

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KITALE**  
**ELC NO. 74 OF 2019**

**PASCAL WAFULA**  
*(Derivatively on behalf of*  
**TRANS NZOIA INVESTMENT**  
**COMPANY**  
**LIMITED-----PLAINTIFF/RESPONDEN**  
**T**

**VERSUS**

**RONALD SAWENJA WALUBENGO-----1<sup>ST</sup>**  
**DEFENDANT**

**PAUL SIMIYU WEKESA-----**  
**2<sup>ND</sup> DEFENDANT**

**GEORGE IMBERA LUDISI-----**  
**3<sup>RD</sup> DEFENDANT**

**KALORI ISOSO-----**  
**4<sup>TH</sup> DEFENDANT**

**MUNDEBE INVESTMENT COMPANY LIMITED----5<sup>TH</sup>**  
**DEFENDANT**

**VIPUL RATILAL DODHIA-----6<sup>TH</sup>**  
**DEFENDANT/APPLICANT**

**CHERANGANI INVESTMENTS**  
**COMPANY LIMITED-----7<sup>TH</sup>**  
**DEFENDANT/APPLICANT**

**AND**

**TRANS NZOIA INVESTMENT CO. LTD-----AFFECTED**  
**PARTY/RESPONDENT**

**RULING**

1. The court, by an application dated **21/7/2025**, is asked to find that the decree extracted by the plaintiff is incompetent, since costs have not been

taxed, nor did the parties agree to or approve the draft decree, and it was also executed without leave of court; hence, its execution should be stayed and the pending court bailiff's warrants of execution application be set aside.

2. The grounds are contained on the face of the application and in a supporting affidavit of Manasse Nyaga Njenga, sworn on the even date. It is deposed that the plaintiff has irregularly extracted a decree attached as annexure marked **MNN-2(a)** and **(b)**, after which he has made an application for execution of the decree as per annexure marked **MNN-3(a)** and **(b)**, on in addition to applying for warrants to the bailiff to evict the occupants of the suit land as per annexed copies marked **MNN-(4)**.
3. The applicant deposes that the extracted decree is irregular, since costs have not been taxed and or leave of court sought.
4. The applicant deposes that as a director of the 7<sup>th</sup> defendant pursuant to an authority attached as **MNN-(1)**, that notwithstanding the lack of court leave, the plaintiff has already started the execution process against the tenants in the suit land as per letters attached as **MNN-5(a), (b), (c), and (d)**.

5. The applicant deposes that in view of the glaring irregularities and the failure to serve the decree for approve by the 6<sup>th</sup> and 7<sup>th</sup> defendant, contrary to **Section 94** of the Civil Procedure Act, the court should set aside the decree for being invalid, and as breach of **Order 21 Rule 8** of the Civil Procedure Rules, otherwise, the decree holder could be at liberty to re-start the process as long as the law and the rules are complied with.
6. The application is opposed by a replying affidavit of Majune Kraido, advocate, sworn on **28/8/2025**. It is deposed that the application seeks to dishonestly delay the execution of the decree for the decree holder to enjoy the fruits of the judgment through sensational claims.
7. The deponent deposes that where a decree is for the delivery of any immovable property that is in occupation of a tenant or any person, the decree holder can appoint someone to whom the suit property can be delivered to, and the court can order for the delivery by affixing a copy of the warrant in some conspicuous place on the property and by notice of proclamation to the occupancy at some

convenient places, the substance of the decree concerning the suit property.

- 8.** The deponent deposes that **Section 152** of the Land Act does not apply to the decree and could not impede the immediate execution of the decree pursuant to the judgment of **18/6/2025**, where there is no stay of its execution, and also since **Section 152** thereof was not formally invoked to apply to the judgment.
- 9.** Equally, the deponent deposes that the decree was open for execution to obtain actual possession as against the 6<sup>th</sup> and 7<sup>th</sup> defendants and the symbolical possession against the tenants in the suit land, through the court bailiff in line with the Civil Procedure Rules.
- 10.** The deponent admits that he did not cause the decree holder to comply with **Order 21 Rule 8** of the Civil Procedure Rules by sharing a draft decree for the approval by the 6<sup>th</sup> and 7<sup>th</sup> defendants or comply with **Section 94** of the Civil Procedure Act.
- 11.** The admission notwithstanding, the deponent deposes that the application before the court lack merits, otherwise the intention of **Order 21 Rule 8** of the Civil Procedure Rules is to ensure that the

decree complies with the judgment and in this case, it is not at variance with the judgment, no prejudice was occasioned to the judgment debtors, the decree is non-monetary for its to await the party to party taxation of costs, before its execution, all what the affected party needs is for all the occupiers to become its tenants so that the rent from them accrues, no occupier would be evicted merely because warrants of execution are issued to a court bailiff, the 6<sup>th</sup> and 7<sup>th</sup> defendants have not filed any affidavits of the tenants or occupiers alleged to be threatened with eviction, and that the application is without merits.

