Ahmed v Tindika (Civil Appeal 156 of 2015)
[2023] KEHC 19726 (KLR) (5 July 2023) (Judgment)

Neutral citation: [2023] KEHC 19726 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 156 OF 2015

DKN MAGARE, J

JULY 5, 2023

BETWEEN

KHALEF KHAMIS AHMED .... APPELLANT

AND

RANDOLPH M TINDIKA .... RESPONDENT

JUDGMENT

1. This matter is as old as age itself. The Defendant in the lower court filed this appeal from the decision of Hon N Njagi, from the then senior principal magistrate. It is an appeal of a ruling in Mombasa CMCC 3388 of 2007.

2. By a plaint dated 3/12/2007, the plaintiff claimed for a sum of 2,000,000/= being money the defendant personally signed and undertook to pay.

3. The Defendant entered appearance in person. He wrote a Defencve through Abuodha and company advocates on 21/2/2007. He wrote those defences I call Raghbir defences. He denied ever writing the agreement. And without prejudice, if he ever wrote it was under duress or fraud. He gave two particulars. The first one was that he signed because the plaintiff threatened to charge the Defendant with robbery with violence. Secondly, no reasons for the payment were indicated. One thing that is loudly missing is the denial that there is any money due.

4. Paragraph 3 of the plaint is categorical that a sum of 2,000,000/= is due from the defendant. Paragraph 3 of the defence, simply denies the contents of paragraph 3. There is nothing more.

5. In the reply to defence the plaintiff denied the particulars of duress. He stated that he had made previous demands which were unheeded. He also says that the defendant's advocate was within the premises when the Defendant signed.

6. Vide an application made 7 years later, the plaintiff sought summary judgment for the amount. The application was dated 24/1/2014 and filed on the same day. The file seems to have been lost and a skeleton file had to be reconstructed though an application to that effect.

7. I have noted that the application was filed in the same file. Proper practice is to file a miscellaneous application, which when allowed, then and only then will a file be opened. The application to reconstitute a skeleton was filed in June, after the one for summary judgment. I Have seen that the original file was eventually recovered.

8. In a replying affidavit dated 3/12/2014 the Appellant denied the debt and stated as doth: -

    a. Annexture RMT 1 was not made by me as it purports to indicate

    b. In the alternative, if the same was ever made in my presence or by me, then it was under duress or coercion

    c. There is no witness to the agreement

    d. That over 400,000/- advanced to me by the plaintiff I am willing to settle at 800,000/=. He then annexed annexture KKA 1

    e. The plaintiff has refused to respond to my offer"

9. The parties field submissions in the lower court. The court then delivered its judgment on 9/4/2015. The court entered judgment for the amount of 2,000,000 as prayed.

10. The Appellant then appealed and was granted unconditional stay. Only the court appealed to can issue such an order after establishing whether the appeal is arguable. Otherwise under order 42 rule 6 security is mandatory. That is for another day, another time and different circumstances.

11. The appellant took his sweet time from 2015 to this year. Parties filed submissions and I gave directions on disposal.

Appellant's Submissions

12. After reviewing the 5 paragraph memorandum of appeal, the appellant stated that he will review each limbs separately

    a. Triable issues – he stated that the manner the agreement came into existence is an issue. He pleaded the issue of fraud and duress.

    b. He states that there was no contract. He states that there was no evidence of a contract.

    c. Defective plaint -he stated that the plaint was definitive. Wrong procedure his view is that a wrong procedure was followed.

    d. Settlement proposal for 600,000 or 800,000/= was Germaine.

    e. He relied on the case of *Kenruss Medics Limited & another v Pasaiba Tourmaline Limited & another* [2021] eKLR, where justice A Mabeya stated as doth: -

> " This was reiterated by that Court in *Moi University v Vishva Builders Limited* CA No 296 of 2004 (unreported) wherein it was held that: -
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> > " The law is now settled that if the defence raises even one bona fide triable issue, then the Defendant must be given leave to defend. In this appeal

we traced the history from the commencement of relationship between the parties herein. The dispute arises out of a building contract. In the initial Plaint the sum claimed was well over 300 million but this was scaled down by various amendments until the final figure claimed was Shs 185,305,011.30/- We have looked at the pleadings and the history of the matter and it would appear to us that the appellant had serious issues raised in its defence. As we know even one triable issue would be sufficient – see *HD Hasmani v Banque Du Congo Belge* (1938) 5 EACA 89. We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in *Patel v EA Cargo Handling Services* Ltd [1974] EA 75 at P 76 Duffus P said: -6

> " In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as Sheridan, J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."

10. In the present case, the plaintiffs' case is that they advanced monies to the defendants which the latter have acknowledged. That the defendants have no valid or plausible defence to warrant the suit to go for full trial. That since the defendants had acknowledged their indebtedness, they have no plausible defence."

