Jomo Kenyatta University of Agriculture & Technology v Kwanza Estates Limited; Kenya Commercial Bank Limited & 4 others (Garnishee) (Environment & Land Case E19 of 2020) [2024] KEELC 344 (KLR) (1 February 2024) (Ruling)

Neutral citation: [2024] KEELC 344 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT & LAND CASE E19 OF 2020

FM NJOROGE, J

FEBRUARY 1, 2024

BETWEEN

JOMO KENYATTA UNIVERSITY OF AGRICULTURE & TECHNOLOGY ..... PLAINTIFF

AND

KWANZA ESTATES LIMITED ..... DEFENDANT

AND

KENYA COMMERCIAL BANK LIMITED ..... GARNISHEE

CO-OPERATIVE BANK OF KENYA LIMITED ..... GARNISHEE

STANDARD CHARTERED BANK KENYA LIMITED ..... GARNISHEE

EQUITY BANK LIMITED ..... GARNISHEE

ABSA BANK KENYA PLC ..... GARNISHEE

RULING

1. This ruling is in respect to the applications dated 2/8/2023 and 8/8/2023. The application dated 2/8/2023 was filed by the defendant and is expressed to be brought under Sections 1A, 1B, 3A of the *Civil Procedure Act*, Order 23 Rules 1, 2, 3, 4, 9 & 10, Order 51 Rule 1 of the Civil Procedure Rules, Rule 3 of the High Court (Practice and Procedure) Rules and Rule 16 and 17 of the High Court (Organization and Administration) (General) Rules, 2016 which sought the following prayers;

    a. Spent

    b. Spent

c. That the garnishees Kenya Commercial Bank Limited, Co-operative Bank of Kenya Limited, Standard Chartered Bank Kenya Limited, Equity Bank Limited and Absa Bank Kenya PLC do appear before this court on a day to be fixed by the court to show cause why the garnishee order nisi issued should not be made absolute and the sum of Kshs. 9,660,530.40 as at 31st July 2023 should not be released to the defendant decree holder in satisfaction of the decree herein.

d. That the costs of the application be borne by the plaintiff/respondent judgement debtor.

2. The application was supported by the grounds on the face of the application and the supporting affidavit of Geoffrey Makana Asanyo who deposed that he was the Managing Director of the defendant company. The background to the application is that judgement was delivered on 27/04/2022 and on 6/07/2022 the plaintiff filed an appeal against it seeking orders inter alia that the judgement and decree issued ordering the plaintiff to pay Kshs. 71,965,138.70 be set aside. The defendant filed a cross-appeal. That the Court of Appeal delivered its judgement on 16/06/2023 where it ordered the plaintiff inter alia to pay the costs of restoration of the suit premises to its original state ordered at an all-inclusive cost of Kshs. 40,000,000/= Each party was to bear their costs of the appeal. The application further states the costs payable in the present matter were taxed at Kshs. 8,211,675.80 and subsequently the plaintiff applied for stay of execution pending appeal which the court allowed on 17/05/2022, on condition that it deposits the taxed costs in a joint interest earning account within 30 days of the issuance of the certificate of costs. On 25/05/2023 the defendant forwarded to the plaintiff the certificate of costs. The plaintiff is yet to deposit the said costs and as at 31/07/2023 the outstanding amount was Kshs. 9,660,530.40 which continues to accrue interest. The plaintiff/judgement debtor is said to hold funds in various bank accounts of the garnishees who are Kenya Commercial Bank Limited, Co-operative Bank of Kenya Limited, Standard Chartered Bank Kenya Limited, Equity Bank Limited and Absa Bank Kenya PLC. The defendant is apprehensive that the plaintiff might transfer or utilize the funds held in the said accounts and that it is in the interest of justice that a garnishee order be issued attaching or freezing the plaintiff's bank accounts to preserve the funds.

3. In response to the application, the plaintiff filed a replying affidavit on 9/08/2023 sworn by Richard Wokabi Kariuki its Chief Legal Officer. He deposed that the sum of Kshs. 9,660,530.40, which the defendant seeks to have garnisheed from the plaintiff's bank account, was not a judgment debt but party and party costs of kshs. 8,211,675.80 which were taxed by Hon. R. Ombata on 19/05/2023 and which had allegedly accrued interest. The taxed costs were based on the judgement delivered on 27/04/2022 which dismissed the plaintiff's suit and awarded the defendant costs of its counterclaim together with interest. It is deposed that the Court of Appeal in its judgment delivered on 16/06/2023 allowed the plaintiff's appeal and set aside the said judgement and dismissed the defendant's counterclaim. Consequently, the taxed costs and the accrued interest are no longer payable to the defendant. It is further deposed that the certificate of taxed costs was issued on 19/05/2023 while the judgement of the Court of Appeal was delivered on 16/06/2023 and that the defendant was to deposit the party and party bill of costs within 30 days which were to expire on 19/06/2023; that by the time the Court of Appeal delivered its judgement on 16/06/2023; the 30 days were yet to expire and therefore the deposit of security for costs pending appeal as a condition for stay of execution of the judgement was overtaken by events. Consequently, the deponent stated, the only monies payable to the defendant by the plaintiff as per the judgement was Kshs. 40,000,000/= which has since been settled, and that the defendant's application for garnishee proceedings is an attempt to frustrate the plaintiff. It was further averred that the order issued on 3/08/2023 preserving the bank accounts held by the plaintiff had hindered the plaintiff's operations and that the preserved bank accounts are public fund accounts monitored by the exchequer and any unjustified interruption could adversely affect the operations of the plaintiff and expose it to pecuniary embarrassment.

