Cooperative Bank of Kenya Limited v Onyamo & another (Civil Appeal E371 of 2023) [2025] KEHC 11818 (KLR) (Civ) (23 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11818 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E371 OF 2023

DKN MAGARE, J

JULY 23, 2025

BETWEEN

COOPERATIVE BANK OF KENYA LIMITED ..... APPELLANT

AND

KENNEDY MANG'ARE ONYAMO ..... 1ST RESPONDENT

EMERGENCY COOPERATIVES SAVINGS & CREDIT SOCIETY LIMITED ..... 2ND RESPONDENT

(Appeal from the judgment and decree of Cooperative Tribunal at Nairobi by Hon. J. Mwatsama delivered on 27.04.2023 in Nairobi Cooperative Tribunal Case No. 150 of 2021)

JUDGMENT

1. This is an appeal from the judgment and decree of Cooperative Tribunal at Nairobi by Hon. J. Mwatsama delivered on 27.04.2023 in Nairobi Cooperative Tribunal Case No. 150 of 2021. The appellant was a Garnishee in the matter. The 1st Respondent Kennedy Mang'are Onyamo, was the judgment creditor. The 2nd Respondent had an account at the appellant bank with a humongous amount of money, that is, Ksh. 576.33/=. It is in respect of this amount that the court sought to have the appellant satisfy the entire decretal amount of Ksh. 148,700/=, costs and interest.

2. A request for judgment had been made against the 2nd Respondent. Judgment was entered for Ksh. 148,700/=. Garnishee proceedings were filed vide a notice of motion dated 7.1.2022. A garnishee nisi was granted on 21.1.2022. The application for garnishee was allowed for failure to file a defence. The appellant sought to set aside orders of 25.04.2022. The main contention was that the decree could not be satisfied with amounts in the account. The amount in the account was 576.33/=.

3. The raison d'être for the proceedings was that the appellant was served and instructed an advocate who did not enter appearance. Orders were issued on 5.4.2022. They instructed new advocates who entered appearance and filed the application dated 25.04.2022. They blamed the former advocate for the delay. However they maintained that the delay was not inordinate.

4. The tribunal, after hearing the parities dismissed the application as unmerited. The matter proceeded by way of submissions which shall be subsumed in the judgment, given that this is a single issue appeal. The issue is whether the appellant was bound to satisfy the decree against the 2nd Respondent.

5. The appellant posited that the court misdirected itself by relying on the case of Martin Mwangi Ndirangu v Invesco Assurance Co. Ltd [2020] KEHC 3785 (KLR) referred to by the appellant. The court, C. Kariuki J held as follows:

   All these orders were issued far after the issuance and service of this court's order nisi which was confirmed absolute on 20/1/2020 thus takes precedent over all other subsequent orders.

   34. In view of the foregoing analysis and exposition of the law and fact, I find and hold that the applicant ignored this court's order thus the instant application stands dismissed for want of merit.

6. They also relied on the cases of Suleiman Vs Ambrose Resort Ltd [2004] 2KLR and Mary W. Ngunju Vs Commercial Bank of Africa & Another [2011] KEHC 3138 (KLR). They argued that the court should always opt for the lower rather than the higher risk of injustice.

7. They faulted the tribunal for holding that the admissions that they were served but counsel failed to appear is a flimsy excuse. Reliance was placed on the case of Gideon Mose Onchwati V Kenya Oil Co. Ltd & Another [2017] eKLR, where the court, R.E. Aburili held as doth:

   In Shah Vs Mbogo and Ongom Vs Owota the court held that for such orders to issue inter alia the court must be satisfied about one of the two things namely:-

   a. Either that the defendant was not properly served with summons; or

   b. That the defendant failed to appear in court at the hearing due to sufficient cause.

      The court defined what constitutes sufficient cause and in this respect it stated thus:-

      "Once the defendant satisfies the court on either, the court is under duty to grant the application and make the order setting aside the ex parte decree, subject to any conditions the court may deem fit. However, what constitutes 'sufficient cause' to prevent a defendant from appearing in court, and what would be 'fit conditions' for the court to impose when granting such an order, necessarily depend on the circumstances of each case.

      Although it is an elementary principle of our legal system, that a litigant who is represented by an advocate, is bound by the acts and omissions of the advocate in the course of the representation, in applying that principle, courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not to bear the consequences of the advocates default, unless the litigant is privy to the default, or the default results from failure, on the part of the litigant, to give the advocate due instructions."

8. The appellant submitted that it is in the interest of justice and fairness that the appeal be allowed. They argued that the court must have regard to all circumstances before declining to set aside a default order. Reliance was placed on the case of Samuel Muchiri W'Njuguna & 6 others v Minister of Agriculture [2005] eKLR.

