Kisangau v Sila (Civil Case 96 of 2015) [2025] KEMC 18 (KLR) (23 January 2025) (Ruling)

Neutral citation: [2025] KEMC 18 (KLR)

REPUBLIC OF KENYA

IN THE MAKINDU LAW COURTS

CIVIL CASE 96 OF 2015

YA SHIKANDA, SPM

JANUARY 23, 2025

BETWEEN

PETER MAWEU KISANGAU ..... PLAINTIFF

AND

JOHN MAINGI SILA ..... DEFENDANT

RULING

The Application

1. Before me is an application dated 26/7/2024 brought by Peter Maweu Kisangau (hereinafter referred to as the applicant) under a certificate of urgency. The application seeks the following main orders:

    1. That this Honourable court be pleased to grant leave to the firm of Gichuhi Kivindyo & Associates Advocates to come on record on behalf of the defendant/applicant;

    2. That this Honourable court be pleased to issue orders staying execution of the decree herein dated 4/8/2016 and any other decree re-issued subsequent thereto in execution of the judgment rendered in this suit;

    3. That this Honourable court be pleased to issue orders directing rectification of the decree issued in favour of the judgment creditor so as to discount the amounts substantially liquidated by the judgment debtor towards settlement of the decretal sum;

    4. That this Honourable court be pleased to issue orders directing the judgment debtor to liquidate the amount due upon adjustment and/or rectification of the decree in monthly instalments of Ksh. 10,000/= per month, or such other terms as may appear to court as fair, reasonable and just, bearing in mind the defendant/applicant's status in life and the prevailing economic realities;

    5. That the plaintiff/respondent be condemned to bear the costs of this application.

2. The application is supported by an affidavit sworn by the defendant/applicant and is premised on the following general grounds:

   a. That judgment herein was entered irregularly and a decree issued for Ksh. 334,030/= in favour of the plaintiff/respondent on 4/8/2016;

   b. On 1/4/2022 a notice to show cause was issued against the defendant/applicant herein for the same amount, which the applicant instructed the firm of Mutuku Mary & Company Advocates previously on record, to apply and set aside;

   c. Sometime in June, 2023 the erstwhile Advocates entered into negotiation with the plaintiff/respondent's Advocates, committing the decretal sum at Ksh. 375,000/= payable in quarterly instalments of Ksh. 100,000/= every three months;

   d. The Judgment debtor was not party to the said negotiations and the same did not take into account his economic status as well as his prevailing and contingent liabilities;

   e. Notwithstanding the foregoing, the defendant/applicant between the months of October and December 2023, liquidated the decretal sum to the tine of Ksh. 100,000/= comprising the 1st instalment;

   f. The said part payment has not been discounted in the warrant of arrest issued against the judgment debtor/applicant herein, and the said warrant is therefore erroneous and defective on the face of the record;

   g. That between the year 2020 and 2023, the judgment debtor herein incurred new liabilities mainly in form of school and college fees amount to Ksh. 450,000/= per annum, which the judgment debtor is liable to pay under the *Basic Education Act* 2013 or face sanctions from the Government;

   h. The judgment debtor cannot avert or avoid such liabilities as the same comprises basic parental responsibilities, which are universally recognised and statutorily incumbent upon him;

   i. The judgment debtor is a peasant farmer who has been struggling to satisfy the decretal sum herein on the face of a hostile and degenerated economic environment arising from political upheavals and attendant disruptions in the current business environment;

   j. The decree herein having been issued over 12 months ago, the judgment creditor was legally obligated to apply for and issue the judgment debtor with a fresh notice to show cause why execution should not issue before obtaining a warrant of arrest;

   k. Unless execution of the decree herein is stayed and warrants of arrest set aside, the applicant herein risks being arrested and detained unlawfully, subjected to cruel, degrading and inhuman treatment and his right to movement and security of the person and freedom from detention without a justifiable cause be violated, thereby occasioning the judgment debtor/applicant mental suffering, irreparable loss and damage;

   l. The remedies sought are lawful, justiciable and within the discretion of this Honourable court to grant.

