



REPUBLIC OF KENYA



**Riunge (Suing as the Administrator of the Estate of Joseph Gichuki Riunge) v Gachanja & 2 others
(Environment & Land Case 430 of 2018) [2024] KEELC 4733 (KLR) (10 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4733 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 430 OF 2018**

**J OMANGE, J
JUNE 10, 2024**

BETWEEN

**THERESA WANJIRO RIUNGE (SUING AS THE ADMINISTRATOR OF THE
ESTATE OF JOSEPH GICHUKI RIUNGE) APPLICANT**

AND

ANDREW KIMATA GACHANJA 1ST RESPONDENT

SOLOMON GACHANJA MUOKI 2ND RESPONDENT

GEORGE MWAI MBURU 3RD RESPONDENT

RULING

1. For consideration before this court is the Notice of Motion application dated 24th April 2024 where the Applicant seeks the following orders:
 - a. Spent.
 - b. Spent.
 - c. That the honourable court be pleased to recall and set aside the warrants of attachment issued to Bermac Auctioneers for having been improperly, illegally and irregularly issued as no judgement or decree has been issued pursuant to the taxation.
 - d. Costs of the application.
2. The Application is supported by the affidavit of the applicant in which she avers that there is no Judgement or Decree in the matter. As such the warrants of attachment are a nullity and offend the rules of procedure and should be set aside.



3. The 3rd Party/Respondent in rebuttal filed a notice of preliminary objection dated 4th April, 2024 deposing that the application offends the provisions of Section 6 of the Civil Procedure Act and should be struck out.
4. In addition to the Preliminary Objection the Respondent filed a Replying Affidavit dated 2nd May 2024 sworn by Paul Kariba Kibiku in which he deposed that having obtained a ruling in their favour striking out the main suit and after taxation of the bill of costs, they were in order to apply for a decree. In any event it was his argument that the Applicant having participated in the taxation could not raise issue with the warrants.
5. The Applicant in their submissions state that the plea of res judicata cannot hold water as the test set out in the Supreme court case of John Florence Maritime Services Limited & another v. Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39, had not been met.
6. Counsel submitted that issuance of warrants of attachment is governed by Order 22 of the Civil Procedure Rules which require that a decree be extracted before warrants of attachment can issue. That a Certificate of Costs cannot be equated to a Judgement or a Decree. Counsel cited Section 51(2) of the Advocates Act which require that after issuance of a certificate of costs the court needs to enter Judgement on the Certificate of Costs.
7. Counsel submitted that in absence of the Judgement and subsequent decree, the warrants of attachment are irregular, illegal and improper and by extension the proclamation.
8. Counsel for the Respondent submitted that the matter is res judicata. That the Respondents had acted on the decree from the ruling dated 22nd July 2021 which upheld their preliminary objection and awarded costs to the defendants/respondents.
It was their argument that a ruling is in place awarding costs and that a decree and Certificate of Costs had been extracted from the ruling. As such counsel argued that the warrants were properly obtained.
9. The court shall first address the Preliminary Objection which was brought on the basis that the Court has dealt with a previous application. The doctrine of res judicata is defined in Black's law Dictionary 10th Edition as
settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”
10. Going by this definition, the facts of this case do not fit within the definition of Res Judicata as the previous application was struck out on a technicality. The technicality being that the application was filed by an advocate who had not sought leave of the court to come on record after Judgement. The preliminary objection is therefore without merit.
11. The remaining issue is for the court to determine whether the warrants of attachment dated 21st February 2024 and proclamation dated 5th March 2024 were obtained in an illegal, improper and unprocedural way.



12. The courts have held that a certificate of costs is not an executable instrument. In the case of *Rubo Kimngetich Arap Cheruiyot v Peter Kiprop Rotich* (Supra) where Ibrahim J (as he then was) the court stated;

“As far as the parties in a suit are concerned, a certificate of costs is not an executable legal instrument. A certificate of costs is not capable of being executed. Warrants of attachment and sale cannot in law be issued on the basis of a certificate of costs. There must be a decree first.”

13. In the instant case the main suit was struck out with costs being awarded to the Respondent herein.

Following delivery of the Ruling striking out the suit, a decree was issued on the 7th December, 2023. Section 2 of the *Civil Procedure Act* defines a decree thus “the formal expression of an adjudication which so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may either be preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91....”

14. In the instant case the Ruling delivered by the court 27th May, 2019 determined the rights of the parties following which a decree was subsequently issued. Section 51 of the *Advocates Act* and the authorities cited by the applicants apply to advocate-client bills in respect of which Judgement on costs must be obtained. They are not relevant to this case whereby a decree was issued following a court decision that determined a matter. The attachments are therefore not irregular or un-procedural.

15. In the end, I find that the application has no merit and is dismissed with costs.

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS ON 10TH JUNE, 2024.

JUDY OMANGE

JUDGE

In the Presence of

Court Assistant: Steve Musyoki

