



Laboso & 3 others (Suing on Their Own Behalf and on the Behalf of Ndakisal Farmers Group Incorporating Salangena and Ndarawetta Farmers) v New Gatundu Mixed Farmers & another; Kangethe & another (Interested Parties) (Environment & Land Case 317 of 2015) [2025] KEELC 3652 (KLR) (8 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3652 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 317 OF 2015**

LA OMOLLO, J

MAY 8, 2025

(FORMERLY HCC NO. 132 OF 2007)

BETWEEN

PAUL KIBET LABOSO 1ST PLAINTIFF

PETER KAPOLOMAN 2ND PLAINTIFF

KIKOSKE ARAP TUNGUS 3RD PLAINTIFF

JOHN CHERUIYOT MILGO 4TH PLAINTIFF

SUING ON THEIR OWN BEHALF AND ON THE BEHALF OF NDAKISAL FARMERS GROUP INCORPORATING SALANGENA AND NDARAWETTA FARMERS

AND

NEW GATUNDU MIXED FARMERS 1ST DEFENDANT

TIMOTHY KIMUTAI MOSONIK 2ND DEFENDANT

AND

GEORGE WAITHAKA KANGETHE INTERESTED PARTY

MUGO MBIJIWE & COMPANY ADVOCATES INTERESTED PARTY



RULING

Introduction.

1. This ruling is in respect of the 1st Interested Party/Applicant's application dated 4th June, 2024. The application is expressed to be brought under Sections 3 & 3A of the Civil Procedure Act, Order 9 Rules 9, 10 & 11, Order 10 Rule 11 and Order 22 Rules 6, 7, 17, 18, 19 & 22 of the Civil Procedure Rules.
2. The application seeks the following orders;
 1. Spent
 2. Spent
 3. Spent.
 4. Spent
 5. That the orders of arrest and committal to civil jail of one George Waithaka Kangethe be set aside absolutely after the hearing of this application.
 6. That the judgement entered and passed by Honourable Court on the 14th day of March, 2023 against the first Defendant New Gatundu Mixed Farmers. (sic)
 7. That this Civil Suit Number ELC 317 of 2015 against the first Defendant be struck Out on the ground that the case of which it was based had been dismissed on the 23rd day of September, 2011 and was never reinstated and no application for reinstatement has ever been served on the first Defendant.
 8. That the dismissal order issued by the Honourable Court on the 23rd day of September, 2011 in ELC Case No. 132 of 2007 be vacated by consent of the parties in the interest of justice to all the parties and because there was a comprehensive consent by the parties signed by their Advocates.
 9. That the Court do make any other orders in ELC Suit No. 132 of 2007, that it deem fit to meet the ends of justice.
 10. That costs be in the cause.
3. The application is based on the grounds on its face and the supporting affidavit of one George Waithaka Kangethe.

Factual Background.

4. The Plaintiffs/Respondents commenced the present proceedings vide the Plaint dated 5th December, 2007 where they sought the following orders;
 - a. An order of permanent injunction restraining the Defendants, agents, servants from selling, entering, interfering or dealing in any way with land parcel number Narok-Cis Mara/Ololunga/349 and Narok-Cis Mara/Olulunga/11534.
 - b. An order of specific performance compelling the 1st Defendant to transfer the said parcel of land to the Plaintiffs.



- c. General damages.
- d. Any other relief that will assist to meet the ends of justice.
5. The 2nd Defendant entered appearance on 28th January, 2009 but did not file any Statement of Defence.
6. The Court record does not contain any documents filed by the 1st Defendant.
7. On 13th December, 2011 the parties entered into a consent which was in the following terms;

“By consent the parcel known as Narok/Cis Mara/Ololunga/349 be excised whereof 930 acres will be registered in the name of Ndakisal Farmers Group which incorporates Salangena, Ndaraweta and Kimagata Farmers groups.

That the District Commissioner Narok South do provide security and supervise the exercise of the said sub division.

That the Narok South District Surveyor do carry out the said subdivision within the next sixty (60) days and that the parties be at liberty to appoint their own surveyor should they wish to have them to work with the District Surveyor.