3. In the affidavit in support of the application the defendant/applicant reiterated the grounds on the face of the application and also gave a history of his transaction with the plaintiff/respondent that made him to be sued. I will disregard that history since it is already water under the bridge. The applicant further gave details of his liabilities.

The Plaintiff's Response

4. The plaintiff opposed the application by a Replying affidavit sworn on 22/8/2024. He opposed the application on the following grounds:

    1. That the application is an afterthought and an abuse of the court process;
    2. The defendant stated falsehoods;
    3. The defendant has all along proposed an amicable settlement but has never honoured his promise;
    4. The defendant/applicant personally suggested and offered to settle the matter out of court;
    5. The parties had a meeting at the offices of the defendant's advocates to have a meeting on amicable settlement. The applicant was present at the meeting;
    6. Upon deliberation and at the request of the applicant himself, a consent was reached;
    7. The amount of Ksh. 100,000/= payable every three months was suggested by the applicant himself;
    8. The applicant did not comply with the terms of the consent;
    9. The period for payment of the full sum has since expired;
    10. The defendant deliberately failed to pay the debt so that he could take care of his own needs without regard to the fact that the respondent's children also required school fees;
    11. The matter has taken almost 10 years and the application is intended to buy time so as to deny the respondent the fruits of the judgment.

Main Issues For Determination

5. From the record, it would appear that the prayer to allow the firm of Gichuhi Kivindyo & Associates Advocates to come on record for the judgment debtor/applicant is unopposed. In my opinion, the main issues for determination are as follows:

    i. Whether the court should stay execution of the decree herein;
    ii. Whether the decree is defective and ought to be rectified;
    iii. Whether the defendant/applicant should be allowed to defray the decretal sum by instalments;
    iv. If so, whether an order for instalments of Ksh. 10,000/= per month is fair and reasonable;
    v. Who should bear the costs of this application?

The Defendant/applicant's Submissions

6. In the written submissions filed on behalf of the judgment debtor, it was submitted that the decree ought to be rectified to discount Ksh. 100,000/= paid by the applicant. That the judgment debtor be allowed to settle the decretal sum in monthly instalments of Ksh. 10,000/=. The applicant submitted that he ought not to be committed to civil jail. He relied on authorities whose copies were not attached to the submissions and contended that a person should not be committed to civil jail for inability to pay a debt unless it is shown that he has the means to pay but has refused to do so. The applicant further

submitted that no evidence had been adduced to show that he was dishonest. That he was willing to settle the decretal sum by instalments of Ksh. 10,000/= per month.

7. The applicant submitted that he was not issued with a notice to show cause why a warrant of arrest should not be issued against him for failure to pay the decretal sum. That the applicant used a notice to show cause that had been issued two years ago. The applicant argued that such notice to show cause was not enforceable by law. That a notice to show cause is valid for 12 months, after which a new notice ought to be issued. The applicant relied on the provisions of Order 22 rule 18 of the Civil Procedure Rules. The applicant contended that the notice to show cause relied upon by the respondent was null and void and as such, the warrant of arrest ought to be lifted.

8. The applicant argued that the decree had an error. That the respondent ought to have applied for a re-issuance of a decree which discounted the Ksh. 100,000/= paid by the applicant. That if the decree is executed as it is, it will occasion an injustice to the applicant and occasion an unjust enrichment to the respondent. The applicant further argued that the respondent ought to apply for rectification of the decree. The applicant submitted that he was not involved in the negotiations between his counsel and counsel for the respondent and that the consent was recorded without his knowledge. That the mistake of counsel should not be visited on him. The applicant urged the court to direct that he pays the decretal sum in instalments that he can afford. The applicant relied on the provisions of Order 21 rule 12 of the Civil Procedure Rules. The applicant further urged the court to consider the prevailing economic circumstances. That the applicant has other liabilities owing to parental responsibilities. The applicant prayed to be awarded costs of the application as the respondent did not discount the Ksh. 100,000/= already paid.