9. In a nutshell, they submitted that the appeal was merited. The amounts in the account as at 29.1.2022 could not satisfy the decree and the garnishee order.

10. The 1st Respondent filed submissions dated 14.03.2025, in which they prayed that the appeal be dismissed. Reliance was placed on the case of Ephantus Mwangi V Duncan Mwangi Wambugu[1984] KECA 13 (KLR), where the Court of Appeal held as follows:

> A Court of Appeal will not normally interfere with a finding of fact by the trial court, unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown, demonstrably, to have acted on wrong principles in reaching the findings he did.

11. It was their case that Order 12 Rule 7 provides steps to be taken to set aside. The question of service was admitted and the Appellant took no step to deal with the steps required in garnishee proceedings. They stated that a sum of Ksh. 203,471.17/= was entered and interest of Ksh. 53,8124/= (sic). The 1st respondent also stated that pages 50-55 were not part of the original record. This part of submissions were to be dealt with at the directions stage. Reliance was placed on the case of Martin Mwangi Ndirangu V Invesco Assurance Co. Ltd [supra].

12. Reliance was also placed on the case of Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others [2015] KECA 674 (KLR), where the court of appeal [Makhandia, Ouko & M'Inoti, JJ.A] stated as follows:

> Thus, there is a corollary to the hallowed maxim that mistakes of counsel should not be visited on a client. This is to be found in the case Ketteman & others v. Hansel Properties Ltd [1988] 1 All ER 38; in which an application was brought for belated amendment of the defence; an amendment which had been necessitated by mistake of counsel. In his judgment, Lord Griffith stated that
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> "Legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of lawyers to fall on their own heads rather than allowing an amendment at a very late stage in the proceedings."

13. The 1st Respondent posited that the Appellant was using the appeal to delay execution. This part is not true as the decree is still valid as against the judgment debtor.

Analysis

14. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

15. This court's the jurisdiction to review the evidence should be exercised with caution. In the cases of Peters vs Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...but the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

16. This court does not have the advantage of seeing and hearing the witnesses as did the lower court, yet it must reconsider the evidence, evaluate it itself and draw its own conclusions. In Selle & Another vs. Associated Motor Boat Co. Ltd & others [1968] EA 123, this principle was enunciated thus:

> "...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... Is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

17. Where, however the matter proceeded by way of affidavits, the appellate court has the same jurisdiction as the trial court. In the case of Sugut V Jemutai & 3 Others (Civil Appeal 110 of 2018) [2023] KECA 202 (KLR) (17 February 2023) (judgment) neutral citation: [2023] KECA 202 (KLR) Kiage JA stated as doth: -

> "I have carefully considered those rival submissions by counsel in light of the record and the bundles of authorities placed before us. I have done so mindful of our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. See rule 29(1) of the court of appeal rules 2010; Selle vs associated motor boat co [1968] EA 123). I do accord due respect to the factual findings of the trial court out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned judge may not have been in a fully advantageous position in that regard having taken up the case when it was already half-way heard. Her conclusions on the evidence and findings of fact were therefore from a reading of what was recorded by the previous judge."

18. The question to deal with herein is whether the court was right in failing to set aside the decree absolute on the face of the evidence tendered by the appellant. In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017)eKLR, the court of appeal, Ouko, Kiage and Murgor JJA held as doth;-

> Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.

19. In Prudential Assurance Company of Kenya Limited v Sukhwinder Singh Jutley & Another [2007] eKLR, the court of appeal, [R.S.C. Omolo, P.K. Tunoi and E.M. Githinji] stated as follows:

> It is apparent that in reaching those conclusions, the learned Judge placed much reliance on the following passage in Odgers Construction of Deeds and Statutes and statutes (5th Edition) at p. 106:

> "Parol Evidence and written documents. It is a familiar rule of law that no parol evidence is admissible to contradict, vary or alter the terms of a deed or any written instrument. The rule applies as well as deeds as to contracts in writing. Although the rule is expressed to relate to parol evidence, it does in fact apply to all forms of extrinsic evidence.
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> As it stands this is not a rule of interpretation but of law, and means that the interpretation of the document must be found in the document itself with the addition if necessary of such evidence as we have previously seen is admissible for explaining or translating words and expressions used therein"

20. However, we must deal with the question of setting aside first. The requirements for setting aside are:

    a. Length of delay

    b. Reason for the delay

    c. Any possible defence

21. The Appellant's defence was that they did not owe. This was proved. This was thus a sufficient defence to allow the setting aside of the garnishee absolute order.

