



**Lamu Breeze Investment Limited & another v Malakwen & 5 others  
(Cause 224 of 2014) [2025] KEELC 3032 (KLR) (26 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 3032 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI**

**CAUSE 224 OF 2014**

**EK MAKORI, J**

**MARCH 26, 2025**

**BETWEEN**

**LAMU BREEZE INVESTMENT LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**EQUATORIAL COMMERCIAL BANK LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**CHARLES MALAKWEN ..... 1<sup>ST</sup> DEFENDANT**

**LUCAS CHIMERA KENGA ..... 2<sup>ND</sup> DEFENDANT**

**DIM PROPERTIES LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**THE SENIOR REGISTRAR OF TITLES ..... 4<sup>TH</sup> DEFENDANT**

**COUNTY GOVERNMENT OF KILIFI ..... 5<sup>TH</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

1. The 3<sup>rd</sup> Defendants filed a Notice of Motion Application dated 11<sup>th</sup> December 2024 seeking the following orders:
  - a. Spent
  - b. That there be a stay of execution of the Order of Deputy Registrar, Hon. I. Thamara, granted on 9 December 2024, pending the hearing and determination of this inter-parties Application. (Spent)
  - c. That the court preserves the subject matter of the intended appeal, irrespective of whether, in the Court’s view, the Appeal is devoid of merit.



- d. That, in the circumstances, it is necessary and appropriate for the protective orders as prayed for herein to be granted on an urgent basis.
2. The Plaintiff, in opposition to the Application, filed its Replying Affidavit sworn on 13th December 2024.
  3. Before issuing directions on the hearing of the Application, this Court directed the parties to appear before the Deputy Registrar to establish a chronology of events that occurred up to the signing of the decree. The Deputy Registrar published her report on 23rd December 2024; the 3<sup>rd</sup> Defendant filed this instant application seeking to have the Deputy Registrar's ruling varied because the Deputy Registrar wrongly granted orders for the execution of the decree against the property known as CR 18245(LR No. 10159) to which the decree in the matter does not relate to. Moreover, the Deputy Registrar, in her directions of 23<sup>rd</sup> December 2024, confirmed that no amended or fresh decree had been issued in the Court file.
  4. The issues I frame for the consideration of this court are whether a review will be germane in the circumstances and who should bear the costs.
  5. The Applicant avers – rightly so - that pursuant to Section 12(1) of the *Environment and Land Court Act*, this Court is vested with the requisite jurisdiction to review a decision of the Deputy Registrar, and the 3<sup>rd</sup> Defendant's application is properly before this Court for determination. Section 12(1) states:

“ Any person aggrieved by a decision of the Registrar on matters relating to judicial functions of the Court may apply for review by a judge in accordance with the Rules.”
  6. The 3<sup>rd</sup> Defendant relies on the case of *Atul Shah v Deputy Registrar, High Court of Kenya at Mombasa & 2 others* [2018] eKLR where the Court held:

“ Further, Section 12 (1) of the *Environment and Land Court Act* provides a party aggrieved with the decision of the Registrar with an avenue to review the decision before a Judge of that court. A Judge before who such a review is lodged is empowered by sub-section (2) to confirm, modify, or reverse the decision of the Registrar. In this case, the Respondent, in signing and sealing the decree in question, was acting as the Deputy Registrar of that court for all intents and purposes. I find no reason as to why the Ex parte Party would not have approached the same court and sought a review of the Respondent's decision.
  7. The 3<sup>rd</sup> Defendant argues that the Deputy Registrar wrongfully allowed the Plaintiff's application to execute against CR 18245, as there is no decree pertaining to this parcel of land. The Decree issued by the Court on 20 February 2020 relates to CR 8245. The Court has issued no other decree regarding parcel CR18245.
  8. The 3<sup>rd</sup> Defendant proceeds to state that Order 21, Rule 7 provides that the decree shall agree with the judgment, and the decree issued on 20th February 2020 in CR 8245 was in accordance with the judgment delivered by this Court. However, the Plaintiff sought to execute against the property of CR No 18245, whose decree is nonexistent. Plaintiff, in its Replying Affidavit, argues that the decree was amended by an ex parte order of the Court dated October 27, 2020, which substituted CR 18245 for CR 8245. In that regard, the 3<sup>rd</sup> Defendant was unaware of the amendment being made.
  9. The 3<sup>rd</sup> Defendant opines that, despite the ex-parte order amending the judgment and decree, no resulting decree was extracted by Plaintiff for execution. The law is crystal clear that a judgment is enforced by way of a decree, and one can only make an application for the execution of a decree. In the



absence of a decree giving the true position of the judgment, there is no decree capable of executing. The position as relates to this particular matter was affirmed by the Deputy Registrar in her directions issued on 23rd December 2024

