



**Khamisi (Suing as the Legal Representative of the Estate of Juma Omari Mwendo) v Juan & 5 others; Prime Bank Limited & 2 others (Intended Interested Party) (Environment and Land Case E006 of 2023) [2025] KEELC 5849 (KLR) (2 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 5849 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT AND LAND CASE E006 OF 2023**

**LL NAIKUNI, J  
JUNE 2, 2025**

**BETWEEN**

**MASUDI TSUMO KHAMISI ..... APPLICANT  
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JUMA OMARI  
MWENDO**

**AND**

**ZAHIR HABIB JUAN ..... 1<sup>ST</sup> RESPONDENT  
EUNICE WANJIRU KAIGAI ..... 2<sup>ND</sup> RESPONDENT  
LAND SETTLEMENT & SETTLEMENT OFFICE ..... 3<sup>RD</sup> RESPONDENT  
KWALE LAND REGISTRAR ..... 4<sup>TH</sup> RESPONDENT  
HON.ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT  
ABSA BANK LIMITED ..... 6<sup>TH</sup> RESPONDENT**

**AND**

**PRIME BANK LIMITED ..... INTENDED INTERESTED PARTY  
NUKUMI LIMITED ..... INTENDED INTERESTED PARTY  
DIAMOND TRUST BANK ..... INTENDED INTERESTED PARTY**

**RULING**

**I. Introduction**

1. This Honourable Court was called upon to determine the Notice of Motion application dated 22<sup>nd</sup> October, 2024 by Masudi Tsumo Khamisi (suing as the legal representative of the Estate of Juma Omari



Mwendo, the Plaintiff/Applicant herein. It was brought under the provisions of Sections 1A,1B,3A and Section 63 ( e ) of the Civil Procedure Act (Cap.21), Order 1rule 10(2), Order 51 Rule 1 of the Civil Procedure Rules, 2010, Section 3 of the Judicature Act, Section 107(1) of the Land Registration Act, Article 40(6) and Article 159(2) of the Constitution of Kenya 2010 and all other enabling provisions of the law.

2. Upon service of the Application to the Respondents, .....

## II. The Plaintiff/Applicant's case

3. The Plaintiff/Applicant sought for the following orders: -

- a. Spent.
- b. That this Honourable Court do grant leave for joinder of the Intended 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties as parties to this application for the purpose of the execution of the decree of the court issued on the 23<sup>rd</sup> September, 2024.
- c. That a declaration do issue that the acts of the 2<sup>nd</sup> Respondent of discharging a charge as against the parcel of land, KWALE/MSAMBWENI 'A'/2185 herein 'the suit property' with the Intended 1<sup>st</sup> Interested Party, the sale and transfer of the suit property to the Intended 2<sup>nd</sup> Interested Party and the Intended 2<sup>nd</sup> Interested Party Charging the suit property with the Intended 3<sup>rd</sup> Interested Party was unlawful, null and void pursuant to the doctrine of Lis pendens.
- d. That this Honourable court be pleased to amend the decree issued on the 23<sup>rd</sup> September, 2024 by revoking the charge and discharge registered in favour of the Intended 1<sup>st</sup> Interested Party.
- e. That the sale of the suit property by the 2<sup>nd</sup> Respondent to the Intended 2<sup>nd</sup> Interested party is null and void.
- f. That the charge registered by Intended 2<sup>nd</sup> Interested Party using the suit property as security in favour of the Intended 3<sup>rd</sup> interested party is null and void ab initio.
- g. That the Kwale Land Registrar do revoke the charge and discharge by the Intended 1<sup>st</sup> Interested Party, the transfer in favour of the Intended 2<sup>nd</sup> Interested Party and the charge in favour of the Intended 3<sup>rd</sup> Interested Party respectively in respect to the Parcel of land Kwale/ Msambweni 'A'/2185.
- h. That the orders issued in this application be deemed as further decree of the court which runs concurrently with the decree issued on 23<sup>rd</sup> September, 2024.
- i. That the costs of this application be provided for.