The Plaintiff/respondent's Submissions

9. The plaintiff/respondent submitted that the application was an abuse of the court process as the same seeks similar orders as in the earlier application dated 9/9/2022. That the consent terms and orders are still in force and the applicant has not sought to vary or review the terms of the consent order. The respondent argued that the application could not override the consent. That the application was mischievous and an afterthought meant to delay the execution of the decree. The respondent submitted that the matter had been in court for 9 years and the applicant had several opportunities to settle the amount but failed to do so. That litigation must come to an end and justice delayed is justice denied. The respondent urged the court to dismiss the application with costs.

Analysis And Determination

10. I have carefully considered the application and given due regard to the submissions made by the parties.

11. Section 1A of the *Civil Procedure Act* provides as follows:

> "(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
>
> (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
>
> (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect,

to participate in the processes of the Court and to comply with the directions and orders of the Court".

12. Section 1B provides thus:

> "(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims— (a) the just determination of the proceedings;
>
> (b) the efficient disposal of the business of the Court;
>
> (c) the efficient use of the available judicial and administrative resources;
>
> (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
>
> (e) the use of suitable technology".

13. Section 3A provides:

> " Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court".

14. Article 159(2)(b) of *the Constitution* provides that in exercising judicial authority, the courts and tribunals shall be guided by the principle that justice shall not be delayed.

Defective Decree.

15. I will start with the issue of the allegation that the decree is defective for failure to discount Ksh. 100,000/= paid by the judgment debtor. There is no dispute that the judgment debtor has so far paid a sum of Ksh. 100,000/= in settlement of the decretal sum. Section 2 of the *Civil Procedure Act* defines the term decree as follows:

> ".....means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but does not include—
>
> a. any adjudication from which an appeal lies as an appeal from an order; or
>
> b. any order of dismissal for default:
>
> Provided that, for the purposes of appeal, "decree" includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up".

16. In essence, the decree serves as a final declaration defining the case's legal consequences. It is a formal statement of adjudication, indicating the court's final settlement of the contested issues in the litigation. To put it simply, the decree is the final section of the judgment that summarizes the main points of the larger judgment and the verdict that was reached. For execution, the decree's date is the day the judgment is delivered. The decree is a reflection of the judgment. I am not aware of any law that requires a money decree to be rectified each time a judgment debtor pays part of the decretal sum. Even if

payment is made towards settlement of the decretal sum, the decree does not change nor it is rendered defective. The amount paid by a judgment debtor ought to be discounted while making the application for execution but does not alter the decree. If the court were to go by the reasoning of the applicant, it would mean that once the decretal sum is fully settled, there will be no decree. Therefore, I find and hold that the decree is not defective and that there is no need for rectification of the same.

Payment in instalments.

17. The applicant prays to be allowed to defray the balance of the decretal sum by instalments of Ksh. 10,000/= per month. It is agreed by both parties that there is a consent order that required the applicant to pay Ksh. 100,000/= every three months until payment in full. Order 21 rule 12(2) of the Civil Procedure Rules provides thus:

> " After passing of any such decree, the court may on the application of the judgment debtor and with the consent of the decree-holder or without the consent of the decree-holder for sufficient cause shown, order that the payment of the amount decreed be postponed or be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor or the taking of security from him, or otherwise, as it thinks fit".(Underlining mine)

18. Order 22 rule 22(3) of the Civil Procedure Rules provides that:

> " Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor the court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit".

19. From the above provisions, it is clear that the court has discretion to allow the judgment debtor to pay the decretal sum by way of instalments. However, the judgment debtor must show sufficient cause and the court may impose such terms as it thinks fit. There are numerous judicial decisions in which the courts have allowed judgment debtors to pay by instalments. I will highlight a few. In the case of Winfred Nyawira Maina v Peterson Onyiengo Gichana [2015] eKLR, the court held that in order for the court to exercise its discretion to allow payment of the decretal sum by instalments, sufficient cause must be shown and the indulgence to pay by instalments may be on such terms that the court thinks fit.

