



Auto Hauliers (K) Limited v Ministry of Lands and Physical Planning & 4 others (Environment & Land Petition 19 of 2022) [2024] KEELC 7411 (KLR) (5 November 2024) (Ruling)

Neutral citation: [2024] KEELC 7411 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND PETITION 19 OF 2022

LL NAIKUNI, J

NOVEMBER 5, 2024

IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 1, 10, 19, 21, 22, 23, 24, 40, 47, 94, 95, 114, 124 AND 125 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE LAND ACT, NO. 6 OF 2012

AND

IN THE MATTER OF: THE NATIONAL LAND COMMISSION

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015

BETWEEN

AUTO HAULIERS (K) LIMITED PETITIONER

AND

MINISTRY OF LANDS AND PHYSICAL PLANNING 1ST RESPONDENT

LAND REGISTRAR MOMBASA 2ND RESPONDENT

NATIONAL LAND COMMISSION 3RD RESPONDENT

DIRECTOR OF SURVEY 4TH RESPONDENT

THE HON ATTORNEY GENERAL 5TH RESPONDENT



RULING

I. Introduction

1. What is before the Honourable Court for its determination is the Notice of Motion application dated 9th September, 2024 by the Honourable Attorney General, the 5th Respondent/ Applicant herein. It was brought under the provision of Sections 1A, 3A and 99 of the Civil Procedure Act Cap 21, Rules 19 and 25 of the Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules 2013 and all other enabling provisions of the law.
2. Upon service of the application to the Petitioners, they responded through a replying affidavit dated 10th September, 2024.

II. The Applicant's case

3. The Applicant sought for the following orders: -
 - a. Spent.
 - b. That order number 5 in the Judgment and decree be rectified and or clarified to give clarity to the Judgment and decree of court.
 - c. That the costs of the Application in the course.
4. The application by the Applicant herein was premised on the grounds, testimonial facts and averments made out under the 8 paragraphed Supporting Affidavit of –Emmanuel M. Makuto, an Advocate of the High Court of Kenya and Senior State Counsel attached with the State Offices of the Honourable Attorney General, County of Mombasa sworn and dated the same day with the application. The Applicant averred that:
 - i. The Judgment was delivered in this matter on 16th May, 2023. A copy of the judgment was annexed herewith and marked as “EMM – 1”.
 - ii. A decree extracted and or issued on 4th July, 2023. A copy of the decree was annexed herewith and marked as “EMM – 2”.
 - iii. In the 5th Order of the judgment and decree the trial court awarded a sum of Kenya Shillings Ninety Million (Kshs. 90,000,000/-) as general damages being 5% of the quantified damages of (Kshs. 360,000,000/-) for loss of user on the unconstitutional and unlawful acquisition of land to the government and subsequent orders from the year 2017.
 - iv. The award mentioned herein above was lacking in clarity to the extent that 5% of a sum of Kenya Shillings Three Hundred & Sixty Million (Kshs. 360,000,000/-) was a sum of Kenya Shillings Eighteen Million (Kshs. 18,000,000/-) and not a sum of Kenya Shillings Ninety Million (Kshs. 90,000,000/-).
 - v. Unless the trial court rectified the error or clarified the award, the Respondents were unable to settle the decree the subject matter of this application and interest will continue to accrue on the decretal sum of the detriment of the public.
 - vi. The affidavit was in support of the application before the Court.



