of the two Courts so as to inflate the amount that is due to him in interest. It does not require complicated calculations or a complex arithmetic formula to work out the interest of Kshs.20,662.80 at 27.5% per annum from 12th November, 1996 to the time the calculations were made by the Deputy Registrar in March 2024, which gave rise to an amount of Kshs.179,388.13.
67. It is not in the business of the Court to inflate amounts due to a litigant, just because a litigant thinks he is entitled to more than what he was awarded by the Court.
68. It is about time the plaintiff herein came to terms with the fact that litigation has to come to an end, and the time is now. Instead of taking what the appellate Court granted him, the plaintiff has ventured into calculating the interest of the amount of Kshs.20,662.80 with an interest of 27.5% per annum, based on compound interest. That position is untenable. No Court awarded him compound interest of Kshs.20,662.80 at 27.5% per annum. If that was the intention of the Trial Court and/or the Court of Appeal, the said Courts would have expressly pronounced in their judgments that compound interest had been awarded.
69. That being the case I find the defendant's application dated 11th April, 2024 to be meritorious in so far as lifting the warrants of attachment and execution issued on 4th April, 2024 is concerned.
70. I also find that the prayer for the release of the sum of Kshs.179,388.13 to the plaintiff is merited.
71. I hereby grant the following orders-
- i. That the warrants of attachment and sale dated 4th April, 2024 against the defendant herein are hereby lifted and set aside;
 - ii. In lieu thereof the sum of Kshs.179,388.13 shall be released to Captain Jammies Nyongesa Wafubwa out of the sum of Kshs.9,264,963.00 deposited in Consolidated Bank of Kenya, Koinange Branch, A/C No. 10011101001315 in the joint names of Captain Jammies Nyongesa Wafubwa & MMC Asafo. The said payment shall be in final satisfaction of the decrees issued on 26th April, 2012 and 28th March, 2014, after inclusion of the interest accrued from April 2024 to the date of this ruling;



- iii. The Branch Manager, Consolidated Bank of Kenya, Koinange Branch, is hereby ordered to forthwith put into effect order No. (ii) above;
- iv. The balance of the amount in the said joint account shall be released to the defendant herein;
- v. There shall be no order as to costs for the application dated 11th April, 2024;
- vi. This file shall stand closed after extraction of the Court orders above.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF NOVEMBER, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Captain J. N. Wafubwa – plaintiff acting in person

Ms Kinyua holding brief for Ms Muthee for the defendant

Ms B. Wokabi – Court Assistant.

