Kivala v Gavardi (Suing through Attorney Turini Renato) (Environment & Land Case 41 of 2009) [2023] KEELC 85 (KLR) (19 January 2023) (Ruling)

Neutral citation: [2023] KEELC 85 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND CASE 41 OF 2009

EK MAKORI, J

JANUARY 19, 2023

BETWEEN

GEOFREY MWANGANGI KIVALA ..... PLAINTIFF

AND

ALDO GAVARDI (SUING THROUGH ATTORNEY TURINI RENATO) ..... RESPONDENT

RULING

1. Hon. Justice Boaz Olao of the ELC in Peter Wafula Welimo – A Legal Representative of the Estate of Welimo Mukati v Mukhwana Walucho Kituyi [2020] eKLR, began his ruling in that case in a rather rib-tickling manner as follows: -

> " In the Book of Luke (NIV) Chapter 13 Verse 24-25, it is written: -
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> "Make every effort to enter through the narrow door, because many, I tell you will try to enter and will not be able to. Once the owner of the house gets up and closes the door, you will stand outside knocking and pleading, "Sir, open the door for us." But he will answer "I don't know you and where you come from."
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> For those members of staff at this Court who caused the disappearance of Bungoma Chief Magistrate's Court Misc Application FilE No 49 of 1999 and BUngoma High Court Civil Misc Application File No 155 OF 1999, when you finally arrive in heaven, you will find the gate closed and when you ask the Angel "Sir open the door for us," he will reply "Sorry, the keys to the gate are lost like the two files that you hid at Bungoma Court".

2. He was dealing with a matter that had dragged before the Bungoma Law Courts because of lost files in both the Superior Court and the Lower Court, leading to untold suffering for the parties who were seeking justice before that Court.

3. The scenario is the same here. The Plaintiff commenced this suit via an Originating Summons (OS) on 27th March 2009. The OS was served through substituted service. An application was made on 22nd May 2014 to have a vesting order issued in favour of the Respondent in respect of property plot No. Kilifi/Gede/Dabaso/484 (the Suit Property) together with all developments thereon to issue in favour of the Plaintiff. It was allowed summarily. We have an extracted order dated 27th May 2014 by the Deputy Registrar of this Court.

4. What followed is that the Suit Property which was in the name of Aldo Gavardi (the Defendant) by dint of the vesting orders changed to Geoffrey Mwangangi Kivala (the Plaintiff).

5. The file immediately thereafter went missing. Attempts to have the orders in place set aside were rendered futile. Correspondences on record attest to the fact that the Defendant through his Attorney Renato Turini has been attempting to come on record and defend.

6. An application was made to have the file reconstructed. It is dated 25th February 2016. It was allowed on 3rd February 2016 (Angote J.).

7. What followed next are a series of applications and efforts to negotiate and have the matter resolved by the parties – (proceedings before Olola J.). The outcome was negative.

8. The application dated 12th September 2022 to have Turini Renato allowed as Attorney for the Defendant and that all past orders set aside and the matter heard on merit was resuscitated. It was opposed. We have a Preliminary Objection dated 21st October 2022 to the effect that this matter is res judicata. The Court was rendered functus officio and cannot revisit the issues raised. The intended personal Attorney has in the past filed several motions and documents without leave of the Court and his plea should be rejected in limine.

9. The parties at the direction of the Court filed written submissions on the application and the Preliminary Objection.

10. The issues for determination are whether this Court has jurisdiction to hear the matter and whether the doctrine of functus officio applies in this case. In addition, whether one Turini Renato should be allowed as a personal Attorney representing the Defendant in this proceedings.

11. On the Preliminary Objection, that this Court is functus officio the Applicant submits that the PO does not state the particulars upon which it is propped. It is bare and does not meet the threshold of a PO. The Applicant has never participated in the proceedings and therefore audience should be declined by this Court, which is why he applied to be allowed by the Court to act for the Defendant, and the ex parte orders to be set aside.

12. The Respondent on the other hand states that the file is already closed. Fully and final orders were issued, and the Court cannot reopen the same. The Respondent relies on the decision in Telcom Kenya Ltd Vs John Ochanda [2014] eKLR that defines functus offficio as an enduring principle of law that prevents the reopening of a matter before a Court that rendered the final decision thereon. The vesting order issued by the Court fully settled the matter and cannot be revisited, having been obtained procedurally and regularly issued.