10. The 3rd Defendant submits that the Plaintiff ought to have obtained a fresh decree pursuant to Order 21, Rule 8 of the Civil Procedure Rules in order to execute. The Application to execute the decree of 20th February 2020 was thus irregular. 3<sup>rd</sup> Defendant relies on the holding in *Masinde Muliro University of Science and Technology v Alfatech Contractors Limited; Kenya Commercial Bank Limited & another* [2021] eKLR, where the court, in determining an issue on a decree with errors, held that:

“Consequently, the decree extracted had errors, which should be addressed before execution can be embarked upon. Accordingly, I do hereby order cancellation of the decree extracted from the orders made on 26<sup>th</sup> September 2018. Let the parties start the process of extracting the decree afresh, by following all the steps contemplated in Order 21 Rule 8(2)(3)(4) of the Civil Procedure Rules. (Emphasis mine) The execution proceedings founded on the decree that I have just cancelled are accordingly hereby halted.”

11. 3<sup>rd</sup> Defendant opines that had the Deputy Registrar been aware that there was no decree capable of being executed at the first instance, she could not have allowed the Plaintiff's application in the manner that she did. This decision was made in error, and therefore, this Court has the requisite jurisdiction to review and rectify the error.
12. The 1st Plaintiff avers that in 2008, learned that a wall had been erected around the suit property and instituted a suit against the Defendants herein. In the long run, this Court entered judgment in favour of the Plaintiff and declared that the registration of the 1st and 2nd Defendants as the proprietors of title CR 44095, consolidating plots numbers 10159 and 10160, North of Kilifi Township, was illegal, fraudulent, null, and void. The judgment delivered on 22 November 2019 by Justice J.O. Olola contained a typographical error in the description of the suit property. Therefore, Counsel for the 1<sup>st</sup> Applicant filed a Notice of Motion Application dated 19 October 2020, seeking rectification of this error and a fresh decree to be issued incorporating the amendments. Justice J.O. Olola allowed the application, and the Deputy Registrar issued a fresh decree on 27th October 2020. The court also directed the court bailiff to put the Plaintiff in possession of Plot LR NO. 10159 Kilifi. The 3<sup>rd</sup> Defendant proceeded to lodge an Appeal at the Court of Appeal and also sought a stay of execution of the decree pending the hearing and determination of the appeal, and the same was granted. On November 10, 2024, the Court of Appeal in Mombasa dismissed the appeal, and consequently, the stay of execution granted expired on that day.
13. The Application by the 3<sup>rd</sup> Defendant now seeks orders of stay of execution for the orders of the Deputy Registrar. It presupposes that the orders issued by the Deputy Registrar on December 9, 2024, have not been executed. An affidavit by a director of the 1<sup>st</sup> plaintiff confirming that the orders of the Deputy Registrar dated 9 December 2024 have been complied with. Therefore, there is nothing to be stayed.
14. 1<sup>st</sup> Plaintiff contends that even if execution had not taken place, it has been demonstrated the existence of the court order issued by Justice J.O Olola - annexure “JMM-1” in the Replying Affidavit sworn by counsel for the Plaintiffs. That order expressly provides for the correct CR Number. It is CR No.18245. Since the orders issued by Justice J. O Olola on 27<sup>th</sup> October 2020 have not been set aside, the application before this Court lacks basis. In the grounds supporting the motion, the main complaint is that the decree relates to CR No. 8245, but the LR No. remains 10159. If this were the



position at the moment, the Applicant would be justified in getting the orders. However, this changed on 27<sup>th</sup> October 2020, when Justice J. O. Olola issued the orders amending the decree.