4. The application by the Applicants was premised on the grounds, testimonial facts and the averment made the 20 Paragraphed annexed affidavit of MASUDI TSUMO KHAMISI, a resident of Msambweni, Applicant herein. The Affiant averred that:-

- a. He instituted a suit against the Respondents on the 27<sup>th</sup> January, 2023 where he sued the Respondents for procuring the parcel of land Kwale/Msambweni 'A'/2185 (the suit property) which belonged to his grandfather as at the point of demarcation and adjudication. He also relied on the documents issued by the Kwale Land Registrar to institute the main suit.



- b. The main suit proceeded to its logical conclusion, the Court delivered its judgment on the 17<sup>th</sup> September, 2024.
- c. The Applicant through his Counsel extracted the decree on the 23<sup>rd</sup> September, 2024. Annexed in the affidavit and marked as “MTK – 1” was a copy of the decree issued on 23<sup>rd</sup> September, 2024.
- d. The Applicant made the requisite application to have the Kwale Land registrar comply with the edicts of the decree. Annexed in the affidavit and marked as “MTK – 2” was a copy of the application for registration and the payment receipts marked as “MTK - 2(a), (b), (c) and (d)”.
- e. There were unexplained delays in execution of the decree, the Applicant inquired from the Kwale land registrar on the reasons for the delay, that was when he was informed that there was a charge registered in favour of the Intended 3<sup>rd</sup> Interested party.
- f. The 4<sup>th</sup> Respondent advised his counsel on record that the decree of the court could not be implemented as is unless the Intended Interested parties were enjoined as parties for the purpose of effecting the decree of the court since the green card reflects that there were transactions which took place as the case was ongoing.
- g. His counsel on record was also supplied with certified copies of green card certified on 9<sup>th</sup> October, 2014 there green cards indicated that the various dealings that took place as against the suit property as explained hereunder. Annexed in the affidavit and marked as “MTK – 3” were copies of the green cards.
- h. The Intended Interested Parties of the case, the Judgement and Decree and the Applicant’s claim. Annexed in the affidavit and marked as “MTK - 4(a)” and “MTK - 4(b)” were the letters to the Intended Interested parties).
- i. Entry number 10 of part B-(the proprietorship section) indicates that on 24<sup>th</sup> May, 2023, the 2<sup>nd</sup> Respondent sold the suit property to the 3<sup>rd</sup> Intended Interested Party. This sale of the property was done while the case was pending in court.
- j. Entry number 10 of the encumbrance section indicated that on 17<sup>th</sup> February, 2023, the 2<sup>nd</sup> Respondent discharged a charge with Prime Bank Plc, the Intended Interested Party, the discharge of the charge also took place while this matter was pending before this Honourable court.
- k. Entry number 11 of the encumbrances section on the green card showed that the Intended 2<sup>nd</sup> Interested Party charged the property with the Intended 3<sup>rd</sup> Interested Party, this was pending Judgment. Notably, the charge was registered on 16<sup>th</sup> September, 2024, a day before this Honourable Court rendered its Judgment.
- l. The unlawful conduct by the 2<sup>nd</sup> Respondent which was the discharge, the selling and transfer and also the charging the suit property to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Intended Interested party was in a bid to defeat the Plaintiff’s/Applicant’s right to property.
- m. The 4<sup>th</sup> and 6<sup>th</sup> Respondents must have worked in cohort in advancing the ill motive of the 2<sup>nd</sup> Respondent for they knew and ought to have known that this matter was pending in court thus would have raised alarm and prevented the malicious acts of the 2<sup>nd</sup> Respondent.



- n. The illegal discharge, transfer and the charge as shown above was contrary to law, principally it was against “the doctrine of Lis pendens” which barred litigants from adversely dealing with the suit property by litigants while the matter was still in Court.
- o. The intended Interested Party would not suffer any prejudice if the decree of the court was perfected by cancelling and or impeaching the transactions carried on by the 2<sup>nd</sup> Respondent with the Intended Interested Parties.

