



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**  
**CIVIL SUIT NO. E003 OF 2026**

FRANCIS MUGENDI NJUE .....1ST PLAINTIFF  
TONFRA SERVICES COMPANY LTD. .... 2ND PLAINTIFF  
VERSUS  
PETER MUNENE NYAGA .....1ST DEFENDANT  
ELGIN PAMS LTD. .... 2ND DEFENDANT

**RULING**

**Introduction**

- [1] This is a ruling on the two applications by way of the Notice of Motion dated 5/1/2026 for setting aside of an interlocutory judgment and the Objection and corresponding Notice of Motion dated 6/1/2026 to the execution by the alleged owner of property attached upon execution of the decree ensuing from the default judgment.
- [2] By a Plaint dated 22/9/2025, the Plaintiffs sought against the Defendants the following reliefs for liquidated and unliquidated damages, and declaratory orders, interest and costs, based on a cause of action for breach of a business agreement pleaded in paragraph 5 *et seq.* as follows:

**“5. The 1st Plaintiff avers that he and the 1st Defendant have been business associates since 2015 and on or about the year 2020 the 1st Plaintiff and the 1st Defendant agreed to form a joint venture in the field of mining and stone crusher business.**

**6. The 1st Plaintiff avers that the initial agreement was that the 1st Plaintiff and the 1st Defendant were to do the mining business as a joint venture where they would hold equal shares, contribute capital equally and manage the business mutually and at the end share the profit equally.**

7. The plaintiff avers that under the joint venture business engagement duties were assigned and performed by the 1st Plaintiff and the 1st Defendant as follows:

**Duties of the 1st Plaintiff**

- Looking for the viability of the business project
- Prospecting for the mining sites
- Doing the initial ground work and preparing the site where the machines were to be installed
- Seeking approvals from relevant authorities including the County Government, the Ministry of mines and the National Environmental Management Authority.
- Sourcing for premises to lease for installation of the Crusher plant.
- Completing the leasing transaction of the premises
- Paying for the leased premises
- Clearing the crusher plant upon arrival in the country and transportation to the premises.
- Paying for the clearance and transportation of the Crusher
- Sourcing and hiring an installation company.
- Paying for installation of the crusher plant
- Providing transport to the mining and crushing business using Lorries belonging to the 2nd Plaintiff during the installation process.
- Recruiting and retaining staff
- Managing the business from the initial stages.
- Contributing money for the daily running of the business.

**Duties of the 1st Defendant**

- Purchasing the crusher plant and shipping it to the country.

8. The 1st Plaintiff avers that he consulted the 1st Defendant and they agreed that the 1st Plaintiff was to incur the cost of leasing land parcel number Ngandori/Kirigi/13081 belonging to the Abijim family, where the Crusher Plant was established.

9. The 1st Plaintiff avers he paid the lease deposit amount to the tune of Ksh. 3,000,000/= to one EVA EUNICE NYAGA who is part of the Abijim family and a Trustee of the family trust.

10. The 151Plaintiff avers that he was astonished when at the time of signing the lease agreement he was ambushed with the requirement that the 151Plaintiff was signing the lease agreement as a representative of a registered company which was the 2nd Defendant and who was a stranger to the earlier joint venture agreement.

11. The It Plaintiff avers that he was left with no option but to sign the lease agreement since he had already put in a lot of investment into setting up the joint venture business.

12. The Plaintiffs aver that by mutual understanding with the 1st Defendant ,they incurred the following expenses;

- a.) Transport costs for Preparation of the site and ferrying of stones to the crusher plant using the 2nd Plaintiff's two lorries namely motor vehicle registration numbers KCL 728A and KCP 728J @ 20,000/- per lorry per day for 8 months [from 1st June 2020 to February 2021] - Ksh. 9,600,000/=
- b.) Clearing the Crusher plant - Ksh. 700,000/-
- c.) Transportation of the Crusher Plant - Kshs. 120,000/-
- d.) Payment of lease - Ksh. 3,000,000/-
- e.) Payment for installation of the Crusher Plant - Kshs. 1,600,000/-
- f.) Money spent for daily operations at the Mining site - Kshs. 500,000/-

13. The 1st Plaintiff avers that that he actively supervised the mining site for a period of Eight months commencing from the month of June 2020 to February 2021 without any assistance from the 1st and 2nd Defendants.

AND the 1st Plaintiff claims compensation for a sum of Kenya Shillings Nine Million Five Hundred Thousand (Ksh. 9,500,000/=) being 30% of the total cost of the works.

14. The 1st Plaintiff avers that he solely set up the crusher plant upon its arrival into the country, whereby he hired Hardrock Machinerics Ltd for the installation of the crusher plant.

15. The 1st Plaintiff avers that some of the monetary expenses incurred by the 1st Plaintiff as listed under paragraph 13 herein were paid directly from the accounts of the 2nd Plaintiff with consent and knowledge of the 1st and 2nd Defendants.

16. The 1st Plaintiff avers that all the directors of the 2nd Plaintiff duly authorized the transfer of funds made by and on behalf of the pt Plaintiff into the joint venture business and the use of the two lorries, KCL 728A and KCP 728J in the joint venture business.

17. The 1st Plaintiff avers that as soon as the business started running and the sales income began streaming in the Defendants breached the initial agreement for the joint venture and managed to unlawfully and forcibly evict the 1st Plaintiff out of the joint venture business.

**Particulars of breach by the 1st and 2nd Defendants of the joint venture agreement.**

a) The 1st Defendant illegally procuring his own staff without the consent of the 1st Plaintiff.

b) The Defendants using deceit to defeat the purpose of the joint venture and cunningly converting the business into a Limited Liability company with its own the employees who are illegally employed and retained.

c) The Defendants forcibly evicting the 1st Plaintiff from business and preventing the 1st Plaintiff from participating in the daily running of the business.

d) The 1st Defendant instructing his staff to send sales monies directly into his accounts in the UK.

e) The 1st Defendant failing to share the profits of the business with the 1st Plaintiff as per the initial joint venture agreement.

18. In consequence of the matters aforesaid, the plaintiffs have lost the benefit of the said contracts, and each of them have lost the profit they would otherwise have made, thereby occasioning them great detriment in their said business and have been put to extensive trouble, inconvenience and expense and have thereby suffered loss and damage.

19. The Plaintiffs' claim against the Defendants is for the sum of Ksh. 25,020,000/= being the Plaintiffs' contribution into the joint venture business broken down as follows:

- a) Cost of using the Plaintiffs' lorries registration numbers KCL 728 A and KCP 728 J at a cost of Ksh. 20,000/= per lorry, per day for 8 months - Ksh, 9,600,000/=
- b) Cost of the 1st Plaintiff supervising the mining site for 6 months at 30% of the total cost of the works- Ksh. 9,500,000/=
- c) Clearing the Crusher plant - Ksh. 700,000/-
- d) Transportation of the Crusher Plant – Kshs. 120,000/-
- e) Payment of lease - Ksh. 3,000,000/-
- f) Payment for installation of the Crusher Plant - Kshs. 1,600,000/-
- g) Money spent for daily operations at the Mining site - Kshs. 500,000

20. Further, the defendants threaten and intend, unless restrained by this Honourable continue to do the acts and things hereinbefore complained of.

21. Despite demand made and intention to sue intimidated the defendants have failed neglected, and/ or refused to settle the claim.

22. There is no other suit pending in this court or at all, and there have been no previous proceedings in any court on the same subject matter and involving the same parties herein.