The parties do pay their own surveyors and that the 1st Defendant do pay the District Surveyor.

That this matter be mentioned on 5th March 2012 to confirm compliance.”
8. The application under consideration first came up for directions on 12th June, 2024 before Hon. F. M Nyakundi the Environment and Land Court Deputy Registrar.
9. The Deputy Registrar issued the following orders; -
 - i. The Application was certified as urgent.
 - ii. Leave was granted to the firm of Njiru Mbogo to come on record for the 1st Defendant/ Respondent.
 - iii. George Waithaka Kangethe was joined to the suit as an Interested Party.
 - iv. Orders of stay of arrest and committal to civil jail were granted in favour of George Waithaka Kangethe pending the hearing and determination of the present application.
10. The orders were in respect of prayers 1,2, 3 and 4 of the application under consideration.
11. On 12th November, 2024 the matter was mentioned before this Court and the application dated 4th June, 2024 was scheduled for hearing on 10th December, 2024.
12. On 10th December, 2024 the Court gave directions that the application be heard by way of written submissions. On 11th February, 2025 it was mentioned to confirm filing submissions and then reserved for ruling.

The 1st Interested Party/Applicant's Contention.

13. The 1st Interested Party/Applicant contends that he is the chairman of a caretaker board of the 1st Defendant and adds that he was appointed after the former Chairman died in the year 2011.



14. He also contends that the 1st Defendant/Respondent has never been served with the order re-instating the present suit, any Court orders or documents filed in the present matter together with any notice or judgement.
15. He further contends that he was not involved in the management of the 1st Defendant/Respondent before the year 2016 and he was not aware of the present suit. He adds that he did not understand why the firm of Mutai & Company Advocates served him with Notices of Warrants of Arrest and other Court documents.
16. It is his contention that he looked for the advocate who was representing the 1st Defendant/Respondent but he could not trace him. He adds that the said Advocate did not have the authority to act for the 1st Defendant/Respondent.
17. It is also his contention that he looked for the advocate who was handling the transactions and sale of the suit land on behalf of the 1st Defendant/Respondent and instructed him to get to the root of ELC Case No. 132 of 2007 and ELC Case No. 317 of 2015. He adds that the said suits were between the same parties and over the same subject matter.
18. It is further his contention that the original suit was settled by the parties vide a consent dated 21st September, 2011 and the advocates who signed the consent were Mr. Mugo for the Defendants/Respondents and Mr. Korir for the Plaintiffs/Respondents.
19. He sets out the terms of the consent and contends that it was signed by both parties. He adds that the Court gave a mention date for 5th March, 2012.
20. He also contends that the parties did not address the issue of costs and adds that the matter was not prosecuted until 23rd September, 2011 (sic) when the suit was dismissed for want of prosecution.
21. He further contends that his Advocates perused the Court record and could not trace any proceedings where the suit was reinstated after it was dismissed.
22. It is his contention that there are no proceedings that show why the suit was given another number to wit ELC Case No. 317 of 2015 with the same parties and no new plaint. He adds that no reason has been given for 'having one civil file on top of another file'.
23. It is also his contention that as far as the 1st Defendant/Respondent is concerned, the original suit to wit ELC Case No. 132 of 2007 was dismissed and any other application and/or suit filed by the Plaintiffs/Respondents thereafter is null and void including the bill of costs.
24. It is further his contention that if any application to reinstate the suit was filed, it was not served upon the 1st Defendant/Respondent.
25. He contends that the 1st Defendant/Respondent does not contest the consent entered into on 23rd September, 2011 and that the 1st Defendant/Respondent has authorized him to seek for the reinstatement of ELC Case No. 132 of 2007.
26. He also contends that his identity is separate from the Company and the actions of the Plaintiffs/Respondents to obtain orders against him personally are illegal and unprocedural and contradicts the Provisions of the *Civil Procedure Act*.
27. He further contends that he has been advised by his advocates on record that a company and an individual are two distinct persons. He therefore seeks that the warrants of arrest issued against him and/or the obtaining of orders against any other director be stopped and the law strictly followed.



28. He ends his deposition by stating that the actions undertaken in Civil Case No. 317 of 2015 are null and void because they were based on a suit that was dismissed on 23rd September, 2011.

