



REPUBLIC OF KENYA



**KENYA LAW**  
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**Josvir Traders & Agencies Limited v Kirundi & 2 others (Environment & Land  
Case 174 of 2018) [2023] KEELC 22214 (KLR) (4 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22214 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 174 OF 2018**

**BM EBOSO, J  
DECEMBER 4, 2023**

**BETWEEN**

**JOSVIR TRADERS & AGENCIES LIMITED ..... PLAINTIFF**

**AND**

**GEOFFREY CHEGE KIRUNDI ..... 1<sup>ST</sup> DEFENDANT**

**LUCY WAMAITHA CHEGE ..... 2<sup>ND</sup> DEFENDANT**

**EVERTON COAL ENTERPRISES LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. Two applications fall for determination in this ruling. The first application is a notice of motion dated 8/5/2023 through which the 1st and 2nd defendants seek the following verbatim orders:
  1. Spent
  2. Spent
  3. That pending the hearing and determination of this application, this Honourable do order for extension of time to deposit the principal decretal amount of Kshs 22,550,000 pursuant to the Ruling by Justice Eboso on 20th January 2023.
  4. Spent
  5. That pending the hearing and final determination of the plaintiff/ applicant's (Civil Appeal No E164 of 2023 – Geoffrey Chege Kirundi & Lucy Wamaitha Chege v Josvir Traders & Agencies Ltd), this Honourable Court do stay taxation of the Party & Party Bill of Costs herein dated 9th June 2022 and any other proceedings herein.
2. The second application is the plaintiff's notice of motion dated 25/11/2023, through which the plaintiff seeks an order granting them leave to execute and recover the principal sum of Kshs 22,550,000



before taxation of the awarded costs of the suit. I will outline a brief background to the two applications before I dispose the issues that fall for determination in the two applications.

## **Background**

3. Judgment in this suit was rendered by Angote J on 18/2/2022. The Judgment was a culmination of a dispute that arose from a land sale agreement dated 20/12/2008, between the plaintiff [purchaser] and the 1st and 2nd defendants [vendors], in relation to Land Reference Number 10090/23, situated in South West of Thika Municipality. The agreed purchase price for the land was Kshs 50,000,000, out of which the plaintiff paid to the 1st and 2nd defendants Kshs 22,550,000. Subsequent to the signing of the sale agreement, the two defendants conveyed the land to a third party [the 3rd defendant].
4. The plaintiff sued the defendants seeking, among other reliefs, an order cancelling the title that had been issued to the 3rd defendant in relation to the suit property, and an order of specific performance against the 1st and 2nd defendants. As an alternative relief, the plaintiff sought damages.
5. Upon conclusion of trial, and upon receiving submissions from the parties, Angote J rendered the said Judgment, dated 18/2/2022, in which he decreed the 1st and 2nd defendants to pay the plaintiff Kshs 22,500,000 [*sic*] together with interest at 18% per annum, compounded on a monthly basis, from the date when this suit was filed [2009]. The court further condemned the two defendants to bear costs of the suit.
6. Subsequent to that, the 1st and 2nd defendants brought a notice of motion dated 15/5/2022 seeking an order of stay of execution of the Judgment of this court pending the hearing and disposal of their appeal in the Court of Appeal. The application was considered and disposed by Eboso J in the following verbatim terms:
  - a. There shall be stay of execution of the Judgment rendered by Angote J in this suit [previously designated as Nairobi ELC Case no 236 of 2009 and also designated in the signed Judgment as Machakos ELC Case No 174 of 2018] on condition that:
    - i. The 1st and 2nd defendants shall pay to the plaintiff the principal award of Kshs 22,550,000 within 30 days from today.
    - ii. The 1st and 2nd defendants shall, within 45 days from today, provide to the plaintiff's advocates and also file in court an irrevocable undertaking by a reputable financial institution, binding the financial institution, to satisfy any part of the decree that may ultimately fall payable by the 1st and 2nd defendants in this suit.
  - b. No order as to costs
7. It does emerge from the two applications that are under consideration that the two defendants did not comply with the terms of the above stay order. It does also emerge from the court record that the plaintiff's a bill of costs dated 9/6/2022 came up for taxation on several occasions but taxation was not done. It is against the above background that the two applications were brought.

## **Application dated 8/5/2023**

8. The application dated 8/5/2023 is premised on the grounds outlined in the motion. It is supported by the 1st defendant's affidavit sworn on 8/5/2023. The case of the 1st and 2nd defendants is that they have preferred an appeal against the Judgment of Angote J and that some of the grounds of appeal relate to the element of compounded interest. They add that the bill of costs dated 9/6/2022 is based on the compounded interest. It is their case that should the appeal succeed, there is likely to be a multiplicity



of taxation proceedings. The two defendants further contend that the terms upon which this court granted them an order of stay of execution are too harsh, adding that they amount to them being denied the order of stay of execution. They further contend that they are not in a position to raise Kshs 22,550,000 within 30 days as ordered by this court.