III. The Petitioners/ Respondents' case

5. The Petitioners opposed the Notice of motion application through an 8th Paragraphed Replying Affidavit sworn by Tasneem Kasmani Moolraj, the Advocate of the High Court of Kenya and practising in the name and style of K.A. Kasmani & Company Advocates herein. The deponent averred as follows:-
- a. The AG's application dated 9th September, 2024, revolved around the interpretation of paragraph 101(e) of this Court's judgment dated 16th May, 2023.
 - b. Prayer 40(e) of the Petitioner's petition dated 9th May, 2022 prayed for "General Damages for Loss of use of the suit property from 2017 to be assessed by this Honourable Court and an order of Mandamus, compelling the 2nd Respondent to pay to the Petitioner the said assessed sum, together with interest at 12% per annum, from the date of judgment";
 - c. Paragraph 101 of this Honourable Court's ruling stated "In the long run, having intensively and thoroughly deliberated on all the framed issues herein, this Honorable Court arrives at the finding that the Petitioner has succeeded in all the prayers sought from their filed Petition. For avoidance of doubt, I proceed to grant the following orders".
 - d. Therefore from reading of the preamble to the Specific awards, it was clear and obvious that the Petitioner succeeded in his prayers with regards to the loss of use.
 - e. Paragraph 101 (e) of the ruling was very clear in that General damages being 5% of the quantified damages of a sum of Kenya Shillings Three Hundred and Sixty Million (Kshs. 360,000,000/-) were awarded from the year 2017: this was 6 years to the date of close of pleadings on 21st November, 2022 when highlighting of submissions occurred.
 - f. Therefore if there was any calculation or clerical error it could only be that the loss of use was erroneously calculated at 5 years, instead of 6 full years (2017 – 2022) as follows Kshs 360,000,000/- x 5% x 6 = Kshs 108,000,000/-.
 - g. They would therefore very humbly prayed for the paragraph 101 (e) to be rectified and corrected to show the loss of use for the correct number of years and it read synonymously with Order (d) as follows:-

"That the Petitioner herein is awarded Kshs. 108,000,000/= as General Damages being 5% of the quantified damages of (Kshs 360,000,000/=) for loss of user on the unconstitutional and unlawful acquisition of land to the Government and subsequent orders for the year 2017, 2018, 2019, 2020, 2021 and 2022, together with interest at 12% per annum from the date of judgment.

IV. Submissions

6. On 9th October, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 9th September, 2024 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged a ruling date was reserved on 23rd October, 2024 by Court accordingly.



A. Oral Submissions by the 1st, 2nd, 4th & 5th Respondents/Applicants.

7. The 1st, 2nd, 4th & 5th Respondents/Applicants through their Advocates on record, Mr. E. Makuto, a Senior State Counsel attached with the State Office of the Honourable Attorney General orally made his submissions. He averred that the application dated 9th September, 2024 sought for clarification and rectification of Clause 5 of the Judgement delivered by this Honourable Court on 16th May, 2023. Specifically, according to the Counsel, that needed rectification was the following Order which read, inter alia:-

“the Petitioner herein is awarded a sum of Kenya Shillings Ninety Million (Kshs. 90, 000, 000.00/=) as general damages being 5% of the quantified damages of Kenya Shillings Three Hundred & Sixty Million (Kshs. 360, 000, 000.00/=) for loss of User on the unconstitutional and unlawful acquisition.....”

8. The Learned Counsel argued that clearly from the above calculation there existed arithmetic error. Instead of the awarded sum of Kenya Shillings Ninety Million (Kshs. 90, 000, 000.00/=) as general damages. It should have been a sum of Kenya Shillings Eighteen Million (Kshs. 18, 000, 000.00/=) as general damages.
9. The Counsel stated that he had read the replies by the Petitioners/Respondents and found that they were holding their calculations from date of the filing of the Petition. He opined that the Petitioners/Respondents had not provided when exactly their land was appropriated and taking that they were ones who drew the Petition, the last date was 11th May, 2022 to be applied.
10. He stated that the question that the award was for 5% for six (6) years was baseless as there was no evidence adduced to this effect during the trial. Further, had not indicated what economic activity they undertook on the land during this period or at all to warrant being awarded the general damages they sought from Court. In conclusion he urged Court to allow their application and grant the reliefs sought in order to allow the settlement of the Decree thereof.