### III. Submissions

5. On 18<sup>th</sup> March, 2025 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 22<sup>nd</sup> October, 2024 be disposed of by way of written submissions. Unfortunately, by the time the Honourable Court was penning down this Ruling, it had not managed to access the submissions by the parties herein. Nonetheless, it proceeded to render its Ruling on 2<sup>nd</sup> July, 2025 on its own merit accordingly.

### IV. Analysis and Determination

6. I have carefully read and considered the pleadings herein and the relevant provisions under *the Constitution* of Kenya, 2010 and statutes. In order to arrive at an informed decision, the Honorable Court has framed the following four (4) issues for determination. These are:-
  - a. Whether the prayer for Joinder of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Intended Interested Party as parties to this Application for the purposes of the execution of the court issued on the 23<sup>rd</sup> September, 2024.
  - b. Whether the Honourable Court can issue orders on discharging a charge summarily without taking evidence and whether the said charged registered by the Intended 2<sup>nd</sup> Interested Party as security in favour of the Intended 3<sup>rd</sup> Interested Party can be nullified.
  - c. Whether the Applicant has made out a case for the amendment of the decree issued on 23<sup>rd</sup> September, 2024 by revoking the charge and discharge registered in favour of the Intended 1<sup>st</sup> Interested Party.
  - d. Whether the sale of the suit property to the 2<sup>nd</sup> Respondent can be nullified and voided.
  - e. Who will bear the Costs of Notice of Motion application 22<sup>nd</sup> October, 2024.

#### **Issue No. A). Whether the prayer for Joinder of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Intended Interested Party as parties to this Application for the purposes of the execution of the court issued on the 23<sup>rd</sup> September, 2024.**

7. Under this sub – title, the Honourable Court has taken cognizance that the main substratum herein is on joinder of parties. The joinder of interested parties for the purpose of executing a Judgment in Kenya is governed by the *Civil Procedure Act*, Cap. 21 and the Civil Procedure Rules, 2010 and particularly the provision of Order 22 (Execution of Decrees and Orders) and Order 1 (Parties to Suits).
8. Under the provision of Order 22 Rule 7 of the Civil Procedure Rules, 2010 allows that the Court to enforce judgments against “any person” liable under the decree, including agents or trustees holding the Judgment Debtor’s assets. Joinder in execution is an exceptional but vital tool to overcome evasion by judgment debtors. Kenyan courts broadly interpret ‘necessary parties’ under Order 1, Rule 10(2) to ensure judgments are not rendered illusory. Strategic joinder – especially of state agencies, financial institutions, or asset-holders – is often decisive in successful enforcement.



9. The Joinder of parties is governed by Order 1 Rule 10 (2) of the Civil Procedure Rules which provides as follows:-

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant, be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

10. In law, the court may at any stage of the proceedings either on application by a party or on its own motion add a party to the suit if such party is necessary for the determination of the issues in dispute or whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit. Therefore, the issue of joinder of parties is allowed in law and can be done at any state of the proceedings. However, joinder of parties is declined where the cause of action being proposed or the relief being sought is incompatible to or totally different from the existing cause of action or the relief. The determining factor in an application for joinder is that a common question of fact or law would arise between the existing and the intended parties.
11. In the case of “Joseph Njau Kingori – Versus - Robert Maina Chege & 3 Others [2002] eKLR”, Nambuye, J (as she then was) set out the guiding principles applications seeking for joinder of parties as follows:-

