

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

MISCELLENOUS APPLICATION (REFERENCE) NO. E059 OF 2023

NDIMA PAUL NDUNDA APPLICANT

VERSUS

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION 1ST RESPONDENT

JENNIFER MUGAMBI (RETURNING OFFICER 2ND

RESPONDENT

MBITE JOSEPH MUSYOKA 3RD

RESPONDENT

RULING

1. This Ruling relates to a Notice of Motion dated 22/1/2024 which is seeking orders pending the hearing and determination of this application inter partes an interim order be issued staying execution against the applicant by the respondents pursuant to a ruling delivered on 14/11/2025.
2. That the court be pleased to allow the applicant to liquidate the decretal sum of Kshs. 700,000/= in instalments comprising an initial deposit of Kshs. 50,000/= to the parties and subsequently monthly deposits of Kshs. 20,000/= until the complete settlement of the decretal sum.

3. That costs of the application be provided for. The application is based on the grounds that on 14/11/2022 the court issued a ruling and upheld the assessed costs at Kshs. 800,000/=. That he had paid security of costs of Kshs. 100,000/= which has been released to the respondent's advocate leaving an outstanding sum of Kshs. 700,000/=. That he proposes to pay by instalments of Kshs. 20,000/= per month until the full amount is settled.
4. The applicant avers that he is not able to pay the lump sum as he is ailing and requires regular medication every month for which he pays a monthly average of Kshs. 35,000/= on medication and treatment. That he has a genuine willingness to settle the decretal sum and has proposed a reasonable instalment plan which demonstrates his commitment to meeting the decretal sum despite his current unfortunate medical challenges.
5. That **Order 21 Rule 12 of the Civil Procedure Rules** grants the court discretionary powers to allow the payment of money either in a lump sum or in instalments. That no prejudice will be occasioned to the respondents.

6. The application is supported by the affidavit of the applicant sworn on 22/11/2025. He has in his averments reiterated the above grounds.
7. The 3rd respondent filed a replying affidavit sworn by Wilfred Nyamu on 12/6/2025 and opposed the application on the ground that there has been no transfer of the decree to this court and so the court is not seized with jurisdiction to determine particular aspects of the decree emanating from Mutomo Principal Magistrate's Court.
8. That the applicant has not acted in good faith as he has only paid Kshs. 100,000/= as security for costs. That the application is an abuse of court process and an afterthought aimed at denying the respondent the fruits of his judgement and a delaying tactic. That the applicant has not shown good will as he has not paid instalment.

The Applicants written submissions

9. The applicants submits that the issue for determination is whether he should be granted leave to settle the decree by way of instalments. He relies on **Order 21 Rule 12 of the Civil Procedure Rules and Diamond Star General Trading LLC -v- Ambrose D. O. Rachier carrying on**

Business as Rachier Amollo Advocates, [2018] eKLR

where the Judge relied on **Order 21 Rule 12 (2) of the Civil Procedure Rules** to exercise her discretion to order payment by instalment and cited with approval. The case of **Keshvaji Jethabhai & Brothers Limited -v- Saleh Abdulla [1959] EA 260** which laid down the principles for the exercise of discretion under the rule. He also relies on **Elizabeth Wanjira Evans -v- Richard K & 2 others [2021] KE ELC 4301**. That he is committed to pay the decretal sum but is unable to pay the amount in lump sum.

10. On whether the court has jurisdiction to entertain the application, he submits that the court dealt with a reference and upheld the ruling of the taxing master. He submits by so doing the High Court assumed jurisdiction in the matter.

1st and 2nd Respondents Affidavit & Submissions

11. The 1st and 2nd Respondents opposed the application and filed a replying affidavit sworn by Mercy Mwimbi. The respondents contend that the application is vexatious. That this court lacks jurisdiction to entertain the application as the decree was issued in the Principal Magistrate's Court and this court lacks jurisdiction to entertain the application.

It is further submitted that the matter came to this court as a reference on the Bill of Costs and since the reference was dismissed on 14/112024 the file had to be returned to the Magistrate's Court at Mutomo for execution of the decree. That if the applicant is allowed to pay by instalments, he will not have cleared the costs by the next election cycle. That the applicant has not shown goodwill in the payment of the decretal sum.

12.1st and 2nd respondents submits that the issue for determination is whether the application is properly before this court.

