



Water & Sewerage Services Trustees (MEWASS) & 2 others v M'Mbijiwe (Acting as the Legal Representative of the Estate of the Hon Kabeere M'Mbijiwe) (Environment and Land Appeal 28, 30 & 31 of 2012 (Consolidated)) [2025] KEELC 3290 (KLR) (20 March 2025) (Ruling)

Neutral citation: [2025] KEELC 3290 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL 28, 30 & 31 OF 2012 (CONSOLIDATED)
JO MBOYA, J
MARCH 20, 2025

BETWEEN

WATER & SEWERAGE SERVICES TRUSTEES (MEWASS) APPLICANT

AND

TANA WATER SERVICES BOAR 1ST APPELLANT

COUNTY GOVERNMENT OF MERU 2ND APPELLANT

AND

KINYUA M'MBIJIWE (ACTING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE HON KABEERE M'MBIJIWE) RESPONDENT

RULING

1. Vide the Notice of Motion Application the 3rd January 2025 the Respondent/Applicant [hereinafter referred to as the Applicant] has sought the following reliefs;
 - i. That this Application be certified urgent and be heard on priority basis in view of the hearing of an application dated 16.1.2025 on 4.2.2025.
 - ii. That this Honourable court be pleased to re-call the decree issued on 24.11.2023 as the same is not drawn in accordance with the Judgment dated 18.10.2023.
 - iii. That costs be borne by the 1st Respondent.
2. The instant application is premised on the various grounds which have been highlighted in the body thereof. In addition, the application is supported by the affidavit of the Applicant, namely; Kinyua M'mtoo Mbijiwe sworn on even date and to which the deponent has annexed two [2] documents namely, the extracted decree and the judgment of the court.



3. Upon being served with the subject application, the 1st Respondent [1st Appellant] filed a Replying affidavit and wherein same has opposed the application beforehand.
4. The rest of the Respondents [namely, the 2nd and 3rd Appellants] have neither filed any grounds of opposition nor replying affidavit.
5. The Application beforehand came up for hearing on the 18th February 2025 whereupon the advocates for the parties covenanted to canvass and dispose of the application by way of written submissions. In this regard, the court circumscribed the timelines for the filing and exchange of the written submissions.
6. The Applicant and the 1st Respondent [1st Appellant] duly proceeded to and filed their respective submissions. The 2nd and 3rd Respondents did not file any written submissions.
7. For coherence, the written submissions filed by and on behalf of the Applicant and the 1st Respondent are on record. Instructively, the court shall take cognizance of and apply the submissions filed.
8. Having reviewed the application dated the 3rd January 2025, and the supporting affidavit thereto; upon taking into account the response by the 1st Respondent and upon consideration of the written submissions filed on behalf of the Applicant and the 1st Respondent, I come to the conclusion that the determination of the instant application turns on two salient issues, namely;
 - i. Whether the court is seized of the jurisdiction to recall and rescind a decree of the court or otherwise;
 - ii. Whether the decree extracted on the 24th November 2023 accords with the judgment of the court or otherwise.
9. Regarding the first issue, namely; whether this court is seized of the requisite jurisdiction to recall and rescind a decree issued pursuant to a judgment of the court, it is important to underscore that the decree of the court must ordinarily conform to and accord with the judgment of the court. For good measure, the decree must be drawn from the judgment of the court.
10. To the extent that the decree must conform with the judgment of the court, it then means that where a decree does not conform to and/or accord with the judgment, then such a decree must lend it self to recall, review and/or rescission by the court. Notably, a decree of the court is correctable by dint of the provisions of Section 3A and 99 of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya.
11. Moreover, it is worthy to recall that the extraction of a decree is regulated by the provisions of Order 21 Rule 7 and 8 of the Civil Procedure Rules 2010. Pertinently, the law requires that before a decree and by extension an order of the court is submitted to the deputy registrar for sealing and execution, the draft thereof must be served on the adverse party. The purpose of such service is to enable the adverse party to approve or otherwise the terms of the decree.
12. On the other hand, it is imperative to posit that even where the decree is not served on the adverse party, the decree or order must nevertheless, be executed and sealed by the deputy registrar only and only if same accords with or corresponds to the terms of the judgment.
13. The bottom line is to the effect that where a decree of the court does not correspond with and/or accord to the judgment, then the court has the requisite jurisdiction to recall the decree for amendment and/or correction, whichever is applicable.
14. To this end, I endorse and reiterate the holding of the court in the case of Masinde Muliro University of Science and Technology v Alfatech Contractors Limited; Kenya Commercial Bank Limited &



National Bank of Kenya Limited (Garnishee) (Civil Suit 237 of 2014) [2021] KEHC 9668 (KLR) (22 January 2021) (Ruling), where the court stated as hereunder;

12. The bottom-line is that the final decree or order is a document that is approved and signed by the registrar. The registrar has the final say in the process. Whether the initial draft had emanated from one of the party is neither here nor there, for ultimately it has to be approved by the registrar, and it issues at the hand of the registrar.
13. The other thing to note is that in the event of any disagreement between the parties on the content of the decree or order, as extracted, the matter is placed before the judge, with notice to the parties, for adjudication by the court, either without or after hearing the parties. Of course, where the provisions in Rule 8 are followed to the letter, there would be no need for a formal application, but I understand the application dated 6th November 2018 to have been made in that spirit.
15. I reiterate what I have stated above, at paragraph 10, that the respondent did not reckon a payment, that the claimant had made, in the process of extracting the decree. Consequently, the decree extracted had errors, which should be addressed before execution can be embarked upon. Accordingly, I do hereby order cancellation of the decree extracted from the orders made on 26th September 2018.
16. Let the parties start the process of extracting the decree afresh, by following all the steps contemplated in Order 21 Rule 8(2)(3)(4) of the Civil Procedure Rules. The execution proceedings founded on the decree that I have just cancelled are accordingly hereby halted.
17. The power of the court to recall, review and/or rescind a decree that does not correspond with the judgment was also elaborated by the Court of Appeal in the case of Highway Furniture Mart Limited v Permanent Secretary Office of The President & another [2006] eKLR, where the court stated as hereunder;

The decree in this case was, in our view, a nullity as it included a very large claim (over Shs. 30 million) which was not awarded in the judgment of the court.

