



Njoroge v Come-Cons Africa Ltd & 2 others (Environment and Land Case Civil Suit 258 of 2016) [2022] KEELC 3647 (KLR) (19 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3647 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND CASE CIVIL SUIT 258 OF 2016**

**LA OMOLLO, J
MAY 19, 2022**

BETWEEN

PAUL WANJIGI NJOROGE APPLICANT

AND

COME-CONS AFRICA LTD 1ST RESPONDENT

MESHACK ISIKATI 2ND RESPONDENT

KENYA POWER & LIGHTING CO. LTD 3RD RESPONDENT

RULING

Introduction

1. This ruling is in respect of the Plaintiff/Applicant's Notice of Motion dated February 7, 2022.
2. The application seeks the following orders:
 - i. That the Applicant be granted leave to execute the decree herein against the Respondents before the costs of the suit are ascertained.
 - ii. That costs of this application be provided for.
3. The application is based on the grounds on its face and supported by the affidavit sworn on February 7, 2022 by Loice Wairimu Kagucia counsel for the plaintiff.

Factual Background.

4. The Plaintiff/Applicant commenced this suit by way of a plaint dated July 17, 2012. The Plaint was subsequently amended on August 27, 2018. The prayers sought in the plaint are as follows:



- a) Permanent injunction/restraining orders against the Defendants on land known Naivasha Town Block 2/859
 - b) Eviction of the Defendants and removal of all structures erected by the 1st and 2nd Defendants and removal of all illegal electricity connections installed by the 3rd Defendants.
 - c) Cost and interest of the suit
 - d) Mesne Profits
5. All the Defendants were served. Only the 3rd Defendant entered appearance. The matter was heard and judgment issued on January 19, 2022 in favor of the Plaintiff/Applicant in the following terms:
- a) A permanent injunction/restraining orders do issue against the 1st and 2nd Defendant on land known as Naivasha town Block 2/859.
 - b) Orders of eviction and removal of all illegally erected structures do issue against the 1st and 2nd Defendant.
 - c) The eviction orders in (b) above, to be effected after 90 days of service of this court order.
 - d) The claim for mesne profits fails.
 - e) The suit as against the 3rd Defendant is dismissed with no order as to costs.
 - f) The Plaintiff shall have the costs of the suit as against the 1st and 2nd Defendant.
6. The Plaintiff/Applicant thereafter filed the instant application and served all parties.
7. The application came up for hearing on 14th March, 2022 where the court directed that the said application was premature and should be heard on 28th April, 2022. The same was then heard on 28th April, 2022 and a ruling date set for 19th May, 2022.

Plaintiff/applicant's Contention.

8. The Plaintiff/Applicant contends that the instant suit was filed on July 17, 2012 and judgment delivered on January 19, 2022 in his favour.
9. It is the Plaintiff/Applicant's contention that the claim against the 3rd Defendant was dismissed with no order as to costs. That the orders granted to the Plaintiff/Applicant as against the 1st and 2nd Defendants in the said judgment is for possession of the suit land by eviction of the Defendants.
10. The Plaintiff/Applicant further contends that there is imminent danger that his enjoyment of the fruits of the judgment will be unduly delayed as the Defendants have continued to settle on the suit land.
11. She ends her deposition by stating that the Plaintiff/Applicant desires to secure immediate possession of the suit land subject to the court's orders that eviction be affected after 90 days upon service of the order and that taxation of costs will delay the intended eviction.
12. The 1st and 2nd Defendants' did not file any response to the application.
13. The Plaintiff/Applicant urged the court to allow the instant application as it was unopposed.



Analysis and Determination.

14. Upon perusal of the Application and Supporting Affidavit, it is my considered view that two issues that arise for determination are;
- a. Whether the Plaintiff should be granted leave to execute the decree of January 19, 2022 before taxation of costs.
 - b. Who should bear the cost of the application.
15. This application is brought pursuant to section 3A and 94 of the *Civil Procedure Act*.
16. Section 3A provides for the inherent powers of the court. It is as follows;
- Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.
17. Section 94 provides as follows;
- Where the High Court considers it necessary that a decree passed in the exercise of its original jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.
18. In *Mary Wangui Karanja & another v Rhoda Wairimu Karanja & another* [2021] eKLR, the Learned Judge in considering a similar application, reaffirmed the court of appeal decision in *Bamburi Portland Cement Co. Ltd v Hussein* (1995) LLR 1870 (CAK) wherein it was held as follows;
- “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 judgment is delivered but if that is not done then it must be made by way of a notice of motion. The motion must be served on the other party and heard inter parties....”
19. In another case *Lakeland Motors Limited vs Harbhajan Singh Sembi* [1998] eKLR the Court of appeal stated;
- “The exercise of judicial discretion by the superior court under section 94 of the Act necessarily requires that parties to a decree passed by that court in the exercise of its original civil jurisdiction should be availed an opportunity to be heard before making an order for execution of that decree before taxation. This, we think, is the spirit of the observation of Shah, J.A., with which we agree, in *BAMBURI Portland Cement Company Limited v Imranali Chandbhai Abdulhussein*.”
20. The decision in *Mercedes Sanchez Rau Tussel v Samken Ltd & 2 Others* [2002] eKLR, also offers useful insights on the rationale of section 94 as follows: -
- “The principle behind this section is not far to search. When awarded costs are not agreed, it often takes a considerable time before the costs are taxed by a taxing officer. In order not to permit a judgment-debtor to hold up execution of a decree for a known sum or



