REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

CIVIL SUIT NO. 28 OF 2014

BENARD KIBET RONO (*Suing as the legal representative of the Estate of the late*

EUNICE CHEPNGETICH NGASURA(Deceased).....PLAINTIFF/RESPONDENT

VERSUS

TAPNYOBII CHEBII NGASURA.....1ST DEFENDANT/APPLICANT

PHILEMON ROTICH ALIAS DAVID.....2ND DEFENDANT/APPLICANT

RULING

1. I am called upon to determine the motion on notice filed here on 21st August, 2019 and dated 19th August, 2019. The applicants – **TAPNYOBII NGASURA** and **PHILEMON ROTICH alias DAVID** – are the defendants in the suit while the respondent – **BENARD KIBET RONO** – is the plaintiff. The suit from which the application arises is already concluded, with judgment having been delivered on 16th May, 2018. The application at hand therefore focuses on the process of execution.

2. The application is expressed to be brought under Section 51 (2) of the Advocates Act (cap 16), Order 11(3) (1) (h), Order 9, Order 51 Rules 1,3,10, Order 22 Rule 49, Order 10 Rule 1, Order 21 Rule 12 and Order 22 Rule 22(1) all of Civil Procedure Rules, 2010, Sections 3A and 63 of Civil Procedure Act (cap 21), Article 50 of the Constitution of Kenya, 2010, Rules 21(1) (2) 24, 25, and 20 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, and all enabling provisions of law.

3. The application came with ten (10) prayers for consideration but prayers 1 and 3 are now spent, having been meant for consideration at the exparte stage. The prayers for consideration now are 2,4,5,6,7,8,9 and 10. The said prayers are as follows:

> ***Prayer 2****: That the firm of P.Sang & Company Advocates be granted leave to come on record for the defendants in the place of E.M.Orina and Company Advocates.*
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> ***Prayer 4****: That the Honourable court be pleased to review and/or set aside order dated 15/8/2019 and issue an order discharging the 1st Applicant from custody at Kericho Prison.*
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> ***Prayer 5****: That the honourable court be pleased to review and/or set aside the orders of this Honourable court dated 18/7/2019 by lifting the warrants of arrest against the 1st and 2nd applicants accordingly.*
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> ***Prayer 6****: That the honourable court be pleased to review and/or set aside the orders of the honourable court dated 11/7/2018 and order that all titles issued as a result of the said order being KERICHO/SILIBWET/5243 and KERICHO/SILIBWET/5244 be cancelled and/or revoked.*
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> ***Prayer 7****: That there be a stay of execution pending the hearing and determination of Nyeri, Court of Appeal, Civil Application number 72 of 2018.*
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> ***Prayer 8****: That in the alternative to prayers 1-7 above the honourable court be pleased to allow the defendants/judgment debtors to satisfy the decretal amounts in monthly instalment.*
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> ***Prayer 9****: That this honourable court be pleased to make any other or further orders as it seems fit and in the interest of justice.*
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> ***Prayer 10****: That the costs of this application be provided for.*

4. The application is anchored on grounds, interalia, that the applicants were never served with notice to show cause; that the certificate of

costs issued after taxation of the bill was never converted into a decree as required by law; that the warrants of arrest against the defendants were issued despite concealment of material facts by the respondent; that the applicants were not aware of the order issued by the court arising from application dated 26th June, 2018; that due process was not followed by Deputy Registrar in signing mutation forms; that the applicants have an unheard and undetermined application pending at the Court of Appeal seeking, interalia, to be allowed to file an appeal out of time; that the applicants stand to suffer loss and damage if the orders in force continue to stand; that there was a communication breakdown between the applicants and their former advocate; and that the respondent in this application can be compensated by way of costs.

5. The application came with a supporting affidavit that largely reiterated and/or amplified the grounds on the face of the application.