The 2nd Defendant/Respondent's Response.

29. The 2nd Defendant/Respondent filed a Replying Affidavit. It is sworn on 9th July, 2024.
30. He deposes that he has no objection to the advocates being granted leave to represent the 1st Interested Party/Applicant upon him being joined to the suit.
31. He also deposes that the 1st Interested Party/Applicant seeks orders to strike out the present proceedings as the issues raised in the suit had been settled with no order as to costs.
32. He further deposes that the matter was fully settled between the parties with no order as to costs.
33. It is his deposition that the Plaintiffs/Respondents have 'twisted the Court around their fingers' and have deliberately refused to give the true position of the matter.
34. It is also his deposition that the Plaintiffs/Respondents ought to have extracted a decree but they did not and they are now demanding costs when there is no decree or order directing that costs be paid.
35. He ends his deposition by stating that he filed the application dated 7th September, 2023 raising the very same issues which application is pending hearing and determination.

The Plaintiffs/Respondents Response.

36. In response to the 1st Interested Party/Applicant's application, the Plaintiffs/Respondents filed a Replying Affidavit sworn on 18th July, 2024 by one Joshua Kipkemoi Mutai Counsel for the Plaintiffs/Respondents.
37. He deposes that the firm of Ms. Njiru Mbogo should not be granted leave to come on record as the matter is already concluded. He adds that the 1st Interested Party/Applicant's application raises issues that should have been raised in a main suit and/or on appeal.
38. He also deposes that the matter is before the Taxing Officer who does not have the jurisdiction to sit as an Environment and Land Court and deal with the application.
39. He further deposes that ELC Case No. 317 of 2015 was concluded and judgement entered by the Court on 14th March, 2023 against the 1st and 2nd Defendants/Respondents who were represented by Counsel.
40. It is his deposition that the Taxing Officer taxed the bill of costs at Kshs. 17, 306,385/=.
41. It is also his deposition that the 1st Interested Party/Applicant has been the chairperson of the 1st Defendant/Respondent since the year 2016 and has been in charge of its affairs and management.
42. It is further his deposition that on 2nd October, 2023 the 1st Interested Party/Applicant committed himself before the Taxing Officer that he would pay the costs owed within seven months. He adds that to date the said amount has not been paid.
43. He deposes that the 1st Interested Party/Applicant's claim that he was not aware of the suit against the 1st Defendant/Respondent is untrue and negligent of him as the Chairperson of the 1st Defendant/Respondent. He adds that the 1st Defendant/Respondent has always been represented by counsel.



44. He also deposes that the 1st Defendant/Respondent was initially represented by the firm of M/s Wambui Ngugi & Company Advocates followed by Kanja & Njoroge Advocates. He goes on to state that the 1st Interested Party/Applicant as the Chairperson of the 1st Defendant/Respondent ought to have been aware of the suit against it.
45. He further deposes that the failure by the 1st Defendant/Respondent to comply with Court orders displays arrogance and disrespect of Court orders.
46. It is his deposition that the 1st Interested Party/Applicant's application is an abuse of the Court process and a waste of Court's time and resources. He adds that the 1st Interested Party/Applicant has a history of disobeying Court orders such as payment of costs which lead to the issuance of the warrants of arrest.
47. It is also his deposition that the 1st Interested Party/Applicant through his application is attempting to frustrate the Plaintiffs/Respondents and delay justice by prolonging the suit which was already concluded and judgement entered in their favour.
48. He ends his deposition by stating that it is in the interest of justice that the Court dismisses the 1st Interested Party/Applicant's application and allow the Plaintiffs/Respondents to proceed with execution.

Issues for determination.