a sum to which there can be no sensible contest, section 94 provides that the court may permit the execution of a decree except as to so much thereof as relates to unsettled costs. Till such formal expression has been given to the judgment of the court, the decree is not executable, and in order to obviate the difficulty arising in a case where the taxation of the costs would take some time, section 94 permits the decree holder, as it were to execute a “decree” which strictly does not constitute the formal expression of an adjudication in as much as the provision with regard to costs has not been embodied in that decree, and it is perfectly true that an order from the court for a decree to be executed is required if it is a “decree” not in the proper sense of the term as defined by section 2 of the Act. That is the rationale for section 94 making a specific order of the court necessary in a case where a decree holder wants to execute a decree which does not contain the provision for costs, and that permission is necessary because a decree cannot be drawn up and the seal of the court cannot be put upon the decree unless the provision with regard to costs is inserted in it, because it is in the judgment of which the decree is only a formal expression.”

21. Having set out the law, procedure and rationale behind the provisions of Section 94, I am obligated to situate the circumstances in this particular case in the law.
22. The Applicant has sought leave of this court, as required, before he can execute the decree herein. He has served the 1st and 2nd Defendants and the affidavit of service is on record. It is also expected that leave is sought from the court that passed the decree in exercise of its original civil jurisdiction. It therefore, important to mention that the decree was passed by this court in exercise of its original jurisdiction. To that extent and from a procedural stand point, the Applicant has fulfilled the criteria set out in section 94.
23. Secondly and importantly, the grant of orders under this section is discretionary. The Applicant herein filed this suit in the year 2012. As at the time of filing the suit, he was not in occupation of the suit parcel and sought orders from the court to evict the Defendants (trespassers).
24. The matter was heard, the 1st and 2nd Defendant did not participate in the trial, the 3rd Defendant did and the suit was struck out as against them. Essentially, the Plaintiff has been denied use of his land for about 10 years.
25. In *Sparkle Properties Limited v Johana Ngai & 8 others* [2020] Eklr, the Learned Judge observed as follows;

“...On my part, I can’t quite grasp the philosophy behind Section 94, save probably for monetary decrees, so that the judgment creditor does not need to face execution twice, once for the money in the decree, and secondly for the money in the costs. That is the only reason that I can see apparent on the face of Section 94. But where the decree is not for money, I really find it difficult to see the reason behind Section 94.

If, assuming, the decree is for delivery of a chattel, say a car, why should the decree holder have to wait until the costs are taxed for him to execute for the delivery of the car” And if he has another car for use for his daily errands, would it be considered “necessary” for him to execute for delivery of the car before taxation of costs” In decrees for delivery of land, why should a decree holder wait, until the costs are taxed for him to execute for possession of the land” On my part, I find little or no correlation between the delivery of the land and the payment of the costs. I think it is time we relooked the necessity of Section 94.”



26. In line with this reasoning, the decree sought to be executed is in respect of eviction of the 1st and 2nd Defendant from the suit parcel. The execution of the decree was to take effect after 90 days so as to enable the Defendants make plans to vacate the suit land. It is well over 90 days since judgment was rendered. Time for the 1st and 2nd Defendants to deliver vacant of the suit land is long overdue.

B. Who shall bear the cost of this application?

27. On the question of costs of the application, the general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

Disposition.

28. I find that the Plaintiffs' Application is merited. The 1st and 2nd Defendant have failed to vacate the suit premises after judgement and after the lapse of a 90 days stay of execution. It is only fair, in the circumstances, for an order of eviction to issue against the 1st and 2nd Defendant.

29. Consequently, the application dated February 7, 2022 is allowed in the following terms;

- a. The Plaintiff/Applicant is granted leave to execute the decree herein against the 1st and 2nd Defendant/ Respondent before the costs in this suit are ascertained.
- b. The Plaintiff/Applicant shall have costs of the application.

30. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 19TH DAY OF MAY, 2022.

L. A. OMOLLO

JUDGE.

In the presence of: -

Mr. Kagucia for the Plaintiff/Applicant.

No appearance for the 1st Defendant Respondent.

No appearance for 2nd Defendant/Respondent.

Court Assistant; Ms. Jeniffer Chepkorir.