20. In Jabali Alidina v Lentura Alidina [1961] EA 565, the court held thus:

> " .....the court's discretion to order payment of the decretal amount in instalments is one which must be exercised in a judicial and not arbitrary manner. The onus is on the applicant to show that he is entitled to indulgence under this rule. It is for the applicant to show 'sufficient cause' for indulgence being shown to him....."

21. In the case of Lavington Security Limited v Nairobi City Water & Sewerage Company Limited [2014] eKLR, the court observed that in such an application, of great significance are:

    1. The circumstances of the case;
    2. The conduct of the parties;
    3. The willingness and bona fides of the applicant to pay a fair proportion of the debt; and
    4. The application is made without undue delay.

22. Judgement herein was delivered on 12/11/2015 and a decree together with a certificate of costs drawn on 4/8/2016. The record indicates that on 17/7/2023, the parties through their counsel recorded a consent, which was adopted as an order of the court in the following terms:

    a. The decretal sum of Ksh. 375,000/= be liquidated in four equal instalments of Ksh. 100,000/= after every three months until payment in full;

    b. In default of any instalment, execution to issue for the entire sum owed.

23. The record further indicates that while recording the terms of the consent, it was stated that the instalments would be paid with effect from 22/9/2023. However, this was not captured by the court while adopting the consent. The parties agreed to mention the matter on 12/2/2014 to confirm compliance. Do the circumstances warrant the granting of the orders sought by the applicant?

24. The applicant alleged that he was not involved in the negotiations leading to the recording of the consent and that the consent was entered into without his knowledge. It is trite law that generally, an advocate has ostensible authority to compromise a suit on behalf of his client(s). The extent of authority of an advocate on record to compromise a suit is set out in the Supreme Court Practice 1976 (Vol 2) paragraph 2013 page 620 as follows:

> " Authority of Solicitor – a solicitor has a general authority to compromise on behalf of his client, if he acts bona fide and not contrary to express negative direction; and it would seem that a solicitor acting as agent for the principal solicitor has the same power....No limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their notice."

25. The Court of Appeal in M & E. Consulting Engineers Limited v Lake Basin Development Authority & Another [2015] eKLR held, inter alia, that a duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side. The court also held that an advocate has general authority to compromise on behalf of his client, as long as he is acting bona fide and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding.

26. From the above jurisprudence, several key principles are discernible:

    1. An advocate in the course of conducting the cause is clothed with authority to compromise a suit in which he has been retained as counsel;

    2. Express authority is not needed for a counsel to enter into a compromise within the scope of the suit;

    3. Where there is limitation of authority and that limitation is communicated to the other side, consent by counsel outside the limits of his authority would be of no effect;

    4. Unless his authority to act for his client is revoked and such revocation is notified to the opposite side, he has, by virtue of his retainer and without need of further authority, full power to compromise a case on behalf of his client;

    5. The authority to compromise is implicit in the appointment unless it is expressly countermanded, and that, whether there is express authority conferred by the power or not.

27. From the above principles, it is my view that the argument that the erstwhile counsel for the applicant acted without the knowledge and consent of the applicant is legally frail and unsustainable. As rightly submitted by the respondent, the consent order on payment of the decretal sum by the applicant is still in force. Are there sufficient grounds to set aside or vary the consent order? In the case of Brooke Bond Liebig (T) Limited v Mallya [1975] E.A. 266, Law JA, stated the law at p. 269 in these terms: -

> The circumstances in which a consent judgment may be interfered with were considered by this court in Hirani vs Kassam (1952), 19EACA 131, where the following passage from Seton on Judgments and Orders, 7th edition, Vol.1 p.124 was approved:
>
> 'prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them..... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court..... or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement." (Emphasis supplied)

28. A court cannot interfere with a consent judgement except in such circumstances as would afford good ground for varying or rescinding a contract between the parties. This was the holding in the case of Flora Wasike v Destimo Wamboko (1988)1 KAR 625, wherein Hancox JA (as he then was) said in his judgment at page 626:

> It is now settled law that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out."