13. The question to determine is whether the PO has achieved the threshold as laid in the leading authority in this realm - Mukisa Biscuits Manufacturing Co. Limited Vs West End Distributors Limited [1969] E. A 696. The case has been cited in several others with approval for instance in the case of Gladys

Pereruan v Betty Chepkorir [2020] eKLR, Hon Justice Githinji, quoting several authorities held as follows: -

> " The purpose of a preliminary objection was broadly discussed in Charles Onchari Ogoti v. Safaricom Ltd & Anor [2020] eKLR as follows:
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> "[9] This Court is aware of the leading decision on Preliminary Objections where the Court of Appeal for East Africa, then the highest Court for purposes of this jurisdiction and the others in East Africa in Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd. (1969) EA 696, where Law J.A. and Newbold P. (both with whom Duffus V-P agreed), respectively at 700 and 701, held as follows:
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> Law, JA.:
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> "So far as I am aware, a Preliminary Objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection on the jurisdiction of the Court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

Newbold, P.:

> " A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop."
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> [10] The Supreme Court of Kenya, now the highest Court in the land has broadly confirmed and extended, the nature and scope of Preliminary Objections in cases discussed below, and its decision thereon is binding on this Court and all Courts below it by virtue of Article 163 (7) of *the Constitution* of Kenya 2010.
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> (11) In the case cited by the 1st Respondent, David Nyekorach Matsanga & Another v. Philip Waki & 3 Others [2017] eKLR, the three-judge bench of the High Court (Lenaola, J. (as he then was), Odunga and Onguto, JJ.) after considering various holdings of the Supreme Court of Kenya on the question of Preliminary Objection held as follows:
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> "We quickly turn to the question of whether we have before us a Preliminary Objection proper. Traditionally, the case of Mukisa Biscuit Manufacturing Co Ltd v. West End Distributors Ltd [1969] EA 696 has been the watershed as to what constitutes Preliminary Objections. The Court of Appeal in Nitin Properties Ltd v. Singh Kalsi & another [1995] eKLR also captured the legal principle when it stated as follows:
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> "A Preliminary Objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."
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> In Hassan Ali Joho & another -v- Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR the Supreme Court stated that:

"a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit"

The preliminary objection if allowed may dispose off the entire suit without allowing parties to be heard. This has to be done with caution that the Court has a duty to hear all parties and determine the case on merit. In addition, this Court has also a duty to safeguard itself against abuse of its process.

The Court is guided by Order 2 rule15 of the Civil Procedure Rules on when a suit can be struck out as provided below:

(1) At any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that:

a) it discloses no reasonable cause of action or defence in law; or

b) it is scandalous, frivolous, or vexatious; or

c) it may prejudice, embarrass or delay the fair trial of the action; or

d) it is otherwise an abuse of the process of the Court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

14. The demur raised in this case is that the Court is functus officio by virtue of the vesting orders issued and cannot revisit the matter at all. The authority quoted Telcom Kenya Ltd Vs John Ochanda [2014] eKLR, enunciates factus officio to mean: -

"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. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19th Century. In the Canadian case of Chandler Vs Alberta Association Of Architects [1989] 2 S.C.R. 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860);

"The general rule that a final decision of a Court cannot be re-opened derives from the decision of the English Court of Appeal In re St. Nazaire Co., (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:

1. Where there had been a slip in drawing it up, and,

2. Where there was an error in expressing the manifest intention of the Court. See Paper Machinery Ltd. vs. J.O. Rose Engineering Corp., [1934] S.C.R. 186"

The Supreme Court in Raila Odinga v IEBC cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, "The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law" (2005) 122 SALJ 832 in which the learned author stated;

"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 given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."

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. There do therefore exist certain exceptions and these have been captured thus in Jersey Evening Post Ltd Vs Ai Thani [2002] JLR 542 at 550, also cited and applied by the Supreme Court;

"A Court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the Court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the Court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the Court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher Court if that right is available."

