Hiram v Muiruri & another (Environment & Land Case 483 of 2017) [2023] KEELC 18485 (KLR) (29 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18485 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ENVIRONMENT & LAND CASE 483 OF 2017

LN GACHERU, J

JUNE 29, 2023

BETWEEN

BENSON MUIGAI HIRAM ..... PLAINTIFF

AND

JACOB MWANGI MUIRURI ..... 1ST DEFENDANT

ELIZABETH WAMBUI MUIRURI ..... 2ND DEFENDANT

RULING

1. One by the plaintiff and the other by defendant, all arising from the Judgment of this Court of October 31, 2018. The plaintiffs filed an application dated March 8, 2023, for orders:

    1. That leave be granted to the law firm of M/S Tim Kariuki & Co. Advocates, to come on record for the applicants in place of Wairimu Kiongera & Co. Advocates, who are on record for the 1st Plaintiff/ Applicant

    2. That this Honourable Court be pleased to review and set aside the Notice to show cause dated October 5, 2022, the Certificate of Taxation of costs dated September 23, 2020, and any other subsequent orders issued in this suit against the Applicant for being irregular

    3. That costs of the suit be provided for

2. The application is premised on nine grounds stated on its face and the supporting affidavit sworn by the 1st plaintiff. He contends that this court in its judgment of October 31, 2018, directed that the costs of the suit were to be paid by the defendant. That contrary to the orders of court, the defendant prepared a party to party bill of costs of Kshs. 131, 995/= and sought execution against the plaintiffs/ applicants. He averred that the defendant took out notice to show cause, which he claims was irregular and ought to be struck out.

3. In opposing the application, the defendant through his Advocate S.M Muthomi, swore a replying affidavit wherein he deponed that he was awarded costs of the suit, being the successful party. That the Decree executed indicated that the plaintiffs were to bear the costs of the suit. Additionally, that the application is res judicata as the Applicant made a similar application orally on February 1, 2023, and the court pronounced itself then. He deponed further that the judgment has a typographical and/ or clerical error, that ought to be corrected by the Judge who delivered the judgment to handle the errors.

4. The plaintiff filed a supplementary affidavit wherein he deponed that defendant ought to have filed for review or appeal, if aggrieved by the decision of the court. That whereas costs follow the events, the Court in its wisdom directed the Defendant to pay the costs. That the Defendant slept on his rights for 4 years. That the attached copy of the judgement in the Plaintiffs' application for setting aside the Notice to show cause was a true copy of the original by the Deputy Registrar and it does not need signing by the judge; that the Defendant if aggrieved ought to have raised issues with the Deputy Registrar.

5. He averred further that the Decree attached to the Defendant's Affidavit was drafted and presented by the Defendant's advocate on assumption that court had awarded the Defendants costs of the suit. That the application is not res judicata, since no similar one on the same issues has been filed and determined. That nothing stops the Defendant from annexing the same.

6. Conversely, the defendant filed an application dated March 21, 2023, for orders

    1. That the Court be pleased to amend the clerical mistakes in the typed judgment delivered on October 31, 2018, and certified on February 20, 2019.

    2. That costs be borne by the plaintiffs.

7. The application is anchored on Eleven Grounds stated on the face of it and the supporting affidavit of the defendant. It is his claim that the court in its judgment of October 31, 2018, allowed the defendant's counter-claim and awarded him costs. He deponed that the copy of typed judgment indicated that costs be borne by the defendant in place of the plaintiffs, contrary to the oral and hand written judgment of the court which directed that the Plaintiff meets the costs of the suit.

8. The plaintiff opposed the application vide the replying affidavit sworn on the 12th April, 2023. He deponed that there was no error on the judgment of the Court and the application is thus an afterthought. He further deponed that there was no oral judgment that directed the Plaintiff to pay costs. That the mere act of not objecting to the Bill of Costs did not in any way mean that the Plaintiffs had been ordered to pay costs.

9. This Court directed that the two applications be dispensed together by way of written submissions.

10. The Plaintiffs/Applicants filed their submissions through the Law Firm of Tim Kariuki & Co. Advocates, wherein he submitted on his application of 8th March, 2023, and raised two issues.

11. On the issue of leave, he submitted that his previous advocates on record were served with the instant application, but they never opposed it and further that the Defendant is not opposed to granting of leave, as such the same is uncontested.