23. The cause of action arose in Embu within the jurisdiction of this court.

**REASONS WHEREFORE the plaintiffs pray for Judgement against the defendants for:**

**a) The sum of Ksh.25,020,000/=.**

**b) A declaration that the 1st Plaintiff and the 2nd Plaintiff are tenants on. L.R. Ngandori/Kirigi/13081 as per the lease agreement dated 10th June 2020.**

**c) A declaration that the business conducted on L.R. Ngandori/Kirigi/ is a Joint Venture between the 1st Plaintiff and the 1st Defendant.**

**d) A declaration that the 2nd Defendant is a stranger to the lease agreement entered into on 10th June 2020.**

**e) An order of Permanent injunction to restrain the 1st and 2nd Defendants from evicting the 1st and 2nd Plaintiffs from L.R. Ngandori/Kirigi/13081.**

**f) Damages for breach of Agreement.**

**g) IN THE ALTERNATIVE and without prejudice to the foregoing, A declaration be issued by the Honourable court that the mining business located at Ngandori/Kirigi/13081 be declared a Joint venture between the 1st, 2nd Plaintiffs and the 1st Defendant and directions be given that the 1st defendant is in breach and thus the joint venture should be dissolved and all incomes and assets of the business be divided among the Plaintiffs and the 1st Defendant parties.**

**h) Interest on (a) above.**

**i) Costs.**

**j) Any other relief the court deems fit to grant.**

Dated at Embu this 22nd day of September 2025.

**KAHIGA, MUKAMI & CHARIA ADVOCATES  
ADVOCATES FOR THE PLAINTIFFS.”**

*[emphasis added]*

[3] Upon alleged service of summons on the 1<sup>st</sup> defendant who is said to have accepted service for himself and on behalf of the 2<sup>nd</sup> defendant of which he is one of the directors with his wife, Anne Mbugua, by affidavit of service sworn by Wifred Njeru Kigoro on 13/11/2025, the Plaintiff's Counsel requested for interlocutory judgment for failure of the Defendants to file a defence within time as follows:

**“REQUEST FOR INTERLOCUTORY JUDGEMENT**

**(Under Order 10 Rules 3 & 6 Civil Procedure Rules)**

**The 1ST and 2ND PLAINTIFFS herein FRANCIS MUGENDI NJUE and TONFRA SERVICES COMPANY LTD request for interlocutory judgement against the 1ST AND 2ND DEFENDANTS PETER MUNENNE NYAGA and ELGIN PAMS LTD who have failed to file a defence within the stipulated period after they were duly served with summons to enter appearance and the Plaintiff. (Affidavit of service attached).**

**Thereafter the matter may proceed for formal proof.**

**DATED AT EMBU THIS 13TH DAY OF NOVEMBER 2025.**

**KAHIGA, MUKAMI & MACHARIA**

**ADVOCATES FOR THE 1ST AND 2ND PLAINTIFFS.”**

**[emphasis added]**

[4] The Affidavit of service of Wilfred Njeru Kigoro of 13/11/2025 deponed in material parts as follows:

**“AFFIDAVIT OF SERVICE**

***I, WILFRED NJERU KIGORO of P.O. BOX 633-60100, EMBU a licensed Process Server of the court do hereby make oath and state as follows:***

***1. That on 23RD October, 2025 at about 12.30 p.m. I received instructions from KAHIGA, MUKAMI & MACHARIA, ADVOCATES to serve summons to enter appearance, Plaint, Verifying affidavit, Plaintiff list of documents, Plaintiff list of witness and Witness statement to the 1st and 2nd Defendants.***

***2. That I called the 1st Defendant on his mobile phone no. 0745659781 and informed him that I have instructions to serve him with court documents and he gave me his email xxxx address and asked that I send the documents on that email, which) did on the same day(annexed hereto is a screenshot of the email).***

***3. That the said 1st Defendant Peter Munene Nyaga informed me that he is one of the Directors of the 2nd Defendant together with his wife Anne Wangari Mbugua hence is duly authorized to receive the court documents on behalf of the 2nd Defendant.”***

***Interlocutory Judgment***

[5] The record of the Court indicates the first minute on file as the request for interlocutory judgment, as follows:

**“27/11/2025**

***In the Registry.***

***The firm of Kahiga, Mukami & Macharia has today filed a Request for Interlocutory Judgment vide Ref No. EAMGQFU2.***

***Signed:***

***Frank for Deputy Registrar.”***

[6] The Plaintiffs obtained an interlocutory judgment on the same date of the request on 13/13/112025 and the Court record indicates the judge granting the request for judgment in the following terms:

***“27/11/2025***

***Before Hon. R. Mwongo, J.***

***C/A Munyao***

***In Chambers.***

***Court:***

***The 1<sup>st</sup> and 2<sup>nd</sup> defendants having failed to file their defences within the statutory timelines interlocutory judgment is hereby entered for the Plaintiffs.***

***Orders accordingly.***

***R. Mwongo, J.***

***27/11/2025.”***

[7] The Plaintiffs then extracted a Decree signed by Deputy Registrar and posted on the **Court Tracking System (CTS)** on 1/12/2025, which was in the following terms:

***“REPUBLIC OF KENYA***

***IN THE HIGH COURT OF KENYA AT EMBU COUNTY***

***COURT NAME: EMBU LAW COURT***

***CASE NUMBER: HCCC/E009/2025***

***CITATION: FRANCIS MUGENDI NJUE AND TONFRA SERVICES***

***COMPANY LTD VS PETER MUNENE NYAGA AND***

***ELGIN PAMS LTD***

***DECREE***

***BEFORE HON. JUSTICE MWONGO, RICHARD MURURU***

***THIS MATIER coming up for Directions on the 27th day of November, 2025 on the Application for Request for Interlocutory Judgment dated 13th day of November, 2025 before the Hon. R. MWONGO, J. and in the absence of Counsel for the Plaintiffs, 1st Defendant and the 2nd Defendant AND UPON CONSIDERING the Application;-***

***IT IS HEREBY ORDERED AND DECREED:-***

**1. THAT Judgment be and is hereby entered in favour of the Plaintiffs and against the defendants for:**

a. The sum of **Ksh. 25,020,000/=**

b. A declaration that the 1st Plaintiff and the 2nd Plaintiff are tenants on **L.R. NGANDORI/KIRIGI/13081** as per the lease Agreement dated **10th June, 2020**.

c. A declaration that the business conducted on **L.R NGANDORI/KIRIGI/13081** is a Joint Venture between the 1st Plaintiff and the 1st defendant.

d. A declaration that the 2nd defendant is a stranger to the Lease Agreement entered into on **10th June, 2020**.

e. An order of Permanent Injunction be and is hereby issued restraining the 1st and 2nd defendant from evicting the 1st and 2nd plaintiffs from **L.R. NGANDORI/KIRIGI/13081**.

f. Damages for breach of Agreement.

g. **IN THE ALTERNATIVE** and without prejudice to the forgoing, a declaration be and is hereby issued that the Mining business located at **NGANDORI/KIRIGI/13081** be declared a joint Venture between the 1st. 2nd Plaintiffs and the 1st Defendant and directions be given that the 1st defendant is in breach and thus the joint Venture should be dissolved and all incomes and assets of the business be divided among the Plaintiffs and The 1st defendant parties.

h. Interests on (a) above.

i. Costs.

**GIVEN under my hand and seal of this Honorable Court at Embu this 27th day of November, 2025.**

**HON. R. MWONGO, J.**

**JUDGE OF THE HIGH COURT.**

**ISSUED at EMBU this 4th day of December, 2025.**

**DEPUY REGISTRAR,**

**HIGH COURT AT EMBU.**

**GIVEN under my hand and Seal of this Court on 2025-11-27 00:00:00**

**SIGNED BY: HON. DORCAS ENDOO MCIARB., (DEPUTY REGISTRAR)**



The Auctioneer had given a Notification of Sale of Movable Property by public auction on **19/12/2025** before he obtained the warrant of sale.

***The application for setting aside of default judgment and objection to attachment***

[12] The execution by way of attachment of the suit property triggered two reactions by way of an application to set aside the judgment dated 5/1/2026 and an Objection (and corresponding application) to the execution by the Objector dated 6/1/2026 alleged owner of the attached property.