6. The respondent replied vide a replying affidavit filed on 17th September, 2019. According to the respondent, the application is incompetent, bad in law, and an abuse of the court process. It is, it was deposed, an invitation to court to sit on appeal on its own decisions. The applicants former counsel was said to have been served with the application dated 26th June, 2018 but the application was not responded to even after such service. The applicants averred that it would be wrong for the applicants to visit the laxity of their counsel on him or even try to blame the court. The applicants were also said not to be beneficiaries of the estate of the respondent's late mother and therefore have no locus standi to question how it is administered.

7. Further, the respondent averred that the applicants were served with the notice to show cause dated 9th May, 2019 and the service was accepted. Realizing that the applicants are opposing the execution for costs on the basis that no decree has been drawn, the respondent deposed that the execution being undertaken is for party and party costs and not advocate/client costs, which would require such decree. Party and party costs were said to be costs reflected either exactly or generally in a decree drawn after a judgment delivered in a suit. Such costs, it was deposed, do not require another decree as a certificate of costs issued after taxation is enough.

8. The applicants were said to have been represented by counsel during proceedings and should not therefore be entertained to claim laxity or incompetence on the part of their counsel. It was further stated that the applicants have never made proposals to settle the decretal amount in this matter.

9. The application was canvassed by way of written submissions. The applicants' submissions were filed on 29th November, 2019. According to the applicants, the court needs to establish whether it has authority to review and/or set aside its decisions; whether prayers 4,5 and 6, in the application should be granted due to failure by the respondent to have the certificate of taxation converted into a decree for purposes of execution; whether the mistake of an advocate should be visited on his client; whether the affidavit of service on record as a response to the application should be expunged from record for conflict of interest and whether the order of stay is merited pending the hearing of the appeal.

10. All of these issues raised were answered in the affirmative, with the court said to have authority to review or set aside under Section 80 of Civil Procedure Act and Order 45 of Civil Procedure Rules, 2010. The justification for this in the application at hand lies allegedly in the fact that execution proceedings were conducted without due process of the law. The applicants were said not to have been served with notice to show cause and the certificate of costs issued after taxation was said not to have been converted into a decree before execution. All these were said to be mistakes on the face of the record and the court was therefore said to be justified to do a review.

11. As regards granting of prayers 4,5 and 6 in the application, it was reiterated that the certificate of taxation was never converted into a decree for purposes of execution and that violated Order 21 and 22 of Civil Procedure Rules, 2010, more particularly rules 7,8 and 9 of Order 21 and rules 7 and 13 of Order 22. The decided case of **RUBO KIMNGETICH ARAP CHERUIYOT VS PETER KIPROP ROTICH: HCC NO. 133 OF 1993**, Eldoret, was cited to reinforce the position.

12. The mistake of an advocate should not be visited on the client, the applicants further submitted. It was pointed out that there was an apparent breakdown in communication between the applicants and their counsel, with the counsel allegedly being served with various court processes but failing to inform the applicants. The case of **CHRISTINE ANDREE JOSH & 2 OTHERS VS SALLY CHEPWOGEN: ELC NO. 6 OF 2014, KERICHO**, was proffered for guidance.

13. The applicants also submitted that there was conflict of interest arising from the commissioning of oath in respect of the replying affidavit by the former counsel for the applicants as he was then still the counsel on record for the applicants. The counsel was faulted for commissioning the affidavit of the applicants' nemesis.

14. As to whether the order of stay is merited, the applicants submitted that such order is necessary. The law – Order 42 Rule 6(1) of Civil Procedure Rules, 2010, - was said to allow it. The justification for it was said to consist in the fact that the applicants stand to suffer substantial loss and damage if the order is not granted. Their appeal, they also submitted, would be rendered nugatory. The respondent was also said to be unlikely to have the ability to pay any costs arising from the appeal.

15. Ultimately, the applicants submitted that "***the orders sought are therefore merited and we humbly pray that they are granted***". Which I understand to mean that the application herein is meritorious and should be allowed.

16. The respondent filed his submissions on 25th October, 2019. To the respondent, the issues are whether there are sufficient reasons for review of the orders of 15th August, 2019, 18th July, 2019 and 11th July, 2018; whether the order of stay sought should be granted; whether the decretal sum should be paid by instalments; and/or finally, who should pay the costs of this application.