It seems quite clear to us that as at the time the respondents made their application dated 31st January 2012, the proceedings respecting the dispute between the parties had been finally concluded before Mwera J. His judgment and decree had been perfected and, as we have seen, had subsequently been the subject of an appeal to this Court as well as a number of applications including for stay. The respondents themselves had proceeded to attempt to execute the same. There was finality as to the proceedings, merits, and decision in the matter. And the High Court had become functus officio so that any issues of grievance could only be dealt with by escalation to this Court on appeal."

15. The doctrine of functus officio as enunciated very clearly in the quoted decision in my view does not apply in this case. The OS was prosecuted in a summary manner it proceeded ex parte it was summarily allowed. The Defendant or his representative was never in attendance. Service of Summonses was through substituted service. Whether there was actual delivery of the same on the Defendant, is not clear. After the issuance of the vesting orders, the file went missing. Reconstruction was done through orders of this Court – Angote J. after several years. Meanwhile, the Applicant sought a joinder to represent the Defendant and have the orders set aside. It was frustrated by the fact that the original file went missing after the vesting orders had been issued. In the reconstructed file, it is not clear who was the Judge who issued the vesting orders, nor the Deputy Registrar who extracted the orders. How the ex parte proceedings were conducted is also not clear.

16. Where a Court is moved ex parte and proceeds to issue ex parte Orders/ Judgement, the aggrieved party or his representative has a right to move the Court to have the Orders/Judgment set aside or varied under Order 10 Rule 11 of the Civil Procedure Rules: -

> " 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."

17. Odunga J. in Mureithi Charles & another v Jacob Atina Nyagesuka [2022] eKLR has affirmed this position echoing several authorities with the leading being Shah vs. Mbogo & Another [1967] EA 116. as follows: -

> " That the decision whether or not to set aside ex parte judgment is discretionary is not in doubt and that the discretion is intended so to be exercised to avoid injustice and hardship

resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. See Shah vs. Mbogo & Another [1967] EA 116."

18. The history of this matter as stated above is that orders were issued on vesting the suit property on the Respondent. Immediately thereafter, the file disappeared. Attempts to have the Applicant joined to represent the Defendant were rendered futile. A reconstructed version of the original file was ordered as stated above. The record as reconstructed does not show the Judge who issued the orders. The proceedings were ex parte. Defendant never participated in the trial. Service was by substitution. There is nothing on record to show that the Defendant received the Summonses or the suit papers. The whole process leading to the issuance of the vesting orders ex parte and thereafter the file disappearing muddies the proper flow of the stream of justice. A litigant has a right to question the same. The doctrine of funcus officio cannot apply here since there was no formal hearing attended by all the parties affected in this litigation process. A litigant ought to be accorded natural justice – the right to be heard on merit. More than 11 years have been wasted in litigating before this Court because of the loss of the Court file. That cannot be visited on the Applicant, to do so will be siding with injustice. The vesting orders were never issued on merit, the orders can be relooked at, and there is no finality when one side alleges that it has not been heard. Having said so, I find the decision quoted - Telcom Kenya Ltd Vs John Ochanda [2014] eKLR (supra) is not in pari materia with the current suit at all and that the PO has no merit and is hereby dismissed.

19. The next issue is whether to grant leave to have the Applicant approved as an Attorney for the Defendant. The Applicant submits that the application is made pursuant to Order 9 Rule 2(a) of the Civil Procedure Rules affirmed by the decision in Carolyne Mpenzwe Chipande Vs Wanje Kazungu Baya – that the Court needs to check whether there are enough reasons for a party to donate the power of attorney and on the other hand to assess whether the Donee has been duly authorized to litigate on behalf of the Donor. The authenticity of the power of attorney is also assessed by the Court to avoid busy bodies litigating on behalf of innocent litigants without authority or knowledge.

20. The Respondent on the other hand thinks that the alleged Donor of the power of attorney ought to have entered an appearance and defended this suit. The Donee has not stated germane reasons why the Donor has not made representations in these proceedings.

21. The alleged power of attorney has not been attached to the affidavit in support of the application and the honourable Court cannot be called upon to make the approval on what has not been shown.

22. The Donor having been served back in the year 2011, 13 years down the line, and failed to defend and participate in the proceedings, is guilty of larches and delays. The suit property has long changed hands to a 3rd party and the substratum of the suit property has long changed and there remains nothing to litigate on.

