



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kibet v Kiptugen & another (Civil Appeal 29 of 2018)  
[2024] KEHC 844 (KLR) (2 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 844 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL 29 OF 2018  
JRA WANANDA, J  
FEBRUARY 2, 2024**

**BETWEEN**

**ELIJAH KIPKIRUI KIBET ..... APPELLANT**

**AND**

**ELIJAH KIPTOO KIPTUGEN ..... 1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Application herein basically seeks Review of the Judgment delivered in this matter on 18/11/2020 by Lady Justice H. Omondi (as she then was). The matter was placed before me for determination since Omondi J (as she then was) was subsequently elevated to the Court of Appeal.
2. The Application is the Appellant's Notice of Motion dated 12/05/2023 seeking the following orders:
  - i. [.....] Spent
  - ii. [.....] Spent
  - iii. [.....] Spent
  - iv. That this Honourable Court be pleased to review and/vary the terms of the Judgment of this Court delivered on 18<sup>th</sup> November 2020 and set aside liability as against the Applicant.
  - v. That in the alternative and without prejudice to the above, this Honourable Court does make a finding on the apportionment or extent of liability as between the Applicant and the second Respondent, the Attorney General.
  - vi. [.....] Spent



- vii. That this Honourable Court be pleased to stay the arrest, detention and/or committal of the Applicant in execution of the Judgment entered in SPMCC No. 40 of 2010 delivered on 19<sup>th</sup> March 2018.
- viii. That the costs of this Application be provided.
3. The Application is filed through Messrs Oyaro J & Associates Advocates and is stated to be brought under Order 45 Rules 1, Order 51 Rule 1, Order 42 Rule 6(1)(2) & (7) of the Civil Procedure Rules, Section 1A, 1B, 3A, 79A and 80 of the Civil Procedure Act, Article 159 of the Constitution and “all other enabling provisions of the law”. It is premised on the grounds stated on the face thereof and is supported by the Affidavit sworn by the Appellant, Elijah Kibet Kipkirui.
4. In the Affidavit, the Appellant deponed that upon delivery of the Judgment herein on 18/11/2020 by H. Omondi J (as she then was) dismissing his Appeal, the Respondent moved and obtained warrants of arrest against the Appellant, that the Appellant learnt of the Judgment in late December 2022 when he was arrested and detained at Naiberi Police Station Eldoret, that the Judgment was unclear on the issue of liability as between the Appellant and the 2<sup>nd</sup> Respondent, the amount awarded was excessive and he is unable to raise the entire amount by himself, the 1<sup>st</sup> Respondent has now moved to execute against the Appellant and caused the Appellant’s arrest and detention for more than 2 weeks in satisfaction of the decree, the 1<sup>st</sup> Respondent has not exhausted other avenues of execution but has opted for detention of the Appellant, that the Appellant should not be held solely liable for acts committed by another party, the 1<sup>st</sup> Respondent has not made any attempt to execute against the Attorney General who is the decision maker in arrests and recommending for prosecution of suspects, the Judgment by the Judge lays blame on the Attorney General who moved to arrest without proper investigations, that the Appellant is in poor health and requires close medical attention and if committed to civil jail his condition is likely to deteriorate, that there being two Respondents, the Court ought to have been clear on the respective parties’ liabilities, that the said Solomon who is the Judgment-Creditor was not party to the proceedings in this Appeal, a reading of the Judgment reveals that there is an error apparent on the face of the Record and ought to be corrected for the ends of justice to be met, that the Appellant is related to the 1<sup>st</sup> Respondent by virtue of being blood brothers and this Court should consider the family ties and not further disintegrate them.