17. Review, the respondent submitted, is not merited as the applicants have not demonstrated an error or mistake on the face of the record. They have not also shown any new matter or evidence that was not within their knowledge when the orders they seek to review were made. According to the respondent, what the applicant seek to review can only be handled through an appeal.

18. Review was said to be justifiable where an obvious error or mistake on the face of the record is apparent or where a new matter or evidence not within the knowledge of the applicant at the time the orders were made is shown to exist. To drive the point home the respondent cited the case of **ANTHONY GACHARA AYOB VS FRANCIS MAHINDA THINWA: CA NO 92 OF 2008**, where another case, **DRAFT & DEVELOP ENGINEERS VS NATIONAL WATER CONSERVATION** and **PIPELINE CORPORATION: CIVIL CASE NO 11/2011**, was cited with approval. Also cited was the case **NATIONAL BANK OF KENYA LIMITED VS NDUNGU NJAU:CA NO 21 OF 1996**. The point made is that the error or mistake has to be obvious. It should not be one arrived through protracted or labored reasoning.

19. The respondent also submitted that the applicants averment that the certificate of costs needed to be converted into a decree before execution was wrong. That, he submitted, would apply to an advocate/client bill of costs but not to a party and party bill of costs as is the case here.

20. As regards the order sought for stay of execution, the respondent submitted that the applicants have not yet filed an appeal. They have only expressed an intention to do so and followed it up with an application seeking to be allowed to do so out of time. That same application was also said to have sought an order of stay but the Court of Appeal did not grant it. As there is no actual appeal filed, the respondent submitted that this court cannot be invited to speculate on the unknown.

21. The respondent then took issue with the applicants proposal to be allowed to satisfy the decretal sum in instalments. The applicants were faulted for not giving a clear and detailed manner in which such instalments are to be paid. It was pointed out that prior to issuance of warrants of arrest against the applicants, the matter had been mentioned several times in court all in an attempt to get a payment proposal from them. No such proposal was given and the respondent feels that the applicants are not sincere. Ultimately, the respondent asked the court to dismiss the application with costs.

22. I have considered the application, the response filed, rival submissions, and the entire record of proceedings generally. The applicants want the orders granted because "*the execution proceedings were conducted without due process of law*". They say they were never served with notice to show cause and they also fault the process because the certificate of taxation was not converted into a decree before execution. According to the applicants, this violated Order 21 rules 7,8, and 9 and Order 22 rules 7 and 13. It was also allegedly in violation of Section 51 (2) of the Advocates Act, (Cap 16). They further allege a possible conflict of interest in their advocate's conduct.

23. The applicants former counsel was also said to have blundered and the applicants feel that this blunder should not be visited on them. The blunder seems to consist in not communicating with the applicants and/or acting without their instructions. They also say they have gone on appeal and their appeal may be rendered nugatory if the application is not allowed. Needless to say, the respondent does not agree with any of these averments.

24. In order to establish the truth, I had to read both the pleadings and the proceedings. And the truth is more in the proceedings than in the pleadings. This is what I gleaned: Judgment was delivered on 16th May, 2018. Shortly after delivery of judgment, a decree dated 23rd May, 2018 was raised. Thereafter, there was an application dated 26th June, 2018 seeking, interalia, that authority be given to the deputy registrar to sign documents of transfer of two acres of the suit land to the respondent. The application was not opposed and was therefore allowed. This happened in presence of the applicants' counsel.

25. Later, a bill of costs dated 20th September, 2018 was filed. The court taxed it at Kshs. 275,095 vide a ruling dated 16th January, 2019. The ruling came after both sides had duly filed submissions. On 18th January, 2019 a certificate of taxation for the taxed bill was issued. Then came the application dated 14th March, 2019 for execution of the decree for costs. That application sought issuance of notice to show cause. A notice to show cause dated 9th May, 2019 was issued. The record show it was served and received by the applicants on 20th May, 2019 at 1.01pm.

