



**Heier & another (Suing for and on behalf of aggrieved residents of Watamu within Kilifi County) v County Government of Kilifi & 4 others (Environment & Land Petition 23 of 2016) [2022] KEELC 13848 (KLR) (25 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13848 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND PETITION 23 OF 2016  
MAO ODENY, J  
OCTOBER 25, 2022**

**BETWEEN**

**ELIZABETH KURER HEIER ..... 1<sup>ST</sup> PETITIONER  
DETLEF HEIER ..... 2<sup>ND</sup> PETITIONER  
SUING FOR AND ON BEHALF OF AGGRIEVED RESIDENTS OF WATAMU  
WITHIN KILIFI COUNTY**

**AND**

**COUNTY GOVERNMENT OF KILIFI ..... 1<sup>ST</sup> RESPONDENT  
OFFICER COMMANDING POLICE DIVISION KILIFI ..... 2<sup>ND</sup> RESPONDENT  
ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT  
KIOKO ENTERPRISES LIMITED ..... 4<sup>TH</sup> RESPONDENT  
MARVAL LTD T/A COMEBACK RESTAURANT, LOUNGE & DISCO  
WATAMU ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of a notice of motion dated November 5, 2021 by the 4<sup>th</sup> respondent seeking the following orders: -
  - a. Spent.
  - b. Spent.
  - c. That upon inter parties hearing this honourable court be pleased to issue an order for stay of execution against the petitioners by themselves, their



instructed auctioneers, servants, agents, employees from acting on the proclamation notice dated October 27, 2021 issued against the 4<sup>th</sup> respondent/ applicant for pending the hearing and determination of this application and suit.

- d. Spent.
  - e. That upon inter partes hearing this honourable court do issue an order for a temporary injunction restraining the petitioners/respondents by themselves, their agents, instructed auctioneers servants and/or employees from collecting, removing, advertising and offering for sale any of the 4<sup>th</sup> respondents goods proclaimed in the proclamation notice dated October 27, 2021 pending the hearing and determination of this application and suit.
  - f. That the warrants of sale and warrants of attachment all issued by this honourable court dated September 28, 2021 against the 4<sup>th</sup> respondents be vacated and/or set aside.
  - g. That costs of this application be borne by the petitioners/respondents.
2. The applicant relied on the grounds on the face of the application together with the supporting affidavit sworn on November 5, 2021 by Reuben Mulwa Kioko, a director of the 4<sup>th</sup> respondent company, who deposed that on April 19, 2018, judgment was entered by this court dismissing the petition and costs awarded in favour of the 4<sup>th</sup> respondent. On appeal, that judgment was set aside and costs awarded to the petitioners on May 27, 2020. Subsequently, the petitioners filed their party and party bill of costs which was taxed at Kshs 883, 970.28/- and a certificate of costs dated July 1, 2021 issued.
  3. The applicant further deponed that as a result, the petitioners have commenced the execution process and have served the 4<sup>th</sup> respondent with a proclamation notice dated October 27, 2021 seeking to seize the 4<sup>th</sup> respondent's stock and furniture. It was the applicant's case that as per the Court of Appeal judgment costs were against the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents.
  4. It was further the applicant's case that no decree has been drawn or signed by the deputy registrar to warrant execution.
  5. In response, the petitioners filed a replying affidavit sworn on November 29, 2021 by Elisabeth Kurer Heier who deposed inter alia that prior to commencing execution, the petitioners' advocates forwarded to the 4<sup>th</sup> respondent's advocates, a draft of the Court of Appeal order which they did not dispute. She further deponed that despite their demand to pay the costs, the 4<sup>th</sup> respondent refused to comply prompting the petitioners to instruct auctioneers.
  6. Counsel agreed to canvas the application vide written submissions which were duly filed.

#### **4<sup>th</sup> respondent's submissions**

7. Counsel for the 4<sup>th</sup> respondent identified three issues for determination namely: whether a certificate of costs is executable; whether the taxed costs should be apportioned; and who should bear the costs of the application,
8. On the first issue, counsel for the 4<sup>th</sup> respondent submitted that execution of the certificate of costs without a duly signed decree was illegal and contrary to order 21 rule 8 of the *Civil Procedure Rules*. It was counsel's submission that a certificate of costs on its own is not an executable legal instrument



and warrants of attachment cannot be issued on the basis of a certificate of costs alone as there must be a decree. Counsel relied on the case of [\*Rubo Kimngetich Arap Cheruiyot v Peter Kiprof Rotich \[2006\] eKLR\*](#).

9. On the second issue, counsel argued that the Court of Appeal judgment was against all the 4 respondents, hence the costs ought to be apportioned amongst the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents.
10. Finally, counsel submitted that costs should follow the event as per the provisions of section 27 of the [\*Civil Procedure Act\*](#).

