

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 139 OF 2019**

**AIRWAVE**

**PROPERTY**

**LIMITED:.....PLAINTIFF/APPLICANT**

**VERSUS**

**PATRICK**

**NDETO**

**KAVIU:.....1<sup>ST</sup>**

**DEFENDANT/RESPONDENT**

**BERNARD MUTISO KAVIU:.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**KAMUTHI HOUSING CO-OPERATIVE**

**SOCIETY LIMITED:.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**AND**

**1. JIMMY MUTIE KAVIU**

**2. JOHN MUTETI KAVIU**

**3. DAMARIS MWIKALI KAVIU**

**4. WILLIAM KIOKO KAVIU**

**5. CATHERINE KOKI KAVIU**

**6. MARTIN KAVIU KIOKO :.....PROPOSED INTERESTED**

**PARTIES/RESPONDENTS**

**RULING**

The application is dated 27<sup>th</sup> January 2027 and is brought under Sections 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act, Cap. 21 Laws of Kenya, and

Order 1 Rule 10, Order 9 Rules 9 and 10, Order 45 Rules 1,2 and 3, Order 22 Rule 22 and Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules seeking the following orders;

1. That this writ of motion be certified as urgent and be heard ex parte in the first instance.
2. That the firm of Chris N. Mutuku & Co. Advocates be permitted to come on record for the Plaintiff in place of Kinyanjui Karimi & Company Advocates.
3. That pending the hearing and determination of this application, there be a stay of execution of the Decree and all consequential orders herein.
4. That the 1<sup>st</sup> to 6<sup>th</sup> Interested Parties be joined in this suit as the 4<sup>th</sup> to 9<sup>th</sup> Defendants.
5. That the Decree herein, and all consequential orders, be set aside and vacated.
6. That further and in the alternative, the Hon. Court be pleased to review, vacate and set aside any purported Decree flowing from and/or based on the consent order recorded and adopted in Court on 19<sup>th</sup> May, 2021, and a proper and lawful Decree confirming to the terms of the consent be issued.
7. That a recommendation be made to the Directorate of Criminal Investigation, Machakos, to investigate and prosecute the 1<sup>st</sup> and 2<sup>nd</sup>

Defendants for fraud, attempted theft and conspiracy to defraud in attempting to steal from the Plaintiff by executing on funds already received by them, and concealing this material fact from the Court.

8. That such further or other orders as are necessary for the just disposal of this suit be issued.

9. That the costs of this application be costs in the cause.

That there is on record an unprocedural and illegal Decree purportedly extracted from the consent order dated 19<sup>th</sup> May, 2021, adopted by the Court on the same date and extracted as an order of the Court on 20<sup>th</sup> May, 2021. That even the issuance of the order for execution is improper and illegal as it was not an option availed to the litigants or the Court by the consent order and there is a very clear and specific consequence of default spelt out under paragraph 7 of the consent order, which is rescission of the consent order itself. That the consent order is also very specific on the manner and procedure for rescission, which includes giving the other party a 21 days' Notice of the Intention to rescind the consent, together with details of the breach and a requirement that the breach be remedied within the specified time. That since the available remedy in the event of a disagreement or perceived default on the consent was rescission of the consent, it logically meant that the available option for any aggrieved party was to either list the case for hearing and determination or renegotiate with the other. That nowhere in the consent was

Judgment to be entered in favour of any party and the money Decree herein is a gross error in both law and fact, and ought to be vacated *ex debito justitiae*.

That it is erroneous for a court to order for the execution of an improper Decree not procedurally obtained through a valid court process. That in addition, the purported execution is fraudulent, criminal in nature and is calculated as stealing from the Plaintiff. That specifically, notwithstanding the fact that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have failed to fulfil their obligations under the consent order filed in court on 19<sup>th</sup> May, 2021, the Plaintiff has honoured its part of the agreement and made payments to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. That these payments have been made at the risk of losing the monies because, todate, the Plaintiff is not seized of any legal documents that can confer any proprietary rights on the suit property upon it. That this consent order was extracted from the detailed Deed of Settlement between the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in which they affirmed that they had settled the claim of the 3<sup>rd</sup> Defendant, who also was laying claim on the property.