13. They also relied on the case of *Pwani United Builders Ltd & another v Waterways (Coast) Limited* [2021] eKLR, where justice Chepkwony stated as doth: -

" 24. Further, In the case of *Job Kiloch v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Riorio* [2015] eKLR, the Court stated as follows:

> " Before the grant of summary judgment, the court must satisfy itself that there are no triable issues raised by the Defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner."

What then is a defence that raises no bona fide triable issue. A bona fide triable issue is any matter raised by the Defendant that would require further interrogation by the court during a full trial. The *Black's Law Dictionary* defines the term "triable" as, subject or liable to judicial examination and trial". It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court...."

25. I have looked at the pleadings before me and find that the summary Judgment application was properly before court as it was filed after the Respondents had entered appearance but was yet to file a defence. The ruling was however delivered on November 9, 2012, long after the Appellants had filed the defence. The trial court also appreciated that a defence had been filed and at the 2nd last paragraph of its ruling at found that although the appellant had pleaded breach on part of the Plaintiff which led to them spending Ksh 231,362/= on reports, no receipt has been produced to buttress that argument."

Respondent's Submissions

14. The respondent set forth the duty of the Appellate court as seen in two cases, that is, of *Selle and another v Associated Motor Board Company and Others* [1968] EA 123, where the court of Appeal for Eastern Africa stated as doth: -

> " ...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..."

15. He also relied on the decision of *Kenya Ports Authority v Kuston (kenya) Limited*, (2009) 2EA 212 wherein this Court held inter alia that:

> " On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

16. He then addressed the issues along the lines addressed by the Appellant in the Appeal.

17. The first issue is the question of the triable issues. He states that the Appellant never denied signing the agreement. If there was duress, he had 6 months after signing but did nothing.

18. He relied on the decision of *Njogu & Company Advocates v National Bank of Kenya Limited* [2016] eKLR, where the court of appeal stated as doth: -

> " Since the appellant and the respondent had clearly agreed on the above provisions, it is evident that they were both party to an agreement that is illegal as the terms of the agreement contravened the law. In the case of *Patel v Singh* (2) [1987] KLR 585, the Court of Appeal dismissed an appeal holding that a contract entered into by the parties that was contrary to the provision of section 3(1) of the *Exchange Control Act* Cap 113 was illegal ab initio and unenforceable. Nyarangi, JA quoted with approval the following passage from the case of *Archbolds (Freightage) Ltd v S Spanglett Ltd* [1961] 1 QB 374, at page 388:-
>
> > " The effect of illegality upon a contract may be threefold. If at the time of making the contract there is an intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having that intent; if the intent is held in common, it is not enforceable at all. Another effect of illegality is to prevent a plaintiff from recovering under a contract if in order to prove his rights under it he has to rely upon his own illegal act; he may not do that even though he can show that at the time of making the contract he had no intent to break the law and that at the time of performance he did not know what he was doing was illegal. The third effect of illegality is to avoid the contract ab initio and that arises if the making of the contract is expressly or impliedly prohibited by statute or is otherwise contrary to public policy."

19. He relies on section 3(1) of the *Contracts Act* to show that they proved their case. The said section provides as doth: -

> "Certain contracts to be in writing (1) No suit shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person unless the agreement upon which such suit is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized."

20. It is the respondent's submissions that the party to be charged, the defendant signed the note.

21. He also relied on a persuasive case of *Lucy Mwihaki Mureithi v Sylvanus Ngaira Mukotsi* [2018] eKLR, where Hon lady Justice A Mshila, Stated as follows: -

> "17. The respondent stated that there was no ambiguity on the parties intentions so as to invite the court to get a better meaning from the extraneous circumstances; and reiterated the 'golden rule' of interpretation of an agreement which is that the language in the document is to be given its grammatical and ordinary meaning unless this would result in some absurdity or some repugnancy or inconsistency with the rest of the document; case law referred to *Coopers & Lybrand v Bryant* (1995) 3SA 761; that the court needs to only consider the literal meaning of the subject words and phrases and may only go beyond the agreement to consider the background circumstances and extrinsic evidence when the language of the document is on the face of it ambiguous;
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> 18. That by asking the court to consider the conduct of the parties or other evidence beyond the subject agreement was inviting a breach of the golden rule;
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> 19. The appellant when executing the agreement was bound by the doctrine of "pacta sunt servanda" (agreements must be kept) and the doctrine of "caveat subscriptor" (let the signatory beware) which dictates that when parties append their signatures to an agreement they are bound by its terms; case law referred to *South African Railways* (1903) TS 571; where it was held that;
>
> > ".... it is a sound principle of law that a man when he signs a contract he is taken to be bound by the ordinary meaning and effect of the words which appear over his signature."
>
> 20. The respondent contends that the appellant was trying to escape from that which she had agreed to and executed; whereas the respondent's counterclaim was well founded and based on the plain terms of the sale agreement; that he cleared the balance of the purchase price prior to the filing of the counterclaim whereas the appellant is yet to release the logbook as required under the sale agreement and is thus in clear breach of it;"

22. The Respondent also relies on the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR, where the court of appeal stated as doth: -

> "This, in our view, is a serious misdirection on the part of the learned judge. A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their

contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.

