



Kagau (Suing as administrators of the Estate of Eustace Kagau Kangwere - Deceased) & another v Chief Magistrate, Milimani Commercial Court & 9 others (Judicial Review Application E101 of 2023) [2026] KEHC 4608 (KLR) (Judicial Review) (9 April 2026) (Ruling)

Neutral citation: [2026] KEHC 4608 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E101 OF 2023
RE ABURILI, J
APRIL 9, 2026

BETWEEN

MOFFAT NYAGA KAGAU (SUING AS ADMINISTRATORS OF THE ESTATE OF EUSTACE KAGAU KANGWERE - DECEASED) 1ST APPLICANT

MARGARET RACHEL MUTHONI MBOGO ARTHUR MUNENE MBOGO] (SUING AS ADMINISTRATORS OF THE ESTATE OF GERSHON JOHN MBOGO - DECEASED) 2ND APPLICANT

AND

THE CHIEF MAGISTRATE, MILIMANI COMMERCIAL COURT 1ST RESPONDENT

THE NATIONAL LAND COMMISSION 2ND RESPONDENT

THE CHIEF LAND REGISTRAR 3RD RESPONDENT

THE COUNTY LAND REGISTRAR, EMBU 4TH RESPONDENT

THE COUNTY GOVERNMENT OF EMBU 5TH RESPONDENT

AND

PATRICK ODUNDO OWITI T/A COUNSIN MOTOR WORKS 1ST INTERESTED PARTY

NEW EMBU IHURU GARAGE LIMITED 2ND INTERESTED PARTY

AHAMED ALI GEDI 3RD INTERESTED PARTY



**RAPHAEL MURIITHI NYAMU WALTER NYAMU KARIUKI VICTOR MWAI
KARIUKI (SUING AS ADMINISTRATORS OF THE ESTATE OF JOSEPH
KARIUKI NYAMU - DECEASED) 4TH INTERESTED PARTY
JOYCE WANJUKI NJOKA MARGARET KAIRU NJOKA GRACE LKARAU
NJOKA TERESIA GATURI NJOKA (ALL SUING AS ADMINISTRATIVES OF
THE ESTATE OF JOSEPHAT NJOKA MBIRIAI) 5TH INTERESTED PARTY**

RULING

1. The history of this matter is that on 19th August 2024, Ngaah J delivered a ruling dismissing the exparte applicant's chamber summons for leave to apply for judicial review orders. The learned Judge also awarded costs of the application to the respondents and the interested parties. Those costs were not quantified and therefore they had to be taxed.
2. The interested parties filed their bill of costs dated 26th November, 2024 for taxation and the Deputy Registrar did tax the costs interpartes and issued a certificate of taxation dated 20th March, 2025 in the sum of Kshs 157,330.
3. The certificate of taxation was served upon the exparte applicants' counsel on 8th April, 2025 via email.
4. Thereafter, the interested parties filed a Notice to show cause application in execution of the said costs, why the applicants could not be arrested and detained in jail for non-settlement of the taxed costs. The Notice to Show Cause is dated 14th May 2025.
5. The exparte applicants filed a preliminary objection dated 20th June, 2025, to the notice to show cause dated 14th May, 2025. The grounds of objection are that the notice to show cause is invalid, null and void as it is not founded on any formal decree and or order, contrary to sections 25 and 28 of the Civil procedure Act as well as Order 21 Rule 8 of the Civil Procedure Rules; that the said notice to show cause is not founded on any prior formal written application for execution in the relevant form contrary to section 38 of the Civil Procedure Act and Order 22 Rules 6, 7.13 and 31 of the Civil procedure Rules; that the certificate of taxation issued by the Deputy Registrar is not an instrument capable of being executed in the absence of a formal decree and or order being extracted from the ruling of the court granting costs to the party that has taken out the impugned notice to show cause; that the notice to show cause is in flagrant violation of the mandatory provisions of section 39 of the Civil Procedure Act to the extent that it seeks to execute against the exparte applicants in their personal capacities. The exparte applicants urged the court to uphold their preliminary objection.
6. Parties filed written submissions to canvass the preliminary objection filed by the exparte applicants. Before the deputy Registrar could fix a ruling date on the preliminary objection filed challenging the notice to show cause, the interested parties filed before this court the application dated 11th February, 2026 by way of notice of motion seeking the following orders:
 1. That this court be pleased to enter judgment in favour of the 3rd interested party applicant herein for the sum of kshs 153, 330 being the sum of costs taxed by the taxing officer and contained in the certificate of taxation herein issued on 20th March, 2025
 2. That this court be pleased to order that the taxed sum do attract interest at court rate from the date of taxation until payment in full
 3. That costs of the application be provided for.