[13] When the applications came up for hearing on 20/1/2026, the Judge at Embu High Court (Mwongo, J.) recused himself and transferred the file to this Court for hearing and disposal in proceedings recorded on the file as follows:

***“20/1/2026***

***Before Hon. R. Mwongo, J.***

***C/A Munyao.***

***Ms. Muthama for Applicant/objector***

***Ms. Mukami for 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs***

***Mrs Wambugu for 1<sup>st</sup> and 2<sup>nd</sup> Defendants (Applicants in application dated 5/1/2026)***

***Muthama-*** Mention for hearing of application dated 6/1/2026 of Objector.

***Court:***

*The Court is unable to hear this matter for personal reasons. I hereby recuse myself. Reasons may be through the Hon. Chief Justice. Matter may...*

***Wambugu:*** *I propose we forward the file to the nearest High Court at Kerugoya.*

***Muthama:*** *I concur- the mater may be sent to kerugoya High Court.*

***Mukami:*** *No objection – Matter can be placed before High Court at Kerugoya.*

***Court:***

*Following recusal this file is transferred by consent to Kerugoya High Court forthwith. To be placed before the Judge in Kerugoya on 19/2/2026. Interim orders are extended to that date.*

**R. Mwongo, J.**

**20/1/2026”**

There only lingers a question whether upon the recusal of the judge, he should have reset the matter to the position it was before he granted the interlocutory order of 27/11/2025 by setting aside the interlocutory judgment and discharging any subsequent orders. However, as the Court was not addressed on this aspect of the case, no determination may be made thereon.

[14] By the Notice of Motion dated 5/1/2026, expressed to be brought *UNDER ARTICLE 159 OF THE CONSTITUTION OF KENYA 2010, SECTION 3 AND 3A OF THE CIVIL PROCEDURE ACT, AND ORDER 51 OF THE CIVIL PROCEDURE RULES AND ALL OTHER ENABLING PROVISIONS OF THE LAW*, the defendants sought the setting aside of the default judgment and the lifting of the attachment levied on the property:

*“1. THAT this application be certified urgent and be heard forthwith ex parte.*

*2. THAT this Honourable Court be pleased to Order a stay of execution of the interlocutory Judgment/Decree issued by this Honourable Court on the 27th November, 2025 pending the hearing and determination of this Application.*

***3. THAT this Honourable Court be pleased to set aside or lift the warrants of attachment and sale of movable properties issued on 22nd December, 2025 pending the hearing and determination of this Application.***

***4. THAT this Honourable Court be pleased to grant the Defendants leave to file their statement of defence.***

*5. THAT the costs of this Application be provided for.”*

[15] The application was supported by the grounds set out in the application as follows:

*“a) That interlocutory Judgment herein was entered against the 1st and 2nd Defendants/ Applicants herein on the 27th November, 2025 for the sum of Kshs.25,262,418.00.*

***b) That the 1st and 2nd Defendants/Applicants were never served with the plaint and summons to enter appearance.***

c) That the Plaintiffs/Respondents have obtained warrants of sale of property in execution for money decree on the 22nd December, 2025.

d) That vide a letter dated 10th December, 2025 the Plaintiff/Respondent instructed Viewline Auctioneers to proclaim the Defendants/Applicants movable assets.

**e) That on 1st January, 2026 the auctioneers illegally and unlawfully proclaimed commercial motor vehicles some of which do not belong to the Defendants/ Applicants herein.**

**f) That the 1st and 2nd Defendants/Applicants herein were never served with the summons to enter appearance and plaint or any court documents by the Plaintiff/ Respondent herein.**

**g) That the 1st and 2nd Defendants/ Applicants shall at the hearing of this application seek to cross-examine the process server on the allegations of service upon the Defendants with any pleadings or notices.**

h) That the entire object of this Application will be defeated and rendered nugatory should the Plaintiff /Respondent proceed to execute the Decree and in such event the Defendants/ Applicants herein would suffer irreparable loss and damage.”

[16] The 1<sup>st</sup> Defendant’s Supporting Affidavit of 5/1/2026 set out the facts relied on by the Defendants as follows:

**“SUPPORTING AFFIDAVIT**

1. **THAT** I am the 1st Defendant/Applicant and a co-director of the 2nd Defendant/Applicant in this matter and I am conversant with the facts therein hence competent to swear this Affidavit.

2. **THAT** interlocutory Judgment herein was entered against the 1st and 2nd Defendants/Applicants herein on the 27th November, 2025 for the sum of Kshs.25,262,418.00. **I will rely on the court record to prove the same.**

3. **THAT** I wish to categorically state that we were never served with the plaint and summons to enter appearance.

4. **THAT** the Plaintiffs/Respondents have obtained warrants of sale of property in execution for money decree on the 22nd December, 2025.

***(annexed hereto and marked "PM1" is a copy of the said warrants of sale)***

5. ***THAT*** vide a letter dated 10/11/2025 the Plaintiff/Respondent instructed Viewline Auctioneers to proclaim the Defendants/Applicants movable assets.

6. ***THAT*** on 1st January, 2026 the said auctioneers illegally proclaimed 5 commercial motor vehicles some of which do not belong to the Defendants/Applicants herein and they intend to sell the said motor vehicles at a public auction. ***(attached hereto and marked "PM2a and b" is a copy of the said proclamation and notification of sale of movable property)***

7. ***THAT*** I reiterate that the 2nd Defendants/Applicants and I were never served with the summons to enter appearance and plead or any court documents by the Plaintiff/Respondent herein.

8. ***THAT*** we shall at the hearing of this application seek to cross-examine the process server on the allegations of service upon the defendants with any pleadings or notices.

9. ***THAT*** we intend to defend and oppose the Plaintiff claim and allegations and we seek leave of this court to allow us file our respective statement of defences.

10. ***THAT*** if the orders sought herein are not granted we stand to be condemned unheard."

[17] By Objection dated 6/1/2026 expressed to be brought under Article 159 (2), Article 50 (1) of the Constitution of Kenya, the Judicature Act Cap-8, the High Court (Practice and Procedure Rules, Part 1 Rule 3, Sections 63(e), 1A, 1B and 3A, of the Civil Procedure Act, Order 22 Rules 51, 52, and, Order 51 Rules 1 of Civil Procedure Rules, the Objector claims ownership to the property and by a Notice of Motion dated 6/1/2026 sought the release of the attached property as follows:

***1. THAT*** the Honourable Court be pleased to hear the Applicant's application under Certificate of Urgency during the current vacation in the first instance.

***2. THAT*** the proclamation and intended sale of the Objector's properties excavator registration number KHMA 152P and roller grader

registration number KHMA 660N be stayed pending the hearing of this Application ex-parte,

3. THAT Honourable Court be pleased to set aside the Warrants of Attachment of movable property in execution of Decree for money and the Warrants of sale of property in execution of Decree for money issued to on 22,"1December, 2025 and the Proclamation of Attachment by VIEWLINE AUCTIONEERS dated 10th December, 2025 in respect to the excavator registration number KHMA 152P and roller grader registration number KHMA 660N.

4. THAT the Decree Holders through their agents VIEWLINE AUCTIONEERS and/or any other Auctioneers or Agent authorized by the Decree Holders be precluded from proclaiming or having proclaimed, from attaching or selling the Objector's properties in answer of the Decree of this Honourable Court.

5. THAT the Honourable Court be pleased to issue an order for the immediate release of the excavator registration number KHMA 152P and roller grader registration number KHMA 660N being properties of the Objector herein.

6. THAT the Decree Holders be condemned to pay the costs of this application.”

[18] The application was based on the grounds out in the application as follows:

“1. The Objector is not a party to this suit and has no interest and/or claim in the subject matter and the movable properties herein attached and proclaimed by Viewline Auctioneers solely belongs to her and not the Defendants/ Judgment Debtors herein.

