

**REPUBLIC OF KENYA**

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

**ELC CASE NO. E016 OF 2021**

**MARTIN MWANGI GACHERU.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**JAMES GACHOKA KABERERE.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**JAMES MWANGI GACHERU.....3<sup>RD</sup> PLAINTIFF/RESPONDENT**

**VERSUS**

**CATHERINE MORESO PATITA.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**OSCAR LEMAIYA PATITA.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**MARVIN LENANA PATITA.....3<sup>RD</sup> DEFENDANT/APPLICANT**

**RULING**

*(In respect of the Notice of Motion dated 24<sup>th</sup> April 2024 by the Plaintiffs/Judgement debtors seeking to set aside the decree issued herein and the execution process)*

**BACKGROUND**

1. Judgement in this case was delivered on 9<sup>th</sup> October 2023. The court dismissed the Plaintiffs' main claim but allowed the alternative prayer thereby directing the Defendants to refund the Plaintiffs Ksh.6,250,000/=, with interest at 14% Per Annum from the date each installment was received

by the deceased to the date of refund. The costs of the suit were awarded to the Plaintiffs.

2. The Plaintiffs went ahead to extract the decree and further initiated execution proceedings of the decree against the Defendants before taxing the costs awarded to them against the Defendants.
3. The Defendants in their application under consideration seek a variety of orders as follows;

- i. Spent.**
- ii. That leave be granted for the firm of Mwaniki Gitau & Co. Advocates to come on record and replace the firm of Tobiko Njoroge & Company Advocates for the 1<sup>st</sup>, 2<sup>nd</sup>, & 3<sup>rd</sup> Defendants.**
- iii. That the Decree dated 19<sup>th</sup> October 2023, the Warrants of Attachment dated 2<sup>nd</sup> April 2024 and the entire execution process be set aside, vacated and annulled.**
- iv. That a declaration be made that the process of determining the decree violated order 21 rules 7(1), 8(2), (3) and 5 of the Civil Procedure Rules as regards the preparation of a decree, approval or settlement.**
- v. That the decree violated order 21 rule 17 where special directions for accounts were made.**

- vi. Spent.
- vii. Spent.
- viii. Spent.
- ix. **That the cost of this application be provided for.**

4. The application is premised on the grounds on the face of it and on the affidavit of Oscar Patita Lemayian sworn on 24<sup>th</sup> April 2024. In a nutshell the Defendants/Applicants allege that;

- a) **The procedure governing the drafting, preparation and approval of the decree was grossly flawed.**
- b) **The Deputy Registrar's calculation of interest departed from the Judgment which expressly stated that interest would be calculated at 14% Per Annum from the date each installment was received to the date of the refund on a reducing balance method but was instead compounded from 17<sup>th</sup> December 2009 to 15<sup>th</sup> December 2024.**
- c) **No draft decree was posted to the Law firm of Tobiko Njoroge & Company Advocates for approval.**
- d) **The sum of Kshs.12,326,712/= as interest would amount to unjust enrichment.**

**e) The execution process is directed against the Defendants personally and not the estate of the later Jonathan Patita Katua (Deceased).**

**f) No application was made pursuant to Order 94 of the Civil Procedure Rules to allow execution without taxation of costs.**

**g) It is in the interests of justice that the application be allowed.**

5. I note that the Defendants' application was filed under certificate of urgency but was not certified urgent. The Defendants/Applicants then filed a 2<sup>nd</sup> certificate of urgency dated 2<sup>nd</sup> May 2024 supported by the affidavit of Oscar Patita Lemayian sworn on 30<sup>th</sup> April 2024 in a bid to persuade the court to reconsider the urgency of the application. The certificate of 2<sup>nd</sup> May 2024 does not constitute a 2<sup>nd</sup> application. There is therefore only one pending application for determination by the court; which is the Notice of Motion dated 24<sup>th</sup> April 2024.

**RESPONSE BY THE PLAINTIFFS/RESPONDENTS.**

6. The Plaintiffs responded to the motion by the Defendants by way of a Replying Affidavit sworn by one Martin Mwangi Gacheru, the 1<sup>st</sup> Plaintiff herein. He deposes that the Defendants application is fatally defective having been filed by a new advocate after delivery of Judgement without leave of the court. The advocate(s) is therefore improperly on the record.

7. The deponent explains the sequence of events following the delivery of the Judgement in this case on 9<sup>th</sup> October 2023.
8. The Plaintiffs' advocates vide a letter to the Deputy Registrar dated 17<sup>th</sup> October 2023 requested for a certified copy of the Judgement and the decree culminating from the same. Following the issuance of the decree, the Plaintiffs' advocates applied for warrants of attachment for the principal sum and accrued interest thereon amounting to Kshs.18,578.40 as at 15<sup>th</sup> January 2024.
9. The deponent avers that he has been advised by his advocates that **Order 21 rule 8(1) & (2) of the Civil Procedure Rules** is not couched in mandatory terms. He asserts that the court can approve a decree without the parties drafting and exchanging drafts.
10. The deponent further deposes that draft decrees are majorly shared between parties for purposes of having consensus on the costs which the Plaintiffs in this case have foregone despite the same being awarded to them. He further alleges that the Deputy Registrar has the option of electing whether to compute interest using the simple or compound interest method.
11. The deponent insists that the execution process is directed against the Defendants in their capacity as the administrators of the estate of the late

Jonathan Patita Katua and they were served with the execution proceedings in that capacity.