49. The 1st Interested Party/Applicant and the 1st Defendant/Respondent filed joint submissions on 10th February, 2025. The Plaintiffs/Respondents also filed their submissions on the same date.
50. The 1st Interested Party/Applicant and the 1st Defendant/Respondent set out the orders sought in the application dated 4th June, 2024 and the grounds on the face of the application.
51. They reiterate the averments of the 1st Interested Party/Applicant in his affidavit in support of the application and submit that ELC Case No. 132 of 2007 was concluded vide a consent which did not address the issue of costs.
52. They also submit that since the parties did not agree on costs, it was wrong for the Plaintiffs/Respondents to seek costs as they did not form part of the consent.
53. They conclude their submissions by urging the Court to set aside all orders granted in this matter apart from the consent.
54. The Plaintiffs/Respondents set out the background of the matter and submit that the Plaintiffs/Respondents purchased land parcel No. Narok-CIS Mara/Olulunga/349 from the Defendants/Respondents herein.
55. They also submit that the Defendants/Respondents refused to transfer the suit parcel to them which necessitated them to file the present proceedings.
56. They further submit that the suit was initially instituted before the High Court as HCC No. 132 of 2007. Upon the establishment of the Environment and Land Court, the matter was transferred and given the current case number to wit ELC Case No. 317 of 2015.
57. It is the Plaintiffs/Respondents submissions that parties entered into a consent which was adopted vide a court order issued on 13th December, 2011. They further submit that the terms of the consent were that the suit parcel which measured 930 acres was to be transferred to the Plaintiffs/Respondents upon survey.



58. It is also the Plaintiffs/Respondents submissions that upon survey, it was discovered that the suit parcel was less by 40.02 acres. They submit that they moved the Court appropriately but the Defendants/Respondents failed to comply.
59. They also submit that upon failure to comply, the Court directed the Deputy Registrar to sign the transfer forms and for the Defendants/Respondents to compensate them for the 40.02 acres.
60. They further submit that they were awarded costs of Kshs. 17, 306,385 and they began the execution process. The 1st Interested Party/Applicant being the Chairman of the 1st Defendant/Respondent was brought to Court and he committed to pay the said sum within seven months which amount has not been paid to date.
61. The Plaintiffs/Respondents submit on the following issues;
 - a. Whether leave should be granted to Njiiru Mbogo to come on record for the 1st Defendant/Respondent.
 - b. Whether George Waithaka Kangethe should be joined as an Interested Party.
 - c. Whether warrants of arrest against George Waithaka Kangethe should be set aside.
 - d. Whether ELC suit of 31 of 2015 be struck out. (sic)
 - e. Whether orders should be granted in relation to the ELC Suit No's 107 of 2011 and 132 of 2007. (sic)
62. With regard to the first issue, the Plaintiffs/Respondents reiterate that the 1st Defendant/Respondent has always been represented by counsel. They also reiterate that the 1st Interested Party/Applicant has been the chairperson of the 1st Defendant/Respondent since the year 2016 and has always been aware of the present proceedings.
63. On the second issue, the Plaintiffs/Respondents rely on the judicial decision of Skov Estate Limited & 5 Others v Agricultural Development Corporation & another [2015]eKLR and submit that the 1st Interested Party/Applicant should not be joined to the suit as he is the Chairman of the 1st Defendant/Respondent which is already a party to the proceedings.
64. The Plaintiffs/Respondents also submit that the present proceedings have already been concluded and therefore the 1st Interested Party/Applicant's request to join the suit is a mere attempt to frustrate them and delay justice.
65. On the third issue, the Plaintiffs/Respondents rely on the judicial decision of Grand Creek LLC & another vs Nathan Chesangmoson [2015] eKLR and submit that the claim by the 1st Interested Party/Applicant that he only became aware of the proceedings on 12th March, 2024 is not true. This is because he appeared in Court on 2nd October, 2023 and committed himself to pay the costs within seven months.
66. The Plaintiffs/Respondents also submit that warrants of arrest were issued against the 1st Interested Party/Applicant in his capacity as the Chairperson of the 1st Defendant/Respondent for failing to pay costs of Kshs. 17,307,885/=.
67. On whether the present suit should be struck out, the Plaintiffs/Respondents submit that since the suit has been concluded, the only remedy available to the parties is filing of an appeal as a suit cannot be struck out after it has been concluded.



68. The Plaintiffs/Respondents urge the Court to dismiss the 1st Interested Party/Applicant's application with costs.

Analysis and determination.