## Response

5. There is no Response to the Application from either of the two Respondents. However, there is a Replying Affidavit sworn by one Solomon Kiprop Kiptugen (hereinafter referred to as “Solomon”) who, although a co-Plaintiff of the 1<sup>st</sup> Respondent in the suit before the trial Court, was inexplicably omitted and not joined in this Appeal. I note that for this reason, the 1<sup>st</sup> Respondent had sought that this Appeal be struck out for non-joinder. I however also note that in her Judgment delivered on 18/11/2020, Omondi J declined to strike out the Appeal and proceeded to entertain and consider the Submissions by the said Solomon. Upon dismissing the Appeal, she also awarded costs to Solomon. By reason of this direction already adopted by Omondi J, I have to follow suit and will similarly therefore entertain and consider the Replying Affidavit sworn and Submissions filed by Solomon. Should this Application fail, Solomon may also be entitled to an award of costs.
6. In the Replying Affidavit, filed through Messrs R.M. Wafula & Co. Advocates, Solomon deponed that he was a co-Plaintiff/Decree Holder in Iten SPMCC NO.40 of 2010, that his Advocate was served with the present Application and the order thereunder hence the basis for his filing of the Replying Affidavit. He deponed further that with the dismissal of this Appeal on 18/11/2020, there is no matter pending before this Court which is therefore functus officio and hence lacks any power to re-examine and/



or revisit the Judgment, that the Appellant has deposed to falsehoods when he states in his Affidavit that he learnt of the Judgment in late December 2022, the truth is that on several occasions before the execution of the warrants, he had brought the Judgment to the attention of the Appellant and further had requested the Appellant to pay the decretal sum. He deposed further that the Appellant is salaried man, a farmer and owns rental houses in Nakuru, that the Appellant is therefore endowed with means to pay the decree but just does not want to do so, that the Appellant's filling of application after application confirms what he had told Solomon – that he will ensure that Solomon gets a rough time in getting even a shilling from him, and that he would rather spend his money on his Advocate than pay Solomon.

7. He deposed further that clan members and neighbours have tried to intervene in the matter but the Appellant has refused to co-operate, that on several occasions, his Advocate used to inquire from the Appellant's former Advocate as to when the Appellant would settle the decree and the Advocate always answered that he had advised the Appellant to pay, this was after this Court had delivered its Judgment. Solomon added that the Appellant was served with Notice to Show Cause (NTSC) together with the application for execution of decree on 7/3/2019, the Appellant personally acknowledged receipt by appending his signature thereon, that he and the Appellant are neighbours back in their rural home thus around mid-2021, he showed the Appellant a copy of the Judgment delivered herein but the Appellant rubbished it, that the Appellant is an arrogant person, that the Appellant was given an opportunity to show cause but he failed to do so hence his arrest in execution of the warrant of the Court, that upon execution of the warrant of arrest, the Appellant was sent to civil jail in December 2022 but pursuant to an Application by the Appellant, the matter was compromised after the Appellant paid a sum of Ksh 200,000/- as 1<sup>st</sup> instalment, the Appellant, through his Advocate, promised to make a further payment of Kshs 800,000/- but has now reneged on the promise, and that the present Application has therefore been filed in bad faith.
8. He deposed further that in his Amended Complaint, he sought Judgment against the Defendants "jointly and severally" and Judgment was entered as such, that in the Memorandum of Appeal, the issue of apportionment of liability or the issue of liability in general was not one of the grounds of Appeal, raising of the issue at this stage is an afterthought, there is nothing unclear on the issue of liability and there is no error on the face of the record that needs correction or rectification. On the allegation that the amount claimed is excessive, he deposed that the same issue was raised in the Memorandum of Appeal and was conclusively dealt with in the Judgment delivered herein, that the Appellant is therefore estopped from raising that issue again since this Court is not sitting as an appellate Court, there is nothing barring Solomon from proceeding against the Appellant since Judgment was entered against the Defendants, jointly and severally. Solomon added that the Appellant is in good health and the Medical Report exhibited is manipulated and meant to shield the Appellant, that the Appellant works in Nakuru, the two are brothers and their rural home is in Elgeyo Marakwet County, that the reason why the Appellant decided to seek treatment in Kakamega County leaves a lot to be desired, the Medical Report should therefore be disregarded, that since he (Solomon) was not a party to the proceedings in this Appeal, orders ought not to be issued against him, that indeed the Appellant is his blood brother, but has tormented him, after what the Appellant did to him, family ties and/or disintegration is of less concern to him, and that this is not the first time the Appellant is seeking stay of execution.