29. No such circumstances have been shown to exist in this case. There is no suggestion of fraud or collusion.

30. The record indicates that when the matter was mentioned on 12/2/2024, after over four months from 22/9/2023, the applicant had not paid the full instalment of Ksh. 100,000/=. He was given more time until 6/5/2024. However, there were no proceedings until 8/7/2024. On that day, the court was informed that no payment had been made as per the consent order. The court issued a warrant of arrest against the applicant. Following the issuance of the warrant of arrest, the applicant filed the instant application. It is clear that the applicant paid one instalment only and the same was not paid as per the terms of the consent. By paying he first instalment, it is evident that the applicant was aware of the terms of the consent. He did not bother to apply for variation of the terms of the consent order until a warrant of arrest was issued against him.

31. The instant application was filed after a period of one year from the date of adoption of the consent as an order of the court. No reasons have been given to explain the delay in bringing the application. Given the circumstances of the case, I find the delay to be unreasonable. When delay is unexplained, it becomes inexcusable. I would agree with the respondent that the application is an afterthought calculated to stifle or derail the execution process. It is also obvious that the applicant is in default. He seeks indulgence from the court yet his hands are tainted. He who comes to equity must come with clean hands. I do not think the applicant's soiled hands should be allowed to touch the pure fountain of justice.

32. My view is that the applicant is not entitled to the indulgence sought. He has no reasonable or legitimate expectation of receiving one. His only reasonable or legitimate expectation is that the discretion relevant to his application be exercised judiciously in accordance with established principles

of what is fair and reasonable. In those circumstances, it is incumbent on the applicant to provide the court with a full, honest and acceptable explanation of the reasons for failure to honour his commitment and orders of the court. He cannot reasonably expect the discretion to be exercised in his favour, as a defaulter, unless he provides a reasonable explanation for the default and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant. I am afraid that the applicant has failed in this endeavour. His conduct has given him away. I see no plausible reason to enable me exercise my discretion in favour of the judgment debtor.

33. I would borrow the words of the Court of Appeal in the case of John Ongeri Mariaria & 2 Others v Paul Mutundura [2004] 2 EA 163, wherein the Court observed quite authoritatively that:

> Legal business can no longer be handled in such sloppy and careless manner. Some clients must learn at their costs that the consequences of careless and leisurely approach to work must fall on their shoulders ....whereas it is true that the court has unfettered discretion, like all judicial discretions, must be exercised upon reason not capriciously or sympathy alone..... justice must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to assist the indolent."

34. I do not think the applicant is keen on settling the decretal sum. To-date, there is no indication that he has made any further payments. It appears that he returned to slumber when he got a temporary relief upon filing this application. The upshot of the above considerations is that the applicant has failed to demonstrate circumstances that would enable the court to vary the terms of the consent order on settlement of the decretal sum. The prayer to pay in instalments of Ksh. 10,000/= per month is devoid of merit.

35. Stay of execution/setting aside of the warrant of arrest.

36. The record indicates that after the applicant defaulted, a warrant of arrest was issued against him upon an oral application by counsel for the respondent. Part of the consent order stipulates that in default of payment of any instalment, execution was to issue for the entire sum owed. The consent was recorded following an application by the judgment debtor to set aside the judgment and after a notice to show cause had been issued. The notice to show cause was issued on 18/4/2022. In my considered view, the consent order compromised both the notice to show cause issued on 1/4/2022 as well as the judgment debtors application dated 9/9/2022.