12. On the issue of review and setting aside, the Notice to show cause, he submitted that the Defendant was guilty of latches having waited for the instant application before raising the issue. Reliance was placed on the cases of Abigael Barmao -Vs- Mwangi Theuri (2013) eKLR, and Benjoh Amalgamated Limited & Another vs Kenya Commercial Bank Limited {2014} eKLR, where the Courts observed the need of parties with a right to move Court at the earliest. He submitted that the Defendant is guilty of

laches and acquiescence and there being no reason for delay, he ought not to be given an opportunity to drag litigation. In the end, he submitted that the instant application is not res judicata and it ought to be allowed.

13. The Defendant/Applicant filed his submissions through the Law Firm of Milimo Muthomi & Co. Advocates to the application of 8th March, 2023, and framed four issues for determination.

14. The Defendant submitted on the issue of res judicata, that the Plaintiff had made a similar application orally in Court on 1st February, 2023, but which application was dismissed and as such, the instant application is meant to subvert the course of justice. In submitting that there must be an end to litigation, he invited this Court to the pronouncement of the Court in Yana Namachemo Wafula vs Michael W Wanyonyi & 2 Others {2019} eKLR, where the Court referred to a litany of cases in holding that res judicata also applied to instant where there is multiplicity of applications.

15. On whether stay orders should be granted, the Defendant submitted that the Plaintiff is guilty of inordinate delay having filed the instant application five years since the date of judgment. In submitting that the delay is unexplained, inordinate, inexcusable and actuated by malice and an afterthought, the Defendant invited this Court to the pronouncement in the case of Rift Valley Railways vs Jackline Akech Apinde {2019} eKLR, where the Court observed that an unexplained delay for eight months was inordinate and inexcusable. Reliance was also placed on the case of Arthur Mathitu Nderitu & Another vs. Settlement Fund Trustees & 2 Others {2018} eKLR, where the Court observed that an unexplained delay for five years in an application for stay was caught up by laches.

16. On whether review and setting aside orders should be granted, the Defendant submitted that it would be against public policy that the Court would have awarded costs to the Plaintiffs, yet they lost the suit. He maintained that the judgment had typographical error, which the Plaintiff was taking advantage. He relied on the case of Re Estate of Joseph Okunda (Deceased) {2020} eKLR, where the Court elaborated on the term "mistake or error apparent" and observed that this means an error or a mistake that does not require detailed examination. He urged this Court to dismiss the application.

17. On the Defendant's application of 21st March, 2023, the Plaintiff did not file any submission. The Defendant filed his submissions on the 25th April, 2023, and raised two issues for determination. On whether there was a clerical mistake, he maintained that the Court gave orders orally that he was entitled to the costs. He submitted that this was an error that ought to be corrected, he relied on the case of Republic vs Cabinet Secretary for Interior and Co-ordination of National Government Ex parte Abulahi Said Salad {2019} eKLR, where the Court elaborated itself on issues of error and omissions by Court. He submitted that the error in the judgment of the Court is an error apparent on record.

18. This Court delivered its judgment on 31st October 2018, dismissing the Plaintiffs' claim and allowing the Defendant's counterclaim. The Court gave orders in the judgment that the costs of the suit was payable by the Defendants. A Decree was issued on the 14th December 2018, showing that costs of the suit was payable by the Plaintiffs. The Defendant thereafter filed a Party to Party Bill of Costs on 16th July, 2019, which was taxed at Kshs. 131,995/= and a Certificate of Taxation dated 23rd September, 2020 was issued. Execution process began which resulted in a Notice to Show Cause being issued against the Plaintiffs, and which culminated to the orders of 14th February, 2023 where the judgment debtor was directed to pay the decretal sum.

19. The 1st Plaintiff would later file the application of 8th March, 2023 seeking to stay the execution, review and setting aside of the Notice to Show Cause, and all consequential orders. He also sought leave to change his counsel. In a seemingly a rebuttal to the contents of the application, the Defendant filed

another application of 21st March 2023, seeking for orders to amend clerical orders in the judgment of this Court of 31st October, 2018.

20. Having analyzed the applications and the annexures thereto, the responses and the annexures thereto and the rival written submissions by parties, this Court takes note of prayer 4 of the Plaintiff's application of 8th March, 2023, and in light of it this, Court must first determine the Defendant's application dated 21st March, 2023.

21. The main issue for determination in the application dated 21st March, 2023 is Whether this Court can amend the judgment of this Court of 31st October, 2018?

22. The law on amending and/or rectifying typographical errors in judgments, decrees and orders is provided for under Sections 99 and 100 of the *Civil Procedure Act*. Section 99 of the Act provides:

> Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties."