That to date, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have not fulfilled their part of the bargain. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have set out to defraud the Plaintiff, and in this regard have enlisted the services of legal counsel who is new in the matter and probably has no idea what has been going on. This is a case for the police to intervene, investigate and prosecute if necessary.

That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents (together with their family members) were previously represented by Chris N. Mutuku & Company Advocates who have

sworn an Affidavit and exhibited bank statements showing that indeed the 1<sup>st</sup> and 2<sup>nd</sup> Defendants received the monies that they are now purporting to execute upon. The Affidavit is filed commensurately with this application. That the Deed of Settlement was clear that the funds were to be shared out between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and 6 other members of their families interested in the suit property, and these have now been listed in these proceedings as Proposed Interested Parties. That the Interested Parties are necessary parties in unraveling the fraud perpetrated by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

That the irregular Decree has far-reaching consequences in that it requires of the Plaintiff payment of a colossal sum of Kshs. 35 million, without any proper inquiry on the *bona fides* of the claim by the Respondents and whether or not they have in fact complied with their obligations under the consent order. That the process leading to the order for execution was unprocedural, as the Plaintiff was not personally served with the alleged Notice to Show Cause, and the Advocates to whom it was served had ceased acting for the Plaintiff upon conclusion of the case. That in addition, it appears that the substantive order for execution to proceed was issued on a date set for Mention, contrary to the law. That on account of the reasons spelt out hereunder, the purported Decree of the Court is a nullity in law. That the failure to attend court on the date set for mention was neither deliberate nor reckless but was the result of a genuine and excusable lack of knowledge of the said hearing date. That hand in hand

with the forgoing, by entering a Judgment based on a consent that did not envision such Judgment, the Hon. Court has in essence re-written the agreement of the yet it is trite law that Hon. Court had no power to re-write the contract of the parties. That it is settled law that no party ought to be condemned unheard, and the denial of the Applicant's right of audience is an infringement on its constitutional rights under Article 50 of the Constitution of Kenya. That given the circumstances of this case, it is imperative that the order permitting execution of an unprocedural Decree be reviewed and set aside.

The second application is dated 27<sup>th</sup> January 2025 and is brought under Sections 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act, Cap. 21 Laws of Kenya, and Order 45 Rules 1, 2 and 3, Order 22 Rule 22 and Order 51 Rule 1 of the Civil Procedure Rules seeking the following orders;

1. THAT this application be certified as urgent and be placed before the Judge for hearing *ex parte* in the first instance.
2. THAT the Order of the Court issued on 27<sup>th</sup> January, 2025 or thereabouts declining to certify this matter as urgent be reviewed and the Plaintiff's application dated 23<sup>rd</sup> January, 2025 be certified as urgent.
3. THAT pending the hearing and determination of this and the application dated 23<sup>rd</sup> January, 2025, there be a stay of execution of the Decree of the Court in this matter.
4. THAT such further or other orders as are appropriate for the effective and fair administration of justice be issued.

5. THAT the costs of this application be provided for.

It is based on the grounds that the Hon. Judge, in declining to certify the application dated 23<sup>rd</sup> January, 2025, may have overlooked the fact that the Applicant's properties in its offices have already been proclaimed upon by auctioneers and are set to be carted away for auction by 29<sup>th</sup> January, 2025, unless the Plaintiff pays the sum of Kshs. 35 million being unlawfully demanded. That the error may have been occasioned by the failure of the Plaintiff to bring this fact to the attention of the Court through its Certificate of Urgency dated 23<sup>rd</sup> January, 2025. That this is a genuine and excusable mistake that should not condemn the Applicant to execution on a matter in which it is clear that the Plaintiff is not indebted to the Respondents at all, and more so pursuant to *ex-parte* proceedings. That the fact of the proclamation and attachment of the Plaintiff's property is stated in the Supporting Affidavit of Elijah Njoroge attached to the application dated 23<sup>rd</sup> January, 2025. And exhibited as the annexure ENN-1. That should the Respondents proceed to execute the Decree the subject matter of these applications, these proceedings will be rendered nugatory and an exercise in futility. That the Respondent will suffer no prejudice or harm as the Appellant is a legal corporation with a known fixed address and is not in danger of folding up or closing down.