69. I have considered the application, the response thereto and the rival submissions filed in this matter.

70. It is important to note that the application under consideration is a post judgement application.

71. The 1st Interested Party/Applicant seeks the following orders;

1. That the application be heard ex parte in the first instance.
2. That Messers Njiru Mbogo be given leave to act for the first Defendant in both ELC Case No. 107 of 2011 and 317 of 2015.
3. That George Waithaka Kangethe be joined as an Interested Party in the suit.
4. That the orders of arrest and committal to civil jail against one George Waithaka Kangethe be stayed pending the hearing of this application inter partes.
5. That the orders of arrest and committal to civil jail of one George Waithaka Kangethe be set aside absolutely after the hearing of this application.
6. That the judgement entered and passed by Honourable Court on the 14th day of March 2023 against the First Defendant New Gatundu Mixed Farmers. (sic)
7. That this Civil Suit Number ELC 317 of 2015 against the first Defendant be struck out on the ground that the case of which it was based had been dismissed on the 23rd day of September, 2011 and was never reinstated and no application for reinstatement has ever been served on the first Defendant.
8. That the dismissal order issued by the Honourable Court on the 23rd day of September 2011 in ELC Case No. 132 of 2007 be vacated by consent of the parties in the interest of justice to all the parties and because there was a comprehensive consent by the parties signed by their Advocates.
9. That the Court do make any other orders in ELC Suit No. 132 of 2007, that it deem fit to meet the ends of justice.
10. That costs be in the cause.

72. As afore stated, the application was placed before the Deputy Registrar of this court on 12th June, 2024 and he granted prayers (1) to (4) of the application. What is left for determination are prayers (5) to (10).

73. My view, therefore, is that the following issues arise for determination;

- a. Whether the question of costs of this suit and by whom the said costs were payable was determined by this court.
- b. Whether orders of arrest and committal to civil jail of George Waithaka Kangethe should be set aside.
- c. Whether the suit against the 1st Defendant should be struck out.
- d. Whether the order of dismissal issued by this Court on 23rd September, 2011 should be vacated.



- e. Who should bear costs of the application.

A. Whether the question of costs of this suit and by whom the said costs were payable was determined by this court.

74. This is a preliminary question that is important for determination because the present application stems from execution proceedings in respect of the costs of this suit.
75. The 2nd Defendant/Respondent in his response to the 1st Interested Party/Applicant's application deposes that the suit was settled with no order as to costs.
76. The Court record shows that the consent entered into by the parties did not address the issue of costs.
77. The Court record also shows that the Plaintiffs/Respondents filed an application dated 22nd October, 2020 where they sought the following orders;
- a. That service of this application be dispensed with in the first instance.
 - b. That as per the orders issued by consent on 13th December, 2011 the Respondent be compelled to transfer the land parcel known as LR No. Narok/CIS Mara/Ololulunga/349 to the Applicants herein.
 - c. That the Respondents herein be compelled to provide an extra 40.02 acres to the Applicants and/or an amount equivalent to the current market value for 40.02 acres of land in the area where LR No. Narok/CIS Mara/Ololulunga/349 is situated.
 - d. That costs for the survey work conducted be refunded by the Respondents to the Applicants.
 - e. That Costs of this application and the suit be provided for.
78. This Court delivered a ruling on 28th September, 2021 and the application dated 22nd October, 2020 was allowed. The wordings of paragraph 26 of the ruling are as follows;
- “The Application dated 20th October 2020 (sic) has merit and is hereby allowed with costs.”
79. Therefore, the question of costs of the suit was determined on 28th September, 2021 when the application dated 22nd October, 2020 was allowed.
80. Having resolved that important preliminary question, I shall proceed to determine the other questions

B. Whether orders of arrest and committal to civil jail of George Waithaka Kangethe should be set aside.

81. The 1st Interested Party/Applicant contends that he was appointed as a Chairperson of the 1st Defendant/Respondent in the year 2016.
82. He also contends that by the time he was being served with the warrants of arrest and other documents, he was not aware of the suit.
83. He further contends that upon service of the said documents he looked for Counsel who was dealing with the transactions between the Plaintiffs/Respondents and the 1st Defendant/Respondent who informed him that the parties had entered into a consent on 23rd November, 2011 which concluded the matter.