4. The plaintiff filed the Notice of Motion application dated 8/8/2023 on 9/08/2023. The said application is expressed to be brought under Order 51 Rule 1 and 15 of the Civil Procedure Rules, Section 1A, 1B, 3A and 63(e) of the *Civil Procedure Act* and sought the following orders:

    a. Spent;

    b. The honorable court be pleased to set aside and/or discharge the order that was made ex parte in this matter on 3/08/2023 and/or;

    c. Spent;

    d. Spent;

    e. Costs of this application be borne by the defendant.

5. The application was supported by the grounds on the face of the application and the supporting affidavit of Richard Wokabi Kariuki the Chief Legal Officer of the plaintiff. He reiterated the contents of his replying affidavit filed on 9/08/2023 in response to the application dated 2/08/2023.

6. On 10/08/2023 the court made the following orders with respect to both applications:

    a. The hearing of the motions before court dated 2/8/2023 and 8/8/2023 is hereby adjourned.

    b. The 1st to 4th garnishees are hereby discharged from the present proceedings and the issue of whether they are entitled to costs and from whom shall be determined in the application.

    c. The 5th garnishee is not discharged from these proceedings yet, but all the plaintiff's accounts that the 5th respondent administers except account number 0721022145- ABSA Bank Kenya PLC- Juja Branch are hereby discharged.

    d. The other garnishees and the 5th garnishee shall be at liberty if they so wish make representation in the form of written submissions to this court but only on their issue of entitlement to costs of the proceedings and the amount;

    e. The motions mentioned herein above shall be heard by way of written submissions;

    f. The applicants shall file submissions on their respective application within 7 days of this order.

    g. The respondents shall file and serve their responses within 7 days of service of the applicant's submissions upon them.

    h. The parties shall highlight their submissions before ELC 2 on 24/08/2023 by way of Ms. Teams on which date a ruling date shall be issued.

7. By the orders issued on 10/8/2023, the substantive participation of four Garnishees was terminated with the exception of the small issue of their costs, regarding which they subsequently filed written submissions.

8. The 5th garnishee filed a replying affidavit to the application dated 02/08/2023 on 9/08/2023. The replying affidavit is sworn on the same date by Michael Massawa a Legal Counsel of the 5th garnishee. He deposed that the judgement debtor holds accounts, whose numbers he gave, with the garnishee, and that there are sufficient funds to satisfy the entire decretal sum of Kshs. 9,660,530.40 claimed by the decree holder. He prayed that the court be pleased to order the retention of the garnishee's costs in the present application from Judgement Debtor's account aforementioned.

9. The 3rd garnishee filed its submissions on 22/08/2023, the 2nd garnishee filed its submissions on 23/08/2023, the 5th garnishee filed its submissions on 24/08/2023. The plaintiff filed its submissions on 24/08/2023 while the defendant filed its submissions on 31/08/2023 and 18/08/2023.

Garnishees' Submissions On Costs.

10. The 3rd garnishee in its submissions submitted on whether or not the 3rd garnishee was entitled to costs and who was to bear the said costs. The 3rd garnishee relied on the case of Board Trustees, National Water Conservation & Pipeline Corporation (NWCPAC) Staff Superannuation Scheme v Mombasa Water Supply & Sanitation Co. Ltd [2017] eKLR and submitted that once a garnishee is brought to the proceedings, it is entitled to costs. The 3rd garnishee also submitted that it appointed the firm of Sheth & Wathigo to represent it. The said firm attended court and opposed the said proceedings on the ground that the referenced accounts were closed and not operational. It was the 3rd garnishee's submissions that the proceedings before the court were governed by Schedule (VI) Paragraph 14 (b) of the Advocates Remuneration (Amendment) Order 2014 and the Defendant/decree holder was to bear the costs of the garnishee as was held in the case of Maurice Odor Nikon vs Diamond Property Merchants Ltd and Co-Operative Bank Of Kenya Ltd (1st garnishee) and Equity Bank of Kenya Ltd (3rd garnishee) [2020] eKLR.

11. The 2nd garnishee in its submissions set out the factual background of the matter and submitted on who should pay its costs. The 2nd garnishee relied on Order 23 Rule 1 of the Civil Procedure Rules and submitted that upon service of the present proceedings it appointed an advocate who filed pleadings and appeared in court on 10/08/2023. Even though it was discharged from the present proceedings its costs should be borne out of the plaintiff's restricted account with the 5th garnishee as was held in the case of Nyandoro & Company Advocates vs National Water Conservation & Pipeline Corporation; Kenya Commercial Bank Group Limited (Garnishee) [2021] eKLR. The 2nd garnishee also relied on the case of Board of Trustees, National Water Conservation & Pipeline Corporation (NWCPAC) Staff Superannuation Scheme v Mombasa Water Supply & Sanitation Co. Ltd [2017] eKLR and submitted that the recovery of costs from the restricted account be done before the settlement of the judgement debt to the defendant. The 2nd garnishee concluded its submissions by seeking that its costs be paid by the plaintiff and the same be ordered to be recovered from the plaintiff's account with the 5th garnishee that had been restricted through the present proceedings.