7. The ex parte applicants counsel filed a replying affidavit sworn by Phillip Malanga Advocate on 3rd March, 2026 opposing the application dated 11th February, 2026. In the said affidavit, counsel deposes that the prayers sought are incapable of being granted by this court. That the application is an abuse of this court's process and an attempt by the 3rd interested party to avoid complying strictly with orders of this Court.
8. That the matter of notice to show cause is pending before the deputy Registrar on the preliminary objection filed by the ex parte applicant, and both parties had filed written submissions. That the 3rd interested party was guilty of non-disclosure that he was already executing for recovery of the taxed costs.
9. That the application should be dismissed with costs to the ex parte applicants.
10. The application was canvassed orally on 4/3/2026 with the 3rd interested party/ applicant's counsel withdrawing the prayer for interest and urging the court to grant the prayer for a decree.
11. The ex parte applicant's counsel submitted, opposing the application and maintaining that the 3rd interested party was running away from the preliminary objection filed against the notice to show cause.
12. In a rejoinder, the ex parte applicant's counsel submitted that the ex parte applicant were not willing to settle the taxed costs for reasons that there was no decree hence the application.

Analysis and determination

13. I have considered the application by the 3rd interested party and the opposition by the ex parte applicants. The issue for determination is whether the applicant is entitled to the prayer for decree to issue on taxed costs, (having already withdrawn the prayer for interest), and there being a pending notice to show cause for determination, in execution of the taxed costs, with a preliminary objection being filed by the ex parte applicants challenging the notice to show cause.
14. From the background that I have set out above, it is clear that after taxation, the 3rd interested party embarked on execution of the taxed costs by way of notice to show cause and that is when the ex parte applicants raised a preliminary objection which is pending determination by the Deputy Registrar. The 3rd interested party, upon noticing that the Preliminary objection might as well be successful, and before withdrawing the notice to show cause, rushed to this court for judgment and decree to issue and argues that the ex parte applicants have declined to settle the taxed costs for reasons that there is no decree.
15. It is not in dispute that a certificate of taxation, whether party and party or advocate client cannot be executed. What a party ought to do is to seek for judgment to be entered in terms of the certificate of taxation so that a decree is drawn and issued for execution purposes. This position is apparent from the decisions cited by the ex parte applicants' counsel, which decisions include my own decision rendered in Kisumu High Court, citing other decisions. This was in UAP Insurance Company Limited v Alfred Mdeizi T/A Pave Auctioneers and Siganga and Company Advocates Civil Appeal No. 32 of 2018 delivered on 28th September, 2023.
16. It follows that whichever way the 3rd interested party follows, it has to be the path of seeking for judgment and decree before executing decree for costs. What the ex parte applicants are against is the aspect of the 3rd interested party running away from the preliminary objection filed against the notice to show cause.



17. I reiterate that from the pleadings and the opposition thereto, it is clear that this matter arises from a rather untidy procedural path taken by the 3rd interested party/ Applicant after costs were taxed in his favour. Following taxation, the Applicant moved straight to execution by issuing a Notice to Show Cause before the Deputy Registrar. That step was challenged by the Respondent through a preliminary objection on the basis that no judgment or decree had been entered on the taxed costs and that therefore no execution can take place without a decree.
18. As explained in the case of *Rubo Kimngetich Arap Cheruiyot v Peter Kiprop Rotich* [2006] eKLR:
“It is my view that a Decree duly approved and signed had to be on record for any execution to take place, whether for the eviction, costs or otherwise. As far as the parties in a suit are concerned, a certificate of costs is not an executable legal instrument. A certificate of costs is not capable of being “executed”. Warrants of attachment and sale cannot in law be issued on the basis of a certificate of costs. There must be a decree first. It is true that the Decree may not be necessarily or always contain the ascertained costs. Costs can be determined before a decree is issued or subsequently, after the Decree has been drawn. However for one to recover costs, there must be a decree. Any money awarded by court including costs is only payable under a decree particularly, if it is through enforcement (see Order XXI, Rule 1).”
19. In *UAP Insurance Company Limited v Alfred Mdeizi t/a Pave Auctioneers & another* (Civil Appeal 32 of 2018) [2023] KEHC 22683 (KLR) (28 September 2023) (Judgment), this Court had occasion to determine a similar issue of whether a certificate of costs was an executable instrument and relying on various statutory provisions and case law, held as follows:
- “ 55. In other words, execution for recovery of costs can only be issued or levied after the certificate of taxation has been adopted by the judge as judgment of the court and a decree issued so that it is the decree of the court, for the costs that is being enforced. Nothing short of that procedure which is not just a procedural technicality curable under Article 159 of *the Constitution* .
56. Makau J. as he then was had to say in *Shade Manufacturing & Hotel Limits v Serah Mweni Matuu & 3 Others* (2021) eKLR. “I find that the Respondent did not make a formal application to the court for the certificate of costs to be converted to a judgment.” ...Accordingly to the above Section 51(2) of the *Advocates Act*, the Respondent ought to have made a formal application for the Ruling of the taxing master to be adopted as a judgment by this court.”
57. Similar holding was made in *Union of Kenya Civil Servants v Kenya County Government Workers Union & Another*; KCGWU (client); Mbuvi t/a Katunga Mbuvi & Company Advocates (Adv.) Misc. Application No. E216 of 2021 [2023] eKLR January 2023 where Jacob Gakeri J observed correctly that:
“so typically, after the certificate of costs dated June 13, 2022 was issued by the Deputy Registrar it was the duty of the Respondent/ Advocate to have the same adopted as judgment of the court.
51. By letter dated July 9, 2022 the Respondent/Advocate’s counsel applied for warrants of attachment on the ground that the applicant had failed or refused to comply with the orders dated June 27, 2022, the Respondent’s counsel