The Respondent raised a notice of preliminary objection dated 23<sup>rd</sup> January 2025 on the following grounds;

1. That on the 2<sup>nd</sup> July 2024 this court issued a decree pursuant to a deed of settlement dated 5<sup>th</sup> May 2021 and the Consent order dated 18<sup>th</sup> May 2021 was adopted as an order of the court.
2. That in the circumstances the plaintiff's application is res judicata having been determined by the court contrary to section 7 of the Civil Procedure Act.
3. That the Plaintiff cannot circumvent this finality by seeking a review unless they meet the strict requirements of order 45 rule 1 of the Civil Procedure Rules 2010.
4. That Chris Mutuku and Company Advocates is conflicted and barred by estoppel from representing the Plaintiff having previously represented the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in this same matter.
5. That by swearing an affidavit on material issues in controversy, the Plaintiff's advocate violates rule 9 of the Advocates Practice Rules, which bars an advocate from appearing in a matter where they are likely to be called as a witness.
6. That the Plaintiff's advocate is in violation of section 80 of the Advocates Act Rule 8 of the Practice rules and Law Society of Kenya's code of Standards of Professional Practice and Ethical Conduct.

This court has considered both applications, the preliminary objection and the submissions therein. This court will first deal with the preliminary objection, the leading decision on Preliminary Objections is the case of Mukisa Biscuit

Manufacturing Co. Ltd vs West End Distributors Ltd. (1969) EA 696, where the Court held as follows:

*“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.*

Similarly, the Supreme Court in Independent Electoral & Boundaries Commission vs Jane Cheperenger & 2 Others (2015) eKLR made the following observation as relates to Preliminary Objections:

*“... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword,*

*for winning a case otherwise destined to be resolved judicially, and on the merits.”*

The fundamental issue to be determined in the first instant is whether Chris Mutuku and Company Advocates is conflicted and barred by estoppel from representing the Plaintiff having previously represented the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in this same matter. This is critical at this stage to determine whether they can come on record to represent the Plaintiff.

Article 50(2)(g) of the Constitution 2010 provides that any litigant has a right to choose and to be represented by an advocate and to be informed of this right promptly. The right to choose an advocate of one's choice has been upheld in a myriad of decisions in our superior courts. However, there are exceptions to this right, and one such exception is found at Rule 8 of the Advocate's Act upon which this application is based, and which states as follows: -

*“No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear: Provided that this rule does not prevent an advocate from giving evidence whether verbally or by*

*declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.”*

In the instant application, the Respondent has averred that the firm of Chris N. Mutuku & Co. Advocates should be restrained from acting for the Plaintiff on grounds that is conflicted as they represented the 1<sup>st</sup> and 2<sup>nd</sup> Respondent. The Respondent alleges that the Advocate had sworn an affidavit making material averments on the disbursements of payments relating to the deed of settlement and the Defendants have sought leave to cross examine him.

The Advocate Chris N. Mutuku admits representing the Defendants in this matter in the negotiations and signing the deed of settlement resulting in the consent order in this matter. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have set out to defraud the Plaintiff and the advocates have sworn an affidavit showing the payments received by the Defendants. That the Defendants lack moral credibility and are fraudsters hence waving their advocate – client confidentiality.

In the case of Dorothy Seyanoi Moschioni vs Andrew Stuart & another (2014) eKLR, Gikonyo J., relying on the stated:-

*“The following rendition of the Court in Guardian Bank Limited vs Sonal Holdings (K) Limited is apt elucidation of that point:12."I will not re-invent the wheel. All the cases which have been quoted by counsels are relevant. I will not multiply them too. What I need to state is that, in*

*applications for disqualification of a legal counsel, a court of law is not to engage a cursory look at the argument that “these advocates participated in the drawing and attestation of the Deeds in dispute”; as that kind of approach may create false feeling and dilemmas; for it looks very powerful in appearance and quite attractive that those advocates should be disqualified from acting in the proceedings. It is even more intuitively convincing when the applicant say “I intend to call them as witnesses”.*