- 12.** The plaintiff/respondent relied on a replying affidavit sworn on **28/8/2025**, which was filed and served late.
- 13.** The 6<sup>th</sup> and 7<sup>th</sup> defendants rely on written submissions dated **8/8/2025**. Reliance is placed on **Order 21 Rule 8** of the Civil Procedure Rules and **Section 94** of the Civil Procedure Act.
- 14.** It is submitted that the eviction process is governed by several laws, which require specific procedures to be followed to ensure fairness and legality, which the notices issued and the process of execution followed

through annexures marked **MNN-5(a), (b), (c), and (d)**, did not adhere to.

- 15.** The plaintiff/respondent relies on written submissions dated **28/8/2025**. It is submitted that the application is misconceived, chicanery hoped to keep the applicants in control of the suit property instead of allowing the affected party to begin to enjoy the fruits of its judgment immediately.
- 16.** The plaintiff/respondent submits that **Order 21 Rules 7, 8, 9, 10, 11**, and **Order 22 Rules 29 and 30** of the Civil Procedure Rules were faithfully adhered to by the decree holder.
- 17.** It is submitted that the application before the court is brought in total ignorance of the recent interpretation of **Order 21 Rule 8** and **Section 94** of the Civil Procedure Act. Reliance is placed on **Nairobi ELRC Case No. 1605 of 2018, Walter Omondi & Others -vs- English Pressers Ltd, Kitale ELC No. 140 of 2018, Florence Cherugut -vs- Cheptum Mulei Hunah, and Bungoma HCCC No. 2 of 2018, Apollo Mulianga Ekesa -vs- Life Care Hospital Ltd.**
- 18.** The plaintiff submits that, as per a South African proverb, no one drinks medicine on behalf of a sick

person; otherwise, the applicant cannot seek relief on behalf of the occupants.

- 19.** The court has carefully perused the application and all the responses by the parties. The record of the court shows that the affected party up from the inception of the suit to the judgment, was not represented by any law firm.
- 20.** The judgment of this court dated **18/6/2025** effectively was in favour of the affected party, who, as per relief **No. (a) and (f)** was to be transferred and handed over vacant possession of the suit property by the 6<sup>th</sup> and 7<sup>th</sup> defendants, in default of which the 6<sup>th</sup> and 7<sup>th</sup> defendants, their agents, associates, and workers, were to be evicted from the premises in line with the law.
- 21.** The initial plaintiff did not seek any vesting orders of the suit land. Other than the costs, nothing else in terms of the reliefs in the amended plaint dated **21/9/2022** was awarded to the plaintiff in view of the derivative capacity he had approached the court, under **Sections 238** and **239** of the Companies Act Cap **486**.

- 22.** The initial plaintiff in this suit has been represented by the firm of Kraido & Co. Advocates since **17/12/2019**.
- 23.** Summons to enter appearance against the affected party was extracted on **18/12/2019**. By a replying affidavit dated **8/1/2020**, the 3<sup>rd</sup> and 4<sup>th</sup> defendants, as directors of the affected party, admitted that they had no objection to having the suit continued as a derivative one. They opted to appear through Omukama M. & Co. Advocates.
- 24.** Vide a ruling delivered on **1/10/2020**, leave was granted to the initial plaintiff to continue the suit in a derivative capacity, as a minority shareholder.
- 25.** Other than a reply to the defendant's defences dated **1/12/2020**, the firm of Kraido & Co. Advocates did not file any documents in favour of the affected party as representing them. The amended plaint dated **12/6/2023** was also clear that the said law firm was only appearing for the plaintiff. The same applied to the final written submissions dated **16/2/2025**.
- 26.** The court proceedings since inception on **18/12/2019**, and especially during the commencement of the hearing on **10/11/2021**, show that the affected party did not instruct any law firm

to represent it. Even when the current court took over the matter and gave directions on the way forward, and proceeded with the defence hearing, the affected party did not appear as represented by the law firm of Kraido & Co. Advocates.

**27.** Legal representation goes to the heart of access to justice and the right to a fair hearing. There is no indication that the law firm of Kraido & Co. Advocates formally came on record for the affected party as the decree holder designate, to extract the decree on its behalf and undertake the execution process. Changing positions is what the current law firm is doing.