23. Section 100 provides:

> The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding."

24. The Court in the case of Leonard Mambo Kuria v Ann Wanjiru Mambo [2017] eKLR, when discussing the issue of amendments of judgments considered their reasoning in Republic v Attorney General & 15 others, Ex-Parte Kenya Seed Company Limited & 5 others [2010] eKLR, where the Court held:

25. It is a codification of the common law doctrine dubbed 'the Slip Rule', the history and application of which has a wealth of authorities both locally and from common law jurisdictions. It is a rule that applies as part of the inherent jurisdiction of the court, which would otherwise become functus officio upon issuing a judgment or order, to grant the power to reopen the case but only for the limited purposes stated in the section.

26. Some of the applications of the rule are fairly obvious and common place and are easily discernible like clerical errors, arithmetical mistakes, calculations of interest, wrong figures or dates. Each case will, of course, depend on its own facts, but the rule will also apply where the correction of the slip is to give effect to the actual intention of the Judge and/or ensure that the judgment/order does not have a consequence which the Judge intended to avoid adjudicating on.

27. The Australian Civil Procedure has provisions in pari materia with section 99. As was stated in the case of Newmont Yandal Operations Pty Ltd v The J. Aron Corp & The Goldman Sachs Group Inc [2007] 70 NSWLR 411, the inherent jurisdiction extends to correcting a duly entered judgment where the orders do not truly represent what the court intended.

28. Nearer home the predecessor of this Court in Lakhamshi Brothers Ltd v R. Raja & Sons [1966] EA 313 endorsed that application of the rule, that is, to give effect to the intention of the court when it

gave its judgment or to give effect to what clearly would have been the intention of the court had the matter not inadvertently been omitted. Spry JA in Raniga Case (supra) also stated as follows: -

> A court will, of course, only apply the slip rule where it is fully satisfied that it is giving effect to the intention of the court at the time when judgment was given or, in the case of a matter which was overlooked, where it is satisfied, beyond doubt, as to the order which it would have made had the matter been brought to its attention.
>
> What is certainly not permissible in the application of section 99, is to ask the court to sit on appeal on its own decision, or to redo the case or application, or where the amendment requires the exercise of an independent discretion, or if it involves a real difference of opinion, or requires argument and deliberation or generally where the intended corrections go to the substance of the judgment or order".

29. The Defendant's grounds are that the judgement was read out in open court in the presence of parties advocates. On that day the court awarded costs to the Defendant. The Defendant's advocate proceeded to file the impugned Bill of costs and obtained a certificate of taxation which has been contested in these proceedings. The Defendant view of the judgement is that the Court intended to award him costs of the suit; that it was against public policy to award a losing party costs of the suit.

30. The Plaintiffs' on the other hand argue that the Court in its wisdom awarded them costs and departed from the rule that costs follow the event. The Plaintiffs' response is that the Defendant ought to have filed an application for review or filed an appeal. The appeal court has wider discretion to determine the merits of the case and to determine whether the discretion was exercised within the law, looking into the totality of the case.

31. As per the proceedings of 31st October 2018, it is evident the judgment as read out was typed and not handwritten as suggest by the Defendant. There is no evidence that the error if any was a typographical error within the meaning of Section 99. Therefore, to succeed in the application, the Applicant must demonstrate that the nature of the error is or an erroneous conclusion by the court which can easily be rectified without argument. This is an almost similar approach to the nature of error addressed under Order 45 of Civil Procedure Rules and Section 80 of the *Civil Procedure Act* where the court has similar but wider discretion to review its orders. Section 80 grants wider powers in that the Court is not limited to errors apparent on the record, but the Court may act where there is some justified or sufficient cause to intervene.

32. As regards the choice to file review and the option of appeal as postulated by the Plaintiff, the law is clear that an issue that touches on error in interpretation facts and law is an issue to be taken on appeal. This was well stated in the case of Francis Origo & Another Vs Jacob Kubali Mungala (Court of Appeal 149/2001 (UR) the Court of Appeal stated that: -

> "Our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end.

33. Undoubtedly, the nature of errors raised by the Defendant/ Applicant does not fall within the meaning of law and evidence enunciated above. There is a clear provision of the law that a party can approach the Court which is well laid out in Sections 99 and 100 of the *Civil Procedure Act* as stated above.