### **Petitioners' submissions**

11. Counsel gave a brief background to the case and stated that the petitioners filed a petition complaining of noise pollution emanating from the loud music played by the 5<sup>th</sup> respondent. In their petition, they sought conservatory orders against the 4<sup>th</sup> and 5<sup>th</sup> respondents, their servants, agents, employees, tenants, and or any other person(s) acting on their behalf, prohibiting them from further operation of Comeback Restaurant, Lounge and Disco situated in Watamu and any further playing of live music, streamed music and or any other music within Comeback Restaurant, Lounge and Disco situated in Watamu, as well as general damages and costs of the petition.
12. The petition was dismissed with costs to the 4<sup>th</sup> respondent. The petitioners were aggrieved by the court's judgment and appealed to the Court of Appeal whereby the appeal was allowed and judgement entered in the petitioners' favour. Following the successful appeal, the petitioners taxed their costs and proceeded to execution, which the 4<sup>th</sup> respondent is against, hence their application dated November 5, 2021.
13. Counsel for the petitioners identified three issues, namely: whether orders of stay of execution should be issued; whether injunctive orders should issue against the petitioners; and whether the warrants of sale and warrants of attachment ought to be vacated and/or set aside.
14. On the first issue, counsel submitted that there already existed a decree dated June 11, 2018, that was overturned by the Court of Appeal, hence the petitioners need not have obtained another decree prior to execution.
15. Counsel submitted that order 21 rule 8 cited by the 4<sup>th</sup> respondent was not applicable in the present circumstances and that in any event, the provision is not couched in mandatory terms and relied on the case of [\*David Mutemi Ngumi v Kamili Packers Limited \[2019\] eKLR\*](#).
16. Mr Nyongesa submitted that on July 27, 2021, the advocate on record for the petitioners wrote to the 4<sup>th</sup> defendant's advocate asking for a refund of a sum of Kshs 336,700/= which they had paid the 4<sup>th</sup> defendant as costs on August 13, 2019 and payment of the taxed costs for proceeding before the Environment and Land Court as was determined by the Court of Appeal on successful appeal. Counsel stated that the letter was ignored and execution became the only option available for the petitioners to compel the 4<sup>th</sup> respondent to pay costs.
17. Counsel argued that the Court of Appeal order was procedurally forwarded to the 4<sup>th</sup> respondent in line with rule 34 of the Court of Appeal Rules which requires a successful party on appeal to first forward a draft order to the respondents have them approve it before proceeding to extract it. Counsel further stated that according to rule 34 (2) (d) of the [\*Court of Appeal Rules\*](#), where the respondent fails to approve or make any comments on the draft order, then the form of the order shall be settled on by the presiding judge or such other judge that heard the case and the registry or sub-registry where the appeal was heard shall issue out the order.



18. It was counsel's submission that none of the respondents responded to the letter despite them being duly served with a similar letter for a second time in October 2021 as they neither rejected the draft order for being at variance with the Court of Appeal judgment nor suggested any changes to the draft order.
19. On stay of execution, counsel submitted that order 22 rule 22 provides for the conditions to be met to warrant the court's discretion to grant stay of execution which he stated that the applicant had not met any of the conditions as laid out.
20. Mr Nyongesa stated that order 21 rule (1) & (2) of the Civil Procedure Rules, provides that a certificate of costs can stand alone and be executed as such and relied on the case of *Nyamira County Government v Local Authorities Provident Fund [2020] eKLR* where the court held that a certificate of costs is as good as a decree for purposes of execution and that if a decree means the formal expression of an adjudication, then the certificate of costs is the formal expression of the ruling of the court on certified costs and same can be enforced
21. Counsel further submitted that as per the judgment of the Court of Appeal, the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents were jointly and severally liable for violating the petitioners' rights as such the petitioners were at liberty to commence execution either against any one of the said respondents or all of them. Counsel relied on the cases of *Mohamed & Muigai Advocates v Samuel Kamau Macharia & another [2005] eKLR*; and *Astral Aviation Ltd v Tadis Travel & Tours Ltd & another [2018] eKLR*.
22. Mr Nyongesa submitted that the petitioners stand to suffer immensely should the execution process be halted and that the petitioners have a right to enjoy their fruits of judgment, as it was the position in *James Wangalwa & another v Agnes Naliaka Cheseto in Misc App No 42 of 2011 [2002] eKLR*.
23. On whether orders of injunction should be granted, counsel submitted that the 4<sup>th</sup> respondent failed to demonstrate any infringement of its rights on the part of the petitioners in the process of execution to warrant the grant of an injunction. Counsel relied on the case of *Robert Mugo wa Karanja v Ecobank (Kenya) Limited & another [2019] eKLR* to buttress this point.
24. Counsel urged the court to dismiss the application with costs to the petitioner as the warrants of attachment were legally and procedurally obtained.