22. Secondly, the application was filed less than three weeks after the garnishee order was made absolute. The delay was thus not inordinate. In the case of James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] KECA 470 (KLR), the court stated:

    In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion.

23. While addressing the question of setting aside under the Civil Procedure Rules, the court in Pindoria Construction Ltd vs. Ironmongers Sanytaryware Civil Appeal No. 16 of 1976 it was held that:

> "It is a common ground that it is a matter for discretion whether or not to set aside a judgement under rule 8 of Order 9B of the Civil Procedure Rules. It is also well settled that the Court of Appeal will not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice... The appellant was not altogether free from blame. He could have tried harder to be present at the date of hearing. He delayed considerably in filing his application to set aside the ex parte judgement. The trial Judge's exasperation at his behaviour was understandable. Although he should not have been precluded from defending the claim against him he has to be penalised to some extent in view of his somewhat dilatory actions."

24. In the case of Nyandoro & Company Advocates v National Water Conservation & Pipeline Corporation; Kenya Commercial Bank Group Limited (Garnishee) [2021] eKLR, the court, John M. Mativo as then he was stated as follows:

    12. As stated above, Order 23 is a self-contained rule and prescribes its own procedures. There is no provision under Order 23 requiring a Notice to Show Cause to Issue. The only requirement under Order 23 Rule 1 is the existence of an unsatisfied decree, the amount and another person is indebted

to the Judgment-Debtor. There is no argument before me suggesting that the procedures laid down in Order 23 have been not been followed. The fundamental consideration is that the decree has been obtained by a party and he should not be deprived of the fruits of that decree except for good reasons. Until that decree is set aside, it stands good and it should not be lightly dealt with. The decree must be allowed to be executed, and unless an extraordinary case is made out, no stay or setting aside should be granted.

25. In this matter, there was an unsatisfied decree, and a judgment debtor. However, the third limb largely failed. The appellant is not indebted to the judgment debtor except to the extent of a sum of Ksh. 576.33/=. In the case of Lesinko Njoroge & Gathogo Advocates v Invesco Assurance Co; Co-operative Bank of Kenya (Garnishee) [2020] eKLR the Court stated as follows:

> Garnishee proceedings are in their very nature proceedings whereby the garnishee is required to prove whether or not the garnishee is indebted to the judgment-debtor. Ordinarily, the judgment creditor only makes allegations of the garnishee's indebtedness based on sound evidence whereby the burden of proof shifts to the garnishee to prove otherwise. In this regard, to discharge that burden, the garnishee has to produce strong, sufficient, and convincing evidence that the funds in its hands or the debt is not due or payable.

26. What about the inherent merit of the application itself? Having found that it was made without undue delay, the next question is whether the application itself was merited. In this matter, the bank statement showed that only Ksh. 576.33/= was outstanding in the 2nd respondent's account. The Applicant attempted to cast the net wider to dates after 29.1.2022. This was not shown to have been the case. The cross-sectional date for all the garnishee events was 29.1.2022. The amounts were not there. If the 2nd respondent subsequently puts funds in that account, the 1st respondent is free to deal with the new date. However, the garnishee order in situ related to the material date when the order was issued.

27. It is unfathomable how the court could order payment of the entire decretal of 203,471.17/= out of a sum of Ksh. 576.33/=. It may well be that the appellant did not do the best in the circumstances. However, it was not shown that the appellant outreached or was capricious in dealing with the garnishee order. Mere negligence in filing documents does not ipso facto remove the appellant from the protection of the court. In Multiple Hauliers V Enock Bilindi Musundi & 2 Others [2021] eKLR, the court posited as follows:

> 19. In Peter Mwangi Macharia v Alphaxard Warotho Komu & 2 others [2019] eklr, the environment and land court in allowing an appeal due to failure by an advocate to diarize stated:
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> "...it is evident that advocates are mostly guided by their diaries and having numerous files to deal with, one may not know exactly what date each matter has been placed unless they check their diaries. In failing to diarize the matter, it might therefore have escaped the mind of the counsel. This court therefore finds that such a mistake may happen to anyone and therefore excusable."
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> 20. Nevertheless, the court of appeal in Mbogo v Shah [1968] EA 93 long held that:
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> "...the discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice".