84. It is his contention that he is a separate entity from the 1st Defendant and therefore the warrants of arrest issued against him should be set aside.
85. In response, the Plaintiffs/Respondents contend that the 1st Interested Party/Applicant has always been aware of the present proceedings.
86. The Plaintiffs/Respondents also contend that the 1st Interested Party/Applicant, on 2nd October, 2023, committed to pay the assessed costs within seven months.
87. The Plaintiffs/Respondents further contend that the 1st Interested party/Applicant failed to comply with the orders of the Court which led to the issuance of warrants of arrest.
88. Section 38 of the [Civil Procedure Act](#) provides as follows;

“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.”

89. Order 22 Rule 31(1) of the Civil Procedure Rules provides as follows;

- “(1) Notwithstanding anything in these Rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in prison of a judgment-debtor who is liable to be arrested in pursuance of the application, the Court may, instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to prison.
- (2) Where appearance is not made in obedience to the notice, the Court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor”

90. In the judicial decision of *Grand Creek LLC & another v Nathan Chesangmoson* [2015] eKLR the Court held as follows;

“In all cases where Order 22 Rule 18(1) of the Civil Procedure Rules applies, a Notice must be served upon the person against whom execution is applied requiring him to show cause, on a date to be fixed, why the decree should not be executed against him. It should be noted, however, that there must have been an application for execution of a decree for payment of money by arrest and detention in prison of a judgment-debtor. And Order 22 rule 31 will come into play where the Court, instead of issuing a warrant of arrest, decides to issue a notice calling upon the judgment-debtor to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to prison. But where the judgment-debtor does not appear as directed in the notice, the Court will issue a warrant for his arrest. This rule follows after section 38 and 40 of the *Civil Procedure Act*. The warrant of arrest is to bring the judgment-debtor to Court and it is not an automatic committal to prison because the Court will still be required to satisfy itself of all the requirements of Order 22 rule 33 and rule 34 of the Civil Procedure Rules. The proceedings under Order 22 rule 34 act as the safeguard against denial of liberty in execution of a decree without due process.” (Emphasis mine)

91. In the judicial decision of *Innocent G. Ondieki v Julius Nakaya Kabole* [2019] eKLR the Court held as follows;

- “9. As stated above, the only viable ground of setting aside an order for committal to civil jail, is when the Respondent challenges the mode or manner in which the said orders were attained. The respondent herein states that he was not aware of the notice to show cause proceedings against him as he was not served with the notice...
15. It is clear that the service herein has not been successfully challenged. The Deputy Registrar considered the affidavit of service, and found and held that the service was proper. It is my holding, therefore, that the service of the notice to show cause was proper and that the respondent has not offered any



sufficient reason to warrant the setting aside of the orders made on the 3rd April 2019.” (Emphasis mine)

92. In the present matter, the 1st Interested party/Applicant admits that he is the Chairperson of the 1st Defendant/Respondent. He also admits that he was served with Notices of Warrants of arrest.
93. A perusal of the Court record shows that the 1st Interested Party/Applicant was arrested and appeared before the Deputy Registrar on 12th October, 2023.
94. On the said date parties entered into a consent where the 1st Interested Party/Applicant agreed to pay the taxed costs within a period of seven months. He also undertook to pay the first installment of Kshs. 3,000,000/= before the lapse of three months. The parties further agreed that the warrants would remain in force in case of default.
95. In the above cited judicial decisions, the Courts have held that the only ground for setting aside committal to civil jail is by challenging the mode which the said orders were attained.
96. As afore stated, the 1st Interested Party/Applicant was arrested and he entered into a consent to pay the costs. I have noted that the 1st Interested Party/Applicant filed the application under consideration seven months after he had agreed to pay the said costs.
97. It is my view that the 1st Interested Party/Applicant has by his conduct acquiesced to the execution process and the present application is an afterthought.
98. The 1st Interested Party/Applicant has not, therefore, laid a basis for the setting aside of the orders of arrest and committal to civil jail.

