REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL NO. E008 OF 2023

JULIUS GICHUKI ……………………… 1ST APPELLANT / RESPONDENT

JOSEPH IRUNGU ………………………2ND APPELLANT/ RESPONDENT

VERSUS

THE HONORABLE ATTORNEY GENERAL ………….. …..RESPONDENT

AND

SAMUEL MAINA MURIUKI ……………………………………. APPLICANT

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RULING

1. This is an application dated 14.11.2024 seeking the following orders:

    (a) …

    (b) THAT the Honourable court be pleased to issue an order of stay of execution of the decree arising from the judgment dated 11th June, 2024 and the resultant notice of execution of the decree fixed for hearing on 26/11/2025 pending hearing and determination of this application.

(c) THAT the Honourable court be pleased to issue and grant stay of execution of the decree vide Notice to show served on the Applicant pending hearing and determination of the intended re-hearing of the appeal.

(d) THAT the Honourable court be pleased to set aside the exparte judgment delivered on 11th June, 2024 and set down the appeal for retrial.

(e) THAT in the alternative the appeal herein be found to be fatally defective and be withdrawn since pursuing this matter to the Court of Appeal, if need be, under any circumstances, will badly disparage the counsel who prosecuted the appeal.

2. The application is premised on several grounds, but the main one is that the applicant was not served and was not party to the suit, though adverse orders were issued. The grounds were set out as follows:

   a. THAT in the instant appeal, subject of this application, the Applicant is a total stranger as per the parties and has never been served by the Appellants and/or their Advocates M/s Magua & Mbatha Advocates, Pamki House, 2nd floor Nyeri with any of the following;

      i. Duly filed Memorandum of Appeal
      ii. Record of Appeal
      iii. Mention Notices for directions
      iv. Hearing Notices
      v. Submissions
      vi. Bill of costs if any filed

b. THAT the Applicant, upon inquiry from Gori & Ombongi Advocates, who represented the Applicant in the original Nyeri CMCC E324/2021, was informed on 4/11/2024 that the said Advocates were never served with any appeal pleadings, mentions, directions, hearing Notices, and bill of costs, submission, notwithstanding that they did not have my instructions thereof.

c. THAT upon proceeding to the High Court Civil Appeal Registry to inquire I was advised to go to the Appellants' Advocates, where I went on 4/11/2024 and was served with a copy of the judgment dated 11th June 2024 only and no other pleadings.

3. There were no replying affidavits filed in the matter. However, there were submissions filed by the first and second respondents.
4. The applicant filed submissions dated 9.02.2026 in support of the notice of motion dated 14.11.2025. He stated that the *exparte* judgment was delivered against the applicant, who was not a party to the appeal. He was a party in the original suit. He stated that he was not served with either the appeal or a replying affidavit. He further stated that there was another appeal, numbered E025 of 2023, in which he could have cross-appealed. However, the appeal is between **Samuel Maina Muriuki V 5K Cabs Sacco and Nyekasha Self-Help Group**. This is an appeal from the decision dated 22.03.2023.

5. Reliance was placed on the case of **Flamco Limited & 3 others v Githunguri Dairy Farmers Cooperative [2025] KEHC 16903 (KLR)**. He prayed that the application be allowed.
6. The first and second respondents filed submissions dated 16.1.2026. They stated that the applicant was a stranger and did not prove substantial loss. Reliance was placed on the case of **James Wangalwa & Another vs. Agnes Naliaka Cheseto** [2012] eKLR and **RWW vs. EKW (2019) eKLR**. They stated that they are entitled to the fruits of their judgment. Reliance was placed on the decision of Platt, Ag. JA (as he then was) in **Kenya Shell Limited vs. Kibiru** [1986] KLR 410, at page 416 where he expressed himself as follows:

> "If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the Respondents should be kept out of their money".

7. They emphasized the decision of Gachuhi, Ag. JA (as he then was) at 417 where he stated as follows:

> **In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. Granting a stay would mean that the status quo should remain as it was before judgement. What**

> **assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement."**

8. The application dealt basically with security and stay. They stated that the applicant, who was not a party, cannot say he was condemned unheard. Reliance was placed on the case of **Departed Asians Property Custodian Board v. Jaffer Brothers Ltd** [1999] I.E.A 55, where the court held that:

> **…for a party to be joined on ground that his presence is necessary for the effective and complete settlement of all questions involved in the suit, it is necessary to show either that the orders sought would legally affect the interest of that person and that it is desirable to have that person joined to avoid multiplicity of suit, or that the defendant could not effectually set up a desired defence unless that person was joined or an order made that would bind that other person.**

9. They also relied on the case of *JMK v MWM & another [2015] KECA 524 (KLR)*. It is not clear what the authority was meant to be. They relied on several authorities, basically stating that the joinder is not necessary.

