



Kiruru v Meru Central District Land Dispute Tribunal & another (Judicial Review Application 29 of 2011) [2023] KEELC 16297 (KLR) (15 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16297 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
JUDICIAL REVIEW APPLICATION 29 OF 2011**

**CK YANO, J
MARCH 15, 2023**

BETWEEN

KIRERIA KIRURU APPLICANT

AND

**THE MERU CENTRAL DISTRICT LAND DISPUTE TRIBUNAL 1ST
RESPONDENT**

JAMLICK MUTHOMI M'ARIMI 2ND RESPONDENT

RULING

1. This ruling relates to a notice of motion application dated November 7, 2022, brought under the provisions of sections 1A, 1B, 3, 3A and 63 of the *Civil Procedure Act*, Order 21 Rule 12 and Order 22 Rule 22 of the *Civil Procedure Rules*.
2. The applicant is seeking for orders
 1. spent
 2. That this Honourable court be pleased to order stay of execution on costs in this matter pending the hearing of this application.
 3. That this Honourable court be pleased to review and vary the orders on payment of costs and order the interested party and the respondents to share payments of taxed costs equally.
 4. That this Honourable court be pleased to allow stay of execution against the interested parties pending payment of his half share by way of monthly instalments of Kshs 5,000 until same is fully liquidated.
 5. That the costs of this application be in the cause.



3. The application is based on the grounds on the face of it and supported by an affidavit dated November 7, 2022 sworn by the applicant. He avers that the *ex parte* applicant is the father of the applicant who is now deceased and who was successful in the Judicial Review matter. That the court awarded costs of the matter to the *ex parte* applicant against the respondent and the interested party/applicant herein who is willing to pay half of the taxed costs so that the other half is payable by the respondent who were key in the matter.
4. The applicant avers that he is a peasant farmer without a stable source of income and that he is ready to struggle and pay the half costs otherwise he is at the risk of being put into Civil jail which shall be against the interest of justice and fairness. That the costs herein has since been officially taxed at Kshs 136,660/= and execution is likely to be levied any time making the application very urgent and that indeed a demand dated September 15, 2022 has been made.
5. The application was opposed by the *ex parte* applicant through a replying affidavit dated January 18, 2023 sworn by Florence Riinya wherein she states that she is the legal representative of the estate of Kieria Kirurui. She avers that execution has not yet commenced hence the orders sought herein are unwarranted.
6. The respondent further avers that the applicant has not offered an explanation about the delay in seeking the stay orders, the application having been filed four months after judgment making the delay inordinate. The proposal to have the decretal sum shared equally between the applicant and the other respondent is opposed since the judgment was against them jointly. The respondent also opposed the applicant's prayer to settle the decretal sum in monthly instalments of Kshs 5,000/= which she terms too little, and proposes that the applicant pays half of the decretal sum being Kshs 68,330/= immediately, then settle the remainder in installments of 20,000/= per month until payment in full.
7. I have considered the application as well as the affidavit in support and against. I find that the following issues require determination-;
 - i. Whether the order for payment of costs should be reviewed as sought in the application.
 - ii. Whether the applicant has met the threshold for grant of an order for stay of execution and/or the payment in installments.
 - iii. Whether the court should grant the orders sought.
8. Under Order 45 of the *Civil Procedure Rules* review can only be allowed if the applicant satisfies the following-;
 - i. Discovery of new and important matter or evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made.
 - ii. Mistake or error apparent on the face of the record any other sufficient reason which may make the court to review its order.
9. In the case of *Muydi v Industrial and Commercial Development Corporation & another* EA LR (2006) I EA 213 and cited in *Mubamed Mungai v Ford Kenya Election and Nominations Board & Another*, Nairobi High court JR. Misc. Application No. 53 of 2013, it was stated inter alia that:

“For one to succeed in having an order reviewed for mistake or error apparent on the record, he must demonstrate that the order contains a mistake that is there for the whole world to



see. It is not enough for an applicant to say that he is dissatisfied with the decision or that the same is wrong. Such opinions ought to be the subject of an appeal.