The parties were fully heard by Okwengu J on the issue of the claim of Shs.30 million comprising interest before the institution of the suit and the court was satisfied that the inclusion of the claim in the decree was erroneous. The superior court had a duty to see that the appellant only recovered what it was entitled to under the judgment and had jurisdiction to set aside the decree which was a nullity *ex dibito justitae*. Moreover, the superior court had inherent equitable jurisdiction to prevent the appellant from unjustly enriching itself at the great expense of the respondent and from public funds.

18. Furthermore, the court stated thus;

A decree which is not in conformity with the judgment is liable to be reversed and set aside for a party to the suit cannot suffer because of the errors committed by the court. The court would, however, be *functus officio* if the decree conforms with the judgment, which is not the case here.

19. Flowing from the foregoing, my answer to issue one is to the effect that this court is seized of the statutory jurisdiction as well as the inherent jurisdiction to recall a decree which is found not to be in consonance with the judgment. Nevertheless, before exercising the power of recall, review and/or



- rescission, the court must be satisfied that there is a variance between the decree and the judgment in question.
20. Next is the issue as to whether the decree which was extracted on the 24th November 2023 accords with the judgment of the court or otherwise.
 21. To start with, learned counsel for the Applicant has contended that the decree beforehand does not correspond with the judgment of the court rendered on the 18th October 2023. To this end, learned counsel for the Applicant has contended that the decree has not included the findings of the judge contained at paragraphs 99 and 151 and hence the decree lends itself to recall.
 22. Furthermore, learned counsel for the Applicant has submitted that it was imperative that the findings of the judge be included in the decree insofar as it is the finding[s] on the question of jurisdiction that forms the ratio decidendi of the judgment.
 23. What I hear learned counsel for the Applicant to be stating is to the effect that the decree which was extracted and sealed by the deputy registrar of the court on the 24th November 2023 does not accord with the judgment.
 24. The 1st Respondent has however, taken a contrary position. According to the 1st Respondent, the decree which was extracted and sealed by the deputy registrar accords with the judgment rendered on the 18th October 2023. In any event, it has been posited that the duly extracted decree is word for word the orders that were made by the judge.
 25. Having taken into account the rival submissions, it is now apposite to make a determination as to whether the impugned decree accords with the judgment of the court or otherwise.
 26. Nevertheless, before making the decision in terms of the preceding paragraphs, it is instructive to underscore that a decree of the court embodies the final and dispositive orders of the court. For coherence, a decree does not embody the findings of the court. Suffice it to state that in an endeavour to reaching the final and dispositive orders, courts of law make several findings.
 27. Moreover, there is no gainsaying that the findings of the court in the course of a judgment or a ruling are then deployed in formulating the final orders. Having been deployed in formulating the final orders, the extraction of a decree does not concern itself with findings, observations and conclusions of the court. On the contrary, the extraction of the decree deals with and concern itself with the final orders that are made by the court whilst disposing of the dispute beforehand.
 28. Simply put, the contention by learned counsel for the Applicant that the decree needed to capture the findings of the judge on the question of jurisdiction is a misconception of the law.
 29. Back to the issue as to whether the extracted and sealed decree accords with and/or correspond to the judgment of the court. To this end, it is important to state that after the learned judge had made various findings in the body of the judgment, same rendered the final and dispositive orders at the foot of paragraphs 152 and 153 thereof.
 30. In my humble albeit considered view, the extraction of the decree needed to accord with the dispositive orders captured at the foot of paragraph 152 and 153 of the judgment. In any event, it suffices to state that the decree, which was extracted indeed accorded with the judgment.
 31. To borrow the words of learned counsel for the 1st Respondent, the decree under reference was word for word the final dispositive orders of the court.
 32. I agree with nothing useful to add.



Final Disposition:

33. Flowing from the analysis contained in the body of the ruling, I come to the inevitable conclusion that the application dated the 3rd January 2025, is not only misconceived but constitute[s] an abuse of the due process of the court.
34. In a nutshell, the final orders of the court are as hereunder;
- i. The Application dated 3rd January 2025 be and is hereby dismissed.
 - ii. Costs of the Application be and are hereby awarded to the 1st Respondent only.
 - iii. Costs in terms clause [ii] are hereby assessed in the sum of kes.10, 000/= only.
35. It is so ordered.

DATED SIGNED AND DELIVERED ON THE 20THDIVISION DAY OF MARCH, 2025.

OGUTTU MBOYA

JUDGE

In the presence of -

Mr. Mutuma – Court Assistant.

Mr. Kariuki for the 1st Appellant/Applicant.

Mr. Mwanzia for the respondent.

N/A for the 2nd Appellant/Respondent.