### **Appellant's Supplementary Affidavit**

9. The Appellant then swore the Supplementary Affidavit filed on 12/06/2023. He deposed that a Court's power to entertain an Application for Review only emanates after an order and/or decree has been passed by a court, that the issue of functus officio does not arise, that Solomon has shown



no effort of executing against the Attorney General, the attempt to execute against the Appellant is malicious, that there is need to apportion liability, being a malicious prosecution case, the Appellant should not be held liable as the decisions to arrest and charge the accused was made by the police and the office of the Director of Public Prosecution (DPP), that Solomon has not tendered any evidence of having communicated to the Appellant the outcome of the Appeal, that Solomon is hellbent on having the Appellant jailed to settle personal scores, Solomon is motivated by malice and jealousy, that the Appellant initiated negotiations meant to having the matter settled amicably but Solomon sabotaged the same, that the Appellant is a salaried employee and civil jail detention will ruin his career, that although the prayer sought was joint and several, the Court did not mention the extent of liability of each party, this Court is therefore entitled to review the record, that Solomon is not a party to this Appeal, that regarding the issue of sickness, the Appellant fell sick while attending personal errands around Eldoret and he therefore sought medical attention in the nearest health centre and regarding the issue of stay, there is no legal bar precluding him from applying for the same.

### Hearing of the Application

10. The application was canvassed by way of written Submissions. Pursuant to directions given, the Appellant's Counsel filed his Submissions on 7/07/2023 while Counsel for Solomon filed his on 20/09/2023.

### Appellant's Submissions

11. In his Submissions, Counsel for the Appellant submitted that the Judgment of Omondi J (as she then was) delivered herein was unclear on the apportionment of liability as between the Judgment-Debtors. He then submitted that this Court is not functus officio, that the Court retains its power to undertake several actions including stay, review, and execution proceedings, among others. He cited the case of *Leisure Lodge Ltd v Japhet Asige and Another* [2018] eKLR.
12. Regarding the power of this Court to review its decision, Counsel cited Order 45 Rule 1 of the *Civil Procedure Rules*, the case of *National Bank of Kenya Ltd vs Ndungu Njau* [1997] eKLR and the case of *Muyodi vs Industrial and Commercial Development Corporation & Another* [2006] 1 EA 243. He submitted that the Appellant does not differ with the Judgment of this Court, all he seeks is apportionment of liability as between the Judgment-Debtors. He also cited the Court's overriding objective and inherent powers under Rule 1(2) of the *Appellate Jurisdiction Act*. He then reiterated the contention that the suit having been a malicious prosecution case, it is the DPP who was responsible for recommending the prosecution and as such the Appellant cannot be held culpable. He cited the case of *Douglas Odhiambo Apel & Another v Telkom Kenya Limited*, HCCC No. 2547 of 1998 and also Court of Appeal Civil Appeal No. 115 of 2006, *Douglas Odhiambo Apel & Emmanuel Omolo vs Telkom Kenya Limited*. According to Counsel therefore, the Court needs to clarify its order to adequately reflect the law. He also submitted that the Attorney General did not file a response to the claim for malicious prosecution before the trial Court and added that this Court should relook at the decision and evaluate the extent of liability of the two parties, and that Solomon has failed to explain why he has proceeded only to execute against one Defendant.
13. Counsel also argued that the Decree is ambiguous and allows the Decree-holder to collect the fruits of the Judgment from either party, that the actions of the Decree-holder amount to flagrant violation of the Appellant's right under Article 11 of the United Nations *International Covenant on Civil and Political Rights* which Kenya is party to by dint of Article 2(6) of the *Constitution* of Kenya and which disallows civil jail for matters whose cause of action arises from contractual obligations. He cited the case of *Re Zipporah Wambui Mathara* Milimani BC Cause 19 of 2010 (unreported), *R.P.M v P.K.M*, Nairobi Divorce Cause No. 154 of 2008 (unreported). For the procedure of execution against the



Government, he cited Section 21 of the *Government Proceedings Act* and also the case of *Republic vs Permanent Secretary, Ministry of State for Provincial Administration and Internal Security ex parte Fredrick Manoah Egunza* [2012] eKLR.

