



**Mwangemi v Mawingo Construction 2010 Ltd (Cause
235 of 2015) [2025] KEELRC 1102 (KLR) (3 April 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1102 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 235 OF 2015**

M MBARŪ, J

APRIL 3, 2025

BETWEEN

FERDINAND LENJO MWANGEMI CLAIMANT

AND

MAWINGO CONSTRUCTION 2010 LTD RESPONDENT

RULING

1. The respondent, Mawingo Construction 2010 Ltd, filed an application dated 8 January 2025 under the provisions of Article 149 of *the Constitution*, Section 1A, 1B, 3A of the *Civil Procedure Act*, Order 9 rule 9, Order 10 rule 11 and Order 51 rule 1 of the Civil Procedure Rules. The respondent is seeking:
 1. Spent.
 2. Pending the hearing and determination of the application, the court be pleased to issue leave for the firm of Elkana Mogaka & Associates Advocates to come on record on behalf of the applicant post-judgment in place of the firm of Mutuma Gichuri & Associates Advocates.
 3. Spent.
 4. Pending the hearing and determination of this application, the court be pleased to issue the following orders;
 - a. An order setting aside the judgment entered in this matter and that this matter be heard afresh.
 - b. An order setting aside the proclamation of attachment of movable property in execution of a decree for money dated 20 December 2024.
 - c. An order setting aside the warrants of sale of movable property in execution of a decree for money dated 16 December 2024.



- d. An order setting aside the warrants for attachment of movable property in execution of a decree for money dated 16 December 2024.
5. The costs of this application will be borne by the claimant.
6. Any other order this court deems just to grant.
2. The application is supported by the affidavit of Clive Erkin, the director and who avers that he has instructed new advocates to attend in this matter and defend the suit. The previous advocates did not file a proper response. The respondent should not suffer the consequences of the previous advocates' negligence and mistakes in conducting this matter.
3. Erskine avers in the Supporting Affidavit that there is a good response in this claim, and the respondent should be allowed to urge its case on the merits. The claimant has extracted a decree and procured the services of an auctioneer who has proclaimed its vehicle registration numbers KBQ 449F, KBZ 284T, KBR 037D, KFC 494S, KHMA 096K, KHMK 075G, tables, chairs, and all the properties of the respondent to satisfy the decree. The claimant has obtained warrants for attachment of movable properties in execution, and to secure itself, the respondent has deposited in court the entire decretal sum of Ksh. 426,056.
4. Erkin avers that unless the judgment herein is set aside and he is allowed to file a response, the respondent will suffer irreparable loss and damage. There will be no prejudice to the claimant where the judgment is set aside, the claim heard on the merits.
5. In reply, the claimant filed his Replying Affidavit and avers that judgment herein was delivered on 7 July 2021, and he was awarded Ksh. 426,056. Costs were assessed with the full participation of the respondent at ksh. 279,517 and a certificate of costs issued on 18 February 2022. The respondent failed to settle the claim and costs, forcing the claimant to instruct his advocates to proceed with execution proceedings. The respondent was fully represented by his advocates, who filed an application seeking a stay of execution and setting aside the execution process.
6. The claimant avers that the court allowed a stay of execution on condition that the respondent should deposit the sum of Ksh. 426,056 in court, which was done on 6 December 2022.
7. The court delivered a ruling on 3 May 2023 and dismissed the application, and the claimant was at liberty to execute the judgment and costs. The claimant made several attempts to engage the respondent through the appointed advocates to have the decretal sum released without success. The claimant filed an application dated 13 May 2024 for the release of the decretal sum deposited in court, and there was no response and a ruling was delivered on 18 July 2024 allowing the application for the release of the money deposited by the respondent.
8. Warrants of attachment were obtained to execute for the costs and interests which remain unpaid.
9. The court has since determined the matters herein to a conclusion. Court orders should not be issued in vain, and the claimant should be allowed to enjoy the fruits of his judgment. The execution process is unlawful, and the application by the respondent is in bad faith and should be dismissed with costs.
10. The respondent, as the applicant submitted that it should be allowed to appoint new advocates to attend and defend the claim herein. Leave should be granted for this purpose, as this is being done post-judgment.
11. The respondent also submitted that there should be a stay of execution of the judgment herein and the subsequent orders issued to allow attendance and be able to defend the claim. On 23 May 2024,



the court lifted the stay order despite payment of the judgment sum of Ksh.426,056, which had been deposited in court. The warrants of sale of movable properties in execution of a decree are unlawful and prejudicial to the respondent. Any subsequent orders issued based on the judgment are not valid and should be set aside.