12. The 5th garnishee in its submissions only identified one issue for determination which was whether the garnishees are entitled to costs and who is liable to pay for the same. The 5th garnishee relied on Order 23 Rule 4 and Order 23 Rule 10 of the Civil Procedure Rules before submitting that costs for garnishee proceedings should be retrieved from the money recovered from the garnishee order absolute. It was the 5th garnishee's submissions that upon service of the pleadings in the present matter, it appointed counsel who entered appearance and filed a replying affidavit and that were it not for the judgement debtor's default, the 5th garnishee would not have incurred legal costs for representation in the present matter. The 5th garnishee then urged the court to exercise its discretion in its favor and order that it recovers its costs from the judgement debtor's account (number withheld) that is held by the 5th garnishee. The 5th garnishee relied on the case of Nyandoro & Company Advocates v National Water Conservation & Pipeline Corporation; Kenya Commercial Bank Group Limited (Garnishee) [2021] eKLR in support of its arguments.

Plaintiff's Submissions to both Applications

13. The plaintiff in its submissions to both applications identified the following issues for determination:

i. Who between the plaintiff and the defendant is entitled to the orders sought in their respective application?

ii. Who ought to bear the costs of the two applications?

14. The plaintiff submitted that this court was functus officio and does not have the jurisdiction to interpret the Court of Appeal judgement on whether the order requiring the plaintiff to pay costs in respect of proceedings before this court were set aside. The plaintiff relied on the cases of Telkom Kenya Limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) [2014] eKLR and Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR in support of its arguments.

15. The plaintiff relied on the case of Nyandoro & Company Advocates v National Water Conservation & Pipeline Corporation; Kenya Commercial Bank Group Limited (Garnishee) [2021] eKLR and submitted that in its Memorandum of Appeal, it appealed against the whole judgement and decree of the court and sought the setting aside of the said decision in its entirety. The plaintiff submitted that the Court of Appeal in its judgement indicated that the plaintiff had sought to overturn the verdict of the trial court and it reversed the findings of the trial court and held that the lease allowed for early termination. The plaintiff further relied on Section 27(1) of the *Civil Procedure Act*, the cases of Joseph Oduor Anode v Kenya Red Cross Society [2012] eKLR & Stanley Kaunga Nkarichia v Meru Teachers College & another [2016] eKLR and submitted that it was absurd for the defendant to insist that it had a right to execute the taxed costs awarded by the decree which had been set aside by the Court of Appeal. In conclusion, the plaintiff sought that the defendant's application be dismissed with costs.

Defendant's Submissions on the Motion dated 2/8/2023

16. The defendant filed submissions to its application dated 2/08/2023 on 18/08/2023. The defendant set out the grounds on the face of the application and reiterated the contents of its supporting affidavit. The defendant also set out the contents of the plaintiff's replying affidavit and the orders that were issued by the court on 3/08/2023 and identified the following issues for determination:

i. Whether the defendant's counterclaim was dismissed by the Court of Appeal and whether the order requiring the plaintiff to pay costs in this suit was set aside by the Court of Appeal;

ii. Whether the garnishee order nisi should be made absolute to the extent of settling the taxed costs and interest;

iii. Who should bear the costs of this application;

17. On the first issue the defendant reiterated that there is no mention in the Court of Appeal judgment that its counterclaim had been dismissed. The defendant relied on the cases of Bell & another v I.L Matterello Limited (Civil Appeal 72 of 2019) [2022] KECA 168 (KLR)(18 February 2022) (Judgement) Neutral citation: [2022] KECA 168 (KLR), GMD v SAM [2020]eKLR and Julius Ndolo Sila v Kalpataru Power Transmission Ltd [2021] eKLR among other cases and submitted that the plaintiff did not seek in its Memorandum of Appeal to set aside of the order of costs.

18. On the second issue, the defendant relied on the case of Nyandoro & Co. Advocates v National Water Conservation & Pipeline Corporation; Kenya Commercial Bank Group Limited(Garnishee) [2021] eKLR and sought that the garnishee order nisi be made absolute and that the 5th garnishee be ordered to pay the taxed costs and accrued interest to the defendant.

19. On the issue of costs, the defendant relied on the case of Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others [2014] eKLR and sought that the costs of the garnishee proceedings be borne by the plaintiff/judgement debtor.

Defendant's Submissions On the Motion Dated 8/8/2023

20. The defendant in its submissions filed on 31/08/2023 reiterated the contents of its supporting affidavit to its application dated 2/08/2023 and submitted on the following issues:

    a. Whether the ex-parte orders issued on 3/08/2023 should be set aside;

    b. Who should bear the costs of this application and those of the garnishees.

21. On the first issue the defendant sought that the garnishee order nisi should be made absolute as the Court of Appeal only set aside the award of Kshs. 71,965,138.70 and the award of costs was not set aside. The defendant relied on the case of Paul Munenge Muiru v Patrick Thindiu Muiru [2006] eKLR and submitted that if the Court of Appeal wanted to disturb the award of costs it would have stated the same in the judgement unequivocally. The defendant reiterated that the plaintiff did not seek for the setting aside of the order of costs in its memorandum of appeal and only sought that the award of Kshs. 71,965,139.70/= be set aside.

22. On who should pay the costs of the garnishees, the defendant submitted that their costs should be borne by the plaintiff and that since the 1st garnishee did not appear, it is not entitled to any costs. It was the defendant's submissions that the garnishees who appeared be awarded Kshs. 10,000/= as costs.

Analysis And Determination

23. Upon considering the applications dated 2/8/2023 and 8/8/2023, the following issues arise for determination:

    a. Whether the garnishee order given on 3/08/2023 should be made absolute;

    b. Who should bear the garnishees' costs.

    a. Whether The Garnishee Order Given On 3/08/2023 Should Be Made Absolute.