should have at this point sought the adoption of the certificate of costs as an order of the court for purposes of execution. There is no evidence on record that the requisite application was made...”

58. The learned judge held that the certificate of taxation issued by the Deputy Registrar was not executable in the circumstances of the case, without judgment being sought and entered adopting the said certificate of taxation.
59. The learned judge further found and I agree that the warrants of attachment and proclamation were obtained prematurely before the certificate of costs had been adopted as a judgment of the court for purposes of execution proceedings and that neither a judgment nor a decree that was executable was in place. Furthermore, in that case, a reference challenging the certificate of taxation was still pending determination.
60. In the instant case, just as in the cases I have referred to above, the advocate had his advocate/client bill of costs taxed on 19th March 2013. The certificate of taxation was issued but no application for adoption of that certificate of costs as judgment of the court and decree drawn or issued for execution was done.
61. In the circumstances, I have no difficulty in finding and holding that the attempt to ‘assist’ the 2nd Respondent execute for recovery of the taxed costs was premature and unprocedural in law as there was no judgment or decree of the court on the taxed costs, capable of being executed.
62. The second aspect of there being an unprocedural and premature attempt to execute the non-existent decree is governed by the provisions of the *Civil Procedure Act* and Rules. The 1st Respondent claims and this was in his deposition that he acted on an application for execution upon which he was issued by the court with warrants of attachment and sale then he issued a proclamation of the attached movable properties on 23rd April 2023.
63. I have already found and held that a certificate of costs was not an executable legal instrument and was therefore not capable of being executed and therefore no warrants of attachment and sale or proclamation could issue on a bare certificate of costs taxed on 19th March 2013 as there was no judgment and decree flowing therefrom to warrant and an application by the 2nd Respondent for execution.
64. It follows that the 2nd Respondent could not expect the auctioneer to assist them undertake an illegal action of execution. The 2nd Respondents are officers of the court and so is the auctioneer. Both are expected to adhere to the law and its due processes. They are not expected to undertake short circuiting of court processes. They are not even lay persons who can be excused in one way or the other.
65. Execution is the process of enforcing a decree and or order by a court of law. Therefore, a party in whose favour a judgment has been rendered/ decree holder is entitled to execute decree against the judgment debtor.
66. Execution of decrees or orders is provided for under Part III of the *Civil Procedure Act* and Order 22 of the Civil Procedure Rules. Execution of a decree



or order of the court can only be permitted upon an application by the decree holder.