12. The claimant submitted that the respondent has attended in these proceedings from inception and the judgment delivered on 7 July 2021 is lawful and subject to execution. The warrants obtained herein are for the satisfaction of the judgment and costs which the respondent has failed to pay despite participating in these proceedings.

Determination

13. The respondent's application is premised on Article 149 of *the Constitution*. Such provisions are unrelated to the issues at hand. There is no link to the Vacancy for the Office of Deputy President in this case. Such matters and applications are removed from these proceedings.
14. Indeed, under Order 9, Rule 9 of the *Civil Procedure Rules*, a party is allowed to
 - 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 intending to act in person as the case may be.
15. The conditions required in appointing a new advocate post-judgment are twofold. An applicant must file an application and serve all the parties or obtain consent from the previous advocates.
16. Application dated 8 January 2025 is drawn by Elkana Mogaka & Associates Advocates, and indicated as to be served upon IRB Mbuya & Company Advocates and Mutuma Gichuru & Associates Advocates.
17. There is no evidence of service upon the advocates on record attending for the respondent in this matter.
18. There is no consent filed to allow the new advocates attending herein for the respondent. The basis of the orders sought is premised on the new advocates coming on record to represent the respondent. Such a process must first be lawful and valid before proceeding to the next step of seeking the various orders outlined in the application dated 8 January 2025. Without satisfying the court that the new advocates are properly on record, to delve into other matters would not suffice.
19. The motions of Order 9 are for a given purpose. There are good reasons why the law is so tailored, as held in the case of *John Nabashon Mwangi v Kenya Finance Bank Limited (in Liquidation)* [2015] KEHC 6789 (KLR). The process in Order 9, Rule 9 of the Civil Procedure Rules, subserves a bigger constitutional objective: enabling the right to effective legal representation of the litigant concerned and service of process of the court.
20. The advocate previously attending to this matter and on record for the respondent should know of these proceedings. The claimant too should know the person it ought to serve with court process lest its rights will be impeded if they are left to an ad hoc arrangement between advocates and their clients who constantly change advocates at will and file multiple applications.



21. The reasoning behind the provision of Order 9 rule 9 was articulated in the case of *S. K. Tarwadi v Veronica Muehlmann* [2019] eKLR, where the judge observed as follows;

...In my view, the essence of the Order 9 Rule 9 of the *CPR* was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him...

22. Without the respondent demonstrating adherence to the conditions set out under Order 9 rule 9 as outlined in the heading of the application, to agitate other matters seeking to set aside the judgment herein delivered on 7 July 2021 is without a proper foundation.

23. In *Lalji Bhimji Shangani Builders & Contractors v City Council of Nairobi* [2012] eKLR, the Court addressed a scenario such as herein that;

A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the Rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate.

This is one such case.

24. This is not the first time the respondent has attended court seeking a stay of execution and setting aside of the judgment delivered on 7 July 2021. This is addressed in the application dated 10 November 2021, and a ruling delivered on 18 July 2024 dismisses the application. The money deposited by the respondent, being Ksh 426,056, was to be unconditionally released to the claimant through his advocates. Such monies are not available to the respondent who asserts that there is a security deposit in court for the due performance of the judgment herein. Such averments and submissions are misleading and without justification.

25. Upon the ruling on 18 July 2024, the court rendered itself on the setting aside of the judgment herein.

26. The respondent cannot circumvent justice by appointing a new advocate to urge a similar application and orders simply because a different Judge is presiding. To do so in abuse of the court process.

27. The application dated 8 January 2025 is in abuse of court process and is hereby dismissed with costs to the claimant. The execution process commenced by the claimant is lawful and valid.

DELIVERED IN OPEN COURT AT MALINDI THIS 3 DAY OF APRIL 2025.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Davis Wekesa