2. That the Decree holders through their agents Viewlinc Auctioneers never served the Warrant of attachment of movable property in execution of Decree for money and/or the Notice of Proclamation of attachment upon the Objector personally and only showed up on 31'1 December, 2025 and 1'1 January, 2026 in the company of police officers they towed the excavator and roller grader registration numbers KHMA 152P while parked at Kithirnu police station and KHMA 660N at Ugweri market respectively to an unknown place.

3. *That it is therefore illegal for the excavator and roller grader registration numbers - KHMA 152P and KHMA 660N to be attached by the auctioneer as per the Notice of Proclamation of Attachment dated 10<sup>th</sup> December, 2025; which properties belongs to the Objector/Applicant herein who was not a party to the suits proceedings herein.*
4. *Unless this Application is heard and granted, the Applicant stands to suffer irreparable damages and loss based on the Respondents' conduct, hence the urgency of this Application.*
5. *The Defendants herein have no interest and/or claim whatsoever over the said properties and hence the same cannot be attached in satisfaction of the Decree issued against the Defendants.*
6. *It is only fair and just that the orders sought herein be granted in the interest of justice.”*

[19] The application was supported by affidavit of the Applicant setting out the fact of ownership of the attached property as follows:

**“SUPPORTING AFFIDAVIT**

*I, ESTHER RUGURU NYAGA, a resident of Embu within the Republic of Kenya do make oath and state as follows:*

1. *THAT I am the Objector herein conversant with the matters deponed to herein hence competent to swear this Affidavit.*
2. *THAT I am the lawful and registered owner of the Construction excavator registration number KHMA 152P and a roller grader registration number KHMA 660N. [Annexed and marked ERN-1& 2 are copies of the motor vehicle copy of records from NTSAj*
3. *THAT on 31st December, 2025 at night on or around 7.00 p.m. without any color of right; the Decree holders' agents VIEWLINE AUCTIONEERS illegally, forcefully proclaimed and towed away the construction excavator registration number KHMA 152P from Kithimu Police station where it was being parked since it was operating construction work within Kithimu area. Since it was at night and the driver had clocked out his working hours, the Decree holders' agents in my absence and that of the excavator driver went ahead to dismantle the*

*forklift and some spare parts in order to enable them to forcefully tow the excavator to unknown place in the presence of police officers providing security during execution in the guise that they were enforcing a court order from the OCS - Embu-West Police station.*

*4. THAT on 1st January, 2026 being a public holiday in the morning hours the Decree holders' agents VIEWLINE AUCTIONEERS proceeded to Ugweri market and illegally and forcefully proclaimed and towed away construction roller grader registration number KHM.A 660N which was parked at Ugweri market since it was equally operating construction work at the market area. The proclamation was conducted in the presence of some police officers from Runyenjes Police Station who showed the driver of the roller grader the Warrants of Attachment of movable property and Notice of Proclamation of Attachment. The driver immediately called me to inform me that the said grader was being proclaimed and he was given some documents. [Attached and Marked 'ERN-3 & 4' are copies of Warrant of attachment of Movable Property in Execution, Notice of Proclamation of Attachment.]*

*5. THAT on the 02nd January 2026, I proceeded to Kithimu police station to report the incident in respect to the excavator registration number KHMA 152P and I was received with a lot of hostility, they informed me that they were enforcing the court order issued by the court and I was directed that my case can be handled by the OCS Runyenjes Police station.*

*6. THAT on 03rd January 2026, I proceeded to Runyenjes Police station to report the incident in respect to the roller grader registration number KHMA660N which was stationed at Ugweri market and I was not assisted in recording my statement and I tried to inform the officer that I do require an O.B Number since they assisted in the Proclamation of my properties but I was met with a lot of hostility and they equally stated that they were enforcing the court order issued by the Court.*

*7. THAT on 05th January 2026, I instructed my advocates on record who conducted a due diligence and perused the Court file and requested to be supplied with a copy of the Decree and Certificate of Costs. [Attached*

*and marked 'ERN-5, 6a & b, 7a & b are copies of the Decree and verification letters dated 18th & 19th December, 2025]*

*8. THAT I have never been a party to this suit and/or court proceedings and the Honourable Court was misled and/or misinformed that the movable properties Construction excavator registration number KHMA 152 P and a roller grader registration number 660N were the properties of the Defendants/judgment Debtors.*

*9. THAT the defendants/judgment debtors have no interest and or rights over the construction excavator number KHMA 152P and a roller grader registration number KHMA 660N being the movable properties therein cannot be attached in the realization and or satisfaction of the money decree against the Defendants'/judgment debtors.*

*10. THAT it is therefore clear that the Plaintiffs/Decree holders and their Agents have wrongly misled the Honourable Court into issuing the Warrants of Attachment of Movable Property on Execution of Decree for money and subsequent Notice of Proclamation of Attachment of movable property without conducting their due diligence as to the ownership of the proclaimed items. [Attached and Marked ERN-8 is a copy of Notification of sale of movable property schedule].*

*11, THAT I stand to suffer irreparable damages and loss based on the Decree holders and their agent's conduct as the construction excavator registration number KHMA 152P and roller grader registration number KHMA 660N are likely to be sold any time, hence the urgency of this Application."*

[20] The procedure on Objections under Order 21 Rules 52-53 do not appear to have been complied with by the Plaintiffs/Decree-holders.

### **Responses**

[21] The Plaintiffs responded to the Defendants' Application dated 5/1/2026 by a Replying Affidavit sworn on 16/1/2026 in terms as follows:

**"REPLYING AFFIDAVIT**

**[To the Application dated 5th January 2026]**

*1. That I am the 1st Plaintiff/Respondent herein thus competent to swear this affidavit.*

2. *That I swear this affidavit on my own behalf and as a director of the 2nd Plaintiff duly authorized.*
3. *That I have read and understood the contents of the application dated 5th January 2026 and the annexures thereto. I have sought the advice of my advocates on record and on that basis believe that the application is vexatious, incompetent, misconceived, an abuse of the court process and it's a non-starter from the onset and I urge this Honourable Court to dismiss it with costs.*
4. *That I am advised by my Advocates on record which advice I verily believe to be true that the Defendants' application is fatally defective and unfounded in law thus not deserving for grant of the orders sought.*
5. *That I am advised by my Advocates on record which advice I verily believe to be true that the Defendants' application is incompetent as it does not seek to set aside interlocutory judgement entered against the Defendants as required in law.*
6. *That the Defendants herein were duly served with summons and pleadings in this suit.*
7. *That interlocutory judgement was regularly entered as the Defendants failed to enter appearance or file a defence within the stipulated time.*
8. *That the warrants of attachment and warrants of sale of movable property were regularly issued by the Honourable court in favour of the decree holders in execution of the lawfully entered decree.*
9. *That pursuant to the orders of this Honourable court the attached chattels are still in custody of the auctioneer and I continue to incur storage charges amongst other costs to my detriment.*
10. *That after chasing me from the mutual business, Issued the 1st Defendant with a demand notice dated 26th April 2021 and the 1st Defendant verbally threatened that he would ensure that I would not successfully execute any court decree against him (Annexed and marked FMN-I is a copy of the demand letter dated 26/04/2021)*
11. *That in an attempt to make good his threat, the 1st defendant has since disposed of the crusher plant to a third party, transferred two graders to his sister ESTHER RUGURU NYAGA and has recently offered all the attached chattels registration numbers KHMA 152P,*

*KHMA 660N, KHMA 219P and KHMA 674R for sale and engaged one EYANTUS NJOROGE MWEMBU to source for buyers (Annexed and marked FMN-2 is a copy of the affidavit sworn by EVANTUS NJOROGE MWEMBU).*

*12. That I invite the Honourable court to consider that the 1st Defendant's move to quickly put up all the machines for sale shows that he was indeed aware of the pending case and intended to defeat the course of justice.*