“.....parties cannot be added so as to introduce quite a new cause of action or to alter the nature of the suit. Necessary parties who ought to have been joined are parties who are necessary to *the constitution* of the suit without whom no decree at all can be passed. Therefore in case of a Defendant two conditions must be met: (1) There must be a right to some relief against him in respect of the matter involved in the suit. (2) His presence should be necessary in order to enable the Court effectively and completely to adjudicate upon and settle all the questions involved in the suit being one without whom no decree can be made effectively and one whose presence is necessary for complete and final decision on the questions involved in the proceedings. A proper party is one who has a designed subsisting direct and substantive interest in the issues arising in the litigation which interest will be recognizable in the Court of law being an interest, which the Court will enforce. A person who is only indicated or commercially interested in the proceedings is not entitled to be added as a party. But a person may be added as a Defendant though no relief may be claimed against him provided his presence is proper for a complete and final decision of the question involved in the suit and such a person is called a proper party as distinguished from a necessary party... Order 1 rule 10 allows the Court to add a Defendant on its own motion or upon application by either party either orally or formally by summons in chambers under Order 1 rule 22. Here the party has not moved on its own but has been moved by the intending party on its own formally. The use of the words “either party” denotes that the formal move has to be made by a party already participating in the proceedings and it would mean that an intending party cannot come on his own and choose which position he wants.”

12. It is the Plaintiff's case that he instituted a suit against the Respondents on the 27<sup>th</sup> January, 2023 where he sued the Respondents for procuring the parcel of land Kwale/Msambweni 'A'/2185 (the suit property) which belonged to his grandfather as at the point of demarcation and adjudication. He also relied on the documents issued by the Kwale Land Registrar to institute the main suit. The main suit



proceeded to its logical conclusion, the Court delivered its judgment on the 17<sup>th</sup> September, 2024. The Applicant through his Counsel extracted the decree on the 23<sup>rd</sup> September, 2024. Annexed in the affidavit and marked as “MTK – 1” was a copy of the decree issued on 23<sup>rd</sup> September, 2024).

13. The Applicant made the requisite application to have the Land Registrar, Kwale to comply with the edicts of the decree. Annexed in the affidavit and marked as “MTK – 2” was a copy of the application for registration and the payment receipts marked as “MTK - 2(a), (b), (c) and (d)”. There were unexplained delays in execution of the decree, the Applicant inquired from the Land Registrar, Kwale on the reasons for the delay, that was when he was informed that there was a charge registered in favour of the Intended 3<sup>rd</sup> Interested Party. The 4<sup>th</sup> Respondent advised counsel for the Plaintiff on record that the decree of the court could not be implemented as is unless the Intended Interested parties were enjoined as parties for the purpose of effecting the decree of the court since the green card reflects that there were transactions which took place as the case was ongoing.
14. The question this Court needs to answer is whether the Intended Interested Parties are necessary parties to this suit and whether the final decree cannot be enforced without its presence in the matter. Before answering the aforementioned question, it is important to note that in its pleadings, the application was not contended. On the question of whether the Intended Interested Parties are a necessary parties, this Court relies on the case of “Civicon Limited – Versus - Kivuwatt Limited and 2 Others [2015] eKLR”, where the Court stated as follows:-

“Again the power given under the Rules is discretionary which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined.....from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a Defendant in a suit based on the general principles set out in Order 1 Rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the Plaintiff should succeed. We may add that all that a party needs to do, is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”

15. It is clear that a charge was registered in favour of the intended 3<sup>rd</sup> Interested Party on 16<sup>th</sup> September, 2024 a day before the judgement. The transactions which include discharge of the charge by the Intended 1<sup>st</sup> Interested Party. Transfer of the property in favour of the Intended 2<sup>nd</sup> Interested Party and the Charge in favour of the Intended 3<sup>rd</sup> Interested Party are all *lis pendens*. I find it important to have the intended interested parties in this case therefore I find them necessary in these proceedings to enable this Court to effectively and completely adjudicate this matter. In the Court’s view, sufficient interest has been proved to warrant the joinder as Interested Parties. To that effect, the application must be allowed as prayed thereof.