Analysis

10. The only question is whether the application is merited. The first and second respondents agree that the applicant was not a party to the appeal, though he was a party to the original suit. There is a secondary question regarding E025 of 2023. The issue of review is set out in section 80 of the Civil Procedure Act that:

> "Any person who considers himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
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> (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit".

11. This is further enunciated in Order 45 of the Civil Procedure Rules, which provides for Review, and it states as follows:

> *(1) Any person considering himself aggrieved-*
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> *(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*
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> *(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made,*

or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(c) (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review"

12. Kuloba J (as he then was) in **Lakesteel Supplies vs. Dr. Badia and Anor**, Kisumu HCCC No. 191 of 1994, addressed the question of review as follows:

> "The exercise of review entails a judicial re-examination, that is to say, a reconsideration, and a second view or examination, and a consideration for purposes of correction of a decree or order on a former occasion. And one procures such examination and correction, alteration or reversal of a former position for any of the reasons set out above. The court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used in Order 44 rule 1, of the Civil Procedure Rules. A review is by no means an appeal in disguise

> whereby an erroneous decision is reheard and corrected, but lies only for patent error. It can only lie if one of the grounds is shown, one cannot elaborately go into evidence again and then reverse the decree or order as that would be acting without jurisdiction, and to be sitting in appeal. The object is not to enable a judge to rewrite a second judgement or ruling because the first one is wrong…On an application for review, the court is to see whether any evident error or omission needs correction or is otherwise a requisite for ends of justice. The power, which inheres in every court of plenary jurisdiction, is exercised to prevent miscarriage of justice or to correct grave and palpable errors. It is a discretionary power. In the present application it has not been said or even suggested that after the passing of the order sought to be reviewed, there is a discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the ruling was made."

13. In this matter, the case proceeded on an understanding that the applicant was served. It is now confirmed that the applicant was not served. The Court of Appeal, sitting in Malindi [Makhandia, Ouko & M'Inoti, JJ.A] in the case of **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] KECA 470 (KLR)**, posited as follows:

The former Court of Appeal for Eastern Africa, in Ali Bin Khamis v. Salim Bin Khamis Kirobe & Others, [1956] 1 EA 195 expressed the view that where an order is made without service upon a person who is affected by it, procedural cockups will not deter the court, ex debito justitiae, from setting aside such an order. Briggs, JA., with whom Worley P. and Sinclair, VP. concurred, stated thus:

> "On the appeal before us Mr. Khanna relied on Craig v Kanseen [1943] 1 All ER 108 as showing that where an order is improperly made without serving a person known to be affected by it and having a statutory right to be served before it can be made, the order is a nullity in the sense that it must be set aside ex debito justitiae, and that in cases of nullity procedure is unimportant, since the Court has inherent jurisdiction to set aside its own order. I accept these principles, as laid down by Lord Greene, MR."

14. Having been the originator of the application, he ought to have been heard. By not being heard, the consequence is that the decision made is on the face of it erroneous. The error is on the face of it. Without proper hearing, anything anchored on such nullities is equally a nullity. In **Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169**, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

> **If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is**

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no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

15. However, I take note of the decision made in respect of the contempt. This court held as follows:

> In this matter this was not contempt on the face of the court. The court relied on various sections of Contempt of Court Act. This was sad since, before there is no such Act in the republic of Kenya. It was declared unconstitutional by dint of Article ***Articles 10 and 118(b)*** of the Constitution, the said Act is inapplicable while the declaration has not been set aside. In the case of **Kenya Human Rights Commission v Attorney General & another [2018] eKLR, the court considered the case of** ***The Queen v Big M. Drug mart Ltd,*** 1986 LRC (Const.) 332, the Supreme Court of Canada which stated that;
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> ***“Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. The object is realized through impact produced by the operation and applications of the legislation. Purpose and effect respectively, in the sense of the legislation’s object and ultimate impact, are clearly limited, but***

indivisible. Intended and achieved effect have been looked to for guidance in ascertaining the legislation's object and thus validity."

As a result the court in the said case of **Kenya Human Rights Commission v Attorney General & another** [supra] the declared as hereunder: -

"98. Having considered the petition, the response, submissions, the constitution and the law, I am persuaded that sections, 30 and 35 of the Contempt of court Act are unconstitutional. I, however, find that the entire fails the constitutional test of validity for lack of public participation and for encroaching on the independence of the judiciary.

Consequently and for the above reasons, this petition succeeds and I make the following orders.

A declaration is hereby issued that Sections 30, and 35 of the impugned contempt of court Act No 46 of 2010 are inconsistent with the constitution and are therefore null void.

A declaration is hereby issued that the entire contempt of court Act No 46 of 2016 is invalid for lack of public participation as required by Articles 10 and 118(b) of the constitution and encroaches on the independence of the Judiciary

No order as to costs.

The power to punish is set out in Section 5 of the Judicature Act. It provides as follows: -

The High Court and the Court of Appeal shall have the same power to punish for contempt of

court as is for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts.

An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.

16. The proceedings in the lower court were a nullity. There is nothing for the applicant to add to the case. The proceedings were based on a repealed Act. It will be an academic exercise to rehear the appeal just to satisfy the question of being heard. However, it is imperative that where a party has not been heard, he cannot be condemned. The applicant was neither a party nor served. There were documents in the file indicating he was. However, from the Memorandum of Appeal he was not a party. There is, therefore, an error apparent on the face of the record. The court will therefore set aside any order issued that was adverse to the applicant, who was thus condemned unheard.
17. The orders granted in the main appeal that touched on the applicant and incidental thereto, which are set aside, are as follows:

    (a) Being an appeal on contempt, each appellant is granted costs of 105,000/= for the appeal.

(b) Costs ordered herein shall be paid by Samuel Maina Muriuki within 30 days in default execution do issue.

(c) The application for contempt dated 11/12/2021 in Neyri CMCC E324 of 2021 is dismissed with costs of Kshs. 75,000/= to each of the alleged contemnors, the Appellants herein.

(d) The Attorney General to bear his costs.

(e) Cost be paid by Samuel Maina Muriuki as the substantive Respondent within 30 days in default execution do issue.

18. In lieu of the aforesaid orders, the court orders that each party bears its own costs. This is because the failure to join and serve the applicant was on the part of the appellants herein. The final orders that remain on the judgment after this review are as follows:

(a) The appeal is merited, and the same is allowed. The order for contempt is set aside. In lieu thereof, the Application for contempt dated 11/12/2021 in Neyri CMCC E324 of 2021 is dismissed.

(b) The application for contempt dated 7.2.2023, despite the main suit having been concluded, it is my finding that the suit against the 2nd Defendant was a nullity, there having been no summons.

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(c) The Appellants shall be refunded all the fines paid.

(d) The Judgment shall be served upon Hon. F. Muguongo by the Deputy Registrar of the court.

(e) The fine paid be refunded to the depositors.

(f) For avoidance of doubt the consent order recorded on 17.11.2021 is null and void, for all purposes.

(g) Each party to bear its own costs.

(h) The file is closed.

19. This leaves the issue of costs, which is governed by Section 27 of the Civil Procedure Act, which provides as follows:

> **(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.**

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> **(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.**

20. Costs are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of **Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR)** had this to say:

> **It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.**

21. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of **Rai & 3 others v Rai & 4 others [2014] KESC 31 (KLR),** as follows:

> 18.It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special

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> circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation
>
> 22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

22. Given the circumstances of this matter, each party shall bear its costs.

<u>Determination</u>

23. In the upshot, I make the following orders:-

a) The application dated 14.11.2025 is partly allowed as follows:

i. The court declines to join the applicant as a party.

ii. The judgment entered on 11.06.2024 is reviewed to the extent that adverse orders given against the

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applicant are set aside. The prayers remaining in the said judgment are as follows:

1. The appeal is merited, and the same is allowed. The order for contempt is set aside. In lieu thereof, the application for contempt dated 11/12/2021 in Neyri CMCC E324 of 2021 is dismissed.
2. The application for contempt dated 7.2.2023, despite the main suit having been concluded, it is my finding that the suit against the 2nd Defendant was a nullity, there having been no summons.
3. The Appellants shall be refunded all the fines paid.
4. The Judgment shall be served upon Hon. F. Muguongo by the Deputy Registrar of the court.
5. The fine paid be refunded to the depositors.
6. For avoidance of doubt the consent order recorded on 17.11.2021 is null and void, for all purposes.
7. Each party to bear its own costs.
8. The file is closed.

b) Each party shall bear its costs for the application.

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DELIVERED, DATED and **SIGNED** at **NYERI** on this **16th** day of **April, 2026**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Applicant – present

Mr. Magua for the Respondents

No appearance for the Attorney General

Court Assistant – Michael/Martin

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