3rd Respondent's submissions

13. The 3rd respondent submits that **Section 30 of the Civil Procedure Act** speaks on execution of decrees and states that - ***"A decree may be executed either by the court which passed it or by the court to which it is sent for execution."***

14. That **Section 31 (2) of the Civil Procedure Act** speaks on transfer of decree and provides that:

"The court that passed the decree may of its own motion send it for execution to any court of inferior but competent jurisdiction."

15. That the decree can only be executed by the trial court or an inferior court of competent jurisdiction. That jurisdiction is granted by the statute or the laws that order the court and the limits cannot be abrogated by the court.

16. He relies on the Supreme Court decision in **Macharia & Another -v- Kenya Commercial Bank Limited & 2 others (Application No. 2/2011) (2012) KESC 8 KLR 23-10-2012** Ruling where the Supreme Court held that:

“A court’s jurisdiction flows from either the Constitution or the legislation or both. Thus a court of law could only exercise jurisdiction as conferred by the Constitution or any other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by the law.”

17. The issue as to whether a court of law had jurisdiction to entertain a matter before it, was not one of a mere procedural technicality, it went to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings.

18. The counsel submits that this court lacks jurisdiction to entertain the application. That on 14/11/2024 the court

found no merit in the reference dated 6/10/2023 thereby uphold the taxing master's decision which should be executed in the court that issued the decree.

19. It is further submitted that the Principal Magistrate Court's at Mutomo is *functus officio* as the court is considered to be *functus officio* when it has performed all its duties in a particular case and when its judgement or order has been perfected. That the decree of the Principal Magistrate's Court at Mutomo has not perfected.

20. On the merits of the application, it is submitted that the court can only order payment by installments as provided under **Order 21 Rule 12 of the Civil Procedure Rules** under two scenarios -

a) *With the consent of the decree holder or*

b) *Without the consent of the decree holder for sufficient cause shown.*

21. That the applicant has not sought the consent of the decree holder to pay by instalments nor has he shown sufficient cause to warrant such an order without the consent of the decree holder.

22.He relies on **Satya Bhamu Gandhi -v- Director of Public Prosecutions [2018] eKLR** where it was stated that:

“The Civil Justice System depends on the willingness of both litigants and lawyers to try in good faith to comply with the Rules established for the fair and efficient administration of justice. When those rules are manipulated or violated for purposes of delay, harassment or unfair advantage, the system breaks down and, in contravention of the fundamental goal of the Civil Procedure Rules, the determination of Civil Actions becomes unjust, delayed and expensive.”

23.It is submitted that the application is an abuse of court process and should be dismissed. That the application is misguided as it is brought under **Order 42 Rule 6** which is not relevant as the applicant is not seeking a Stay.

Analysis and Determination

24.I have considered the application. What was before this court is a reference dated 6/10/2023 seeking to set aside the assessment of respondent’s costs.

25.It is brought under **paragraph 11 (4) of the Advocates (Remuneration) Order** and **Section 3A of the Civil**

Procedure Act. The duty of the High Court is to hear and determine objections to decisions on taxation by the taxing officer. This is provided under **paragraph 11 of the Advocates (Remuneration) Order.**

26. The Judge is required to give a ruling and that ruling is appealable to the Court of Appeal with leave of the Judge. There is no jurisdiction given to the Judge to proceed with the execution proceedings once he has delivered the ruling. The Judge becomes *'functus officio'* after giving the ruling. The court with jurisdiction is the court that passed the decree. **Section 30 of the Civil Procedure Act** provides that a decree may be executed by the court that passed it or the court to which it is sent for execution. **Section 30 of the Civil Procedure Act** provides as follows:

“A decree may be executed either by the court which passed it or by the court to which it is sent for execution.”

27. On the other hand, **Section 31 (2) of the Civil Procedure Act** (supra) provides that the court that passed the decree may send the decree for execution by a court that is competent jurisdiction but inferior to it.

28.The jurisdiction of the court is allocated by the Constitution or the statute. The court cannot assume the jurisdiction that it does not have. See **Macharia & Another -vs- Kenya Commercial Bank Limited & 2 others** (supra).

29.The jurisdiction for execution of a decree is given to the court that passed the decree. This is not the court that passed the decree. It lacks jurisdiction to execute it. Parties allocate the court jurisdiction that is not donated to it by the statute. The court with jurisdiction to deal with the issue of execution of decree is the trial court.

30.For these reasons, I find that this application is not properly before this court. I therefore order that:

1) The application is dismissed with costs.

2)The file be returned to the lower court to deal with the matter appropriately.

Dated, signed and delivered at Kitui this 7th day of October, 2025.

**HON. LADY JUSTICE L. GITARI
JUDGE**