26. The applicants were supposed to appear in court for notice to show cause on 19th June, 2019. They didn't appear but their counsel was present. He asked for time to get instructions from the applicants. The time was given and the matter was to come up in court next on 26th June, 2019. Records show that nothing happened on 26th June, 2019 and another date – 3rd July, 2019 – was taken at court registry. Again, nothing much happened on 3rd July, 2019 and another date – 17th July, 2019 – was taken for notice to show cause. When the matter came up in court on 17th July, 2019 the respondents counsel told the court that the applicants had not paid what they owed. He applied for warrant of arrests. Counsel for applicants was present and did not oppose. The court issued the warrants and on 15th August, 2019, the 1st applicant was brought to court after having been arrested.

27. When the 1st applicant was brought to court on 15th August, 2019, she asked for time to lease out her land in order to raise money to pay. The respondent had had enough and insisted on committing her to civil jail. That was done. Later, this application now under consideration was filed.

28. I must state right from the outset that one clearly notices some factual untruths and/or misrepresentations on the part of the applicants if the narrative given above is considered. For instance, the applicants say they were not served with notice to show cause. But the record shows service of the notice to show cause on the applicants on 20th May, 2019 at 1.01pm. There is acknowledgment that service was effected. It is not therefore true to say that they were not served. The record does not bear them out. It shows the exact opposite of what they are saying.

29. The other premise of the application is that a decree for the taxed costs was supposed to be raised. According to the applicants' counsel, this is what Section 51 (2) of the Advocates Act (cap 16), Order 21 rules 7,8 and 9 and Order 22 rules 7 and 13 of Civil Procedure Rules require. But is this the true legal position? The answer is No.

30. And here is why: Section 51(2) is in part IX of the Advocates Act (cap 16). That part comprises Sections 44 to 52 of the Act. The part is

captioned "**REMUNERATION OF ADVOCATES**." This sub-title clearly indicates the contextual and thematic positioning of the provisions of that part. It is plainly about remuneration of an advocate by his client. In simple terms, it envisages a disputed Advocate/Client bill of costs and the respondent correctly pointed this out in the submissions.

31. A careful reading of the provisions in this part of the Advocates Act (cap 16) shows clearly that a suit is envisaged based on advocate/client costs and a judgment therefrom is supposed to issue. Such suit may arise not only from matters already concluded in court, but also such other matters outside of court which give rise to an advocate/client relationship. Obviously, from such judgments, decrees are bound to arise. This is the kind of decree which the applicants counsel thinks should have been raised regarding the matter at hand. He is clearly wrong. We are dealing here with a party and party bill of costs, not an advocate/client one. Section 51 (2) of the Advocates Act has no relevance to the matter at hand.

32. The issue of raising a decree is also supposed to find succor in Order 21 rules 7,8 and 9 and Order 22 rules 7 and 13 of the Civil Procedure Rules, 2010. But these rules do not provide that a decree be raised on a bill of costs. They make reference to a decree raised from a judgment pronounced by a court in a suit. Order 21 rule 9 is particularly instructive on the issue of decree and/or costs and it states as follows:

> ***9 (1) Where the amount of costs has been***
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> ***(a) Agreed between the parties;***
>
> ***(b) Fixed by the judge or magistrate before the decree is drawn;***
>
> ***(c) Certified by the registrar under Section 68 A of the Advocates (Remuneration) Order; or***
>
> ***(d) Taxed by the court***
>
> ***The amount of costs may be stated in the decree or order.***
>
> ***(2) In all other cases, and where the costs have not infact been stated in the decree or order in accordance with subrule (1), after the amount of costs has been taxed or otherwise ascertained, it shall be stated in a separate certificate to be signed by the taxing officer, or, in a subordinate court, by the magistrate.***
>
> ***(3) ……..***

33. Simply put, the above provision requires that where a judgment is delivered and costs are assessed before the decree is drawn, the costs assessed are supposed to be stated in the decree that is drawn later. But in a situation where the decree is drawn before costs are assessed, the costs assessed later are supposed to be shown in a certificate of costs duly signed by the taxing officer. My understanding here is that costs assessed before a decree is drawn are supposed to be clearly shown in the decree that comes later. Such costs in my view do not require a certificate of costs from the taxing officer. It is enough that they are shown in the decree. But costs assessed after the decree is drawn require the certificate of the taxing officer.