*13. That the Defendants have no defence to our suit and the present application is a delaying tactic aimed at preventing us from realizing the fruits of the judgement that was lawfully entered.*

*14. That it is trite law that the instant suit being a liquidated claim, the Defendants ought to deposit the entire decretal amount as a condition for stay.*

*15. That the 1st Defendant is a resident of the UK and I am reliably informed that he intends to sell off all his properties in Kenya then hide in the UK making it impossible for me to execute any court decree against him, I implore for protection from this Honourable court.*

*16. That the defendants have come to court with unclean hands and are thus not entitled to the equitable orders sought.*

*17. That from the foregoing, it is beyond peradventure, that the present application is misconceived, misguided and unmerited and the same ought to be dismissed with costs.”*

[22] In reply to the application dated 6/1/2026, the Plaintiff’s filed a replying Affidavit sworn on the 1/2/2026 denying that the Objector is the lawful owner of the attached graders and alleging a fraudulent transfer to the her in order to defeat any court execution process, as follows:

**“REPLYING AFFDAVIT**

***[To the Application dated 6th January 2026] I,***

*FRANCIS MUGENDI NJUE of care of P.O. BOX 822-60100 Embu within the Republic of Kenya do hereby Make Oath and state as follows:*

*1. That I am the 1st Plaintiff/Respondent herein thus competent to swear this affidavit.*

2. That I swear this affidavit on my own behalf and as a director of the 2nd Plaintiff duly authorized.

3. That I have read and understood the contents of the application dated 6th January 2026 and the annexures thereto. I have sought the advice of my advocates on record and on that basis believe that the application is vexatious, incompetent, misconceived, an abuse of the court process and it's a non-starter from the onset and I urge this Honourable Court to dismiss it with costs.

4. That the objector herein is the sister to the 1st Defendant.

5. That the graders registration numbers KHMA 152P and KHMA 660N were initially registered in the name of the 1st Defendant (Annexed and marked FMN-1a and 1b are copies of the log books).

6. That the two graders have since acquisition remained in possession, control and use by the 1st Defendant and are branded in the name of the 2nd Defendant herein to date. ((Annexed and marked FMN-2a and 2b are most recent photographs of the two graders)

7. That the 1st Defendant only recently transferred the 2 graders to the objector defeat the decree of this Honourable Court.

8. That the objector herein is well known to me, we come from the same village, she is a full time primary school teacher at Kanja primary school and I know for a fact she has never been involved in any way in the operations and management of the two graders.

9. That the 1st Defendant in a letter dated 7th January 2026 through his advocates has expressly acknowledged that he owns the two graders (Annexed and marked FMN-3 is a copy of the letter dated 07/01/2026).

10. That on 7th January 2026 the 1st Defendant's advocates M.W WAMBUGU & CO. ADVOCATES on instructions by 1st Defendant demanded the release of the two graders allegedly owned by the Objector herein. (Annexed and marked FMN-4 is a copy of the notice).

**11. That I verily believe the 1st Defendant would have no business demanding for the release of the Objector's items if he indeed had not proprietary interest in the said chattels.**

**12. That the items attached in the proceedings herein are 2 graders, one excavator, one lorry and one shovel all belonging to the 1st and 2nd Defendants herein.**

13. That the said two graders were recovered from employees of the 1st Defendant who are well known to me.

14. That I am a resident of Embu town and in the construction industry and I know for a fact that the two graders have always been in custody and use by the 1st Defendant, my fellow contractors hire the two graders and make payments directly to the 1st Defendant.

**15. That after chasing me from the mutual business, I issued the 1st Defendant with a demand notice dated 26th April 2021 and the 1st Defendant verbally threatened that he would ensure that I would not successfully execute any court decree against him (Annexed and marked FMN-5 is a copy of the demand letter dated 26/04/2021).**

**16. That in an attempt to make good his threat, the 1st defendant had personally recently offered the all the attached chattels registration numbers KHMA 152P, KHMA 660N, KHMA 219P and KHMA 674R for sale and the 1st Defendant had engaged one EVANTUS NJOROGE MWEMBU to source for buyers (Annexed and marked FMN-6 is a copy of the affidavit sworn by EVANTUS NJOROGE MWEMBU)**

**17. That the instant application is aimed at masking the 1st Defendant's illegalities in transferring his property to the objector to defeat the decree of the court and we implore the Honourable Court to reject the same.**

**18. That the objector has come to court with unclean hands and is thus not entitled to the equitable orders sought.**

19. That I reiterate the averments made herein to be true and implore the Honourable court to find that the 1st Defendant is indeed the rightful owner of the two graders registration numbers KHMA 152P and KHMA 660N.

20. *That from the foregoing, it is beyond peradventure, that the present objection application is misconceived, misguided and unmerited and the same ought to be dismissed with costs.*

21. *That I swear this affidavit praying that the Objector/Applicant's application dated 6th January 2026 be dismissed with costs to the Plaintiffs."*

[23] The 1<sup>st</sup> defendant/applicant for the defendants filed a Supplementary Affidavit sworn on 12/3/2026 reiterating the application for leave to defend and for setting aside of the attachment and setting out his relationship with the Plaintiffs as follows:

**"SUPPLEMENTARY AFFIDAVIT**

1. *THAT I am the 1st Defendant/ Applicant and a co-director of the 2nd Defendant/ Applicant in this matter and I am conversant with the facts therein hence competent to swear this Affidavit.*

2. *THAT I have read and understood the contents of the Plaintiffs replying affidavit sworn by Francis Mugendi Njue on 16th January, 2026 and the same having been explained to me by my Advocates on record I wish to respond as follows.*

3. *THAT I wish to reiterate and categorically state that we were never served with the plaint and summons to enter appearance thus the judgement and warrants of attachment and notice of proclamation issues were irregular as I was condemned unheard.*

4. *THAT I wish to state that I met Francis Mugendi Njue during one of my visits to Kenya 2018/19, I returned to the UK and began making arrangements to finance the purchase of the machinery. That I approached several banks for personal loans and also used credit cards in order to raise the required funds.*

5. *THAT I wish to stat that I engaged Francis Mugendi Njue only as an employee to assist with day-to-day operations on the ground. For that reason, his name does not appear in any of the purchase documents, shipping records, clearing documents, or registration records for the machines. All the machinery was purchased, imported, cleared. and registered solely in my name. (annexed hereto and marked UPN1" is a bundle of documents probative of the foregoing)*

6. *THAT FURTHER I wish to state that two of the motor vehicles registration numbers KHMA152P and KHMA660N that the Plaintiff proclaimed do not belong to me. the Plaintiff/Respondent herein did not adduce any evidence to prove I own them. This proves that the Plaintiff/Respondent herein obtained orders through misrepresentation and [concealing] information from this honourable court.*

7. ***THAT Francis Mugendi Njue being my employee handled all operational cash relating to the machines on the ground. Over time, I began to notice that despite the machines being actively in operation and generating income. I was still being asked to send money from the UK to cover salaries, repairs, fuel, and other operating costs. I eventually realised that I was personally funding nearly all running expenses, even though the machines were meant to be self-sustaining from their operations.***

8. *THAT the aforementioned issues created serious tension between us. As a result, our working relationship deteriorated significantly. We eventually parted ways.*

**9. THAT I reiterate that the 2nd Defendants/ Applicants and I were never served with the summons to enter appearance and plaint or any court documents by the Plaintiff/Respondent herein.**

1a. *THAT we shall at the hearing of this application seek to cross-examine the process server on the allegations of service upon the Defendants with any pleadings or notices.*

11. *THAT we intend to defend and oppose the plaintiff claim and allegations and we seek leave of this honourable court to allow us to file our respective statement of defences.*

12. *THAT if the orders sought herein are not granted we stand to be condemned unheard.”*

[24] The Counsel for the parties then made oral arguments on the applications, corresponding to their respective contentions in the pleadings and affidavits.