14. In conclusion, Counsel reiterated that Solomon Kiprop Kiptugen is not a Respondent in this Appeal and therefore lacks the standing to oppose the Application, that Order 51 Rule 14 authorizes a Respondent to file a Replying Affidavit and the same is not extended to parties not before the Court. He cited the Supreme Court in the case of *Gideon Sitelu Konchellah v Julius Lekakeny ole Sunkuli & 2 Others* [2018] eKLR.

### **Applicant's Submissions**

15. On her part, Counsel for Solomon submitted that the Appellant is seeking orders of review after he had filed the Notice of Appeal dated 20/11/2020, that it is trite law that the Appellant cannot appeal and at the same time seek a Review in the same matter, that besides, the Appellant filed the present Application after a lapse of about 2½, there is therefore an inordinate delay, that matters raised in the instant Application are afterthoughts calculated at obstructing and frustrating Solomon from enjoying the fruits of his Judgment,
16. Counsel then submitted that vide the Amended Complaint dated 16/09/2011, Solomon and the 1<sup>st</sup> Respondent sued the Appellant and the Attorney General and sought reliefs against them “jointly and severally”, that somewhere along the way, the 1<sup>st</sup> Respondent lost interest hence his claim was dismissed for want of prosecution thus leaving Solomon as the only Plaintiff, that the Judgment that was delivered by the subordinate Court was in favour of Solomon alone as against the two Defendants “jointly and severally” and that therefore, there is no ambiguity, that in his Memorandum of Appeal, the Appellant came up with 8 grounds and none of which touched on the issue of apportionment or extent of liability as between the Applicant and the Attorney General, that the Appellant is therefore being mischievous by introducing the issue of apportionment of liability and/or decretal sum at this stage, that the said matters were not even issues before the subordinate Court, the Appellant has feigned innocence and ignorance and has even tried to give the impression that he was holier than the Attorney General, that this is far from the truth since at paragraph 40 of the Judgment herein, it was found that “the criminal proceedings were instructed by the Appellant ...”, that the Appellant is not willing to pay the decretal sum despite having means, and that the Appellant cannot appeal against the decision of this Court through a Review since the grounds raised are matters for appeal.
17. Counsel added that Solomon was a necessary party in the appeal, that paragraphs 38 and 39 of the Judgment herein is clear on that, and that this Court is functus officio after the Court dismissed the appeal and after the decree was executed. He cited the case of *Telkom Kenya Limited v John Ochanda* (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya limited) [2014] eKLR and also the case of *Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others* [2013] eKLR, in which the Supreme Court cited an excerpt from an article by Daniel Malan Pretorius entitled, “the Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law” (2005) 122 SALJ 832”.
18. According to Counsel, it is not true that the Appellant only learnt of the Judgment of this Court when he was arrested, that the Replying Affidavit shows that Solomon has been following up on payment from the Appellant, that the Appellant also had a duty to follow up on his case either from Court or his Advocate, that the NTSC was duly served upon the Appellant, the Appellant has not sought to cross-examine the process server, attempts to resolve the issue by clan members have failed and the Appellant has to settle the decree, that Mediation therefore has no place in this matter, Solomon, as decree- holder, cannot be forced



to participate in what he does not want, that this Appeal Court should not look into the merit of the execution which is a subject matter before the trial Court and not in issue here. On his contention on incompetence of the Application for review, Counsel cited the case of Sanitam Services (E.A.) Limited V Rentokil (K) Limited & Another (2019) eKLR, the case of Rose Kaiza-Vs-Angelo Mpanju Kaiza 2009, and the case of Benjoh Amalgamated Limited & Another Vs KCB Limited [2014] eKLR. He submitted that the trial Court held that liability was “jointly and severally” as prayed in the Amended Complaint, that this was not taken up on appeal and the Court dismissed the appeal thus confirming the lower Court’s Judgment on an as it is basis, that the High Court in its wisdom did not apportion liability, this does not amount to an error apparent on the record or new information that was not within the Appellant’s knowledge or which he could not obtain by due diligence nor does it prove a ground to be urged in the interest of justice, and that the issues raised in the present Application can be taken up at the trial Court which is the one seized of the judgment and execution process.