34. It appears to me to be a misapprehension of the law on the part of the applicants' counsel when he takes the position that party and party costs duly certified by the taxing officer require their own decree. That is not the law. Besides, it is clear that such decree would be a superfluous instrument given that it would look more or less like the certificate of costs itself. It is clear therefore that the applicants are also wrong on the issue decree and costs.

35. But that is not the only wrong attributable to the applicants. They also want a review and the position in law is that you do not seek a review in a matter in which you are going to have gone on appeal. The law relating to review is to be found in Section 80 of the Civil Procedure Act (cap 21) and Order 45 of the Civil Procedure Rules, 2010.

Section 80 is as follows:

> ***Section 80: Any person who considers himself aggrieved-***
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> ***(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or***
>
> ***(b) by a decree or order from which no appeal is allowed by this Act***

May apply for a review of a judgment to the court which passed the decree or order, and the court may make such order thereon as it thinks fit. The opening part of Order 45 of Civil Procedure Rules, 2010, is much like Section 80 (supra) except that it is more elaborative, additionally requiring discovery of new and important matter or evidence or existence of an error or mistake apparent on the face of record or any other sufficient reason to warrant a review.

36. It is instructive that what is to be reviewed is the judgment, not the decree or order, the two being deemed to automatically become empty of any legal force once an applicant succeeds in the application for review. Decrees are usually raised from judgments. Orders are usually raised from rulings. To the extent that the law applicable mentions orders, it becomes clear that rulings are also reviewable. The applicants herein are not inviting the court to review any judgement or ruling. They are inviting the court to review the orders. The order or decree is supposed to grieve you, thus leading you to apply for review of judgment or ruling.

37. It is easy to argue for the defendant that review is only one of their options. Setting aside of the orders is another: Primafacie, setting aside seems more appropriate as it applies not only to judgments and rulings but to orders as well. But is it merited in this case? The premise of the applicants is that they were not served with notice to show cause. We have already seen that they were served. They also say that a decree should have been issued for the costs. We have seen it was not necessary to issue it. They also say their advocate failed them. He made mistakes and/or did not communicate.

38. It is necessary to address the issue of advocates mistake before making known the position of the court on the issue of setting aside. According to the applicants, the mistake of an advocate should not be visited on his client. That is the law, they said. They even cited the case of **CHRISTINE ANDREE JOSHI and 2 OTHERS VS SALLY CHIPWOGEN: ELC NO 6 OF 2014, KERICHO**, to drive their point home.

39. But the truth of the matter is that the facts and circumstances of that case precisely warranted the position taken by the court. It is not always the law that mistake of an advocate will not be visited on the client. Sample this: In **GERALD MWITHYA VS MERU COLLEGE OF TECHNOLOGY (2018) eKLR, JOSHPHAT NDERITU KARIUKI VS PINE BREEZE HOSPITAL LT (2006) eKLR, and WATER PARTNERS INTERNATIONAL VS BENJAMIN KOYOO T/A GROUP OF WOMEN IN AGRICULTURE – KOCHIENG (GWAKO) MINISTRIES: (2014) eKLR**, the various courts that handled the matters held that litigants must bear the brunt of mistakes by their advocates as they would be at liberty to pursue their advocates elsewhere for such mistakes. The position therefore that mistake of an advocate should not be visited on a client is not iron-clad. It is the imperative of justice which determines the way to go.