24. At paragraph 7 of its submissions, the defendant quotes the replying affidavit of the defendant that "the respondent never sought the setting aside of the dismissal of its claim against the defendant nor the setting aside of the award of costs and those findings were never disturbed by the Court of Appeal." Again, at paragraph 11 of the same submissions the defendant states that "...it is our submission that what was set aside was the award of Kshs 71, 965,138.70 in line with the plaintiff's memorandum of appeal. that, then means that the award of costs was never set aside. It is also noteworthy that contrary to the plaintiff's submission that the entire judgment of this court was set aside, the true position is that there are limbs of the said judgment which were not disturbed by the Court of Appeal." The defendant continues to posit as follows in its submissions: "...we reiterate our submissions that if the court of appeal wanted to disturb the award of costs, that would have been clearly stated in the judgment in unequivocal terms." At paragraph 12 the defendant further avers: "It is trite that a court of law cannot award that which has not been prayed for."

25. It is clear from the defendant's application and submissions that the main grounds upon which costs are sought are as follows:

    i. Costs were awarded in trial court and not set aside in the Appeal.

ii. The Plaintiff never applied for the setting aside of the order on costs in his memorandum of appeal yet pleadings bind parties.

26. The relevant question that cumulatively arises from the two issues framed above then is: which limbs of the trial court judgment were not disturbed by the Court of Appeal? Since the retention or upholding of such limbs by the appellate court is the mainstay of the defendant's argument for costs, the defendant must prove them, and if there are limbs that were indeed not disturbed, then this court will surely uphold the defendant's submission.

27. The brief history of this matter is as follows: Judgment was delivered in this matter on 27/04/2022 and the counterclaim allowed in the following terms:

i. A declaration is hereby issued that the lease entered into between the defendant and the plaintiff on 1/05/2016 remains in force and has no break clause and the plaintiff is obligated to continue paying the stipulated rent up to 30/04/2022.

ii. A declaration is hereby issued that the purported notice of termination of lease issued by the plaintiff dated 10/07/2020 is null and void in law.

iii. Kshs. 40,000,000/= (fourty million) all inclusive, being the cost of restoring the premises to its original state, in terms of the consent recorded on 2/06/2021.

iv. Kshs. 71,965,138.70 (Seventy-one million, nine hundred sixty-five thousand, one hundred thirty-eight shillings, seventy cents) being rent for the period 1/02/2021 to 30/04/2022.

v. Costs of the counterclaim together with interest.

28. At this preliminary point it is noteworthy, and the significance of this will be evident later in this ruling, that before the definitive orders were issued in the judgment, it was recorded at paragraph 9 that a consent for the sum of Kshs 40,000,000/= had been recorded in favour of the defendant being the cost of restoring the premises to its original state which payment was to be made within 40 days from the date of the consent. The matter proceeded to hearing after recording the said consent.

29. The plaintiff being dissatisfied with the said judgement appealed to the Court of Appeal vide the Memorandum of Appeal dated 14/06/2022 where it sought the following orders:

i. That the judgement, orders and decree issued in Nairobi Environment and Land Court Case No. E19 of 2020; Jomo Kenyatta University of Agriculture and Technology vs Kwanza Estates Limited on 27th April, 2022 ordering the Appellant to pay Kshs. 71,965,138.70 be quashed and set aside in its entirety.

ii. That the appellant be awarded costs of this appeal.

iii. That in the interest of justice, this honorable court does make any other order it may deem just, fair and for a conclusive determination of this appeal before this honorable court.

30. While the plaintiff's appeal was pending before the Court of Appeal, the plaintiff filed the application dated 17/05/2022 seeking for stay of execution of the judgement pending appeal which was allowed on 4/10/2022 and the Court stated as follows:

> " In conclusion therefore, the plaintiff's application dated 17/5/2022 is allowed and a stay of execution of the judgment in this suit is granted on condition that the plaintiff deposits in

a fixed joint interest earning account in the names of both counsel for the parties the taxed costs of the suit within 30 days of the issuance of a certificate of taxed costs."

31. The certificate of costs was issued on 19/05/2023 for the sum of Kshs. 8,211,675.80 and the Court of Appeal delivered its judgment on 16/06/2023. The Court of Appeal in its judgement allowed the plaintiff's appeal in the following terms:

    i. The appellant shall pay the cost of restoration of the suit premises to its original state at an all-inclusive price of forty million (Kshs. 40,000,000/=);

    ii. Each party shall bear its own costs.

32. It was also the defendant's case that despite the conclusion of the appeal, the plaintiff did not pay the said costs that it had been ordered to pay on 4/10/2022 and so it filed the application dated 2/08/2023 seeking that a garnishee order be issued against the 1st to 5th garnishees for the sum of Kshs. 9,660,530.40, being the costs that had been awarded together with the interest accrued. The plaintiff opposed the said application on the ground that the said order had been overtaken by events since the Court of Appeal in its judgement had dismissed the defendant's counterclaim and so the taxed costs and accrued interest could not be payable to the defendant. In response the defendant argued that the plaintiff in its appeal only sought for the setting aside of the award of Kshs. 71,965,138.70 and not the costs.

33. I am inclined to disagree with the argument of the defendant that the plaintiff in its memorandum of appeal only sought for the setting aside of the award of Kshs. 71,965,138.70 and not the costs. This is evident in the prayers sought in the Memorandum of Appeal. In its Memorandum of Appeal, the Plaintiff, as already stated, sought that the judgment, orders and decree be quashed and set aside in its entirety. The keywords being 'in its entirety'. The Oxford Dictionary meaning of "entirety" is 'the whole of something'. In this case therefore, the prayer that the judgment, orders and decree be quashed and set aside "in its entirety" was meant to set aside all that was said and awarded in the impugned judgment by this trial court, including the issue of party and party costs, but excluding the issue of restoration costs as shall discuss later in this ruling.