19. Counsel submitted further that “error apparent on the record” refers to an error which does not require argument but which is clear on the face of the record. On this point, he cited the case of National Bank of Kenya Ltd-Vs-Ndungu Njau (CA) No. 211/1996 UR, the case of Muyodi -Vs-Industrial and Commercial Development Corporation &Anor [2006] 1 EA 243 and the case of Abasi Belinda Vs Fredrick Kangwamu and Another (1963) EA 557. He argued further that the Appellant has not demonstrated how the Court’s decision amounted to a slip and submitted that the decision not to apportion damages is a point of law and was also within the discretion of the trial Court, that the same is not an error on the record but touches on interpretation and application of the law, that the grievances raised all revolve around legal argument which are suitable for appeal, the Appellant therefore ought to have moved to the higher Court as the High Court has already pronounced itself. He argued further that there is no evidence that the Attorney General was served with the Application, that this Court cannot issue orders against a party who is not in Court, that the Attorney General is a necessary party, and that there must be finality in litigation. He reiterated that the Appellant filed a Notice of Appeal of intention to move to the Court of Appeal, and that by filing the Notice of Appeal, the Appellant lost his right to seek Review. On this point, he cited the case of Serephen Nyasani Menge v Rispah Onsase [2018] eKLR4.
20. On stay of execution, Counsel referred to Order 42 Rule 6 of the Civil Procedure Rules and the case of Canvass Manufactures Ltd-Vs-Stephen Reuben Karunditu (1994) LLR 4853 and submitted that the threshold for grant of the orders has not been met. He also cited the case of Machira t/a Machira & Co. Advocates-Vs-East African Standard (No 2) [2002] KLR 63, the case of Kenya Shell Limited v Benjamin Karuga Kibiru & Another [1986] eKLR, the case of Kenya Commercial Bank Limited -Vs- Sun City Properties Limited & 5 Others [2012] eKLR and the case of Antoine Ndiaye-Vs-African Virtual University [2015] eKLR. He further submitted that committal to civil jail in execution of a decree is a legal process under Section 38 (d) of the *Civil Procedure Act*. He cited the case of Diamond Trust Kenya Ltd v Daniel Mwema Mulwa HCCC No. 70 of 2002(Unreported), the case of Kenya Bus Services Ltd & Others vs. Attorney General and Others [2005]1 EA 111; [2005]1 KLR 743, the case of Jayne Wangui Gachoka vs. Kenya Commercial Bank Petition Number 51 of 2010 and the case of James Wangalwa & Another-Vs-Agnes Naliaka Cheseto [2012] eKLR,
21. Counsel accused the Appellant of subjecting Solomon to incurring of unnecessary costs, and wastage of time and resources in unending litigation and on this point, he cited the case of Muchanga Investments Ltd vs Safaris Unlimited (Africa) Ltd & 2 Others [2009]eKLR. He then reiterated that that the basic requirements under Order 45 and Order 42 have not been



met by the Appellant and cited the case of In Leonard Mambo Kuria-Vs-Ann Wanjiru Mambo [2017] eKLR, and the case of UAP Insurance Company Ltd vs Michael John Beckett [2004] eKLR,

### **Analysis & Determination**

22. In light of the above scenario and upon examination of the Pleadings, Affidavits, Submissions and the entire Record, I find the issues that arise for determination in this matter to be as follows:
  - a. Whether Solomon Kiprop Kiptugen should be allowed to participate in the present Application despite not having been named as a party hereto.
  - b. Whether this Court should review and/or vary the Judgment delivered herein by H. Omondi J (as she then was) on 18/11/2020 and set aside its decision upholding liability against the Appellant or in the alternative, apportion liability as between the Appellant and the 2<sup>nd</sup> Respondent, the Attorney General.
  - c. Whether therefore this Court should stay the arrest and/or committal to civil jail of the Appellant in execution of the Judgment entered in the trial Court suit.
23. I now proceed to analyze and determine the said issues.

