

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO E176 OF 2023

CHRISTINE JAMES KIOKO Suing as the legal Representative
of the Estate of late **JAMES MUTUNGA**
APPELLANT

VERSUS

JULIUS
MWANIKI.....RESPONDENT

*(Being an appeal from the ruling and order of Hon. M. Otindo,
Principal Magistrate delivered on 19/07/2023 at the Chief
Magistrates Court in Machakos in CMCC 1163 of 2008)*

JUDGMENT

1.This is an appeal against a ruling of the court below which dismissed a notice to show cause brought by the Appellant against the Respondent herein for a decretal sum of Kshs 2,927,163._The appeal is premised on the grounds that;

“a. The learned Magistrate erred in law and misdirected herself in law in finding and holding that the Appellant as decree holder, could not pursue the Respondent JULIUS MWANIKI to settle any part of the decrement amount;

b. The learned magistrate erred in law and fact and misdirected herself in purporting to sit in appeal against the findings of the trial court which found that the respondent herein was vicariously liable as a joint tortfeasor and that in the absence of any appeal or review of the judgment of the trial court,

- the respondent herein remains liable to satisfy the remainder of the decretal amount as contained in the notice to show cause as a joint tortfeasor;***
- c. The learned magistrate erred in law in purporting to curtail and or limit the appellants choice as a decree holder as to which of the debtors to pursue and the learned magistrate misdirected herself in failing to uphold the appellants choice based on the relevant provisions of law as provided for in Order 22 of the Civil Procedure Rules.***
 - d. The learned magistrate erred in law and fact in holding that execution against the Respondent is untenable due to the appellant's prior election to enforce judgment against a co- defendant.***
 - e. The learned magistrate erred in law and fact by entertaining the respondent's efforts to delay conclusion of the case without sound legal basis;***
 - f. The learned magistrate erred in fact by holding that the 1st Defendant had 'partially but substantially paid the decretal sum' without stating the basis and extent of such payments;***
 - g. The Honorable Trial Magistrate disregarded ample evidence on record that the Respondent was aware of the case against him and ignored the same (as held in the Ruling dated 12th April, 2023) hence the Respondent ought not be shielded or indulged against execution of the judgment;***

h. The Honorable Trial Magistrate erred in law and fact by failing to appreciate that the case has been pending for the last fifteen (15) years, and unduly long period of time to delay a regular judgment is tantamount to committing injustice against the Appellant;

i. The ruling is otherwise an affront to justice, an accession to waste of judicial time and accords accommodation to abuse of the court process.”

2.The appeal was canvassed by way of written submissions but as at the time of writing this judgment, only the Appellant’s submissions dated 3/04/2025 were on record. The Appellant submitted that the trial Magistrate failed to observe the provisions of **Order 21 Rule 4 of the Civil Procedure Rules** which are mandatory in nature and clearly provided that any ruling and/or judgement shall contain a concise statement of the case and the points for determination, the decision thereon and the reasons for the said decision.

3.It was contended that in this case, the trial Magistrate did not give reasons for apportioning liability as a decree had already been issued against the defendants. More particularly, as to why the Appellant could not pursue JULIUS MWANIKI to settle part of the decretal amount. Further, that the magistrate could not purport to sit on appeal on the issue of vicarious liability which had already been settled by a competent court and not challenged in an appeal. In support of these submissions, counsel relied on the case of **South Nyanza Sugar Co. Ltd v/s Omwando**

***Omwando [2011] Eklr and United India insurance Co. Ltd
v/s East Africa Underwriters (Kenya) Ltd [1985] EA 898.***

Analysis and determination.

4. I have considered the record of the court below, the memorandum of appeal, the submissions on record and the law. The issue for determination is whether the Appellant was entitled to execute the decree in the court below against the Respondent.
5. From the record, interlocutory judgment was entered against the 2nd Defendant and 3rd Defendant on 07/02/2012. That judgment also applied to the specials of Kshs 132,620. The general damages were subject to was subject to formal proof which proceeded on 19/03/2013 and damages were assessed as follows;
- a. Pain and suffering Kshs 50,000
 - b. Loss of expectation of life Kshs 150,000
 - c. Loss of Dependency Kshs 1,264,140
 - d. Special damages Kshs 127,320
 - e. less Loss of expectation of life (Kshs 150,000)
 - f. costs and interest
6. The interlocutory and final judgment were against the defendants in the case jointly and severally as prayed in the plaint. **Order 22 Rule 14 (4) of the Civil Procedure Rules, 2010** provides that;
- “The holder of a decree passed against several persons jointly and severally may treat it as a cross-decree in relation to a decree passed against him singly in favour of one or more of such persons.”***