34. Perchance this position is wrong, it behoves this court to examine the alternative position that can be arrived at by way a wholistic examination of the trial court and the appeal.

35. Firstly, the amount of Kshs 40,000,000/= contained in both judgments was not an issue at the trial though it is equally clear from the judgment of the Court of Appeal that it allowed the appeal and ordered the plaintiff to pay Kshs. 40,000,000/= as costs of restoration of the suit premises to its original state. The Court of Appeal did not specifically address the issue of costs in the trial court. The Court of Appeal order regarding the Kshs 40,000,000/- revives a memory of the consent entered into for the same sum between the parties on 2/6/2021 before the suit proceeded to hearing. The concession by the plaintiff that it was liable to pay that sum meant that it was not an issue for determination before the trial court any more after the consent. It virtually ceased being in the pleadings for all intents and purposes. In the Meya Agri Traders Ltd v Elgon House (2010) Ltd (Civil Appeal 15 of 2020) [2023] KECA 574 (KLR) (26 May 2023) (Judgment) the court stated that "...that which is not in the pleadings is not triable in the course of a case." That notwithstanding an order that the said sum be paid to the defendant by the plaintiff was included in the final orders in the trial court's judgment which cited the consent as it issued the orders. That may have been just to emphasize the consent that the parties had entered into and nothing more, and there is no prejudice occasioned by it. The Court of Appeal judgment on its part never cited the consent directly, but the wording of its final orders was almost on all fours with the consent's. It is the case as held in Kenya Commercial Bank Ltd Vs Benjoh

Amalgamated & Another Nairobi CA 276 Of 1997 that the consent order recorded to the parties could not be interfered with on appeal, and indeed the appellate court never at any time attempted to interfere with it. The plaintiff maintained throughout the proceedings in respect of the applications at hand that it had defrayed the said amount to the defendant in compliance with the consent and attached its payment vouchers made within the 40-day payment window provided for in the consent (see ground no (i) at the foot of the motion dated 8/8/2023 and paragraph 10 of the supporting affidavit attached thereto) and the defendant has not controverted that allegation.

36. Dismissing the defendant's cross-appeal, the Court of Appeal stated as follows:

> " In conclusion, and following the foregoing analysis, we find that the appellant's appeal has merit and is hereby allowed in the following terms:
>
> i. The appellant shall pay the cost of restoration of the suit premises to its original state at an all-inclusive price of forty million (Kshs 40,000,000/=);
>
> ii. Each party shall bear its own costs."

37. From the foregoing, it is decipherable that the success of the plaintiff's appeal was total and not partial, albeit that, at the discretion of the Court, it was not awarded the costs thereof.

38. There are several necessary implications of that final order from the Court of Appeal. First, though the fact is not expressly stated in the appellate order itself, is that the ELC decision was entirely set aside.

39. Secondly, the setting aside of the decision of the ELC did not include the setting aside of the consent order, and for the avoidance of doubt the Court of Appeal expressly extricated the consent order and preserved it in its own orders.

40. Thirdly, the setting aside therefore obviously excludes the consent related order in the ELC judgment and is only applicable in respect of the rest of its decision regarding all other limbs of the prayers granted, to wit: (a) the declaration that the lease entered into between the defendant and the plaintiff on 1/05/2016 remains in force and has no break clause and the plaintiff is obligated to continue paying the stipulated rent up to 30/04/2022. (b) the declaration that the purported notice of termination of lease issued by the plaintiff dated 10/07/2020 is null and void in law. (d) Kshs. 71,965,138.70 (Seventy-one million, nine hundred sixty-five thousand, one hundred thirty-eight shillings, seventy cents) being rent for the period 1/02/2021 to 30/04/2022. (e) Costs of the counterclaim with together with interest.

41. Fourthly, with the order of the payment of the sum of Kshs 71,965,138.70 vacated, it begs the question what sum could in such circumstances be used by a taxing master in the computation of costs, yet the costs are at the centre of the present applications; on that basis alone, it would be grave injustice to the plaintiff if this court made the garnishee order absolute as sought by the defendant. In any event, what would be the essence of parties seeking or a court granting an order for stay of execution pending appeal, if an unsuccessful respondent or judgment debtor in the primary suit is allowed to proceed with execution of costs in the primary suit even after an appeal is determined to their detriment?

42. Fifthly and most importantly, it is on the basis of the defendant's counterclaim that orders against the plaintiff had been issued by the ELC. By virtue of the success of the plaintiff's appeal (save the consented sum of Kshs 40,000,000/= for restoration) the whole of the Counterclaim was impliedly thrown out. The Kshs 40,000,000/= was agreed between the parties midstream through the proceedings and whether it was due and payable by the time of hearing was therefore no longer a triable issue in the suit or in the appeal. The record does not demonstrate that the plaintiff at any time disputed the existence of the lease or its duty to comply with Clause 5.5 thereof. It merely sought release from the recurrent duty to pay rents. The Court of Appeal stated as follows regarding the conduct of the

plaintiff which statement persuades this court that the plaintiff was intent or likely to have complied with Clause 5.5 of the lease:

> " The appellant in good faith continued to make payments as required up to January 2021 long after seeking to be released from the lease agreement vide a letter dated 10th July 2020."

43. In contrast the Court stated immediately thereafter as follows regarding the conduct of the defendant:

> " Through the respondent's own actions of restricting the appellant's exit it curtailed its own chances of entering into business arrangements with other entities."