37. My interpretation of the consent order would be that in the event the judgment debtor failed to settle the decretal sum as agreed, the decree holder would be at liberty to commence execution proceedings for the whole amount which remained unpaid. This implies that the decree holder was required to file a fresh application for execution. There can be no execution without an application.

38. Order 22 rule 6 of the Civil Procedure Rules provides that:

> Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions hereinbefore contained to another court, then to such court or to the proper officer thereof; and applications under this rule shall be in accordance with Form No. 14 of Appendix A..."
>
> Provided that, where judgment in default of appearance or defence has been entered against a defendant, no execution by payment, attachment or eviction shall issue unless not less than ten days notice of the entry of judgment has been given to him either at his address for service or served on him personally, and a copy of that notice shall be filed with the first application for execution."

39. Order 22 rule 18 of the same rules provides in part that:

(1) Where an application for execution is made—

(a) more than one year after the date of the decree;

(b) against the legal representative of a party to the decree; or

(c) for attachment of salary or allowance of any person under rule 43,

the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him:

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him:

.....

(2) Nothing in subrule (1) shall be deemed to preclude the court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.

(3) Except as provided in rule 6 and in this rule, no notice is required to be served on a judgment debtor before execution is issued against him." (Emphasis supplied)

40. Order 22 rule 31 of the Civil Procedure Rules provides:

(1) Notwithstanding anything in these Rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in prison of a judgment-debtor who is liable to be arrested in pursuance of the application, the court may, instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the court on a day to be specified in the notice and show cause why he should not be committed to prison.

(2) Where appearance is not made in obedience to the notice, the court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor."

41. The above provisions are clear on the fact that for execution to be carried out, there must be an application. I have perused the record. There is nothing to show that the Decree holder ever made an application for execution of the decree. It is not even clear how the notice to show cause dated 1/4/2022 was issued. When the applicant defaulted following the consent order, the Decree holder applied for a warrant of arrest. In my view, the Decree holder ought to have made a formal application for the arrest and detention in prison of the judgment debtor.

42. The court in Munyui Kahuha v Ng'ang'a Kahuha [2007] eKLR, held that:

> Any kind of incarceration involves the limitation of a person's liberty. Although the law permits that person's liberty may be curtailed in specified situations, the law implores upon us to ensure that "due process" is followed. That is most fundamental. A person cannot

simply be condemned or incarcerated without being heard. That is contrary to the principles of natural justice. It was completely irregular to "extend" his imprisonment at the instance of the Respondent, on a "mention" of the case. That could have only been done by way of a formal application, giving the Judgment Debtor the opportunity to be heard."

43. My view is that the warrant of arrest issued on 8/7/2024 was issued in error. An application for execution ought to have been made and a notice to show cause issued so that the judgment debtor is heard before issuance of the warrant of arrest. While issuing the warrant of arrest, the court did not state any reasons to indicate that the issue of a notice to show cause would cause unreasonable delay or would defeat the ends of justice. The consent order did not expressly direct that in case of default by the Judgment debtor, a warrant would issue for his arrest and committal to civil jail. In the absence of such express provisions, the Decree holder was duty bound to apply for execution as provided by law and procedure. For the above reasons, I find merit in the application to set aside or vacate the warrant of arrest issued against the applicant.

Disposition

44. In view of the foregoing, I make the following orders:

    a. The firm of Gichuhi Kivindyo & Associates Advocates is hereby granted leave to come on record for the Judgment debtor in place of the firm of Mutuku Mary & Company Advocates;

    b. The warrant of arrest issued herein on 8/7/2024 is hereby vacated. Consequently, a stay of execution of the decree is granted until such time when the Decree holder will file and serve a proper application for execution;

    c. The prayer for rectification of the decree is declined. However, upon making the application for execution of the decree, the Decree holder should take into account what has already been paid by the Judgment debtor;

    d. The prayer for payment of monthly instalments of Ksh. 10,000/= is hereby declined

    e. Given that the application has partially succeeded, each party shall bear its own costs of the application.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 23RD DAY OF JANUARY, 2025.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE