



**REPUBLIC OF KENYA**

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

**CASE NO. E009 OF 2023**

**JOHN WABWIRE OGOLLA ..... APPLICANT**

**(JUDGMENT/DEBTOR)**

**VERSUS**

**VINCENT LUMUMBA EGESA ..... RESPONDENT (DECREE**

**HOLDER)**

**RULING**

1. This ruling is in respect of the notice of motion (application) dated 20<sup>th</sup> January, 2026. Through the application, the applicant seeks the following orders:-
  - i) Spent.
  - ii) The firm of B.M Ouma & Company Advocates be allowed to come on record for the applicant;
  - iii) Spent.
  - iv) This Honourable Court be pleased to set aside the ruling dated 19<sup>th</sup> September 2025 and all consequential orders

and allow the applicant to be heard on the merits of the Bill of Costs;

v) That the costs of this application be provided for.

2. The application is premised on the grounds on its face and supported by the affidavit of the applicant sworn in support of the application in which the grounds on the face of the application are reiterated. The grounds are as follows: -

- a) That the applicant had instructed the firm of M/S Ashioya & Company Advocates which firm as per the record never complied with the directions of the Court;
- b) That the applicant has never been served with a Bill of Costs, submissions, Certificate of Costs, application for execution as directed by the Court hence delay in bringing the instant application;
- c) That the respondent did not serve the applicant with hearing notices for the Bill of Cost, Certificate of Costs, application for execution and a Notice to show cause why execution should not issue and that ought to have been done in person;

- d) That the applicant was not served with any notice to show cause why execution should not issue so that he could pay;
- e) That the respondent did not act in good faith when it came to service of court pleadings especially the ones which should go to the applicant himself like the notice to show cause and application for execution before sending auctioneers;
- f) That the applicant was not informed at all either by Ashioya & Co. Advocates or M/S Manwari & Company Advocates of the assessed costs;
- g) That the applicant was never informed and/or served with the hearing date of the Bill of Costs as such requiring him to pay the costs he was never aware of is unfair;
- h) That unless an order setting aside of the ruling issued on 19<sup>th</sup> September 2025 is granted, the application will be rendered nugatory as the applicant will be greatly prejudiced since he has not been accorded a fair hearing

i) That the application has been made without unreasonable delay.

3. In reply and opposition to the application, the respondent swore an affidavit dated 10<sup>th</sup> March 2026 in which he *inter alia* contends that the application lacks merit and ought to be dismissed with costs; that the impugned processes that led to levying of execution against the applicant were duly served on the applicant's advocate on record, who despite being duly served, failed to file any document at all in opposition or response thereto; that the applicant's counsel also failed to attend court despite having been served with taxation notice; that the respondent's Bill of Costs was taxed by the Deputy Registrar of this court and a Certificate of Taxation issued.

4. The respondent has further deponed that the Certificate of Costs was served on the applicant's counsel on record; that his advocate filed an application for execution, in which he sought to be issued with warrants for attachment and sale of the applicant's movable properties which application was allowed

and warrants for attachment of sale of the applicant's movable properties issued; that the warrant was issued to Eshikhoni Auctioneers on 17<sup>th</sup> December 2025 who proclaimed and attached the applicant's movable properties leading to filing of the instant application.

5. The respondent points out that the applicant is neither contesting nor disputing the decision of this court awarding him costs of the suit. The respondent also points out that the applicant is not contesting or disputing any specific findings in terms of the ruling on his Bill of Costs or the sum adjudged to be payable to him as the costs of the suit but is faulting/blaming his own advocates for their failure to comply with the orders/directions of this court requiring parties to agree on costs failing which the same be taxed by the Deputy Registrar of the court.
6. The respondent avers that the applicant being the one who filed the instant suit against him, through his duly instructed

firm of advocates, it was incumbent upon him to ensure that he kept abreast all the developments in the suit at all times.

7. Terming service of the court process on the applicant's advocate on record proper service on the respondent, for all intents and purposes, the respondent avers that the instant application is designed, meant and intended to frustrate the implementation and enforcement of the verdict of this honourable court hence deserving to be dismissed with costs to him for being misconceived, misguided, frivolous, vexatious and devoid of merit.
8. The respondent also filed grounds of opposition dated 11<sup>th</sup> February 2026, in which he opposes the applicant's application on the grounds that the application is made under none existent provisions of the law; that it is based on grave misapprehension of the provisions of **Article 50** and **Article 159** of the Constitution of Kenya; **Sections 1A, 1B, 2, 3** and **3A** of the Civil Procedure Act and **Order 10 rule 11** of the Civil Procedure Rules; that the application offends the provisions of

**Section 27(1)** and Advocates (Remuneration) Order, 1962 respectively and that the application is misconceived, misguided, frivolous, vexatious, devoid of merit and otherwise an abuse of the court process.

9. Terming the orders sought by the applicant prejudicial to him, the respondent urges this Honourable court to dismiss it with costs to him.
10. The application was disposed of by way of written submissions.
11. The applicant filed his submissions on 2<sup>nd</sup> April 2026 and submitted that under **Order 9 rule 9** of the Civil Procedure Rules before a notice of change of advocates is filed after judgment has been delivered, it must be preceded by either an application wherein an incoming advocate seeks leave to come on record for a party or by a consent between the outgoing and proposed incoming advocate or party intending to act in person as the case may be. He made reference to the case **Kazungu Nari Yaa V Mistry v Muliji & Co**

**[2014] eKLR**, and submitted that the applicant followed the provisions of **Order 9 Rule 9** of the Civil Procedure Rules. He further submitted that he obeyed the court order to pay the deposit of Kshs. 70,000/= and that failure to oppose the taxation was neither deliberate nor reckless, but was the result of excusable human error of his previous advocates M/S Ashioya & Company Advocates. He relied on the cases of **Nicholas Mutuku Mwasuna vs Patricia Mueni Kilonzo [2022] eKLR** and **James Kanyita Nderitu vs Maries Philotas Chika & Another [2016] eKLR** and submitted that no party should be condemned unheard and that denying them audience is an infringement of their constitutional rights under **Article 50** of the Constitution of Kenya. He urged the court to exercise its inherent powers under the Constitution of Kenya 2010 and in **Section 1A, 1B, 3** and **3A** of the Civil Procedure Act and allow the application.

12. The respondent filed submissions dated 11<sup>th</sup> March 2026 in which he has more or less reiterated the contentions in his

replying affidavit. Worth noting is the submission that the applicant has invoked a none existent provision of law, namely **Order 24 Rule 4(4)** of the Civil Procedure Rules and that the other provisions of law invoked are inherently generic hence of no particular relevance to the orders/remedies the applicant is seeking from this court.

13. On whether this court should grant leave to the firm of M/S B.M Ouma & Company advocates to formally come on record for the applicant in place of M/S Ashioya & Company Advocates, the respondent submits that leave should not be granted for the reason that the applicant opted at the inception of the suit to be represented by the firm of M/S Ashioya & Company Advocates and that has not demonstrated that the application to come on record was properly served upon the outgoing advocate.
14. As to whether the applicant should be granted the other reliefs sought, the applicant submits that the applicant has not made up a case for exercise of the court's discretion in his favour

because he has been an indolent litigant who inexcusably opted not to participate in the taxation/assessment of the impugned Bill of Costs.

15. Maintaining that service on the respondent's advocate on record was proper, the respondent urges this court to dismiss the applicant's application dated 20<sup>th</sup> January, 2026 with costs to him for being devoid of merit and an abuse of the process of the court.
16. I have read and considered the application by the applicant, the respondent thereto and the submissions by both parties. I find the issues arising therefrom to be as follows: -
  - a) Whether service of court processes, post judgment on the advocate on record for parties is proper service;
  - b) Whether the applicant ought to have been personally served with notice to show cause why execution should not issue against him, in the circumstances of this case;

- c) Whether this court should grant leave to the firm of M/S Ouma and Company Advocates to come on record and represent the applicant after judgment;
  - d) Whether the applicant has made up a case for being granted the orders sought or any of them;
  - e) What orders should the court make?
17. On whether service of court processes, post judgment on the advocate on record for parties is proper service, the applicable law is found in **Order 9 Rule 1** of the Civil Procedure Rules, which provides as follows: -

**“Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf:**

**Provided that-**

**(a) any such appearance shall, if the court so directs, be**

**made by the party in person; and**

**(b) ...”.**

16. **Order 9 Rule 3** of the Civil Procedure Rules, provides: -

**“Processes served on the recognized agent of a party shall be as effectual as if the same had been served upon the party in person, unless the court otherwise directs”.**

17. In the circumstances of this case, the applicant does not dispute service on his counsel on record or suggest that there is a possibility that his counsel on record was not properly served. He merely complains about what appears to be failure by his counsel to carry out the duties owed to him pursuant to instructions given to him to represent him in his case. There is no indication, in the application whether the applicant tried to find out from his counsel why he did not attend court or any explanation why that was not done.

18. In **Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] eKLR** the Court stated/held: -

**“It is not enough for a party in litigation to simply blame the Advocate on record for all manner of transgressions in the conduct of litigation”.**

19. Similar holding was made in the case of **Ruga Distributors Limited v Nairobi Bottlers Limited HCCC 534 of 2011**, where the court stated that it is not enough for a party to blame their advocates but to show the tangible steps taken by him in following up his matter.

20. In the instant case, other than blaming his counsel for failing to act in what would appear to have been in his best interest, the applicant has not demonstrated what steps, if any, he took to find out from his advocates why they never attended court to defend his rights. In the absence of any explanation from the applicant or his advocate on record why they never attended court when they ought to, I find the reason given by the

applicant to be incapable of forming a ground for claiming that he was denied the right to a fair hearing.

21. As to whether the applicant ought to have been personally served with notice to show cause why execution should not issue against him, in the circumstances of this case, I have considered that claim vis-à-vis the applicable provision of the law, particularly **Order 22 Rule 18** of the Civil Procedure Rules and found that it was not necessary for the decree/holder to personally serve the applicant with a notice to show cause. The mode of execution proposed to be levied against the applicant, attachment and sale of applicant's movable properties, is not one of the modes of execution in respect of which the law requires that the judgment/debtor be personally issued with a notice to show cause why execution should not issue against him/her or it, as the case may be. In that regard, see the said provisions of the law, which provides as follows: -

**“(1) Where an application for execution is made—**

- a. more than one year after the date of the decree;**

- b. against the legal representative of a party to the decree; or**
- c. for attachment of salary or allowance of any person under rule 43,**

**the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him:**

**Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution**

**against the same person the court has ordered execution to issue against him:**

**Provided further that no such notice shall be necessary on any application for the attachment of salary or allowance...”**

22. On whether this court should grant leave to the firm of M/S Ouma & Company Advocates to come on record and represent the applicant after judgment, I have perused the application dated 20<sup>th</sup> January 2026 and noted that it was intended to be served upon the outgoing advocates. No affidavit of service has been filed by the applicant confirming that the application was indeed served on the outgoing advocates, as contemplated in the application and as by law ordained. It is a requirement of law, particularly **Order 9 Rule 9(1)(a)** that the application for leave to come on record be made on notice to all parties. In that regard, see the said rule which is as follows:

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**“When there is a change of advocate, or when a party decides to act in person having previously**

**engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-**

**a. upon an application with notice to all the parties; or**

**b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party.”**

23. In the absence of any evidence that the application was served on the outgoing advocate as by law required, I find and hold that the leave sought cannot be granted in the circumstances.

24. On whether the applicant has made up a case for being granted the orders sought, or any of them, I find that the applicant has not made up case for being granted the prayers sought or any of them. Consequently, I dismiss his application dated 20<sup>th</sup> January, 2026 with costs to the respondent.

25. Orders accordingly.

**Ruling dated, signed and delivered virtually at Busia this 27<sup>th</sup>  
day of April, 2026**

**L. N. WAITHAKA**

**JUDGE**

**In the presence of;**

N/A for the applicant

Mr Mogi for decree holder/ Respondent

Court Assistant; Tracy