67. Under Section 38 of the *Civil Procedure Act*, a court may on the application of the decree holder order execution of the decree; by delivery of any property specifically decreed; by attachment and sale or by sale without attachment, of any property; by attachment of debts; by arrest and detention in prison of any person; by appointing a receiver; or in such other manner as the nature of the relief granted may require.
 68. Under Order 22 Rule 6 of the Civil Procedure Rules, which provisions echo Section 38 of the *Civil Procedure Act*, a decree holder may apply to court to execute a decree against a judgment debtor either orally or through written application. However, an oral application for execution of a money decree can only be made by the decree holder at the time of making the judgment prior to making and or preparations of warrants of arrest if the Judgment debtor is within the court precincts.”
20. Thus, a certificate of taxation must be converted into a judgment and a decree drawn for execution purposes.
 21. Notice to show cause, on the other hand, is one of the modes of executing decree. Before issuing such notice to show cause, the 3rd interested party was expected to comply with the procedure for execution for recovery of costs. In this case, while the preliminary objection was still pending, challenging the notice to show cause, the 3rd interested party Applicant filed the present application seeking entry of judgment and issuance of a decree. This resulted in two parallel processes in the same matter, one before the Deputy Registrar and another before the Judge, each touching on the same taxed costs, but at different procedural stages.
 22. From the cited decisions, there is certainly no dispute about the proper procedure. After taxation of costs, a party ought first to obtain judgment in terms of the certificate of taxation, where the decree in the suit is only one for costs, extract a decree and only then should it move to execution. The Notice to Show Cause initiated by the 3rd interested party was therefore premature.
 23. The question is what this court should do with the present application in light of that misstep. Counsel for the ex parte applicants argued that the Applicant’s conduct amounts to an abuse of the court process, pointing to the existence of two concurrent processes. There is merit in the concern.
 24. No court of law can permit parties to engage in parallel proceedings over the same subject matter, more specifically where this may lead to inconsistent outcomes. That aside, it is not every procedural blunder that amounts to abuse of court process or that nullifies the court proceedings. There must be evidence of bad faith and the intention to deliberately undermine the administration of justice.
 25. In this case, what is before this Court is not so much bad faith but poor sequencing by the 3rd interested party/applicant. The 3rd interested party/Applicant’s counsel obviously took a wrong step and upon being challenged with a preliminary objection, sought to correct that error by filing the present application, which application is entirely proper. It is the very step that ought to have been taken in the first instance before execution, as a party cannot execute a certificate of costs without having it being converted into a judgment and decree of the court.
 26. The question is whether this Court should strike out the application, in view of the pending notice to show cause that is opposed by way of a preliminary objection. In my view, striking out the application



would not advance justice. It will only delay the foreseeable and expected outcome of taxation of costs and elevate form over substance.

27. I am thus persuaded that the better course is to regularize the position rather than punish the 3rd interested party/ Applicant for an error that can be cured. However, this Court cannot ignore the fact that there are currently two live processes before different arms of the same Court. That kind of situation is unacceptable and must be called out.
28. For the above reasons I make the following orders:
- a. The application for judgment on the taxed costs is allowed. Judgment is hereby entered for the 3rd interested party/Applicant in terms of the certificate of taxation of costs dated 20th March, 2025 and a decree shall issue.
 - b. The prayer for interest was withdrawn by counsel during the oral hearing. It is hereby marked as withdrawn
 - c. The Notice to Show Cause pending before the Deputy Registrar is hereby struck out on account that it was filed prematurely and without a supporting judgment or decree.
 - d. The Applicant will be at liberty to proceed with execution only after complying with the proper procedure.
 - e. The confusion leading to these parallel processes was of the 3rd interested party Applicant's counsel acting prematurely. I would have penalized counsel and not her client who trusted in her professional guidance, and rarely do counsel seek instructions from their clients on what kind of application to make after judgment or ruling. Clients wholly depend on the advice of their counsel. On the other hand, the court which facilitated the issuance of notice to show cause ought not to have allowed the premature process to take place. In the circumstances, I shall not penalize the 3rd interested party. I make no orders as to costs of the struck-out notice to show cause and the present application dated 11th February, 2026 which merely seeks to correct the premature anomaly. [see paragraphs 76 and 77 of UAP Insurance Company Limited v Alfred Mdeizi t/a Pave Auctioneers & another{supra) for the rationale for excusing the party from paying costs in such similar circumstances] where the Court persuasively stated:
 - “76. Having acted so ignorantly and the trial court having ‘aided’ the auctioneer to perpetrate the illegality by issuing warrants of attachment and sale without a decree and application of execution of decree, the appropriate order that this court can make in the circumstances is to set aside the warrants of attachment and sale dated 22nd April 2013 and the proclamation dated 23rd April 2013 and I proceed to equally set aside the Ruling of 25th April 2018 in Civil Misc. Application No. 168 of 2015 and substitute the order allowing the application dated 30th June 2015 with an order dismissing the application dated 30th June, 2015 and striking out the auctioneer – 1st Respondent's untaxed bill of costs in this matter as the auctioneer is not entitled to any costs.
 77. As the 1st Respondent could not have proceeded to obtaining warrants of attachment and sale and proclaimed the appellant's goods, had the court acted diligently in ensuring that there was judgment, decree and application for execution of decree and as the appellant did not delve into the issues that I have delved into in my determination of this appeal, I order that each party shall bear their own costs of the appeal herein and of the application dated 30th June 2015.”



- f. Mention before the Deputy Registrar on 23rd June, 2026 to confirm issuance of decree which shall fully comply with the order on taxation of costs.
- g. The party executing to pay for the decree.

29. I so order.

DATED, SIGNED & DELIVERED VIRTUALLY AT NAIROBI THIS 9TH DAY OF APRIL, 2026

R.E. ABURILI

JUDGE