34. The Defendant/Applicant would like this Court to correct the issue on award of costs. It is not disputed that the Defendant was the successful party and it is also not in doubt that the Court in its

judgment awarded the Plaintiffs costs of the suit. It is trite that awarding costs is a matter of discretion. Whereas costs follow the event, it is possible that the court in its discretion may decline to award costs to a succeeding party and order that each party bears its own costs of litigation. In the case of Devram Manji Daltani vs. Danda [1949] 16 EACA 35 as was quoted by the Court in the case of Limuru Country Club & 6 others v Rose Wangui Mambo 15 others [2019] eKLR, the Court observed that a successful litigant can only be deprived of his costs where his conduct has led to litigation, which might have been averted.

35. Further, in the case of Alexander-Tryphon Dembeniotis vs. Central Africa Co. Ltd [1967] EA 310 (See the case of Republic v National Land Commission; Exparte Peter Mwaura Gikonyo & 2 others; Eunice Kagendo Njue(Interested Party) [2019] eKLR) the Court stated as follows:

> The Defendant is entitled to put his back against the wall and to fight from every available point of vantage. It would be extremely hard on Defendants if as a rule they were told, at the end of the trial: "You have beaten the plaintiff, but because you have raised some points on which you have not succeeded you shall not have all the costs of the action" ... Full costs should be awarded to a plaintiff who has succeeded in the main purpose of his suit and obtained the precise form of relief he wanted...It is not on every issue in a suit that success will bring a right to the costs of that issue. Clearly costs should follow the event where the plaintiff has succeeded in the main purpose of his suit, and he should not be deprived of costs merely because he has raised another issue which in itself cannot affect the result of the suit even if he loses on that issue. Here he has not only substantially succeeded in the main purpose of the suit, but he has obtained the full relief claimed that was the cancellation of the agreement. He obtained the precise form of relief he wanted, and it is immaterial that the other issue is left undecided, because whichever way that issue falls to be decided it cannot affect the result".

36. In exercising the options available, it is unlikely for the court to award costs to a Judgement debtor. The issue in this case is whether the decision of the court was an error in interpretation of the law on costs which is better taken on appeal or whether the court made an accidental slip in its final write up. In resolving this issue, the rationale of costs is to repatriate a winning party who was dragged to court and compelled to participate in the court proceedings.

37. It can be interpreted to be an error especially where the entire judgement is clear on whose case succeeds. In this case, the Counterclaim was an independent suit which succeeded and therefore on that merit the Defendant/Plaintiff in the counterclaim could not compensate the Plaintiffs whose claim had been dismissed. It seems that the part on the orders of costs was erroneous and ought to be rectified in the interest of justice.

38. Here, the only commendable order is to allow the Defendant's application for rectification by finding that there is an error demanding the court to intervene. The Court must be clear that the trial judge intended to award the decree holder costs. As stated above, costs are discretionary and apart from costs following the event, it is not lost to court that such a party also fail to benefit from his right to costs.

39. This Court's predecessor would have been better placed to determine that intention. It is unfortunate that this application was not made earlier in 2019 or sooner when the judge was still at the station. There is no doubt that the Defendant/Applicant took so long before filing the instant application. However, it is discernible from the proceedings that the process of execution had already begun and parties conducted themselves as though the issue of costs was regular. The delay in moving Court can be attributed to both parties and this Court in exercise of its discretion pardons the delay.

40. Relevantly for this Court, the parties have referred Court to open Court proceedings where the judgment was read out. There is no hand written record. It is clear that only the parties present and the Judge can tell the intended final order in costs. Without the handwritten judgement, this Court cannot confirm the Defendant's version of events. Worse is that the executed decree does not have a reference and seemed to have been executed contrary to the final orders of the court.

41. The Defendant placed the cart before the horse, and the fact that the decree was executed, does not regularise any anomaly. Extracting without seeking clarification from the Court has caused more confusion in these proceedings. The effect is that irregular execution proceedings have been pursued, as the purpose of execution is to enforce a judgement. It must therefore be clear to the Court on the final orders. Having stated so, this Court finds and holds that the Defendant's application dated 21st March, 2023, is allowed with no orders as to costs.