23. The Respondent further submits that the approval should be disallowed because the Donee has been participating in these proceedings without proper approval by the Court.

24. On whether from the forgoing submissions by both parties, this Court should allow the Donee to participate in these proceedings, it will be reckoned that the Donee has been participating in these proceedings without first seeking approval from this Court. It is what has also partially led to the delay in the conclusion of this matter.

25. In the case of Carolyne Mpenzwe Chipande Vs Wanje Kazungu Baya [2014] eKLR, Meoli J. held as follows:-

> " ...Order 9 rule 1 Civil Procedure Rules is in following terms:
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> "[Order 9, rule 1.] Applications, appearances or acts in person, recognized agent or by advocate.
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> 1. 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:
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> Provided that—
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> (a) any such appearance shall, if the Court so directs, be made by the party in person;"
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> 12. Order 9 Rule 2 of the Civil Procedure Rules on the other hand describes categories of recognized agents to include:
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> a. Subject to approval by the Court in any particular suit, persons holding powers of attorney authorizing them to make such appearances and applications and do such acts on behalf of the parties;
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> b. .....;
>
> c. .....;"
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> There are two prerequisites under the rule: The recognized agent should hold a power of attorney, and secondly, can only act subject to the approval of the Court. The appellant has strongly argued that the appellant was entitled by virtue of holding the POA to file the suit, without necessarily seeking prior approval by the Court.
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> d) Fortunately, the proper construction of the above provision is not an unexamined question. Mwongo J. grappled with the proper application of order 9 rule 2 of the Civil Procedure Rules in Jack J. Khanjira and Anor v Safaricom Ltd [2012] eKLR. In that case a suit had already been filed by the two plaintiffs when one of them appointed an attorney to act as his recognized agent. An objection was raised to the effect, inter alia, that the power of

attorney held by the agent could not confer on the Donee, as an unqualified person the right to act as an advocate, thereby overriding the provisions of Section 85 of the *Advocates Act*. Although the objection related to the scope of authority of a Donee who is otherwise unqualified to act as an advocate, the Court's consideration of the matter before it has many parallels with the case before us.

e. I am persuaded as Mwongo J. was that the starting point in interpreting Order 9 rule 2 of the Civil Procedure Rules is to consider the provision of Order 9 rule 1 which limits the scope of the recognized agent to application, act or appearance authorized by law to be done by a party "except where otherwise expressly provided for by any law for the time being in force..." Also of significance to the matter before us is the proviso to Order 9 rule (1) which states that:

"Provided that –

a. Any such appearance shall, if the Court so directs, be made by the party in person..."

15. The above proviso is in tandem with Order 9 rule 2 (a) Civil Procedure Rules. A recognized agent makes application, appears or acts, subject to the approval of the Court. This provision cannot be read to mean that the power of attorney itself (as suggested by the respondent) ought to be approved by the Court, even though such power of attorney may of necessity be reviewed by the Court while dealing with the question of whether or not to approve the Donee's application for purposes of acting in the suit.

16. In this regard I can do no better than quote Mwongo J's reasoning as to why this prior approval is necessary:

"Clearly, the essential characteristic of a person acting as a recognized agent is that he or she acts, appears or makes any such applications, acts or appearances subject to the approval of the Court.

The above provision is important because by the very nature of the instrument of their appointment, it may donate to them powers which are, in law, untenable. So that, it appears to me that when exercising their functions in Court, they must periodically obtain the approval of the Court to do such acts. It is for the Court to oversee the scope and extent of the functions of a recognized agent, and to assure itself that they are not overstepping the bounds of the law. In my view, it is not the fact of being an agent that renders a Donee of a power as recognized;

it is the extent or scope of their agency that is recognized. That is to say, a recognized agent can perform only that which he is recognized or authorized to do in law.

In this regard, I would go as far as to say that, for orderly representation in Court, every appearance, act or application by a recognized agent should be subjected to the approval of the Court as and when sought to be done."

17. I fully adopt the above reasoning in this case and add that an agent cannot do the act and then retrospectively seek the Court's approval. This provision is not a technical requirement of procedure as suggested by the appellants but one that goes to the root of the capacity of the recognized agent to bring the suit or to act on behalf of the real party. What might qualify as a procedural matter would be the mode of seeking such approval. To my mind this will depend on the nature of the intended act, appearance or application.