44. From the foregoing it is evident that the defendant prevented the plaintiff from exiting the premises when the latter so wished to and the plaintiff therefore filed the present suit seeking inter alia the following order:

> "(f). a permanent injunction restraining the defendant by itself, or through its agents, servants, employees or assigns from harassing, causing disturbance or in any way being a nuisance to the plaintiff, and/or barring /preventing the applicant from vacating, exiting, and/or leaving the premises known as Kwanza House Building Block 9/90 Nakuru Municipality."

45. Further, in the defendant's witness statement of one Evans Marube it was stated as follows:

> " We had been instructed not to allow any person to remove the distrained goods from the suit premises without a valid court order or instructions from the landlord."

46. Having perused the record, I find no evidence from the defendant that the plaintiff's attempts to be released from the terms of the lease included attempts at release from compliance with Clause 5.5 of the lease. All the Plaintiff wanted through the present suit was to vacate the premises and be released from the onerous obligation of paying the rent while it had no resources to do so. It even filed two applications dated 16/11/2020 and 16/12/20 respectively, seeking an exit from the premises, both which were dismissed due to opposition by the defendant. The basis of the 2 applications was that the Plaintiff (obviously on behalf of the owner) was served with a notice by a roads authority (KeNHA) whose effect was that it was required to demolish the leased premises for encroaching on a road reserve which demolition would make it untenable to continue with the lease. One cannot easily know when at last the defendant's heart softened enough to allow the plaintiff to vacate the premises or if indeed it ever did so. However, an indicator that it never did may be that the defendant's director testified in court that the plaintiff "unprocedurally" vacated on 31/1/2021.That is a date after the commencement of the present suit. No proof of demand to comply with Clause 5.5 was demonstrated to have been made after the exit for it to form the basis of levelling allegations of refusal against the plaintiff. It is quite instructive that the plaintiff agreed to the payment of restoration expenses before the hearing of the main suit, and paid. In the circumstances of the Plaintiff's very acrimonious exit, and the fact that it occurred during the pendency of the present suit, it is this court's view that the defendant failed to establish in the pleadings or at the hearing that the plaintiff willfully refused to comply with the contents of Clause 5.5 for that refusal to constitute a cause of action with regard to the restoration expenses. This Court cannot therefore consider the issue of restoration expenses to have been a triable issue before the trial court.

47. Sixthly, the wholly successful appeal also meant that the order of dismissal of the plaintiff's suit by the ELC was set aside entirely. The appellate court's findings lead to the logical conclusion that the

plaintiff had wholly proved its claim in the ELC and that the defendant had wholly failed to prove its counterclaim. Section 27 of the *Civil Procedure Act* provides that costs follow the event. The provisions of that section are as follows:

> " Subject to such conditions and limitations' as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction shall be no bar to the exercise of those powers:
>
> Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order"

48. By the foregoing provisions, if a litigant fails to prove his claim then he fails to get costs unless the court specifically orders, and such orders on costs which depart from the general principle must be accompanied by reasons therefor. To best illustrate this, in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR the Supreme Court quoted the case of Joseph Oduor Anode v. Kenya Red Cross Society, Nairobi High Court Civil Suit No. 66 of 2009 [2012] eKLR per Odunga, J. as follows:

> " ...whereas this Court has the discretion when awarding costs, that discretion must, as usual, be exercised judicially. The first point of reference, with respect to the exercise of discretion is the guiding principles provided under the law. In matters of costs, the general rule as adumbrated in the aforesaid statute [the *Civil Procedure Act*] is that costs follow the event unless the court is satisfied otherwise. That satisfaction must, however, be patent on record. In other words, where the Court decides not to follow the general principle, the Court is enjoined to give reasons for not doing so. In my view it is the failure to follow the general principle without reasons that would amount to arbitrary exercise of discretion ..."

49. Also so said the Supreme Court in Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR:

> "
>
> " (14) So the basic rule on attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to penalize the losing party; rather, it is for compensating the successful party for the trouble taken in prosecuting or defending the suit. In Justice Kuloba's words [Judicial Hints on Civil Procedure, at p.94]:
>
> "[T]he object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure...Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action."

50. What was before the ELC in the present dispute was not a public interest case but a battle for private interests and the position in Harun Mwau & Others Vs Attorney General & Others NBI HC Petition 65 Of 2011 [2012] eKLR does not apply. In that case it was held as follows:

> " In matters concerning public-interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the

law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed. Costs should therefore not be imposed on a party who has brought a case against the State but lost. Equally, there is no reason why the State should not be ordered to pay costs to a successful litigant."

51. Then, if the Appellate court confirms that a litigant had proved his claim at the trial, then how can he remain condemned to pay the costs awarded against him in the case? It would be absurd in such circumstances to also hold that an order vacating costs must be expressly issued by the appellate court for the cost to be deemed to be vacated. Any interpretation of the appellate finding that supports the idea that costs are payable to the defendant after the success of the appeal in this particular dispute may elicit an absurd conclusion that a litigant may file a claim in a superior court and still automatically earn costs despite failure to prove its claim. The reasoning applicable in the present instance is that when the Court of Appeal stated simply that "...we find that the appellant's appeal has merit" (see para 39 of the appellate court judgment) and not only refrained from making any positive order against the plaintiff but also vacated all the orders of the superior court (save the consent order I have addressed elsewhere), the defendant was consequently bereft of any order not only from both the suit and the counterclaim, but also from the appeal and the cross-appeal, upon which it could have premised its claim for costs. Its claim having totally failed, the defendant, and amazingly so, did not count itself lucky not to have been condemned to the trial costs by the Court of Appeal, but instead went aggressively after the Plaintiff for costs.