The applicant before us has not established that there is an error or mistake in the decision he has asked us to review. He has not even pointed out what in his opinion is the error or mistake in the decision. He has just told us to review the court's decision. That is not good enough, his dissatisfaction with the decision aforesaid notwithstanding. We therefore find no reason for reviewing the decision on the said ground"

10. Further, one should bear in mind that while exercising the power of review, the court concerned cannot sit on appeal over its judgment/decision.
11. In this case, nothing has been pleaded by the applicant herein to denote an apparent error on the face of the orders he endeavors to review. This court notes that in the judgment delivered on February 23, 2018 the respondent and the interested party were ordered to bear the costs of the proceedings which were decided in favour of the exparte applicant. If the applicant was dissatisfied with the order for costs and wished to pursue the matter further, he could have approached the appellate court for review and or setting aside of the said orders. I am therefore not convinced that I should review or vary the order on payment of costs as sought by the applicant.
12. Now turning to the issue of stay, the Provisions of Order 42 Rule 6 of the [Civil Procedure Rules](#) lays down the conditions upon which a stay of execution order will be granted as follows-;
 - i. The applicant will suffer substantial loss unless an order of stay of execution is granted.
 - ii. The application has been made without unreasonable delay, and
 - iii. Security for the due performance of such decree or order has been given by the applicant.
13. The grant of an order for stay of execution is also a discretionary power of the court which must be exercised judicially and not capriciously and whimsically. It must be based on sufficient or reasonable cause or explanation.
14. On whether the applicant was filed without undue delay, I note that the judgment in this matter was delivered on February 23, 2018. The costs were however not taxed until September 19, 2022. The application herein was filed on November 9, 2022 which is a period of over two months from the time the costs were taxed, and over four year from the date the judgment was delivered. I find that the delay of two months is inordinate and the applicant has not even given an explanation for the delay. From the material on record, it is clear to me that the applicant only moved to court when a demand for payment of costs was made.
15. Regarding to the application to pay the decretal sum by monthly instalments, the provision of Order 21 Rule 12 of the [Civil Procedure Rules](#) gives the court a wide discretion as to whether payment of the amount decreed will be postponed or settled by way of installments. However, this discretion must be exercised in a Judicial and not in an arbitrary manner.
16. The case of *Keshvaji Jethabhai & Bros Limited v Saleh Abdulla* (1959 EA 260 lays down the principles that should guide the court in the exercise of discretion in such matter and states as follows-;
 - a. Whilst the creditor's rights must be considered each case must be considered on its own merits and discretion exercised accordingly.
 - b. The mere inability of a debtor to pay in full at once is not a sufficient reason for exercise of the discretion,



- c. Hardship of the debtor might be a factor but it is a question in each case whether some indulgence can fairly be given to the debtor without prejudicing the creditor.
17. It is also trite law that in seeking for orders as herein, the onus is on the applicant to show that he has sufficient cause and is entitled to indulgence under this rule.
18. In this case, the applicant states that he is a peasant farmer without a stable source of income and therefore unable to pay the decretal sum at once. The respondent on the other hand is proposing that the applicant pays half of the decretal sum i.e 68,330/= then pay the remainder in instalments of Kshs 20,000/= per month until payment in full.
19. However other than alleging inability to pay and being a peasant farmer, the applicant has not demonstrated his financial position to enable the court ascertain the reasonable amount that he can pay. However, taking into account the proposal made by the respondent, and considering the circumstances of this case, it will be for the interest of justice to balance the rights of the parties by allowing the applicant to make payments by instalments but upon reasonable amounts that will enable the respondent enjoy the fruits of the judgment.
20. In the result, I make the following orders-;
- a. The applicant will pay an initial lump sum of Kenya shillings thirty six Thousand (Kshs 36,000/=) within a period of 30 days from the date of this order
- b. Upon payment of the said sum under (a) above, the applicant will then pay a sum of Kshs 15,000/= per month with effect from the last day of the following month and continue to pay the said sum of Kshs 15,000/= on the last day of each subsequent month until payment in full.
- c. In default of payment of any single instalment in accordance with the orders herein above given, the decree holder will be entitled to execute forthwith for payment of the outstanding total decretal sum.
- d. Stay of execution is thus granted on the terms under (a) to (c) above.
- e. The costs of this application will be borne by the applicant.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 15TH DAY OF MARCH 2023

In the presence of

Court Assistant Kibagendi

Gikunda Anampiu for interested party

Karanja for ex-parte applicant

No appearance for A.G for respondent

C.K YANO

JUDGE