15. The second issue raised in the application is that the Applicant is apprehensive that the Plaintiffs will take possession of Plot LR No. 10159 (CR No. 18245). According to the record, this is the property of the 1st Plaintiff, as charged by the 2<sup>nd</sup> Plaintiff. The current state of affairs is that the Plaintiffs have already taken possession. Consequently, the 3<sup>rd</sup> Defendant does not stand to suffer any prejudice. The 3<sup>rd</sup> Defendant owns Plot LR No. 10160, which is adjacent to Plot LR No. 10159. The property of the 3<sup>rd</sup> Defendant is intact, and the Plaintiffs have no interest in it.
16. The 1st Plaintiff asserts that, from the record, it is evident that the court's order granting a stay of execution lapsed on December 18, 2024, and was not extended. The effect of this was that the plaintiffs were at liberty to execute the decree as amended by Justice J. O. Olola on 27<sup>th</sup> October 2020, and this has already happened, rendering the 3rd Defendant's application moot.
17. The Plaintiff's Advocate made an application dated 20 January 2025, seeking to proceed with the decree as amended by the Deputy Registrar on 9 December 2024. The judge clarified on January 20, 2025, that his earlier orders had never been extended. The result is that there was nothing to stop execution.
18. 1<sup>st</sup> Plaintiff further asserts that The 3<sup>rd</sup> Respondent seeks a stay of court orders that have already been implemented by the 1st Plaintiff, as seen in the Affidavit of B.S. Dogra, Annexed as Annexure "BSD-1", to justify that the 1<sup>st</sup> Plaintiff owns the suit property, the purpose of an application for a stay of execution pending appeal, as highlighted under Order 42 Rule 6 of the Civil Procedure Rules, is to preserve the subject matter in dispute so that a successful Appellant does not suffer loss. Notably, the 3<sup>rd</sup> Defendant has already appealed, and the Court of Appeal dismissed their appeal on November 10, 2024. Following this dismissal, the 1<sup>st</sup> Plaintiffs took possession of the suit property in an attempt to execute the judgment issued by the High Court in favor of the 1<sup>st</sup> Plaintiff. To this end, the 3rd Defendant is seeking orders that have been overtaken. Reliance is placed on the Court of Appeal decision in Fidelity Commercial Bank Ltd v Shah & 3 others (Civil Application E038 of 2022) [2023] (KLR), where the Court declined to issue stay orders against a successful litigant who had already executed the decree issued in their favor.
19. The 1st Plaintiff concludes that even without the orders of the Deputy Registrar of 9<sup>th</sup> December 2024, the orders of Justice J. O. Olola, which amended the decree by inserting the correct CR Number, namely 18245, are capable of independent execution.
20. From the chronology of events as narrated by the Deputy Registrar, dated 23rd December 2024, an amendment was allowed by the Judge on 27<sup>th</sup> October 2020 at the behest of the Application by the 1<sup>st</sup> Plaintiff, resulting in the insertion of paragraph 6 of the decree as follows:

“That a declaration be and is hereby made that Certificate Title No. CR 18245 is a valid title deed with encumbrance entry No. 5 as a charge in favour of Bullion Bank Limited and that the 4<sup>th</sup> and 5<sup>th</sup> Defendants are directed to restore the beacons of plot CR No. 18246 as they were in the year 1994 instead of

That a declaration be and is hereby made that Certificate of Title CR No. 8245, a valid title deed with encumbrance entry No. 5 as a charge in favour of Bullion Bank Limited, and the 4<sup>th</sup> and 5<sup>th</sup> Defendants are directed to restore the beacons of plot No. 18245 as they were in the year 1994.



That the Deputy Registrar do issue a fresh decree incorporating the amendments made.”

21. On 17<sup>th</sup> February 2025, the Deputy Registrar published a decree dated 22<sup>nd</sup> November 2019, incorporating the amendments.
22. Arising from the foregoing, I consider the application dated 11th December 2024 spent – there will be nothing to review, stay, or preserve, and the same is hereby dismissed with costs.

**DATED, SIGNED, AND DELIVERED VIRTUALLY AT MALINDI ON THIS 26TH DAY OF MARCH 2025.**

**E. K. MAKORI**

**JUDGE**

In the Presence of:

Mr. Munyithya, for the 1st Plaintiff

Ms. Essaje, for the 3rd Defendant

Happy: Court Assistant