52. Therefore, though it is trite that courts normally award only orders that have been sought, and the defendant rightly cites Bell & Anor v I.L. Matterello (supra) I hardly think that the rule should be applied permissively in respect of costs where a statute, the CPA as per Section 27, provides a general principle that costs follow the event. Indeed, the proper position in the practice of litigation is that the exception to that general principle is that a court has discretion to award costs to a party depending on the circumstances of the case. Costs are therefore not a matter affected by pleading only as they are expressly provided for in the law. While dealing with the principle that only orders pleaded can be awarded in Bell & Anor v I.L. Materello (supra) the court wrestled with the issue of whether exemplary damages and special damages, which were not pleaded by the parties, should have been awarded by the trial court; it arrived at a mixed result where it found that the suo motu introduction by the trial court of exemplary damages was in improper exercise of inherent jurisdiction power and in error while the suo motu grant of the special damages of Kshs 270,000/= was upheld on the basis that the same power was properly applied to avoid re-litigation. The Appellate court also reasoned that it was also proper to order the Ksh 270,000/= to be refunded under the general prayer "any other relief..." because it was "consequential to the other claims put forth by the respondent."

53. In Julius Ndolo Sila (supra) the grounds of appeal in the memorandum showed considerable contrast with the prayers sought in review, the latter which sought to introduce new remedies not in the former. The court correctly stated that an application for review is not an opportunity for the applicant to add new prayers which to him were necessary but not included in the memorandum of appeal, and stated that it could not grant such prayers.

54. The defendant further relied on GMD v SAM [2020] eKLR. In that case where an appellant filed a memorandum of appeal in person, the court stuck to what was sought in the memorandum of appeal notwithstanding that the prayers were wrongly sought and stated that:

> " ...the principal pleading in an appeal is the Memorandum of Appeal. In the instant cause, the Memorandum of Appeal on record, makes an ambiguous and un unequivocal prayer that the judgment off the lower court be set aside. As an Appellate Court, I cannot possibly

seek to correct that anomaly for her, for I am bound to consider the appeal based on the pleadings and grants such prayers as are sought in that pleading."

55. Further on, in GMD v SAM [2020] eKLR the court observed as follows:

> "Yet the rule that a party is bound by its pleadings applies to all parties whether the act in person or through an advocate the court cannot possibly step in and try to amend or rectify pleadings for any party so that they can make sense, for doing so would amount to descending into the arena of conflict and playing the partisan role of helping out one of the parties."

56. It must be observed however that in the GMD case (supra) the court had good reason to stick to what was pleaded in the memorandum of appeal, for it concerned the substance of the dispute, which has to be expressly pleaded in every litigation, and not the costs of the proceedings in the trial court. Furthermore, that judgment sought to be vacated in the GMD case (supra) had already been overtaken by an order of review.

57. The decision in Bernard Aswani Vs Reuben Mburu Civil Appeal No 136 Of 2019 was also relied on by the defendant. However, that decision must be distinguished in that contrary to the position in the present proceedings where the appellant successfully sought that the appeal be allowed, the memorandum of appeal sought no orders at all and consequently the appeal failed.

58. In the Paul Munenge Muiru case (supra) the court also held that it can not grant a prayer or an order not sought in the memorandum of appeal. The decision of Paul Munenge Muiru V Patrick Thindiu Muiru 2006 eKLR relied on by the defendant must also be distinguished on the ground that the memorandum of appeal in that case, in contrast with the plaintiff's herein, was very economical with his pleading of the prayers in the appeal and merely sought that "the appeal be allowed with costs" without asking for setting aside of judgment. The only relevant omission in the present plaintiff's memorandum was a prayer specifically seeking that the order on costs in the lower court be set aside.

59. The defendant also refers to Form F provided for under Rule 88(3) of the Court of Appeal Rules 2022 as the format for appeals, and points out that it specifically prompts an appellant to state expressly the prayers that he seeks, yet the plaintiff never complied with it. However, Rules are subsidiary to a principal Statute and can not be deemed to override the provisions of Section 27 CPA regarding the application of the general principle that costs follow the event where the court has not exercised its discretion to award them to a party.

60. In relation to costs in this case, a permissive application of the rule that only prayers sought can be granted would be a bad precedent and a loophole for a mischief to creep into our jurisprudence for the reason that logically, the setting aside, even when it did not include an appellate order expressly setting aside either the dismissal of the plaintiff's claim against the defendant, or the order granting the defendant costs, must be deemed to have set aside both the dismissal and the order on costs.

61. Moreover, it is trite that the duty of the appellate court is to consider the dispute afresh, obviously having in mind certain considerations the guiding principles being that it will normally not interfere with a trial court's discretion unless, as stated in Price & another v Hilder [1984] eKLR, (quoting Mbogo vs shah 1968 EA 93)

> "...it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into

consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

62. In the case of Meya Agri Traders Ltd v Elgon House [2010] Ltd (Civil Appeal 15 of 2020) [2023] KECA 574 (KLR) (26 May 2023) (Judgment) the Court of Appeal outlined its obligations in a first appeal as follows:

> " This is a first appeal and the realm of our mandate under Rule 31(1) of the Court of Appeal Rules, 2022 is to independently reappraise the evidence and draw our own conclusions. Perhaps to buttress the exercise of this mandate, we are guided by the threshold set by this Court in Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, stating that:"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

63. Therefore, where a court sitting on appeal makes a determination that each party shall bear its own costs, as in the case herein, that determination is considered final unless otherwise and procedurally overturned. Also, if the appellate court, clothed in the garments of the trial court, adopting the perspectives of that court, weighing, re-evaluating, re-assessing and re-analyzing the evidence draws the conclusion that the Defendant had completely failed to prove its counterclaim at the trial, that finding is as good as a finding made by a trial court at first instance. And this is where the general principle that "costs follow the event" will significantly affect the defendant, because no court will dismiss a counterclaim, allow the plaintiff's claim and then award the counterclaimant the costs of the entire suit. Implicitly therefore, any costs awarded a counterclaimant in such a scenario are automatically vacated by the appeal judgment that nullifies his entire victory.