7. In the plaint, the Appellant pleaded for judgment against the Defendants jointly and severally. The ***Black's law Dictionary 10th Edition*** defines such a judgment as follows:

“Liability that may be apportioned among two or more parties or to only one or a few select members of the group at the adversary’s discretion. Thus, each liable party is individually responsible for the entire obligation, but a paying party may have a right of contribution and indemnity from non-paying parties”

8. In the case of **Republic v National Land Commission & 6 others; Tunoi (Exparte Applicant) (Environment and Land Judicial Review Miscellaneous Application 7 of 2019) [2024] KEELC 6525 (KLR)** the court held as follows;

“ Joint and several liability makes all parties liable to pay the costs awarded thereto up to the entire amount awarded. For this reason, responsibility for the total amount of costs awarded in a suit is then shared by all the parties held liable for their payment. The Decree holder is at liberty to elect to recover the full amount of the debt from any one of the judgment creditors or recover a share from each or any of them. The liable parties are in law in a position where they are all exposed to the full amount or any share sought by the judgment creditor. This means that the Respondent is at liberty to pursue any of the Judgment debtors to settle the full amount of costs awarded. In the event he pursues one party or any number of them for the costs, the party or parties so pursued are in turn entitled to seek reimbursement from their co-liaible parties for their shares of the costs.

23. This was captured in the case of Hellen Njenga v Wachira Murage & Another [2015] eKLR cited the decision in Dubai Electronics vTotal Kenya & 2 Others Civil Case No 870 of 1998 the court explained the concept of joint and several liability as follows:

“Clearly therefore where you have joint liability all the tortfeasors are and each one of them is liable to settle the full liability. However, in a purely several liability each tortfeasor is only liable to settle the sum due to the tune of his liability. Where, however, the liability is joint and/or several the plaintiff has the option either directing his claim against any one of the tortfeasors or making his claim against each one of the tortfeasors according to their individual liability. Either way he cannot recover more than the total sum decreed. However, the defendants are entitled to reimbursement from the co-defendants in the event that the plaintiff only opts to recover from one of them. That is my understanding of joint and several liability.”

24. Although the above case dealt with a tort, it clearly captures the essence of joint liability as opposed to joint and several liability. As pointed out above, under joint and several liability, the Decree Holder cannot recover more than the total sum decreed. However, the Judgment debtors are entitled to reimbursement from the co-defendants in the event that the plaintiff only opts to recover from one of them.”

9. The driver of the motor vehicle was found liable while the other defendants were found vicariously liable. There was already a

default judgment and so the learned magistrate proceeded to determine the issue of damages by dint of Order 10 Rule 6. It was not necessary for the magistrate to make any findings on liability given that the interlocutory judgment was final in that respect. Nevertheless, albeit that it was superfluous. In the case of **Felix Mathenge V. Kenya Power & Lighting Company Limited, Civil Appeal No.215 of 2002** the court stated;

“The respondent having failed to enter appearance within the prescribed time after the appellant had requested for it, it became mandatory upon the court to enter interlocutory judgment and for the appellant to set down the suit for assessment of damages. Having entered interlocutory judgment, it was not open once again for the same court in the instant case to state that the appellant had not proved liability against the respondent. The role of the court after entering the interlocutory judgment in such a case like this was only to assess damages since interlocutory judgment having been regularly obtained there can never be any doubt that judgment was final with regard to liability and was unassailable. It was only interlocutory with regard to the quantum of damages.”

10. There is warrant of attachment of movable property in execution of the decree dated 10th June 2015 for Kshs 1,982,760 against all the defendants in the magistrate's court. However, the Appellant

only managed to execute against the 1st Defendant and recovered the decretal sum partially. This does not estop him from executing against the other tortfeasors as the judgment and consequential decree was against all of them jointly and severally. The learned magistrate erred in dismissing the notice to show cause and accordingly this appeal is merited.

11. The appeal therefore succeeds and judgment is entered for the Appellant as follows;

- a. The order dated 19/07/2023 is set aside and the Appellant to pursue the Respondent in furtherance of the decree just as he would the other tortfeasors.***
- b. Costs of the Appeal are awarded to the Appellant.***

Orders accordingly.

Judgment signed, dated and delivered virtually on this 14th day of November 2025.

E N MAINA

JUDGE

IN PRESENCE OF:

Ms Ndungu advocate for the Respondent

Christine Kioko – appellant in person

Geoffrey- court Assistant/interpreter