40. In this matter itself, the narrative I have given of the proceedings shows an advocate who was actively involved in proceedings both before and after judgment. The applicants attribute mistakes to him but the record does not bear them out. If anything the record seems to show that the applicants went to sleep after the judgment was delivered. It is reasonably clear that it is the reality of execution that jolted them to wakefulness when it became clear that the respondent wanted the full harvest of the fruits of his judgment. That is the time the applicants started rushing around trying to appeal out of time and then coming back to this court while their application at the court of appeal is still pending.

41. Given all this, I would hesitate to consider favorably the issue of setting aside. I may add that the record shows that the applicant who was committed to civil jail had even promised to lease her land to raise money to pay costs. She was not being honest with that undertaking. She didn't pay and what happened next is the filing of this application.

42. It is necessary to point out also that even as the applicants filed this application, they had already reach the Court of Appeal. And instead of pursuing all their issues there, they chose to file this application here. As things stand now, the applicants are in two courts simultaneously. This, in my view, is trying to play ping-pong with the judicial process. It is not acceptable; it cannot be condoned. It seems to me that appeal, where opted for, leads to forfeiture of the right of review, and review itself, where invoked, makes one loose the right of appeal. The two cannot co-exist; they are mutually exclusive.

43. The applicants also allege conflict of interest on the part of their former counsel. This is said to have happened when the counsel commissioned the replying affidavit filed in response to the application at hand. The replying affidavit is dated 17th September, 2019. According to the applicants' present counsel, the former counsel should not have done so considering that at the time, he could still be deemed to have been acting for the applicants. In fact, the present counsel for applicants would wish that the replying affidavit is expunged from record. I perceive here that this counsel is looking for a short-cut to a quick win. If the affidavit is expunged, the applicants' application will be one without a response. This would give strength to the application. It would boost its chances of success.

44. But it is necessary to appreciate attendant circumstances and fact. The replying affidavit was commissioned on 17th September, 2019. The application at hand was filed on 21st August, 2019 and is dated 19th August, 2019. The record availed by the applicants themselves shows that after judgement was delivered, the applicants former counsel gave a notice of appeal. But everything else about the appeal was handled and/or steered by the current advocate. I see a memorandum of appeal on record dated 29th May, 2018. This effectively means the current counsel had taken over from the former counsel. The same counsel is shown to be appearing for the applicants in the application now under consideration. The application was filed in August, 2019. The former counsel commissioned the affidavit in response in September, 2019. That affidavit itself is clear that it was to be served on the present counsel being the one who had been instructed by the applicants. How then can one allege conflict of interest when it is clear that the applicants had bolted from their former counsel?

45. Whichever way one looks at it, it is clear that the present counsel had taken over completely from the former counsel both for purposes of pursuing the appeal and/or any other related issue in the suit. When the former counsel therefore commissioned the replying affidavit, he was not doing so as counsel who still appeared for the applicants but as one who was already out of the matter. Given this scenario, I find the allegations of conflict of interest puny and/or wishy-washy.

46. Overall, it is clear to me that the application was ill-conceived right from the beginning. It is brought under a myriad provisions of Law – The Advocates Act (cap 16), the Civil Procedure Act (cap 21), the Civil Procedure Rules, 2010, and, strangely and inappropriately, under Rules 21 (1), (2), 20,24 & 25, of the Constitution of Kenya (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) Practice and Procedure Rules, 2013, and – again strangely – Article 50 of the Constitution of Kenya, 2010. Even a casual glance at these provisions shows that they are quite a mouthful, disjointed, and mind-cluttering. I have used the words "strangely" and "inappropriately" here for a reason. And the reason is this: the constitutional provisions cited are for petitions of constitutional nature filed in superior courts. They in no way relate to ordinary suits and are surely not meant for simple applications arising at the tail-end of a concluded suit as is the case here.

47. When all is considered, the application as conceived, formulated, and prosecuted, is a fumble and a gamble at the same time. Its legal premise is a wild shot. Its factual thrust is a mixture of misrepresentations and untruths. The application is therefore one for dismissal and I hereby dismiss it with costs.

Dated, signed and delivered at Kericho this 6th day of February, 2020.

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A. K. KANIARU

JUDGE