12. The deponent finally avers that the Plaintiffs have waived the costs awarded to them and the provisions of Section 94 of the Civil Procedure Act do not therefore apply in this case.

### **ISSUES FOR DETERMINATION**

13. The issues that arise in this matter for determination are;

- a) Whether the Applicants' advocates are properly on record.**
- b) Whether the decree as drawn herein is the formal expression of the Judgement of the court.**
- c) Whether execution proceedings are lawful having been commenced before ascertainment of the costs without leave of the court.**

### **DETERMINATION.**

- i. Whether the Applicants' advocates are properly on record.***

14. Where there is a change of advocate or when a party decides to act in person having previously engaged an advocate, after judgement has been passed, the change or intention to act in person shall not be effected without an order of the court or 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. **Rule 10 of order 9** allows the filing of an application for the order of the court under rule 9 combined with other prayers but the question of representation shall be determined first.

16. In this case a consent between the previous advocates for the defendants and the advocates currently on record was filed on 30<sup>th</sup> April 2024. The issue of representation of the Defendants in this case is therefore a non-issue. The Advocates for the Defendants are properly on record. With the filing of the consent, there is even no need for the court to issue an order granting leave to the Advocates for the Defendants to come on record for the Defendants.

ii. **Whether the decree herein as drawn is a formal expression of the judgement of the court.**

17. A decree by definition means the formal expression of an adjudication.

18. As regards preparation of decrees, it must be understood that a decree issues from the court. The Deputy Registrar of the court signs and seals the decree on behalf of the court, being the authorized officer for that purpose. **Order 21 rule 8 of the Civil Procedure Rules** however allows the parties to a suit to participate in the process of preparation of the decree.

19. **Sub rule 2** thereof allows any party in a suit to prepare a draft decree and submit it for approval by the other party(s) with or without amendments, without delay. If the draft is approved by the other party(s), it shall be submitted to the Registrar who, **if satisfied** that it is drawn up in accordance with the judgement, shall sign and seal it accordingly.
20. The ultimate responsibility for the issuance of an appropriate decree is with the Registrar. The provisions of sub rule 2 are clearly not mandatory and it does not therefore mean that a decree that is prepared by the Registrar, without resort to the parties, is illegal or irregular.
21. The ultimate test in my view is not whether the parties had the opportunity to participate in the preparation of the decree, rather the question must be whether the decree is drawn in accordance with the judgment delivered by the court.
22. The decree in this matter is a money decree where the court ordered the Defendants to refund the Plaintiffs a sum of Kshs.6,250,000/= with interest at the rate of 14 per annum from the date each instalment was received by the deceased to the date of refund.
23. From the judgement, the court did not declare how many installments there were and when the instalments were received by the deceased. The question



that begs for an answer then is how the Deputy Registrar was able to establish the information and draw the decree as she did.

24. The Honourable Deputy Registrar clearly ignored then dictates of the court on the calculation of interest. The decree as drawn up is therefore not in conformity with the Judgement of the court.

25. The judgement as framed calls for the taking of accounts to confirm how many installments there were and when the instalments were received by the deceased so that interest may be calculated as directed by the court.

ii. **Whether execution proceedings are lawful having been commenced before ascertainment of the costs.**

26. Under **Section 94 of the Civil Procedure Act**, a decree passed in exercise of the court's original jurisdiction should only be executed upon ascertainment of costs in the suit by way of taxation, unless the court, where it considers it necessary, orders that the decree be executed forthwith before ascertainment of costs.

27. In this case, I see no such order by the court authorizing execution before taxation of costs.

28. The Court of Appeal in **Bamburi Portland Cement Company Limited Vs. Hussein (1993) KLR**, stated that section 94 of the Civil Procedure Act requires that for execution of a decree before taxation, leave must be

obtained from the High Court. Such leave may be sought informally at the time Judgement is delivered; but if that is not done, then it must be sought by way of a notice of Motion. That was not done in this case.

29. The Plaintiffs allege that they waived their right to costs. Such waiver would have been formally communicated in the motion seeking leave of the court to execute before ascertainment of costs.

30. Consequently, the Defendants' application is allowed with costs. The Decree herein is annulled and the execution proceedings set aside.

It is so ordered.

**Dated Signed and Delivered at Kajiado Virtually this 4<sup>th</sup> Day of December 2025.**

**M.D. MWANGI  
JUDGE**

**In the virtual presence of:**

Ms. Mutesi for the Plaintiffs/Respondents

Mr. Mwaniki Gitau for the Defendants/Applicants

Court Assistant: Mpoye

**M.D. MWANGI  
JUDGE**

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