**Issue No. b). Whether the Honourable Court can issue orders on discharging a charge summarily without taking evidence and whether the said charged registered by the Intended 2<sup>nd</sup> Interested Party as security in favour of the Intended 3<sup>rd</sup> interested party can be nullified.**

16. Under the Laws of Kenya, a charge (similar to a mortgage) is a statutory interest in land governed by the provision of [Land Act](#), No. 6 of 2012 and the [Land Registration Act](#), No. 6 of 2012. The question of whether a Kenyan court can summarily discharge a registered charge without taking evidence and nullify a charge created by one party in favor of another involves nuanced legal principles under Kenyan land law, civil procedure, and constitutional due process. This Court shall analyse the same as below.
17. The provision of Section 90(1) of the [Land Act](#), No. 6 of 2012 provides that discharge of a charge must be executed by the chargee (lender) using Form LRA 38 and registered at the lands registry. Under the provision of Section 93(1) of the [Land Act](#), a court order for discharge is only permissible after full adjudication of rights (e.g., where a charge refuses to discharge despite full payment.)
18. It is important to note that courts cannot bypass statutory procedures or nullify charges summarily without evidence. Due process of the same requires: -Pleadings (e.g, a Complaint or application), Service to all affected parties, Affidavit evidence and/or oral testimony, Legal arguments.
19. There are through exceptions when summary orders might be possible; these are very rare but the Court may issue orders without trial in the following limited scenarios: -
  - a. Fraud, illegality or obvious defect – where the charge is void ab initio in a case of forged signatures, lack of consent, or illegal purpose apparent on the face of documents), a court might nullify it summarily.
  - b. Where there is a legal basis as seen under the provision of Section 26(1) (b) of the [Land Registration Act](#) – where titles obtained fraudulently may be impeached.
  - c. Where a charge was declared void due to registration violating statutory mandates. (See “Petroport East Africa Ltd – Versus - Credit Bank Ltd [2019] eKLR” and in the case of “Dina Management Ltd – Versus - County Government of Mombasa [2013] eKLR”).
  - d. Where all parties (including the chargor, chargee, and any interested parties) consent to discharge, a court may endorse it summarily under Order 25 Civil Procedure Rules.
  - e. Where a charge was registered by a public body (e.g., county government) in violation of the law, an order of certiorari may quash it summarily.
20. Accordingly, for land use to occur, the land must be utilized for the purpose for which the surface of the land, air above it or ground below it is adapted. To the law therefore, land use entails the application or employment of the surface of the land and/or the air above it and/ or ground below it according to the purpose for which that land is adapted. Neither the *cujus* doctrine nor Article 260 whether expressly or by implication recognizes charging land as connoting land use.
21. By definition, a charge is an interest in land securing the payment of money or money’s worth or the fulfillment of any condition (see Section 2 of the [Land Act](#)). As such, it gives rise to a relationship where one person acquires rights over the land of another as security in exchange for money or money’s worth. The rights so acquired are limited to the realization of the security so advanced (see Section 80 of the [Land Act](#)). The creation of that relationship therefore, has nothing to do with use of the land (as defined above). Indeed, that relationship is simply limited to ensuring that the chargee is assured of the repayment of the money he has advanced the chargor.