#### **a. Whether Solomon Kiprop Kiptugen should be allowed to participate in the present Application despite not having been named as a party hereto**

24. The Appellant contends that Solomon Kiprop Kiptugen (Solomon), not being a Respondent in this Appeal, lacks the standing to oppose the Application. He contends further that Order 51 Rule 14 of the Civil Procedure Rules only authorizes a Respondent to file a Replying Affidavit and that this privilege is not extended to parties not before the Court.
25. On this point, I reiterate that I have already hereinabove determined that I will admit and accept the Replying Affidavit and Submissions filed by or on behalf of Solomon. This is on the basis that Omondi J (as she then was) had already in her Judgment delivered on 18/11/2020 allowed Solomon to participate in this Appeal and proceeded to admit and accept Solomon's earlier Submissions despite Solomon not being named as a party. Upon dismissing the Appeal, the Judge even awarded costs thereof to Solomon and which costs have since been now. That matter is therefore technically now Res Judicata and the Appellant is deliberately only feigning ignorance of what has already transpired herein. Omondi J was in fact moved to strike out the Appeal on the ground of non-joinder of Solomon, which she could have swiftly done, but, chose to save the Appeal and instead, allowed Solomon to be heard. I cannot therefore depart from that decision without being formally moved to do so.
26. In any case, I find it contradictory for the Appellant to seek to benefit from his own failure or omission to comply with the correct procedure. I say so because he inexplicably failed to name Solomon as a Respondent in this Appeal yet Solomon was clearly a necessary party having been a co-Plaintiff in the suit before the trial Court and which suit is the one that gave rise to this Appeal. The Appellant has offered completely no reason as to why he chose to omit Solomon from this Appeal. As proof that indeed he appreciates the necessity of Solomon's participation in this Appeal, he has been religiously serving Solomon with pleadings filed herein and the same are even drawn as "to be served upon" Solomon's Advocates. To therefore now turn around and attempt to block Solomon from participating in the Appeal defeats logic and cannot be good practice at all. I find it to amount to an abuse of the Court process. Although Solomon also had a choice to apply to be joined in the Appeal, which option he also never invoked or exercised, still his non-joinder by the Appellant was improper.



27. It is also evident that a substantial part of the Appellant's grounds for the present Application consists of grievances arising from execution of the Decree of the trial Court by way of committal to civil jail and which execution has been commenced or initiated by Solomon. How then can the Appellant challenge or question the legality and/or the process of execution but at the same time insist on omitting Solomon, the initiator or the person who has taken out the execution process, from a determination of the matter? Who then is supposed to be the Respondent to the present Application if not Solomon.
28. In view of the foregoing, I follow the decision of Omondi J to allow Solomon to participate herein.

**b. Whether this Court should review and/or vary the Judgment delivered herein by H. Omondi J (as she then was) on 18/11/2020 and set aside its decision upholding liability as against the Appellant or in the alternative, apportion liability as between the Appellant and the 2<sup>nd</sup> Respondent, the Attorney General**