[25] The Counsel for the Plaintiffs after conclusion of oral arguments subsequently sought to supplement her oral argument with written Submissions dated 19/3/2026 (leave for which was granted *ex post facto* and applicants given right of reply to the submissions) as set out below:

**“PLAINTIFF'S/DECREE HOLDER'S SUPPLEMENTARY SUBMISSIONS**

We submit that the issue of the propriety of the decree issued in this matter for the failure to set down the matter for formal proof was never raised by the Defendants in their application dated 5th January 2026. The said issue is not among the grounds of the application neither is it mentioned in the Defendant's Supporting Affidavit to the application. We submit that parties are bound by their pleadings and submissions do not constitute evidence and it is manifestly unjust to the Plaintiffs for the Defendants to submit on an issue not raised in the pleadings. We implore the Honourable Court to reject the Defendants' submissions on the issue.

**It is further the Plaintiffs/Decree holder's submission that this Honourable Court has no jurisdiction to determine the issue of failure by the Honourable Court to set down the matter for formal proof hearing after interlocutory judgement was entered. We submit that doing so would amount to the Honourable Court sitting on appeal against its own judgment. We submit that the issue of the failure by the court to set down the matter for formal proof goes into the merits of the final judgement that was rendered and which matter can only be determined on appeal. We submit that it is trite law that a distinction has to be made between an erroneous decision that is the subject of an appeal and an error apparent on the face of the record that may be subject of a review as was held in the case of Stephen Wanyoike Kinuthia (Suing on behalf of John Kinuthia Marega (deceased) v Kariuki Marega & another [2018] eKLR.**

**We submit that even had the failure to set down the matter for formal proof been considered as an error apparent on the face of the record, the defendants in their application have not made a pray for review neither have they relied on the relevant provision of the law, being order 45 rule 1 of the Civil Procedure Rules. The Honourable Court's jurisdiction of review cannot therefore be rightfully invoked by the Defendants.**

We submit that as earlier submitted the default judgement entered in this matter was regular and whether or not the mater was set down for

*formal proof is not among considerations the Court ought to take into account in determining the application. We submit that once the court rendered final judgement in the present matter the Honourable Court became functus officio and the Court lacks jurisdiction to make a determination on whether the court erred in law in failing to set down the matter for formal proof hearing.*

*The doctrine of **functus officio** was restated by the Court of Appeal in the case of **Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited)** [2014] eKLR where the Court stated as follows:*

*21. Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon ....*

*24. The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued.*

*From the foregoing we implore the Honourable **Court to find that the issue of whether the present matter ought to have been set down for formal proof after interlocutory judgement was entered, is an issue that is irrelevant to the application before the court and this Honourable Court has no jurisdiction to make a determination on the issue.***”

[26] The Defendants’ Counsel written Submissions in reply dated 30/3/2026 were as follows:

**“DEFENDANTS’/APPLJCANTS’ FURTHER WRITTEN SUBMISSIONS PURSUANT TO THE DIRECTIONS GIVEN BY THE COURT ON 19TH MARCH 2026**

*May it please your Lordship pursuant to your directions given on 19th March 2026 the Defendants/ Applicants submit as follows: -*

*1. Failure to Set the Suit Down for Hearing/Formal Proof*

*That given the nature of the prayers sought in the Plaintiff, failure to set the suit down for hearing is fatal. The same is bad in law as it offends the provisions of Order 10 Rule 9 of the Civil Procedure Rules.*

*Your Lordship we submit that the Plaintiffs / Respondents were aware that they ought to set the matter down for formal proof. We invite the Court to peruse the Plaintiffs request dated 13<sup>th</sup> November 2025.*

*On this issue we humbly submit that where there is a breach of a mandatory provision of the law, the Court has powers in such a situation to set aside a judgment on its own motion ex debito justitiae as a matter of right. On this submission we rely on the case of James Kanyitta Nderitu & another v Marios Philotas Ghikas & another [2016] KECA 470 (KLR) the Court stated as follows: -*

*"In all irregular default judgment, on the other hand, judgment will have been entered against the defendant who has not been served properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion".*

*We pray that you be guided accordingly.*

## **2. On Jurisdiction of This Honourable Court**

*Your Lordship, the Plaintiffs/Respondents have submitted that this Honourable Court lacks jurisdiction to hear and determine the matter before it the same having emanated from failure by the Court to set down the matter for formal proof.*

*Further it has been argued that the failure aforesaid goes to the merits of the final judgment. Further the Plaintiff then concluded that this contention ousts the jurisdiction of this Honourable Court and vests the same in the superior court.*

*It is our humble submission that this Honourable Court is properly seized of jurisdiction by virtue of Article 165(3)(a) of the Constitution of Kenya, 2010, which vests the High Court with unlimited original jurisdiction in civil matters.*

Further, under Section 3A of the Civil Procedure Act, this Honourable Court is clothed with inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

Your Lordship, the issue before this Court is not an appeal on the merits of the judgment, but rather a challenge to the procedural validity and legality of the process leading to the said judgment. This squarely falls within the jurisdiction of this Honourable Court. **This Honourable Court retains the power to set aside judgment where the same is shown to be irregular, unlawful, or obtained in breach of mandatory procedural requirements.**

We reiterate that jurisdiction cannot be conferred by error, omission, or procedural irregularity, As was held in *Mutie T/A Diani Tour & Travel, Equity Bank Limited v Bruce Mutie Mutuku (t/a Diani Tour & Travel [2016/ KECA 250 (KLR)*. The Court relied on the case of *Macfoy v United Africa Co LTD [1961] 3 All ER, 1169* where it was Court held: -

“... You can not put something on nothing and expect it to stay there. It will collapse. ””

Accordingly, where a judgment is found on a procedurally defective process, this Honourable Court not only has jurisdiction, but is under a judicial duty to intervene and set aside such judgment ex debito justitiae. **Further, it is trite law that a point of law may be raised at any stage of the proceedings, and the Court is duty bound to consider it.**

We therefore submit that the objection on jurisdiction is without merit, and this Honourable Court is properly seized of the matter.

### **3. CONCLUSION**

In light of the foregoing, we humbly submit that the failure to set the suit down for formal proof constitutes a fundamental procedural defect, rendering the resultant judgment irregular and a nullity in law. and that this Honourable Court has the jurisdiction and is indeed under a duty to set aside the said judgment ex debito justitiae.

We so humbly pray.

We are guided by the following authorities:

1. *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] KECA 470 (KLR)

2. *Mutie TIA Diani Tour & Travel Equi!!' Bank Limited v Bruce Mutie Mutuku t/u Diani Tour & Travel* [2016] KECA 250 (KLR).”

[27] Ruling was reserved.

**Issues for Determination**

[28] The issues for determination in the twin applications are as follows:

- i. Whether the Court will grant the applications to set aside or lift the warrants of attachment and sale of movable properties issued on 22nd December, 2025 pending the hearing and determination of this Application as prayed in prayer no. 3 of Notice of Motion; and
- ii. Whether the Court will grant the Defendants leave to file their statement of defence as prayed in prayer no. 4 of the Notice of Motion.

[29] An issue was raised by the respondent that the applicant could not urge the issue of requirement of formal proof in the submissions before the Court because it had not been taken in the application or affidavit and the Court will deal with the question at the outset. The same argument was made of review under Order 45 of the Civil Procedure Rules for error on the face on the record as shown the written submissions for the Plaintiffs.

[30] It is trite that there is no ***estoppel*** against legal provisions and whether or not an issue of law, whether established by the Constitution, statute, or rules or binding case-law authority, is properly raised in the pleadings or affidavits, if it is brought to the attention of the Court, it cannot be ignored and the issue must be dealt with, as otherwise the decision of the court may be rendered ***per incuriam*** if the court proceeds to rule on the matter contrary to the applicable position of the law or binding authority.