22. Further, the provision of Section 2 aforesaid recognizes a charge as a disposition in land. A disposition is distinguishable from land use. While the former creates the relationship, the latter is the utilization of the natural resources found on, above or below the land. As seen before, land use connotes the alteration of the environmental conditions prevailing on the land and has nothing to do with dispositions of land.
23. There is no doubt that the suit land was charged to the 3<sup>rd</sup> Interested Party. Entry number 10 of part B-(the proprietorship section) indicates that on 24<sup>th</sup> May, 2023, the 2<sup>nd</sup> Respondent sold the suit property to the 3<sup>rd</sup> Interested Party. This sale of the property was done while the case was pending in court. Entry number 10 of the encumbrance section indicated that on 17<sup>th</sup> February, 2023, the 2<sup>nd</sup> Respondent discharged a charge with Prime Bank Plc, the Interested Party, the discharge of the charge also took place while this matter was pending before this Honourable court. Entry number 11 of the encumbrances section on the green card showed that the 2<sup>nd</sup> Interested Party charged the property with the 3<sup>rd</sup> Interested Party, this was pending judgment. Notably, the charge was registered on 16<sup>th</sup> September, 2024, a day before this Honourable Court rendered its judgment.
24. The Judgement Debtor knew that the land was not available for charging but he still went on to charge it. In this regard I am persuaded by the decision of Justice Ogola in the case of “Moses Kariuki Wachira – Versus - Joseph Muriithi Kanyita & 3 others (2016) eKLR” where the Judge stated as follows:-
- “The court hereby finds and declares that in September 2007, when the suit property was given as security to the 4<sup>th</sup> Defendant and a charge drawn thereon on 14<sup>th</sup> November 2007 the suit property belonged to the Plaintiff and the 1<sup>st</sup> Defendant had no capacity to charge it to the 4<sup>th</sup> Defendant. The Charge dated 14<sup>th</sup> November 2007 between the 1<sup>st</sup> Defendant and the 4<sup>th</sup> Defendant is therefore illegal null and void and has got no contractual effect whatsoever. The 4<sup>th</sup> Defendant’s remedy, if any, shall lie in debt or restitution against the 1<sup>st</sup> Defendant..”
25. The title was not in the circumstance of this instant suit good for charging. The suit property in a judgment delivered on 17<sup>th</sup> September, 2024. The Applicant through his counsel extracted the decree on the 23<sup>rd</sup> September, 2024. Their rights cannot be shelved in favour of the Respondents. It is therefore necessary that the title be discharged to enable the decree holder pursue his execution and enjoy the fruits of his judgment. It is therefore necessary that an order be issued vesting the suit property by the Decree holder upon them.
26. However, I note that in the Judgment delivered on 17<sup>th</sup> September, 2024 the court under paragraph 31 (e) the Court issued a declaration voiding the charge against parcel of land Kwale/Msambweni ‘A’/2185. Issuing the same order again will be subject to the Court repeating itself on an order already granted.



**Issue No. C). Whether the Applicant has made out a case for the amendment of the decree issued on 23<sup>rd</sup> September, 2024 by revoking the charge and discharge registered in favour of the Intended 1<sup>st</sup> Interested Party.**

27. Under this subtitle, on amendments of Judgment, Decree or Orders; the provision of Sections 99 and 100 of the *Civil Procedure Act*, Cap. 21 provide for the powers of the court to amend Judgment, Decrees or Orders and general powers to amend as follows:-

“99. Amendment of Judgments, decrees or orders 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.

100. General power to amend 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.”

28. In the case of “Nguruman Limited – Versus - Attorney General & another [2021] eKLR” where the court while dealing with a similar issue held as follows: -

“The Court of Appeal examined the mechanics of the application of Section 99 of the *Civil Procedure Act* in the case of Republic Vs Attorney General & 15 others, Ex-Parte Kenya Seed Company Limited s others [2010] eKLR, stating as follows-

27. 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.

28. 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.”

29. The Courts have set out guidelines which govern the circumstances under which the exercise of the jurisdiction to correct clerical or arithmetical mistakes in judgments, decrees or orders is made. The court in the case of:- “Nguruman Limited – Versus - Attorney General & Another (Supra)” the court was guided by the holding in the case of:- “Vallabhdas Karsandas Kaniga – Versus - Mansukhlal Jivraj and Others [1965] EA 780”, where the East African Court of Appeal held: -

“Section 3(2) of the *Appellate Jurisdiction Act* confers on the Court of Appeal the same jurisdiction to amend judgments, decrees and orders that the High Court has under section 99 of the *Civil Procedure Act*, making it unnecessary to look to the inherent powers of the



court. The words at any time" in section 99 clearly allow the Power of amendment to be exercised after the issue of a formal order... 'Slip orders' made to rectify omissions resulting from the failure of counsel to ask for costs and other matters to which their clients are entitled.....A court will only apply the slip rules 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. In the present case, if the facts had been before the court when judgment was given on appeal, the court would, on application or indeed of its own motion, have made the order for refund, now sought, which was necessarily consequential on the decision on the main issues."