### **Analysis and determination**

25. The issue for determination is whether process of execution of payment of costs was done procedurally and whether the applicant is entitled to the orders sought for stay of execution.
26. Counsel for the 4<sup>th</sup> respondent/applicant argued that there was no decree hence warrants of attachment and sale cannot be issued and executed. The orders sought are mainly premised on the reason that the petitioners have not extracted a decree to warrant the execution process. That a certificate for costs alone is not an executable legal instrument but the taxed amount is not contested save for the apportionment of costs amongst the respondents.
27. The 4<sup>th</sup> respondent/applicant seeks an order of stay of execution and a temporary injunction restraining the auctioneers from selling the proclaimed goods pending the hearing and determination of this application and suit. I notice however that there is no suit pending either in this court or the Court of Appeal.
28. It is clear in this case that the certificate of costs herein was a product of the decision of the Court of Appeal whereby the court ordered the respondents herein to pay the costs both in the Environment and Land Court and the Court of Appeal and the taxation process was simply an implementation of



the said decision of the Court of Appeal as was held by Odunga J (as he then was) in the case of *Thomas Malinda Musau & 2 others v Independent Electoral and Boundaries Commission & 2 others* [2019] eKLR, where he explained as follows:-

33. As regards the issue whether it was necessary for a decree to be extracted before execution process could be put into motion, I agree that the view adopted by Ibrahim, J (as he then was) in *Rubo Kimngetich Arap Cheruiyot vs Peter Kiprof Rotich* [2006] eKLR is generally the correct legal position. In that case the learned judge held that:

'It is my view that a decree duly approved and signed had to be on record for any execution to take place, whether for the eviction, costs or otherwise. As far as the parties in a suit are concerned, a certificate of costs is not an executable legal instrument. A certificate of costs is not capable of being 'executed'. Warrants of attachment and sale cannot in law be issued on the basis of a certificate of costs. There must be a decree first. It is true that the decree may not be necessarily or always contain the ascertained costs. Costs can be determined before a decree is issued or subsequently, after the decree has been drawn. However, for one to recover costs, there must be a decree. Any money awarded by court including costs is only payable under a decree.'

34. However, rule 108 of the Court of Appeal Rules provides that:

- (1) When making any decision as to the payment of costs, the court may assess the same or direct them to be taxed and any decision as to the payment of costs, not being a decision whereby the amount of the costs is assessed, shall operate as a direction that the costs be taxed.
- (2) For the purpose of execution in respect of costs, the decision of the court directing taxation and the certificate of the taxing officer as to the result of such taxation shall together be deemed to be a decree.

35. It is not in doubt that there was an order directing taxation. That order taken together with the certificate of costs are together deemed as a decree. Therefore, no further decree is required to be extracted for the purposes of execution.'

29. The court further relied rule 108 of the Court of Appeal Rules provides that: -

- (1) When making any decision as to the payment of costs, the court may assess the same or direct them to be taxed and any decision as to the payment of costs, not being a decision whereby the amount of the costs is assessed, shall operate as a direction that the costs be taxed.
- (2) For the purpose of execution in respect of costs, the decision of the court directing taxation and the certificate of the taxing officer as to the result of such taxation shall together be deemed to be a decree.

30. The deputy registrar taxed the costs and a certificate of costs was issued which is deemed to be a decree as per rule 108 (2) of the Court of Appeal Rules.



31. On the issue of apportionment of costs, in the case of *Hellen Njenga –versus- Wachira Murage & Another [2015] eKLR* cited the decision in *Dubai Electronics –versus- Total 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.'

32. Similarly, *Black's law Dictionary 10th Edition* defines joint and several liability 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'

33. It was also held in the held the case of *Astral Aviation Ltd v Tadis Travel & Tours Ltd & another [2018] eKLR* as follows:

' In my earlier ruling delivered on July 10, 2018, I noted that the Court of Appeal issued the order for payment of costs against the applicants/defendants jointly and severally. Under such circumstances, the respondent is at liberty to execute against either all the judgment debtors or any one of them. It would be up to a party against whom execution has been levied to pursue the co-judgment debtors for compensation'

34. It is clear that each respondent is individually responsible for the entire obligation to pay costs but the paying party may have a right of contribution and indemnity from the non-paying parties. The 4<sup>th</sup> respondent therefore can pay the costs but may claim from the rest of the respondents.

35. I have considered the application, the submission by counsel, judicial authorities and find that the application dated November 5, 2021 is hereby dismissed with costs to the petitioner.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 25<sup>TH</sup> DAY OF OCTOBER, 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.**

