



**Reinhard v Nthenya & another; Maurizio Mario Amici Miei Limited
(Interested Party); Keller (Objector) (Environment & Land Case
108 of 2012) [2022] KEELC 3570 (KLR) (11 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3570 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 108 OF 2012**

MAO ODENY, J

MAY 11, 2022

BETWEEN

**ELSBETH REINHARD HEFTI, DANIEL BERNARD REINHARD (SUING
THROUGH THEIR ATTORNEY) JOYCE JEPLETING REINHARD PLAINTIFF**

AND

DAMARIS NTHENYA 1ST DEFENDANT

GIOVANNI OZZI 2ND DEFENDANT

AND

MAURIZO MARIO AMICI MIEI LIMITED INTERESTED PARTY

AND

ALFRED ANDRES KELLER OBJECTOR

RULING

1. This ruling is in respect of a notice of motion dated December 16, 2019 by the plaintiff/applicant seeking the following orders;
 - a. Spent
 - b. That this honourable court be pleased to grant leave for execution of the decree before costs are ascertained
 - c. That costs of the application be provided for.
2. The applicant swore an affidavit and urged the court to allow the application as the court had rendered a judgment in her favour awarding the plaintiffs among others, eviction orders, *mesne* profits and costs of



the suit. That after gaining possession of the suit premises she instructed her then advocates to execute for *mesne* profits only, without the knowledge that it was necessary to seek leave of the court in order to execute for mesne profits before costs of the suit had been ascertained.

3. She therefore urged the court to exercise its discretion and allow her leave to execute for *mesne* profits before costs are ascertained for she has no intentions to apply for execution for the costs of the suit. Further, that there would be no prejudice suffered by the parties should the orders sought be granted.
4. She stated that upon the issuance of the decree the then applicant's advocates applied for execution which was objected to by the defendants prompting the following choices by the court;
 1. That the plaintiff either file a bill of costs for taxation
 2. Seek leave of the court to execute before costs are taxed
 3. To formally abandon the costs and proceed to execute
5. The respondents neither filed a response nor submissions to the application.

Analysis And Determination

6. The issue for determination in this case is as to whether the applicant should be granted leave to execute costs before taxation of a decree dated July 19, 2018 in favour of the plaintiff/applicant.
7. Section 94 of the [Civil Procedure Act](#) provides as follows:

Where the High Court considers it necessary that a decree passed in the exercise of its original civil 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 the 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.”

8. The judgment in this suit was delivered *vide* a decree dated July 19, 2018 in favour of the plaintiff/applicant, and the orders that were granted were eviction, *mesne* profits and costs of the suit, and there has been no appeal in respect of the orders.
9. It is on record that the plaintiff/applicant successfully executed the eviction order and opted for the *mesne* profits and leave out costs of the suit hence the current application.
10. In the Court of Appeal case of [Lakeland Motors Limited v Harbhajan Singh Sembi](#)[1998] eKLR the court 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*, Civil Appeal No 83 of 1995 (unreported) in regard to the application of section 94 of the Act.”

11. The respondent was given an opportunity to respond to the application and file submissions but they did not do so. The applicant has complied with the service of the application to notify the respondent of the current application. This application is unopposed.



12. I find that the application has merit and is therefore allowed as prayed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 11TH DAY OF MAY, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