[31] The Plaintiff’s Counsel also objected that “*the prayers sought do not seek to set aside the interlocutory judgment... We rely on Order 10 rule 11 of the Civil procedure Rules that there is need for applicant to seek to set aside interlocutory judgment which has not been done.*”

[32] The answer to these objections appear to lie also in the provision that no objection may be taken against failure to cite “*order, rule or other statutory provision under or by virtue of which any application is made*” under which an application is

made or other technical objection. Order 51 rule 10 (2) provides that no objection may be taken, and an application may not be defeated, on account of failure to set out provisions of law relied on as follows:

***“10. Provision under which application is made to be stated [Order 51, rule 10]***

*(1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, **but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.***

***(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.”***

That the applicants do not expressly use the Order 10 Rule 11 terminology of “*setting aside interlocutory judgment*” cannot defeat the defendants’ application to same effect for “*leave to defend.*”

[33] Moreover, Order 45 review is available to remedy “*error apparent on the face of the record, or for any other sufficient reason,*” and in terms of Order 51 Rule 10 of the Civil Procedure Rules failure to cite the “*order, rule or other statutory provision under or by virtue of which any application is made*” is not fatal to an application. It is clear that the defendants raised the issue of the errors in the Decree of the Court, that the Decree gave final judgment for claims that went beyond the liquidated claim to grant other reliefs in the Plaint, as a ground for seeking the lifting of the warrants of sale and for setting aside and that Court cannot properly ignore provisions of law that apply to an application before it.

*Does the court become functus officio upon entry of default judgment*

[34] The Supreme Court in PETITION NO. 7 OF 2019, **GEOFFREY M. ASANYO & 1 others v. THE ATTORNEY-GENERAL** of 10th day of January, 2020 considered the meaning of functus officio and held as follows:

***“35] The other crucial question in this matter is the functus officio concept: has the Appellate Court’s role become wholly redundant, and it may no longer entertain the relevant question?***

[36] This Court, in **Raila Odinga & 2 Others v. Independent Electoral & Boundaries Commission & 3 Others** [2013] eKLR, had cited with approval a passage in an article by Daniel Mala Pretorius entitled “**The Origins of the**

*functus officio Doctrine, with Special Reference to its Application in Administrative Law*”, in *South African Law Journal*, Vol. 122 (2005), at p. 832, in the following terms:

*“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been taken, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision-maker.”*

[37] In determining whether the Appellate Court was *functus officio*, we need to ask ourselves whether that Court resolved the matter before it with finality.”

To the same effect, see the caselaw of *Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR, cited by the Plaintiffs’ counsel.

[35] **Order 10 Rule 11** of the Civil Procedure Rules is in the following terms:

**“11. Setting aside judgment [Order 10, rule 11]**

*Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”*

[36] The rule for the setting aside of default judgments under Order 10 Rule 11 of the Civil Procedure Rule belies any sense of finality on an interlocutory or default judgment. The Court has express authority to review its decision on the principles for the setting aside of judgments set out in the rule and case-law.

### **Determination**

[37] The law on default judgments is set out in the various provisions of Order 10 where the court is empowered in the different types of claims to enter judgment for failure by the defend and or defendants to enter appearance and or file a defence.

[38] There are different types of judgments that may ensue from a default of appearance or defence set out in Order 10 Rule 4 -7 of the Civil Procedure Rules. The

applicable rule in this case is Order 10 Rule 4 on **Judgment upon a liquidated demand and other claims against defendant(s)** in default of appearance or defence:

**[Order 10, rule 4.] Judgment upon a liquidated demand.**

**4. (2) Where the plaintiff makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form No. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim.”**

[39] Judgment on such other claims – the claim for damages and declarations – could only be given in the case of pecuniary damages with **formal proof** of the damages under Order 10 Rule 6 where the Court may “**enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages**” or, in the case of other claims, at the hearing of the suit, under Order 10 Rule 9 of the Civil Procedure Rules, which provides for the general rule for all other suits not provided for that “**where any party served does not appear the plaintiff may set down the suit for hearing.**”

[40] If the award of costs were to await judgment upon the other claims, execution could only be levied with leave of court under section 94 of the Civil Procedure Act and Order 22 rule 7 of the Civil Procedure Rules. No of this happened in this case, as the Decree was irregularly issued before judgment on the other declaratory reliefs and non-liquidated damages. Section 94 of the Civil Procedure Act provides as follows:

**“94. Execution of decree of High Court before costs ascertained**

**Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the de cree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.”**

[41] In the present suit, the Plaintiffs made all **three claims** of **liquidated demand, un-liquidated pecuniary claim for general damages** and **other claims for declaratory relief**. Consequently, the judgment types available were:

1. *Final judgment for the liquidated sum of 25,000,000/- for which no formal proof or further hearing was necessary, only subject to leave of court to execute before assessment of costs.*
2. *Interlocutory judgment for the unliquidated pecuniary damages which should be followed by proof of the damage before a final judgment in formal proof proceedings.*
3. *As regards other claims, matter to be set down for hearing.*

The *final judgment* for the liquidated claim and *interlocutory judgment* with formal proof were of course, subject to proof of service of summons and default of appearance and or defence.

#### *Validity of decree*

[42] What is the Decree of the Court extracted and issued in this case? For a decree capable of immediate execution in terms of Order 10 Rule 4 (2), the final judgment should have been entered on the liquidated claim of Ksh.25,000,000/= alone and the costs should have awaited the judgment on the other claims. The decree as drawn therefore offended Order 21 Rule 7 (1) of the Civil procedure Rules which provides as follows:

***“7. Contents of decree [Order 21, rule 7]***

***(1) The decree shall agree with the judgment; it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit.***”

[43] As the levy of execution was based on an irregular Decree, the warrants of attachment and warrant of sale issued in the ensuing proceedings shall be set aside. The Decree dated 1/12/2025 and expressed to be issued on 4/12/2025 which was the basis for the application for execution and grant of the warrant of attachment and sale dated 10/12/2025 and 22/12/2025 was null and void. The consequent attachment in execution of the suit property is invalid.

#### ***Setting aside of default judgment.***

[44] Order 10 Rule 11 of the Civil Procedure Rules provide for the setting aside of default judgments. In considering such an application case-law has distinguished between regular and irregular judgments.

*Regular and Irregular Judgments*

[45] The Counsel for both the Plaintiffs and the Defendants cited the leading decision on setting aside of **James Kanyita Nderitu v Maries Philotas Ghika & Another** [2016] eKLR. The decision was also cited with approval in the Court of Appeal of **Waweru v Maina** (Civil Appeal 59 of 2019) [2025] KECA 50 (KLR) (17 January 2025) (Judgment), where the Court observed as follows:

*“17. The singular issue for determination is whether the trial court erred in dismissing the appellant's application for setting aside the ex parte judgment entered in default of appearance and defence.*

*18. This situation is essentially governed by Order 10, Rule 11 of the Civil Procedure Rules. It provides for the setting aside of a judgment entered under Order 10. This Court has had occasion to judicially explain the applicable principles in **James Kanyita Nderitu v Maries Philotas Ghika & Another** [2016] eKLR. It is imperative to quote the Court in extenso thus:*

*“We shall first address the ground of appeal that faults the learned Judge for setting aside the default judgment and consequential orders in the circumstances of this case. From the onset, it cannot be gainsaid that a distinction has always existed between the default judgment that is regularly entered and one, which is irregularly entered. **In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearances or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 Rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion, in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his Memorandum of appearance or defence, as the case may be, the length of time that has elapsed since the default judgment***

*was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer....In an irregular judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular, it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system....Such a judgment is not set aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process.”*

*19. When confronted with an application to set aside a default or ex parte judgment, therefore, the first task of a trial court is to determine if the default judgment is an irregular or regular one. If it is the former, the trial court must set aside the default judgment as a matter of right. If it is the latter, the trial court has unfettered discretion to determine if there is good cause and may set the default judgment aside if it so finds.”*

[46] As noted above, the application for setting aside of **regular** judgment may still be entertained in discretion. The Court will consider the application for leave to defend at a later date upon cross-examination of the Process Server as sought by the Defendants/applicants to determine whether the judgment in this case was regular or irregular.