9. The application dated 8/5/2023 was opposed by the plaintiff through an affidavit sworn on 25/5/2022 by Virginia Wangui Ng'ang'a, a director of the plaintiff company. The case of the plaintiff is that the two defendants gave the impression that they had always been ready, able and willing to refund the purchase price which was paid to them in 2009 and that it was the plaintiff who was unwilling to receive the money. The plaintiff faults the two defendants for engaging in double speak. The plaintiff contend that the application was brought in bad faith, adding that the two defendants have not made any effort to refund the money or engage the plaintiff on a possible extension of time. They urge the court to reject the application.
10. I have considered the application; the response to the application; the parties' respective submissions; the relevant legal frameworks; and the relevant jurisprudential principles. Two issues fall for determination in the application. The first issue is whether the criteria upon which our courts exercise jurisdiction to enlarge time has been satisfied. The second issue is whether a proper basis has been established to warrant an order of stay of taxation proceedings. I will dispose the two issues in the above order.
11. Jurisdiction to enlarge time is a discretionary one. The prevailing jurisprudence which guides our courts when exercising this jurisdiction was outlined by the Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat v the Independent Electoral and Boundaries Commission & 7 others* eKLR as follows:
  - “ 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
  2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
  3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
  4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
  5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
  6. Whether the application has been brought without undue delay; and
  7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
12. The disposal order in relation to which an extension order is sought required the two defendants/ applicants to pay to the plaintiff the principal award of Kshs 22,550,000 within 30 days from 20/1/2023. It did not require the two defendants to deposit the said amount in court as sought in the application dated 8/5/2023. Secondly, under prayer 3, the plea for enlargement of time was sought “pending the hearing and determination of this application”. The application was lodged on 8/5/2023. Approximately seven (7) months have lapsed since then. The application has been heard and is being disposed through this ruling. Put differently, the plea for extension of time is spent.



13. Even if this court were to treat the prayer for enlargement of time as a general plea for an order enlarging the time within which to comply with the order of 20/1/2023, I do not think the application meets the criteria spelt out in the Nicholas Salat Case (supra). The order requiring the two defendants to pay the money was made on 20/1/2023. The 30 days period lapsed on or about 19/2/2023. The defendants did not bother to pay the money after 19/2/2023. They did not bother to promptly move the court for a time-enlargement order. They have not bothered to pay the money to date. Yet this is entirely money which they received in 2009 as purchase price for land, and having received the money from the plaintiff, they conveyed the land to the 3rd defendant.
14. Given the above circumstance, I do not think the two defendants have satisfied the criteria for enlargement of time. They should pay the principal award as they pursue their appeal against interest.
15. Is there a proper basis for stay of taxation of the bill of costs? The justification proffered by the two defendants in their plea for an order staying taxation is that the party and party bill of costs is based on the compounded interest which they have challenged in the Court of Appeal. I do not agree with them on this contention. The disposal orders in the judgment rendered by Angote J read as follows:
  - (a) The 1st and 2nd defendants to jointly and severally pay the plaintiff Kshs 22,550,000.
  - (b) The 1st and 2nd defendants to jointly and severally pay the plaintiff interest on the above amount at the rate of eighteen (18%) per centum per annum compounded on a monthly basis from the date when this suit was filed until payment in full.
  - (c) The 1st and 2nd defendants to jointly and severally pay the costs of the suit.
16. It is clear from the above disposal orders that only the principal sum of Kshs 22,550,000 is to attract interest at 18% p.a compounded on a monthly basis from the date when this suit was filed till payment in full. Costs of the suit do not attract compounded interest. There is therefore no proper basis for staying taxation of the bill of costs.
17. For the above reasons, I do not find merit in the application dated 8/5/2023.

### **Application dated 25/5/2023**

18. The application dated 25/5/2023 sought an order granting the decree-holder leave to recover a sum of Kshs 22,500,000 [*sic*] before taxation. The application was supported by an affidavit sworn by Virginia Wangui Ngarigu on even date. The case of the decree holder is that the 1st and 2nd defendants have failed to comply with the order of the court made on 20/1/2023, adding that the two defendants are holding the uncontested principal award.
19. The 1st and 2nd defendants opposed the application through a replying affidavit sworn on 14/7/2023 by the 1st defendant. The case of the two defendants is that they need reasonable time to comply with the conditions given by the court, adding that they need time to borrow money from banks or liquidate some property.
20. I have considered the application. The single question to be answered in the application is whether there is a proper basis for enforcement before taxation.
21. A perusal of the court record shows that the taxing officer of this court is seized of the plaintiff's bill of costs. The only reason why the bill of costs has not been taxed is that the 1st and 2nd defendants brought the application dated 8/5/2023. That particular application has been disposed. The taxing



officer of the court is ready and available to tax the bill of costs. In the circumstances, there are no proper reasons why the bill cannot be taxed to facilitate execution. In the absence of special circumstances, the procedure laid down in the Civil Procedure Rules should apply. The application dated 25/5/2023 is accordingly declined.

22. In the end, the parallel applications dated 8/5/2023 and 25/5/2023 are declined for lack of merit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 4TH DAY OF  
DECEMBER 2023**

**B M EBOSO**

**JUDGE**

Mr Mbigi Njuguna for the Plaintiff

Mr Edwin Musyoka holding brief for Mr Mc Ronald for the 1st and 2nd Defendants

Mr Edwin Musyoka for the 3rd Defendant

Court Assistant: Dominic