**28. Order 21 Rule 8** of the Civil Procedure Rules provides that a party in a suit in the High Court may prepare a draft decree, and submit it for approval by the parties first and if not approved within **7 days** after delivery, submit it to the Deputy Registrar, who if satisfied is drawn up in accordance with the judgment, shall sign and seal it.

**29.** A decree holder under **Section 2** of the Civil Procedure Act means any person in whose favour a decree has been passed or whose order capable of execution has been made. Execution powers of the

court are spelt out under **Section 38** of the Civil Procedure Act.

- 30. Section 143** of the Companies Act provides that directors of a company have a duty to and in good faith shall promote the success of the company for the benefit of its members as a whole.
- 31.** After the judgment on **18/6/2025**, which only vested the suit property on the affected party, the persons who, in law, have the obligation to act in the best interest of the affected party are the organs of the company under the Companies Act, namely the directors and the annual or special general meeting.
- 32.** In this case, any third party seeking to act for the affected must derive its mandate to represent the affected party in the execution of the decree through a board resolution. It is the directors who owe a duty to the company and not shareholders. See **Multitrade Industrial Supplies Ltd & Others -vs- ABC Bank IPC [2022] KEHC 162314 [KLR]**.
- 33.** The cause of action that brought the plaintiff into the matter with leave came to an end with the judgment. Any post-judgment decree, save for that on costs as decreed to the initial plaintiff, can only be advanced by the affected company through its statutory

organs. The 3<sup>rd</sup> and 4<sup>th</sup> defendants, as directors, were therefore supposed to have been sent the draft decree for approval.

- 34.** There is no evidence that the 3<sup>rd</sup> and 4<sup>th</sup> defendants were unwilling to execute the decree, so that the plaintiff can now purport to be and to arrogate to himself the power over the execution process, and to advance the interests of the affected party.
- 35. Section 94** of the Civil Procedure Act provides that the leave of the court is a condition precedent in the execution process where costs have not been assessed. Breach of duty or negligence to act has not been leveled against the affected party organs, to grant leave to the plaintiff to execute the decree. The rights of the plaintiff insofar as the cause of action came to an end, the moment the judgment was read out. He can only execute for the costs and no more through his lawyer on record.
- 36.** The law firm to execute on behalf of the affected party and the 3<sup>rd</sup> and 4<sup>th</sup> defendants for the rest of the reliefs decreed must seek a board resolution to act for the affected party. Leave of court for the

execution to proceed before costs are executed was a condition precedent.

- 37.** In seeking for leave stage under **Section 94** of the Civil Procedure Act and **Sections 238** and **242** of the Companies Act, the court would have considered inter alia, the competence of the party, the need to protect and preserve the company property, the efforts to demand action from the directors, the breach of their duty of care or loyalty, if the applicant is acting fairly and accurately to represent the interest of the other members of the affected company or is driven by personal interest and whether he has authority from the other shareholders.
- 38.** The plaintiff has submitted that he had the power to execute the decree in the manner that he did. The affidavit in support is not signed by Mr. Majune Kraido in his capacity as acting for either the plaintiff or the affected party. There is no attached authority or board resolution to plead on behalf of the affected company. There is no board resolution or authority written by either the plaintiff or the affected party authorizing Mr. Kraido Advocate to swear, act, and plead on behalf of the supposed decree holder. To

purport to proceed without instructions or capacity to do so not only undermines the company law, but is also against the Civil Procedure Act, where companies can only act through their organs.

- 39.** A party that proceeds to execute a decree without leave of court or before taxation of costs risks waivers of those costs. See **Vincent Edward Njoroge -vs- Kenol Kobil Ltd [2018] eKLR**. The mischief sought to be cured under **Section 94** of the Civil Procedure Act is to protect the judgment debtor from suffering multiple executions in respect of the same suit. See **Kartar Singh Dhupar & Co. Ltd - vs- Lianard Holdings Ltd [2017] eKLR**.
- 40.** The decree and the process of seeking warrants of execution to yield the suit property, as decreed by the court, have profound implications on the affected party.
- 41.** Once the suit properties were decreed to the affected party, it is not for the plaintiff to arrogate himself the powers of the affected party to take over powers of the directors or its organization and make the decision on how to proceed with the execution, who to undertake the execution, the timelines to do it and

the costs implication of whichever avenue is used to undertake the exercise.