***Service of summons outside the country***

[47] The Court defers the consideration of the issue of service of the Summons to the hearing of the application for leave to defend under prayer No. 4 of the Notice of Motion dated 5/1/2026.

**Conclusion**

[48] The Court is not ***functus officio*** upon entry of an interlocutory or default judgment. Indeed, Order 10 Rule 11 of the Civil Procedure Rules, which provides for setting aside of such default judgments is on point. The Court shall deal with main prayer No. 4 for setting aside as sought in terms of ***an application for leave to defend*** on a date to fixed. The Court will presently deal with the issue of setting aside of the warrant of attachment and sale of the attached property as prayer in prayer no. 3 of the Notice of Motion of 5/1/2026.

[49] Save for the application for leave to defend/setting aside of the interlocutory judgment, this is also a case of defective decree. The problem in this matter arose at the extraction of the decree. Deputy Registrars are cautioned to familiarise themselves with the provisions of Order 10 of the Civil Procedure Rules as to the **different** consequences and procedures for the various situations of ***liquidated*** and ***unliquidated*** claims; claims for ***pecuniary damages*** and other ***non-pecuniary claims***.

[50] The judgment for the ***liquidated*** sum of 25,000,000/- is a regular judgment if proper service was established. However, as service of summons is contested and leave for cross-examination of the process server sought, there shall be directions for the hearing of the prayer no. 4 of the Notice of Motion on a date to be fixed.

[51] General damages could not be awarded without a ***formal proof*** of the damage, and the Decree granting the damages is irregular.

[52] Consequently, the Court finds that judgment could not be entered for the declarations sought without hearing, and the **Decree** as drawn to include the declaratory reliefs was irregular, obviously contrary to order 21 Rule 7 of the Civil Procedure Rules and subject to setting aside ***ex debito justitiae***.

***Decree is incapable of implementation***

[53] Most importantly, the Decree of the Court dated 1/12/2025 upon which the execution was levied by the Plaintiffs is truly incapable of implementation in view of

the award of the declarations which may only be awarded after full hearing of the claim and the award of damages without formal proof to ascertain the damages and, therefore, inform the award of damages and it granted orders in the alternative without indicating which order was effective and therefore capable of the implementation and execution as prayed if prayer (g) as follows:

*“g. IN THE ALTERNATIVE and without prejudice to the forgoing, a declaration be and is hereby issued that the Mining business located at NGANDORI/KIRIGI/13081 be declared a joint Venture between the 1st. 2nd Plaintiffs and the 1st Defendant and directions be given that the 1st defendant is in breach and thus the joint Venture should be dissolved and all incomes and assets of the business be divided among the Plaintiffs and The 1st defendant parties.”*

[54] If this alternative prayer has been granted, there is no question of execution for payment of any monies as that would have to await an order that *“directions be given that the 1st defendant is in breach and thus the joint Venture should be dissolved and all incomes and assets of the business be divided among the Plaintiffs and The 1st defendant parties.”*

[55] The grant of the alternative prayer for partnership called for further proceedings under Order 21 Rule 15 of the Civil Procedure Rules which provides as follows:

*“15. Decree in suit for dissolution of partnership [Order 21, rule 15]  
Where a suit is for the dissolution of a partnership, or the taking of partnership accounts, the court, before passing a final decree, may pass a preliminary decree, declaring the proportionate shares of the parties, fixing the day on which the partnership shall stand dissolved, or be deemed to have been dissolved, and directing such accounts to be taken, and other acts to be done, as it thinks fit.”*

[56] There is *an error on the face of the record* in the nature of the Decree extracted by the Plaintiffs for execution. It is an error within the meaning of the leading decision on error apparent on the face of the record. It does not require protracted argument on fact and law. It is clearly visible to the proverbial *man who runs and read!* See *Multichoice case (Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 Others [2020] KECA 633 (KLR)* (per Ouko, JA, as he then was) defining an error on the face of the record as follows:

“It bears emphasizing that the phrase “**mistake or error apparent**” by its very connotation conveys the fact that the error envisaged is **one which is evident per se from the record and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. It is prima-facie visible. It must relate to an error of inadvertence, one which strikes one on merely looking at record.** An apparent error on the face of the record has been described in the most simplified manner by the Tanzania Court of Appeal adopting with approval commentaries by Mulla, Indian Civil Procedure Code, 14<sup>th</sup> Edition pg 2335-36 as follows:

“The courts in India have for many years had to consider what is constituted by “an error apparent on the face of the record” in the context of 0.47, r. 1 of the Code of Civil Procedure and we think their opinions are of immense relevance. We treat for this purpose as synonymous the expressions “manifest” and “apparent”. The various opinions are conveniently brought together in MULLA, 14th ed., pp. 2335-36 from which we desire to adopt the following. **An error apparent on the face of the record must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions [State of Gujarat v. Consumer Education & Research Centre (1981) AIR Guj. 223]... But it is no ground for review that the judgment proceeds on an incorrect exposition of the law [Chhajju Ram v. Neki (1922) 3 Lah. 127]...**”

See **Chandrakant Joshubhai Patel V. R** [2004] TLR, 218; and **Juma Mzee vs. R** (2020) TZCA 39.”

[57] The man who ***runs and reads*** would see that a decree for judgment for a **liquidated sum** with other non-liquidated pecuniary claims and non-pecuniary claims for declaratory relief could not, **without leave of court** under section 94 of the Civil Procedure Act, be executed before **the ascertainment of costs** which could only be done at the hearing and the decree could not award the non-liquidated and non-

pecuniary claims without judgment after hearing of the suit. Order 10 Rule 4(2) is clear that-

**“(2) Where the plaintiff makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form No. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim.”**

And judgment on such other claims for damages and declaratory reliefs could only be given after hearing of the case.

[58] This Court is confident that had the issue of the irregular decree been brought up before the judge of the Court who gave the interlocutory judgment here (Mwongo, J.), he too would have set aside the decree on the basis of the error apparent on the face of the Decree of 1/12/2025.

[59] The application for setting aside of the Decree and warrants of attachment based thereon has clear merit.

[60] **The Court does not have to determine the objection relating to the ownership of the attached property in the objection proceedings, as sought in the Objection and application dated 6/1/2026, as the execution of the Decree herein is nullified.**

### **ORDERS**

[61] Accordingly, for the reasons set out above, the Court finds merit in the application dated and makes orders in the following terms:

1. The Decree dated 1/12/2025, and expressed to be issued on 4/12/2025 and the ensuing Warrant of Attachment and Warrant of Sale, respectively dated 10/12/2025 and 22/12/2025 are set aside.
2. There shall be an order for the immediate release of the suit property to the defendants and the Objector in terms of prayer no. 3 of the application as follows:

**“3. THAT this Honourable Court be pleased to set aside or lift the warrants of attachment and sale of movable properties issued on 22nd December 2025**

**pending the hearing and determination of this Application.”**

3. The hearing of the application for the Prayer No. 4 of the Application:

**“4. THAT this Honourable Court be pleased to grant the Defendants leave to file their statement of defence”**

shall be had on a date to be fixed in consultation with the parties.

[62] Costs of the application shall be in the Cause.

*Order accordingly.*

**DATED AND DELIVERED THIS 9<sup>TH</sup> DAY OF APRIL 2026.**

**EDWARD M. MURIITHI**

**JUDGE**

**APPEARANCES:**

Ms. Mukami for the Plaintiffs.

Mrs Wambugu for the Defendants/Applicants.

Ms. Muthama for the Objector.