C. Whether the suit against the 1st Defendant/Respondent should be struck out.

99. The 1st Interested Party/Applicant seeks that ELC Case No. 317 of 2015 be struck out as it is based on a suit that was dismissed.
100. In response, the Plaintiffs/Respondents contend that the matter has already been concluded and therefore it cannot be struck out.
101. In the judicial decision of *Ngugi v Meron Limited & another* (Environment & Land Case E156 of 2023) [2024] KEELC 3315 (KLR) (23 April 2024) (Ruling) the Court held as follows;

“26. From the outset, I must state that the power of court to strike out the originating Summons is in its very nature draconian comparable only to the drawing of “the sword of Damocles” as it decimates the entire cause of action by the Plaintiff. The act of striking out a pleading has been described in most apt phraseology such as “it drives away the Plaintiff from the seat of judgment summarily or without being heard.” Therefore, courts of law have sounded caution that the power should be used sparingly and cautiously: In cases which are plain and obvious; which the judge can say at once that the claim is a pure demurrer and cannot be revived even by any amount of amendment. There are ample judicial decisions and literally works on this subject which I do not wish to multiply, except I can cite some few, for instance, the famous *D.T.Dobie case*, *Dysun vs AG* [1981] K.B. 410 at 419, *Hubduck & Sons Ltd vs Wilkinson*, *Hogwood & Clerk* [1899] 1. K.B 86 at 91, *aid Hamad Shamisi case*, *Bulten Leake and Jacobs*; *Precedents of pleadings* 12th edition, *Chutty on contracts*.”



102. I have noted that the 1st Interested Party/Applicant refers to HC Case No. 132 of 2007 and ELC Case No. 317 of 2015 as two separate suits.
103. The Court record shows that a notice dated 10th February, 2016 that was issued to C.K Korir & Co. Advocates, Mbijwiwe & Co. Advocates and the 1st Defendant/Respondent informing them that HCC case No. 132 of 2007 had been transferred to the Environment and Land Court and assigned a new number to wit ELC Case No. 317 of 2015.
104. It is evident that the present suite i.e. ELC Case No. 317 of 2015 was formerly HC Case No. 132 of 2007. It is one and the same suit.
105. It is not disputed that the parties in the present suit entered into a consent that was adopted by the Court vide the Court order dated 13th December, 2011.
106. It is also not disputed that the said consent compromised the suit. The present application is in the nature of a post judgment application. The execution process is in motion and what remains is compliance by the judgment debtor. The proposition to strike out this suit is ill informed.

D. Whether the order of dismissal issued by this Court on 23rd September, 2011 should be vacated.

107. The 1st Interested Party/Applicant contends that ELC Case No. 317 of 2015 was dismissed on 23rd September, 2011 and he therefore seeks that the said orders of dismissal be vacated.
108. The Plaintiffs/Respondents did not address the said issue in their submissions.
109. A perusal of the Court record shows that in the year 2011 this suit came up before court on four occasions i.e 16th of February 2011, 6th of June 2011, 25th of July, 2011 and on 21st November 2011. On 21st of November, 2011 a consent between the parties was recorded.
110. It is, therefore, evident that the matter was not before Court on 23rd September, 2011 and the order of dismissal of the suit that the 1st Interested Party/Applicant alludes to does not exist for the said date. However, the Court record shows that on 23rd September, 2014 the suit was dismissed pursuant to the Provisions of Order 17 Rule 2 of the Civil Procedure Rules. Subsequently, the Plaintiffs filed an application dated 9th July, 2020. The application sought orders to reinstate the suit. The orders reinstating the suit were granted on 5th October, 2020.
111. Therefore, the orders dismissing the suit were already vacated on 5th October, 2020. It shall not be necessary to grant similar orders.

D. Who should bear costs of the application.

112. The general rule is that costs shall follow the event in accordance with the Provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise.

Disposition.

113. Taking the foregoing into consideration, I find that the 1st Interested Party/Applicant's application dated June 4, 2024 lacks merit and it is hereby dismissed with costs.
114. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 8TH DAY OF MAY, 2025.



L. A. OMOLLO

JUDGE.

In the presence of: -

Miss Wanjiku for Njeru Mbogo for applicant/ Interested Party.

Mr. Mitei for the Plaintiffs/Respondent.

Court Assistant; Mr. Joseph Makori.