The court further held:

It is my considered view that the errors alleged, are clerical error owing to an accidental slip which if corrected, would not affect the substance of the judgment. The intention of this Court was to grant the Petitioner/ Applicant compensation equivalent to the value of the subject land as captured in the unchallenged valuation report filed by the Petitioner."

30. This Court is equally conscious and on the lookout for an evident error which does not require extraneous matter to show its incorrectness. This Court is guided by the case "Fredrick Otieno Outa – Versus - Jared Odoyo Okello & 3 Others [2017] eKLR" where the Supreme Court held inter alia that;
- “the “slip rule” does not confer upon a court any jurisdiction to sit on appeal over its own Judgment or to extensively review such Judgment as to substantially alter it. It was further held in that case in respect of Section 21 (4) of the *Supreme Court Act* that corrections made become part of the Judgment or order as initially rendered and that the purpose of the said section was to steer a Judgment, decision or order of the Supreme Court towards logical or clerical perfection”.
31. A determination as to whether the Judgment has an error apparent, which is an accidental slip and that the intention of the Judge was to a contrary position and thus proposed an amendment would equally entail a review under Order 45 of the Civil Procedure Rules and not the correction envisioned under Sections 99 and 100 of the *Civil Procedure Act*. The amendment of the decree is meant to reflect the revoked the charge and discharge registered in favour of the 1<sup>st</sup> Interested Party which to this Court’s opinion is in order with procedural laws.

**Issue No. d). Whether the sale of the suit property to the 2<sup>nd</sup> Respondent can be nullified and voided.**

32. Under this sub - title the sale of the suit property to the 2<sup>nd</sup> Respondent was done on 24<sup>th</sup> May, 2023; the Plaintiff’s suit was instituted on 27<sup>th</sup> January, 2023 where the Applicant sued the Respondents for procuring the parcel of land Kwale/Msambweni ‘A’/2185 (the suit property) which belonged to his grandfather as at the point of demarcation and adjudication. He also relied on the documents issued by the Kwale Land Registrar to institute the main suit.
33. Going by the Judgment delivered on 17<sup>th</sup> September, 2024 by my predecessor sister Lady Justice Hon. Dena, the land as was and to be put in the name of its rightful owner Juma Omari Mwando. In the Judgment, the court gave its final orders as follows: -

- “31. The upshot of the foregoing is that this Court finds that the Plaintiff has proved his case on a balance of probabilities against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.



Judgement is hereby entered for the Plaintiff against the said Defendants. The following orders hereby issue; -

- a. A declaration that the land Kwale/Msambweni 'A'/2185 belongs to Juma Omar Mwendo.
- b. A declaration that the 1<sup>st</sup> and the 2<sup>nd</sup> Defendants procured the land Kwale/Msambweni 'A'/2185 through fraud, illegal and corrupt schemes thus the title deed is null and void.
- c. An order directing the County Land Registrar Kwale to recall, cancel and revoke the title deed in possession of the 2<sup>nd</sup> Defendant and re-issue another title for the parcel Kwale/Msambweni 'A'/2185 in the names of Juma Omari Mwendo.
- d. That the Kwale Land Registrar do delete, revoke and cancel green card for the parcel of land Kwale/Msambweni 'A'/2185 in the name of the 1<sup>st</sup>, 2<sup>nd</sup> and 6<sup>th</sup> Defendants and reconstruct another green card in the name of its rightful owner Juma Omari Mwendo.
- e. A declaration that the charge against the parcel of land Kwale/Msambweni 'A'/2185 is irregular, null and void.
- f. That an order of permanent injunction restraining the Defendants, their agents, servants, nominees, employees from entering, being upon, using, remaining or developing or in any way interfering with the parcel of land Kwale/Msambweni 'A'/2185.
- g. Costs are awarded to the Plaintiff.