29. It is trite law that any party seeking review of Court orders is bound by the provisions of Order 45 of the Civil Procedure Rules which provides as follows:
1. (1) Any person considering himself aggrieved—
    - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
    - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay.
30. It is therefore clear that Order 45 provides for three circumstances under which an order for review can be made. The first one is where there has been discovery of new and important matter or evidence. The second is where there has been a mistake or error apparent on the face of the record. The third ground is “for any other sufficient reason”. Finally, and no less important, the Application must have been brought “without unreasonable delay” Although the Appellant does not disclose the specific ground under which he has moved the Court, from the Appellant's grounds, Affidavits and Submissions, it is clear that the Application is premised on the ground of “error apparent on the face of the record”.
31. On the issue of whether the Application has been brought without unreasonable delay, I note that the decision of this Court against which the Review is sought was, as aforesaid, delivered on 18/11/2020 while the Application seeking Review thereof was filed on 12/05/2023. It is therefore apparent that the Application was filed after a period of almost 2½ years after the Judgment. For an explanation, the Appellant alleges that he only became aware of the Judgment when he was arrested and detained in execution of the decree in late December 2022. I find this to be a very lame excuse. It has been said time and time again that a litigant, whether or not he is represented by Counsel, has the personal duty and obligation to be vigilant and to always ensure that he is abreast with the progress of his case. After all, it is he, and not the Advocate, who has the most to gain or lose in the suit. It cannot therefore be an excuse for a litigant to passively simply sit back and when asked why he has failed to take action, point blame on his Counsel for allegedly failing to inform or update him on the suit. I refuse to accept such excuse. I refuse to buy the line that for 2½ years the Appellant made no effort to find out anything about the progress or fate of his own Appeal.



32. On the above view, I find good company in the case of *Habo Agencies Limited vs. Wilfred Odhiambo Musingo* (2015) eKLR, where in determining an Application seeking extension of time to file an Appeal, and sitting as a single Judge of the Court of Appeal, Hon. Justice P. Waki stated as follows:

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel”.

33. Further, in the case of *Savings & Loan Limited –Vs- Susan Wanjiru Muritu Nairobi (Milimani) HCCC NO.397 OF 2002*, Kimaru J (as he then was), also stated as follows:

“Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former advocate’s failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate’s failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the Defendant to be prompted to action by the Plaintiff’s determination to execute the decree issued in its favor, is an indictment of the Defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favor of such a litigant.”

34. Similarly, in *Duale Mary Ann Gurre –Vs – Amina Mohamed Mahamood & Another* [2014] eKLR, Mutungi J held as follows:

“An advocate is the agent of the party who instructs him and such instructing client as the principal continues to have the obligation and the duty to ensure that the agent is executing the instructions given. In the case of litigation, the suit belongs to the client and the client has an obligation to do follow up with his Advocate to ensure the Advocate is carrying out the instructions as given. The litigation does not belong to the Advocate but to the client. If the Advocate commits a negligent act the client has an independent cause of action against the Advocate.”

35. It is therefore my finding that there is absolutely no convincing explanation offered for the 2 ½ years delay. In the circumstances, I find that the Application has been brought after an inordinate and inexcusable delay and the same cannot be entertained. This finding alone is sufficient to dispose of this matter against the Appellant. Nevertheless, I will still consider the merits of the prayer for Review.

36. Regarding the merits, I observe that the Appellant seeks Review of this Court’s Judgment on the alleged ground that this Appellate Court committed an error on the face of the record by upholding the trial Court’s finding and entry of liability against the Appellant and/or by declining to interfere with the trial Court’s decision not to apportion liability as between the Appellant and the Attorney General.