21. Further, the approach and guidance given by the court of appeal is clear from the case of Tana and Athi rivers development authority v Jeremiah Kimigho Mwakio & 3 others [2015] eklr in dismissing the appeal on similar grounds as the present appeal stated:

> "...from past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side. (see. Halsbury's laws of England, 4th edn, vol 44 at p 100-101) and also re jones [1870], 6 ch. App 497 in which lord Hatherley communicated the court's expectations this way:
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> '....i think it is the duty of the court to be equally anxious to see that solicitors not only perform their duty towards their own clients, but also towards all those against whom they are concerned...'
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> Under this duty, counsel is unequivocally obliged to exercise candor and not aid a litigant in subversion of justice. Even though the determination of whether or not counsel has failed in this obligation is dependent on the circumstances of a case, as a custodian of justice, the court must always stay alive to the interests of both parties. This is of paramount importance. Thus, there is a corollary to the hallowed maxim that mistakes of counsel should not be visited on a client...hence, the mistakes of Mr. Mouko's clerk became the mistakes of Mr. Mouko. This takes us back to the question, was the same excusable enough to warrant court's favour?
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> In determining whether to exercise the discretion in a party's favour, the court pays regard to the damage sought to be forestalled vis a vis the prejudice to be visited on the opposing party. In view of the age of this case and the timelines within which the appellant has acted, we take the view that the appellant has been less than candid with the court and that the appellant's true intentions are the derailment of the suit.

28. In this case, there is no prejudice to be suffered as the appellant did not owe the money and none were released. In the case of Lucy Bosire v Kehancha Div. Land dispute Tribunal & 2 Others [2013] eKLR, Odunga J held as follows:-

> " It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits.

29. Further in the case of Philip Keipto Chemwolo & another v Augustine Kubende [1986] EKLR, the Court of Appeal [Platt, Gachuhi & Apallo JJA] posited as follows:

I think a distinguished equity judge has said:

> "Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits."

30. Further, what is the effect of a garnishee order? The order freezes the money for onward transmission to the judgment creditor. It follows that a garnishee cannot be bound to pay more than the money they have or owe the judgment debtor. In the case of Safaricom Limited v King'oo & another (Civil

Appeal 174 of 2021) [2024] KEHC 4698 (KLR) (3 May 2024) (Judgment), the court, [FROO Olel, J] held as follows:

> It is trite law that as soon as the Garnishee order Nisi is served on the bank, it operates as an injunction. It prevents the bank/Garnishee from paying money to its customer until the garnishee order is made absolute, or is discharged, as the case maybe. It binds the debt in the hands of the garnishee, and creates a charge in favour of the judgment creditor. What Garnishee order Nisi does is to freeze the sum in the hands of the bank until the Garnishee order is made absolute or is discharged. If the said order is made absolute, then the Garnishee bank becomes liable to pay the Decree holder. See Joachimson Vs Swiss Bank Corp (1921) 3KB 110 at 131, (1921) All ER Rep 92 at 102 per Atkin LJ.
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> 25. The key question for consideration from the onset in this Appeal and which the Garnishee is called to unburden is the fact as to whether they were indebted to the Judgment debtor and if not, if they provide sufficient and convincing evidence that they do not have enough funds in their hands to settle the decree due. See; Ecobank Kneya ltd Vs True North construction Company limited & Another (2018) eklr & International Air Transport Association (IATA) & Another Vs Akarim Agencies company limited & 2 others; Equity Bank limited (Garnishee)(2021).

31. In the matter, there was no evidence that the Appellant owed the judgment debtor more than, Ksh. 576.33/=. The Appellant showed that they owed no more than Ksh. 576.33/=. That is the only money due to the garnishee.

32. In the circumstances of this case, the court has to set aside the ruling and in lieu thereof, allow the application for setting aside the garnishee nisi absolute. Only a sum of Ksh. 576.33/= ought to have been paid out. The decree nisi will thus be made absolute for only a sum of Ksh. 576.33/=. Otherwise, the garnishee proceedings largely failed.

33. The next question is costs. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

> (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
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> (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

34. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

> It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

35. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

36. In the circumstances the appeal is allowed. The garnishee absolute is set aside, the application dated 25.04.2022 is allowed. In lieu thereof, the application for garnishee is largely dismissed, except to the extent of Ksh. 576.33/=. Each party to bear their own costs on the applications. The appellant shall have costs of Ksh. 45,000/= for appeal.

Determination

37. In the upshot, the court makes the following orders: -

    a. The appeal is allowed. The garnishee absolute is set aside, the application dated 25.04.2022 is allowed. In lieu thereof, the application for garnishee is dismissed, each party to bear their own costs.

    b. The appellant shall have costs of Ksh. 45,000/= for the appeal.

    c. A sum of Ksh. 576.33/= be paid to the 1st respondent less bank charges.

    d. The foregoing amounts shall be paid within 30 days. In default, execution to issue.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 23RD DAY OF JULY, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Ms. Odongo for the Appellant

Ms. Tuwei for the Respondent

Court Assistant – Michael