Orders accordingly.”

34. There were orders before the hearing and determination of the suit issuing a temporary injunction in the interim issued on earlier on. Therefore the sale to the 2<sup>nd</sup> Defendant in May 2023 was illegal and therefore null and void. It follows, therefore, I discern that the sale to the 2<sup>nd</sup> Defendant be and is hereby found to be null and is hereby voided.

**Issue No. e). Who bear the Costs of Notice of Motion application 22<sup>nd</sup> October, 2024.**

35. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 Laws of Kenya holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise.



36. I have well stated in previous precedence and most especially in “Sagalla Lodge Limited – Versus - Samwuel Mazera Mwamunga & another (Suing as the Executors of Eliud Timothy Mwamunga – Deceased) [2022] eKLR”, that:

“

“ 58. The Black Law Dictionary defines “Cost” to means, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.

The provisions of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that Costs follow events. The issue of Costs is the discretion of Courts. From this provision of the law, it means the whole circumstances and the results of the case where a party has won the case. The events in this case is that the Notice of Motion application dated 7<sup>th</sup> December, 2021 by the Plaintiff has succeeded and hence they are entitled to costs of the application and that of the Defendants dated 21<sup>st</sup> December, 2021.”

37. The provision of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that costs follow the events. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances. In the present case, the Honourable Court elects not to award any costs.

## V. Conclusion and Disposition

38. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience.

39. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following:-

- a. That the Notice of Motion application dated 22<sup>nd</sup> October, 2024 be and is hereby found to have merit partially allowed taking that some of the orders sought in it had already been dealt with in the Judgment and examination of the same would amount to the court offending the doctrine of res judicata.
- b. That this Honourable Court do and is hereby grants leave for joinder of the Intended 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties as parties to this application for the purpose of the execution of the decree of the court issued on the 23<sup>rd</sup> September, 2024.
- c. That be that in the judgment the issue of discharging of the charge as against the parcel of land Kwale/msambweni ‘A’/2185 herein ‘the suit property’ with the 1<sup>st</sup> Interested Party, the sale and transfer of the suit property to the 2<sup>nd</sup> Interested Party and the 2<sup>nd</sup> Interested Party Charging the suit property with the 3<sup>rd</sup> Interested Party was unlawful and the same remains voidable since 17<sup>th</sup> September, 2024 when the Judgment was delivered as long as the judgment was not varied, reviewed or set aside the orders remain the same.
- d. That an order be and is hereby issued amending the decree issued on 23<sup>rd</sup> September, 2024 to reflect the revocation the charge and discharge registered in favour of the 1<sup>st</sup> Intended Party.
- e. That a declaration do and is hereby issued that the sale of the suit property by the 2<sup>nd</sup> Respondent to the 2<sup>nd</sup> Interested party be and is hereby declared null and void and the



subsequent charge registered by the 2<sup>nd</sup> Interested Party using the suit property as security in favour of the 3<sup>rd</sup> Interested Party respectively in respect to the parcel of land Kwale/Msambweni 'A'/2185.

- f. That the orders issued in this application be and hereby deemed as further decree of the court which runs concurrently with the decree issued on 23<sup>rd</sup> September, 2024.
- g. That there shall be no orders as to costs.

IT IS SO ORDERED ACCORDINGLY.

**RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT KWALE THIS 2<sup>ND</sup> DAY OF JUNE 2025.**

.....

**HON. MR. JUSTICE L. L. NAIKUNI  
ENVIRONMENT AND LAND COURT  
AT  
KWALE**

Ruling delivered in the presence of:

- a. Mr. Daniel Disi, Court Assistant.
- b. No appearance for the Plaintiffs.
- c. No appearance for the Defendants.
- d. No appearance for the Interested Parties.