37. Specifically, the Appellant claims that the Judgment was unclear on the issue of liability as between the Appellant and the 2<sup>nd</sup> Respondent, that the amount claimed against the Appellant is excessive and punitive and he is unable to raise the entire amount by himself, that the Appellant should not be held solely liable for acts committed by another party, that the Attorney General is the decision maker in arrests and recommending for prosecution of suspects, that the Judgment lays blame on the Attorney General who moved to arrest without proper investigations, and that there being two Respondents, the Court ought to have been clear on the respective parties' liabilities.
38. In the case of National Bank of Kenya –vs- Ndungu Njau Civil Appeal No.211 of 1996 [1995-98] 2 EA 249; Paul Mwaniki vs. National Hospital Insurance Fund Board of Management [2020] eKLR, Mativo J (as he then was) stated as follows:
- “..... A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court and the error or omission must be self-evident and should not require an elaborate argument to be established. It will not be sufficient ground of review that another Judge could have taken a different view of the matter. Nor can it be a ground of review that the court proceeded on an incorrect exposition of the law and reached erroneous conclusion of the law ... Misconstruing a statute or other provision of the law is not a ground for review ... In the instance case, the matters in dispute had been canvassed before the Learned Judge who made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of the law, it would be a good ground for appeal but not for review. Otherwise, the Learned Judge would be sitting on appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which adjudicated upon it.”
39. Upon considering the grounds and facts alleged and juxtaposing the same to the law, I am clear in my mind that the matters raised by the Appellant are matters that cannot by any stretch of imagination fall within the scope of matters recognized or contemplated in law as constituting proper grounds for Review under Order 45 of the Civil Procedure Rules. The ground alleged is that purportedly this Court committed an error in its determination of the issue of liability and consequently, in upholding the trial Court's findings on liability. What is being raised therefore is that purportedly this Court misapprehended facts and therefore misapplied the law. The Appellant goes as far as faulting the Court for misapplying the law on the tort of malicious prosecution. How then can such substantive grievances of law amount to an error on the face of the record?
40. The trial Court entered Judgment against the two Defendants (Appellant and 2<sup>nd</sup> Respondent herein). The Judgment is express that it is “jointly and severally” against the two Defendants. In this Appeal, Omondi J exhaustively reviewed the issue of liability and found no reason to interfere with the trial Court's findings thereon. Contrary to the Appellant's contention therefore, there is no ambiguity whatsoever on the issue since Judgment was entered “jointly and severally”. To allege that the exhaustive analysis of liability and application of law thereto by Omondi J could amount to an “error on the face of the record” within the meaning contemplated in Order 45 of the Civil Procedure Rules can only be termed as misplaced, the same cannot be a serious submission from whichever point one looks at it. The argument that the Appellant is advancing is that this Court proceeded on an incorrect exposition of the law and therefore reached an erroneous conclusion of law. As already observed above, misconstruing of the law cannot be a ground for review. What the Appellant is asking this Court to do is to re-appraise the entire evidence and revisit the manner in which Omondi J applied or interpreted the law or exercised her discretion. That I cannot do as it will amount to exercise of Appellate Jurisdiction,



which is not permissible. I therefore find that the grievances alleged are grounds for Appeal, not for Review. In the circumstances, I have no hesitation in rejecting the prayer for Review and I so do.

**C. Whether this Court should stay the arrest and/or committal to civil jail of the Appellant in execution of the Judgment entered in Iten SPMCC No. 40 of 2010**

41. The Appellant has submitted that upon delivery of the Judgment herein, Solomon moved and obtained warrants of arrest against the Appellant, that the Appellant was arrested and detained at a Police Station, that the 1<sup>st</sup> Respondent has not exhausted all other avenues of execution but has opted for detention of the Appellant, that the 1<sup>st</sup> Respondent has not made any attempt to execute against the Attorney General, that the Appellant is in poor health and requires close medical attention and if committed to civil jail his condition is likely to deteriorate, that the Appellant is related to Solomon by virtue of being blood brothers and this Court should consider the family ties and not further disintegrate them and that Solomon has failed to explain why he has proceeded only to execute against one Defendant.
42. The execution having been taken out at the trial Court in execution of its Decree, a consideration of the matters raised above reveals that they are matters that are clearly for the trial Court to deal. This High Court's role was simply appellate and upon pronouncing itself on the Appeal, matters touching on execution of the Decree cannot constitute issues that can be placed before this Court. Since this Court dismissed the Appeal, it never interfered with any of the trial Court's orders. The same therefore remain intact and this Court no longer has any role in the remaining matters. This Court is therefore the wrong forum to raise issues or seek reliefs touching on or arising from execution of the Decree. For any grievances touching on execution of the Decree post-delivery of the Judgment of this Court, the Appellant's recourse, if any, lies at the trial Court.

**Final Orders**

43. In the end, the Appellant's Notice of Motion dated 12/05/2023 fails both on the ground that the same was filed after an unexplained inordinate delay and also on merits.
44. The Motion is found to be an abuse of the Court process and is accordingly dismissed with costs to the said Solomon Kipro Kiptugen.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 2<sup>ND</sup> DAY OF FEBRUARY 2024**

.....

**WANANDA J.R. ANURO**

**JUDGE**