As was stated by Shah JA in the case of *Fina Bank Limited v Spares & Industries Limited* (Civil Appeal No 51 of 2000) (unreported):

> " It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain".

23. He also states that the record of appeal was filed on 1/10/2020. The memorandum of appeal was filed on October 22, 2015 for a decision made on 9/10/02015. He relies on the authority of *Dilpack Kenya Limited v William Muthama Kitonyi* [2018] eKLR, where justice G V Odunga stated as doth: -

> " If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.
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> 28. As to the principles to be considered in exercising the discretion whether or not to enlarge time in *First American Bank of Kenya Ltd v Gulab P Shah & 2 Others* Nairobi (Milimani) HCCC No 2255 of 2000 [2002] 1 EA 65 the Court set out the factors to be considered in deciding whether or not to grant such an application and these are
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> (i). The explanation if any for the delay;
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> (ii). the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice;
>
> (iii). Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant."

24. He prays that I dismiss the appeal with costs.

Analysis

Duty of the first Appellate court

25. The duty of the 1st Appellant Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of *Selle and another v Associated Motor Board Company and Others* [1968] EA 123, where the law looks in their usual gusto, held by as follows: -

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

26. The Court is to bear in mind now that it did not see the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The

observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

27. 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 overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed…"

28. The trial court and this court will construct documents in a similar manner as there are no witnesses required to know the content of a document.

29. Therefore, where the findings of the trial Court are consistent with the evidence generally, this Court should not interfere with the same.

30. The court will deal with each issues as raised but will quickly dispense preliminary issues. The respondent stated that the appeal is field out of time. Section 79 G provides as doth: -

> " 79G. Time for filing appeals from subordinate courts Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:
>
> Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time."

31. The section does not say how the appeal is to be filed. This is set out in Order 42 rule 1,

> " Form of appeal [Order 42, rule 1.]
>
> (1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading
>
> (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

32. Therefore, the Appeal to the high court is the memorandum of Appeal as opposed to the court of Appeal that requires the record of Appeal. The record of appeal Is a matter of practice in the high court. Therefore, I am satisfied the appeal was properly filed within time.

33. Going to the main appeal, the issue is whether the appellant had a defence to the claim. In am aware that striking out or summary judgment are rare remedies. It can be recalled that hon C.B. Madan, C.H.E

Miller and K.D Potter, JJA in *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* [1980] eKLR had this to postulate: -

> Per Lord Justice Swinfen Eady in *Moore v. Lawson and Another* (supra) at p. 419.
>
> > "It cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be very sparingly exercised. and only in exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved". per Lord Herschell in *Lawrence v. Lord Norreys,* 15. A.C. 210 at p. 219."

34. The Appellant raised three defences: -

    a. The first one was that he did not owe the Respondent any money.

    b. The second one was that he did not write an agreement.

    c. The third one was that the agreement was written under duress.

35. I was prepared to accept the first one till I saw, that the Appellant was raising an issue in annexture 1 of the replying affidavit, that he offered to pay 800,000/=. This means he owes. The defence, did not raise any issue on part payment.

36. When a party says that he does not owe he is under duty to explain why. Under order 2 rule 4(1) of the *Civil Procedure Rules* the law requires as doth: -

> "Matters which must be specifically pleaded , Order 2, rule 4.
>
> (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality-
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> (a) which he alleges makes any claim or defence of the opposite party not maintainable;
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> (b) which, if not specifically pleaded, might take the opposite party by surprise; or (c) which raises issues of fact not arising out of the preceding pleading.
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> (2) Without prejudice to sub rule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient. (3) In this rule, "land" includes land covered with water, all things growing on land, and buildings and other things permanently affixed to land."

37. If the plaintiff did not owe, he was under duty to plead release payment etc. he cannot raise it in a replying affidavit that he is willing to pay. In the case of the case of *Raghbir Singh Chatte v National Bank of Kenya Limited* [1996] eKLR, where the court of Appeal stated as doth: -

> "The main object of this rule and r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel M. R. in *Thorp v Holdworth* (1876) 3 Ch. D. 637). This object is secured by requiring that each

party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible, (underling supplied).