42. With regards to the Plaintiff's application dated 8th March 2023, the issued for determination by this Court are

    i. Whether leave should be granted to the Firm of M/S Tim Kariuki & Co Advocates to come on record for the Plaintiff

    ii. Whether this Court should review and/ or set aside the Notice to show Cause dated 5th October, 2022 and the Certificate of Costs dated 23rd September, 2020

Whether leave should be granted to the Firm of M/S Tim Kariuki & Co Advocates to come on record for the Plaintiff

43. The right to legal representation is a Constitutional right which this Court cannot oust. However, the procedure for representation in civil proceedings is well settled under Order 9 rule 9 of the Civil Procedure rules provides as follows:

    When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected by order of the court—

    (a) upon an application with notice to all the parties; or

    (b) Upon consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."

44. What the foregoing requires is that where an advocate wishes to come on record to replace another after judgment, he/she must seek leave to come on record, then file and serve the notice of change of Advocates to the previous counsel. Parties may also file a consent before Court, which may then be adopted as an order of Court.

45. The Plaintiff was previously represented by the Law Firm of Wairimu Kiongera & Co. Advocates, and as evident from the proceedings, the said Law Firm filed an application to cease acting on the 15th January, 2020, and which was allowed by Court on 4th March, 2020. The Purpose of complying with procedure was set out in S. K. Tarwadi vs Veronica Muehlmann [2019] eKLR where the judge observed as follows:

    > ...In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him...."

46. The previous advocate having ceased acting, there is nothing that prevented the Plaintiffs from employing another advocate to act on their behalf. Order 9 does not take away the right of a party to be represented by an Advocate of his choice, but provides sanctity to Court proceedings. It seeks to notify the Court of any change to avoid situations where parties change advocates in a bid to avoid their client obligations. The prayer is not opposed and as such, this Court proceeds to grant leave to the Law Firm of Tim Kariuki & Co. Advocates to come on record for the Plaintiff.

Whether this Court should review and/ or set aside the Notice to show Cause dated 5th October, 2022 and the Certificate of Costs dated 23rd September, 2020

47. The Defendant contested that the prayer is res judicata the ruling of the Court of 1st February, 2023. Section 7 of the *Civil Procedure Act* Cap 21 makes provisions for res judicata. It provides that:

> No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court"

48. As per the proceedings of 1st February 2023, this Court has not seen anywhere that the Plaintiff sought for review or set aside the NTSC or the Certificate of Costs. The Court only noted the discrepancies in the judgment and the decree and held that she could not review or set aside the decree. It is thus correct to find that the prayer herein has not been adjudicated on and is thus not res judicata.

49. The Plaintiffs/Applicants prayer for reviewing and/ or setting aside the Notice to show cause, certificate of costs and execution proceedings stems from the confusion in the judgment and decree which execution had commenced. Order 45 of the Civil Procedure Rules as well as Section 80 of the *Civil Procedure Act* makes provisions on review.

50. Section 80 provides: - any person who considers himself aggrieved: -

a) By a Decree or order 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 a review of Judgement to Court which passed the decree or made the Order and the Court may make such order thereto.

50. Order 45 (1). Any person considering himself aggrieved: -

a) By a Decree or order 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, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the 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 review of Judgement to the Court which passed the decree or made the order without unreasonable delay".

51. This Court adopts the principles to be considered whether to allow an application for review, varying or setting aside that were enlisted in the case of Lydia Kaguna Japeth & 2 others v Mbesa Investment Limited & 2 others [2022] eKLR to wit

a) There should be a person who considers himself aggrieved by a Decree or order;

b) The Decree or Order from which an appeal is allowed but from which no appeal has been preferred;

c) A decree or order from which no appeal is allowed by this Act;

d) There is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge or could not be produced by him at the time when the decree was passed or the order made; or

e) 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.

f) The review is by the Court which passed the decree or made the order without unreasonable delay.

52. There is no doubt that the 1st Plaintiff was aggrieved by the execution process. It is curious to note that the 1st Plaintiff duty participated in the execution process which commenced in 2020 and it was not until 2023, that he realized the error. It is also curios to note that the decree as extracted in not in tandem with the judgment of the Court.

53. Both parties have accused each other of laches and acquiescence. The defence case is that the Plaintiffs have contested the execution proceedings at the tail end, and yet their advocate did not oppose the bill of costs and certificate of costs issued. The Plaintiffs on the other hand argue that the Defendant's application for rectification was brought after their application challenging the execution proceedings. The Plaintiffs' contention is backed by record, since the error only became apparent after the plaintiff pointed it out. The Plaintiffs' application was filed on 8th March 2023, while the execution had commenced in September 2020. There had been a gap of 2 years 5 months. The Plaintiffs appointed new counsel after the judgement, who brought the issue to the Courts attention. There is no reason that was placed before this Court as to why there was such a delay in noting the error, yet the Plaintiffs had through the Law Firm of CM Thuku requested for proceedings. The Plaintiffs' conduct was one that depicts acceptance of the contents of the judgment including the pronouncement on costs as contained in the decree.