*What the court is supposed to do is to thrust the essential core of the grounds advanced for disqualification, look at the real issues in dispute, the facts of the case and place all that on the scale of the threshold of the law applicable. In the process, courts of law must invariably eliminate any possibility that the arguments for disqualification may have subordinated important factual and legal vitalities in the transactions in question while inflating generalized individual desires to prevent a party from benefiting from a counsel who is supposedly should be “their counsel” in the conveyancing transaction... But the law has set standards and benchmarks which must be applied in denying a person of legal representation of choice; the decision must not be oblivious of the centrality of the right to legal representation in the Constitution as the over-arching hanger; ... but in all these, it must be convinced that real mischief and real prejudice would result unless the advocate is prevented*

*from acting in the matter for the opponent. The real questions then become: Is the testimony of the advocate relevant, material or necessary to the issues in controversy? Or is there other evidence which will serve the same purpose as the evidence by counsel? Eventually, each case must be decided on its own merits, to see if real mischief and real prejudice will result in the circumstances of the case. And in applying the test, if the argument on disqualification becomes feeble and inconsistent with causing real mischief and prejudice, then a disqualification of counsel will not be ordered’.”*

The Defendants have also claimed that if the firm of Chris N. Mutuku & Company Advocates were to be allowed to continue acting for the Plaintiff there will be a conflict of interest. The Black’s Law Dictionary 10<sup>th</sup> Edition defines conflict of interest as:

*“1.A real or seeming incompatibility between one’s private interests and one’s public or fiduciary duties.2.A real or seeming incompatibility between the interests of two of a lawyer’s clients, such that the lawyer is disqualified from representing both clients if the dual representation adversely affects either client or if the clients do not consent”.*

The term conflict of interest is also defined at Rule 6 paragraph 96 of The LSK Code of Standards of Professional Practice and Ethical Conduct, 2016 as follows:

*“A conflicting interest is an interest which gives rise to substantial risk that the Advocate’s representation of the client will be materially and adversely affected by the Advocate’s own interests or by the Advocate’s duties to another current client, former client or a third person.”*

It is obvious that where there exists a conflict of interest an Advocate may not represent one party in a suit. In the case of *King Wollen Mills Ltd & Another v Kaplan & Stratton Advocates*(1990-1994] EA 244 the court of Appeal observed as follows:-

*“An advocate who has acted for two common clients cannot later act for either party in litigation when a dispute arises between the common clients concerning the original transaction or the subject matter for which he acted for the clients as a common advocate.”*

In laying down the test for disqualification of an Advocate, the court of Appeal in the case of *Pelphis Bank Limited vs Channan Singh Chatthe & Others* (2005) eKLR stated as follows:-

*“.....there is no general rule that an advocate cannot act for one party in a matter and then act for the opposite party in subsequent litigation. The test which has been laid down in authorities applied by the Court of Appeal is whether real mischief or real prejudice will in all human probability result-----“*

The Advocate stated that the Respondents have filed a complaint against him at the Law Society of Kenya (Disciplinary Cause No. 245/2024) alleging that he

received and failed to account to them kshs. 37,500,000/= that he received. I find that conflict of interest can arise broadly where an advocate acts for both parties in a matters such as more parties to a conveyancing or commercial transaction; for two parties on the same side of the record in litigation; or for insured and insurer; an advocate acts against a former client having previously acted for that party in a related or same matter where his own interest is involved, for example where an advocate acts in a transaction in which his company or a company in which he is an associate is involved or has an interest; or where for some other reason his own interests or an associate's may conflict with his client's, such as where he may be a material witness in his client's matter. I find that the preliminary objection on conflict of interest is merited as the advocate is clearly conflicted in this matter and cannot be allowed to come on record for the Plaintiff. Having found so there will be no need to considered the rest of the issues in the preliminary objection or the applications. I there for strike out both applications with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 16<sup>TH</sup> DAY  
OF DECEMBER 2025.**

**N.A. MATHEKA**

ORIGINAL