I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in the appellant's defence. This was that if the respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then the same and here again, without stating how and when, had been paid. Such a spurious pleading in the alternative cannot give any merit to the defence and so also makes it one which discloses no reasonable defence for all purposes including that of 0 6 r 13(1)(a)."

38. What the case settles, is that in the case of an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible. The defence must explain why the debt not is due. This explanation must be in the defence.

39. The second point was that he did not write an agreement and if he did it was under duress. Unfortunately, he did the same for the affidavit. Affidavits, however are a different ball game. They must be limited to the facts order 19 rule 3 provides as follows:-

" Order 19, rule 3 - Matters to which affidavits shall be confined

(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.

(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents, shall (unless the court otherwise directs) be paid by the party filing the same."

40. The affidavit that approbates and reprobates is not useful. The signing of the agreement is within the knowledge of the Appellant. Under section 112 of the *Evidence Act*, he has special knowledge on how the agreement or note was signed. Section 112 of the evidence provides as follows: -

" 112. Proof of special knowledge in civil proceedings In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

41. Facts surrounding the alleged coercion, robbery with violence or duress were not pleaded. What was the source of duress? The Appellant placed nothing show that. Instead he admitted getting money from the plaintiff. He keeps switching on the amount due. He blames the Respondent for not accepting less money.

42. In the circumstances, there is no plausible defence disclosed in the defence in the court below. Regarding the signing of the agreements, the same is not admissible under section 3 of the *Contracts Act.*

43. In the case of *Lagoon Development Limited v Prime Aluminium Casements Limited* [2021] eKLR, the court stated as doth: -

> "First, a Court must determine whether or not the defendant Statement of facts are bare denials and in the circumstances, not sufficient to deny the Plaintiff Summary Judgment relief. Under this test in the case of *Janet Edwards v Jamicca Beverages Ltd* C.A. 2002/037, the Court in discussing the physiology of Summary Judgment and the whole rule as a litigation tool held inter alia that:
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> > "The Civil Procedure Rules represents an attempt to modernize litigation by emphasizing efficiency, proportionality and reduction of costs while maintaining principles of fairness. It does this by asking that the parties to plead in a manner which enables the Court to carry out its duty to manage cases actively, by identifying issues early, and deciding which issues need a trial. The vice of the bare denial, defence is that no one knows which issues are joined, which issues can be resolved summarily, which issues do not need resolution. This is the era of cards face-up and on the table litigation so that all can see the cards."

44. In *Lagoon Development Limited v Prime Aluminium Casements Limited* [*supra*], the court stated as doth: -

> "Also contrary to the Appellant's contention, viewing the evidence in light of what had been placed before the trial Court, I reject Learned Counsels submissions that the defence raised triable issues on the liquidated sum meriting a full trial of the suit. In the case of *International Fund for Agricultural Development v Ahmad Jacayeri* (2001) 1 ALL ER 161 the Court held that: -
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> > "While recognizing that a fuller picture may emerge at that stage, the Court can only determine an application for Summary Judgment on the material before it. The Defendant cannot ask the Court to allow the matter to go to trial simply on the grounds that something unexpected might turn up to assist him."
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> The Courts' exercise of discretion in granting Summary Judgment will not be overturned in absence of arguable points of law and facts which is likely to affect the outcome of the suit. The Appellant made no such showing here in the *Three Rikers DC v Bank of England* (2001)2 ALL ER 513
>
> > "Lord Hope concerning need inter alia that the rule on Summary Judgment is a recognized exception to the traditional method by which issues of fact are tried in our Courts"
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> For example, it may be clear as a matter of law at the onset that even if a party were to succeed in proving all the facts, that he offers, to prove, he will not be entitled to the remedy that he seeks. In that event a trial of the facts used be a waste of time and money, and it is proper that the action should be taken out of Court as soon as it is possible. In other cases it may be possible to say wider confidence before trial that the factual basis for the action is fanciful because it is entirely without substance."

45. I am unable to agree that the matter needs to go to trial simply to know if the defendant truly has no defence. In the circumstances, there is no plausible defence disclosed in the defence in the court below.

46. Each of the grounds raised in the Appeal is a red herring. There is no merit in the appeal. The appeal is bereft of merit. It calls for its dismissal. I therefore dismiss the appeal with costs.

47. The upshot of the foregoing is that I make the following orders: -

    a. I find there is no merit in this appeal and I therefore dismiss the same with costs. The Respondent shall have costs of Ksh 155,000/= for the Appeal which shall be paid within 30 days, in default execution do issue.

    b. A copy of this judgment should be served upon the court.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 5TH DAY OF JULY 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

No appearance for the parties