- 42.** The judgment of the court did not decree the suit property as personally belonging to the plaintiff. The capacity of the plaintiff to act in this suit was limited through the leave that was issued to the initial plaintiff. The decree as extracted is defective in law because the initial plaintiff passed on.
- 43.** Courts have held that lawyers should not swear affidavits on contested matters of fact. The deponent herein is Mr. Majune Kraido, whose mandate in favour of the plaintiff, in law, is restricted to executing for costs only. Learned counsel has not attached any fresh instructions given to his law firm to now take over the execution on behalf of the affected company and to issue instructions on behalf of the affected party without the authority of the 3<sup>rd</sup> and 4<sup>th</sup> defendants as directors, to issue notices for the 6<sup>th</sup> and 7<sup>th</sup> defendants and other tenants or occupiers of the suit land to vacate the suit premises in line with the decree.
- 44.** A party or a law firm acting without instructions cannot bind the affected party for any attendant loss or damage to the suit property. The agency/principal

relationship has to be through writing. In this case, there is no evidence of the law firm coming on record formally, for the affected party to take over its execution process, seek delivery of possession, and or regularize the existing landlord-tenancy relationships on behalf of the affected party. The deponent for the plaintiff on paragraphs **9, 10, and 11** concedes that he did not cause the plaintiff decree holder to comply with the law on execution. As indicated above, his client was only decreed costs and nothing else in the judgment dated **18/6/2025**.

- 45.** The 6<sup>th</sup> and 7<sup>th</sup> defendants are the judgment debtors who have a right to know who the decree holder is and whether he has the capacity to execute the decree against them. In this case, the extractor of the decree is not the decree holder in relation to the reliefs as determined in the judgment. The form and content of the decree must abide by the judgment of the court. There was, therefore, a necessity to have it approved by the opposite parties. The purported decree holder went ahead to prepare an application for execution of the decree purportedly signed by a decree holder, whose particulars are not indicated.

- 46.** The seal of the affected company is not affixed. The mode of execution is eviction. Tenants who are not defined are also included in the execution. Such parties or issues were not included in the judgment. Mr. Majune Kraido has declared in the execution application, yet he is neither a director nor a shareholder of the affected company.
- 47.** The application was made ex parte and was not served upon the respondents, yet the applicant wanted the Deputy Registrar, without a hearing, to sign the warrants under **Order 22** of the Civil Procedure Rules. The warrants clearly indicate that the suit parcels of land had been decreed to the affected party, yet there is no evidence that the affected party had authorized any law firm to contract M/S Margaret Anindo T/A Igare Auctioneers to carry out the execution exercise.
- 48.** Coming to letters dated **21/6/2025, 4/7/2025, 3/7/2025** and **18/7/2025**, annexed to the supporting affidavit of Manase Nyaga Njenga as annexures marked **MNN-5(a), (b), (c), and (d)**, all are clear that the law firm of Kraido & Co. Advocates after the judgment, assumed the role of the affected party without a board resolution or leave of court to

execute the decree on behalf of the affected party, before costs were taxed.

- 49.** From the said annexures, it cannot be true as deposed by Mr. Kraidu Advocate, and submitted that the application before the court is sensational and a dishonest delay of the execution.
- 50.** A nullity is a nullity. The decree, as drawn, was not approved or shared with the defendants. There was no leave sought to execute it before the same was extracted, and execution proceedings commenced. Non-compliance with the law herein cannot be termed as a curable procedural technicality under **Article 159** of the Constitution or **Section 1A** and **1B** of the Civil Procedure Act.
- 51.** As to eviction, the judgment of the court was clear that any intended eviction must follow the law. Issuance of an eviction notice in line with **Sections 152A-I** of the Land Act was not complied with. The notice to vacate given to the tenants as per annexures marked **MNN-5(a), (b), (c),** and **(d)** was not issued by the affected party or its authorized agents. Such notices are not what the law envisages.

**52.** The upshot is that I find the application dated **21/7/2025** merited. The decree issued on **18/6/2025** and all its consequential orders are hereby recalled, invalidated, and declared null and void. The application lodged for execution on **21/7/2025** is equally invalidated for non-compliance with the law, and so are the eviction notices, flowing from the said decree.

**53.** Costs to the 6<sup>th</sup> and 7<sup>th</sup> defendants.

**54.** Orders accordingly.

**Ruling dated, signed, and delivered** via **Microsoft Teams/Open Court** at **Kitale** on this **12<sup>th</sup> day of November 2025.**

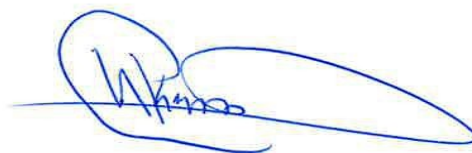
**In the presence of:**

Court Assistant - Dennis

Mr. Kraido for plaintiff/respondent present

Mwemeke for 6<sup>th</sup> and 7<sup>th</sup> defendants/applicants  
present

Muhanda for the 5<sup>th</sup> defendant absent



**HON. C.K. NZILI  
JUDGE, ELC KITALE.**