18. In the present case, the Donee to the POA filed a substantive suit on behalf of the real plaintiff. This is a practice that has gained currency in our Courts until now. Mwongo J's decision as reinforced by Mulla on Civil Procedure 12th Edition (Commentary on Indian equivalent of Order 9 rule 1 of the Civil Procedure Rules) raises serious questions as to whether the scope of the recognized agent is limited directly by the technical wording of Order 9 rule 1 and 2 to exclude filing of suits among acts that an agent can perform, or whether such agent is at liberty to do any and every kind of act, including filing pleadings, giving evidence, cross-examining witnesses etc.

19. The foregoing issue was not canvassed before me and there is not sufficient material to enable me draw any conclusions. Be that as it may, the wording of Order 9 rules 1 and 2 of the Civil Procedure Rules leaves no doubt that the Court has wide discretion in determining whether or not to allow an agent to appear or do any act in a suit. That discretionary power must be invoked by way of an application and is exercised judicially. No party should presume to act or appear before the Court merely on the basis of the power of attorney without first obtaining the Court's approval, howsoever sought. The appellant believed himself properly authorized by the power of attorney alone to act on behalf of the Donor. That was an erroneous understanding of the rules.

20. For all these reasons, I do agree with the reasoning of the learned magistrate and her conclusion that the Donee under a power of attorney cannot act without first seeking the Court's approval. As to the consequence of default by a Donee in seeking such approval, I would not go as far as concluding that an act, appearance or application would be rendered fatally defective.

> Rather that the impugned application, appearance etc would have been irregularly done. In a proper case, the Court might invoke its discretion under proviso (a) of Order 9 rule 1 of the Civil Procedure Rules by directing the actual party to appear or act in person rather than strike out the impugned process. Each case must be considered within its own circumstances.

26. The General Power of Attorney was issued to the Donee/ Applicant sometime in the year 2007 and registered in the Mombasa Land Office on 16th October 2007. A General Power of Attorney unlike a Specific or Springing Power of Attorney gives the Donee wide powers to act on behalf of the Donor. As in this case and about the suit property, the Donee has been acting in good faith on behalf of the Donor since the time he realized the suit property was in danger of being transferred or alienated to the disadvantage of the Donor. Albeit the Donee in this suit failed to get approval from the Court to draw suit papers and participate in the past proceeding and got an "illegal" audience from the Court, the Respondents acquiesced on their rights to question the same. The proceedings show parties went into negotiations with the Donee. A settlement could not be reached. It is what necessitated the resuscitation of the current application. I will see no prejudice to the Respondent if the Donee is allowed to respond to the OS and generally get a hearing and challenge the contention by the Respondent in this suit. The only catch will be that since the Power of Attorney has been in place since 2007, fresh approval and affirmation from the Donor will be necessary for the Court to be sure that the Donor still exists even if it will mean appearing in this Court virtually. I will take this measure to avoid wastage of time – as has happened in the past – leading to the change in the substratum of the suit property. The Court will therefore allow the Defendant/Applicant to participate in this proceedings and I will proceed to issue the following orders as pertains to the two applications: -

    a. The P.O dated 21st October 2022 is hereby dismissed

    b. The application dated 12th September 2022 is allowed – Turini Renato is hereby approved to participate in this proceedings as an Attorney for and on behalf of Aldo Gavardi.

    c. Judgement, Decree, and all consequential orders issued in this suit are hereby set aside and the OS be heard on merit.

    d. The participation of Turini Renato as Attorney for and on behalf of Aldo Gavardi in (b) above and the setting aside of judgment and decree and consequential orders in (c) above will be subject to fresh approval and affirmation of the Principal - Aldo Gavardi who must appear virtually before this Court within 21 days hereof for that purpose.

    e. Costs in the cause.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 19TH DAY OF JANUARY 2023.

E. K. MAKORI

JUDGE

In the Presence of: -

M/S Bwaanadi for the Defendant/Applicant

M/S Kayatta holding brief for Mr. Mulei for the Plaintiff/Respondent