54. The Defendant on the other hand is accused of bringing the application after 5 years. Again the period between obtaining judgement and filing the application dated 21st March 2023, is exactly 4 years 5 months. Respectfully, the Defendant cannot be guilty of laches since the Bill of Costs and certificate were obtained soon after judgement meaning that he was lax in executing the decree save that the decision was misinformed.

55. This Court has already established hereinabove that there was an error in the judgment of the Court which is easily identified by going through the judgment and picking out the intention of the Court. It is no doubt that the Court intended to award costs to the Defendant, having been the successful litigant. There was no reason as to why the Court would have dismissed the Plaintiffs' claim and yet again award them costs. In any event the Plaintiffs were the Defendants in the Counterclaim and which Counterclaim succeeded. It could be possible that the Court meant costs to be borne by the Defendants to the Counterclaim.

56. Presently, parties conducted the execution process as though the judgement and decree of this Court were in tandem. It is sad that the Plaintiffs have had to wait for that long before taking a turn-around. As well, it is unfortunate that the Defendant sought to draw a decree, which was contrary to the judgment and which the officer in charge allowed to proceed without due diligence. Both parties herein are victims of their uninspiring attitude to the proceedings of this Court.

57. It is necessary for this Court to point out that there is no evidence of the 2nd Plaintiff's participation of the execution process. The 1st Plaintiff had on the 31st October, 2022, informed the Honourable Deputy Registrar that the 2nd Plaintiff was deceased. There is no evidence to the contrary and this Court is persuaded that indeed the 2nd Plaintiff is deceased.

58. While the 1st Plaintiff meets some of the principles set out in Lydia Kaguna Japeth & 2 others v Mbesa Investment Limited, supra, he fails on some. The 1st Plaintiff has sought this Court for orders of review or setting aside of the NTSC or Certificate of Costs. The Certificate of Costs was a culmination of the Party to Party Bill of Costs drawn by the Defendant, the same was never challenged. Even though parties acted on an erroneous order, it is apparent for this Court that it intended to grant costs to the Defendant. The execution proceedings cannot be said to have been irregular and this Court finds no reason to set aside and/ or review the certificate of costs.

59. However, this Court takes note of the undisputed fact that the Notice to Show Cause has been allowed to proceed against the 1st Plaintiff at the exclusion of the 2nd Plaintiff, yet both parties were to bear the costs of the suit. As per the application for execution of the Decree, it is evident that the Decree was to be executed against both Plaintiffs. There is no evidence of attempted execution against the 2nd Plaintiff and if she is dead against her estate. This Court cannot allow the Defendant to execute the decree against the 1st Plaintiff alone. In the interest of justice, this Court shall set aside the Notice to Show Cause dated 5th October 2022, since no such orders can be issued against a dead person. To this end, the Plaintiff's application dated 8th March, 2023, partially succeeds to the extent that the Notice to Show Cause dated 5th October, 2022, and all consequential orders arising from it are hereby set aside. This does not however preclude the Defendant from taking out a fresh Notice to Show Cause against the 1st Plaintiff after this ruling.

60. On costs for both applications, this Court considers the nature of the disputes and appreciates that the Defendant is seemingly enjoying the fruits of the judgment though partially and taking cue of the issues raised in both applications, the best resolve is for each party to bear their own costs.

61. In future parties are encouraged to adopt best practices on matter of rectification of judgement and review by raising disputes immediately after judgement, confirming the final decision of the court in extracting decrees.

62. In a nutshell, after a thorough consideration of the two applications herein, the Court partially allows the Plaintiffs' application dated 8th March, 2023. However, the Court allows the Defendant's application dated 21st March, 2023 by amending prayer No. (d) of the Judgement dated 31st October 2018, to read; - (d) costs of the suit payable by the Plaintiffs.

63. Each of the Party to bear his/her own costs of the Applications.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 29TH DAY OF JUNE, 2023.

L. GACHERU

JUDGE

Delivered online in the presence of; -

N/A -1st Plaintiff/Applicant/Respondent

N/A - 2nd Plaintiff

N/A - Defendant/Respondent/Applicant

Joel Njonjo- Court Assistant

L. GACHERU

JUDGE

29/06/2023