64. Consequently, from a wholistic perspective of the now resolved dispute this court finds that it would be oppressive and contrary to the interests of justice to burden the now successful appellant (formerly an unsuccessful plaintiff) with an order of costs arising from the litigation before the trial court. That the Court of Appeal distanced itself from any possibility of an award of costs for the appellate proceedings to any of the litigants and ordered that each should bear their own is quite a significantly bold signpost visible to all and sundry, and which guides this court in applications such as the present. That was a just decision in my view. Drawing from the wisdom of that court this court deduces that in the circumstances of the present case the defendant ceased to deserve any costs from the plaintiff upon the total success of the plaintiff's appeal.

b. Who should bear the Garnishees' costs and the costs of the present proceedings in the two applications?

65. This court had in its order issued on 10/08/2023 discharged the 1st to 4th garnishees as the 5th garnishee had indicated that the plaintiff's account it hosted (number withheld) had a credit balance of Kshs. 34,468,907.30 as at 9/08/2023. The 1st garnishee did not enter appearance. The 2nd and 5th garnishees argued that their costs should be borne by the plaintiff from its account with the 5th garnishee while the 3rd garnishee submitted that its costs should be borne by the defendant. The defendant sought that the garnishees' costs be borne by the plaintiff while the plaintiff did not address itself on the issue of the garnishees' costs in its submissions.

66. Order 23 Rule 4 of the Civil Procedure Rules provides as follows:

> " 4. If the garnishee does not dispute the debt due or claimed to be due from him to the judgment-debtor, or, if he does not appear upon the day of hearing named in an order nisi, then the court may order execution against the person and goods of the garnishee to levy the amount due from him, or so much thereof as may be sufficient to satisfy the decree, together with the costs of the garnishee proceedings; and the order absolute shall be in Form No. 17 or 18 of Appendix A, as the case may require."

67. The court in the case of Nyandoro & Company Advocates v National Water Conservation & Pipeline Corporation; Kenya Commercial Bank Group Limited (Garnishee) [2021] eKLR while considering the provisions of Order 23 Rule 4 of the Civil Procedure Rules stated as follows;

> " 14. The above provision is explicit where the debt is not disputed. The Garnishees admitted the claim in its affidavit sworn by Gordon Winani dated 21st May 2020. It not only confirmed the credit balances in the accounts but it also attached Bank Statements in support thereof. The garnishee confirmed willingness to comply with this court's orders. Consistent with the provisions of Order 23 Rule 4 of the Civil Procedure Rules, 2010, I find absolutely no bar either legal or equitable preventing this court from invoking the provisions of Order 23 Rule 4.
>
> 15. Accordingly, I order that the Garnishee Order Nisi made on 13th March 2020 be and is hereby made absolute. Execution be and is hereby issued against the Garnishee directing it to pay the amounts in account numbers 111xxxxxxx and 112xxxxxxx, so much thereof towards the satisfaction of the decree and costs of these Garnishee proceedings. The Garnishee shall recover its costs from the sums in the said accounts. The Judgment-Creditor shall recover the costs of these garnishee proceedings from the said accounts."

68. In the present matter, it is my view that the 5th garnishee can recover its costs. However, as the defendant's application was quite unnecessary, it shall meet those costs which I assess in the sum of Kshs 30,000/- (thirty thousand shillings only) bearing in mind the 5th Garnishee's protracted participation in these proceedings. I also note that the joinder of only the 5th Garnishee alone would have sufficed to secure the costs as then taxed. It was unnecessarily punitive and oppressive to have the defendant join parties other than the 5th garnishee and my in-depth examination of the record found no justification for that action. Therefore, the 2nd, 3rd and 4th garnishees are each awarded Kshs. 20, 000/= (Twenty Thousand shillings only) being costs of the garnishee proceedings and the same shall be borne by the defendant who shall also bear the Plaintiff's costs of both applications.

69. The final orders on the two applications are therefore as follows:

a. The application dated 2/8/2023 is hereby dismissed with costs to the plaintiff;

b. Prayer No 2 in the application dated 8/8/2023 is hereby granted as prayed and the garnishee orders made ex parte on 3/8/2023 in so far as they were made against the 5th Garnishee are now set aside;

c. For the avoidance of doubt all the orders made as against the 5th garnishee on 10/08/2023 are also set aside;

d. The 5th garnishee shall be entitled to costs of Kshs. 30,000/- (Thirty thousand shillings only) to be paid by the defendant;

e. The 2nd, 3rd and 4th garnishee shall be paid costs of Kshs 20,000 (Twenty Thousand shillings only) each by the defendant;

f. The costs of the application dated 8/8/2023 shall be borne by the defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 1ST DAY OF FEBRUARY 2024.

MWANGI NJOROGE

JUDGE, ENVIRONMENT AND LAND COURT, MALINDI.