B. Oral Submissions by the 3rd Respondent.

11. Mr. S. Mbutia Advocate for the 3rd Respondent fully supported the application. The Learned Counsel strongly held that there was an arithmetic error by Court while awarding the general damages. The amount should be 5% of the sum of Kenya Shillings Three Hundred and Sixty Million (Kshs. 360, 000, 000.00/=) which should be a sum of Kenya Shillings Eighteen Million (Kshs. 18, 000, 000.00/=) and certainly not a sum of Kenya Shillings Ninety Million (Kshs. 90, 000, 000.00/=) as had been already awarded by Court during the delivered Judgement of 16th May, 2023.
12. He urged Court to allow the application as prayed.

C. Oral Submissions by the Respondents.

13. While opposing the application, M/s. Moolraj Kasmani Advocate for the Petitioner/Respondent submitted briefly. The Learned Counsel informed Court that she would be relying fully on the contents of the 9 Paragraphed Replying Affidavit dated 10th September, 2024. According to her, from the filed Petition dated 9th May, 2022 under Prayer 40 (e) they prayed for general damages for loss of use of the suit land from the year 2017 to be assessed by this Honourable Court. They also sought for orders of mandamus issued compelling the 2nd Respondent to pay the Petitioner the said assessed sum together with interest at 12% per annum from the date of the Judgement. The Counsel referred court



to Paragraph 101 (e) of the Judgement and held that the Court had calculated the general damages for the loss of use for the five (5) years instead of six (6) years. It should be Kshs. 360, 000, 000.00/ X 5%X 6 = Kshs. 108, 000, 000/=.

14. The Learned Counsel submitted that since the application was brought under the provision of Section 99 of the *Civil Procedure Act*, Cap. 21 it should be rectified on the spot. She averred that the Petitioner had suffered a lot and being denied to enjoy the fruits of their Judgement.

V. Analysis & Determination.

15. I have carefully read and considered the pleadings herein by the 1st Defendant/Applicant, the myriad of cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
16. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has three (3) framed issues for its determination. These are:-
- a. Whether the Notice of Motion application dated 9th September, 2024 seeking to clarify and rectify Order 5 of the judgment and decree and to give clarity to the judgment and decree is merited?
 - b. Who will bear the Costs of Notice of Motion application dated 9th September, 2024.

Issue No. a). Whether the Notice of Motion application dated 9th September, 2024 seeking to clarify and rectify Order 5 of the judgment and decree and to give clarity to the judgment and decree is merited

17. Under this Sub – title, the main gist of the is whether the Court can rectify through an amendment of its order of 16th May, 2023 and rectify Order 5 of the Judgment. Section 99 of the *Civil Procedure Act* state as follows:
- “ 99. Amendment of judgments, decrees or orders
- Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.”
18. According to the provision of Section 99, clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may lead to an application such as the present. The errors that Section 99 seeks to cure are those the court may make while going about its business. In the case of “V. Karsandas Ramuga – Versus - Mansukhlal Jivuraji & Others 1965 E.A 700. It was held (ii) the words “at any time”. In the provision of Section 99 *Civil Procedure Act* allows the prayer of amendment to be exercised after the issue of formal order, (iv) a slip order will only be made where the court is fully satisfied that it is giving effect to the intention of the court at the time when judgment was given, or in case of a matter which was overlooked where it is satisfied beyond doubt as to the order which it would have made had the mater then been brought to his attention.
19. The Australian Civil Procedure has provisions in pari materia with section 99. As was stated in the case of “Newmont Yandal Operations Pty Limited – Versus - The J. Aron Corp & The Goldman Sachs Group Inc [2007] 70 NSWLR 411”, the inherent jurisdiction extends to correcting a duly entered judgment where the orders do not truly represent what the court intended.



20. It is a codification of the common law doctrine dubbed ‘the Slip Rule’, the history and application of which has a wealth of authorities both locally and from common law jurisdictions. It is a rule that applies as part of the inherent jurisdiction of the court, which would otherwise become *functus officio* upon issuing a judgment or order, to grant the power to reopen the case but only for the limited purposes stated in the section. Some of the applications of the rule are fairly obvious and common place and are easily discernible like clerical errors, arithmetical mistakes, calculations of interest, wrong figures or dates. Each case will, of course, depend on its own facts, but the rule will also apply where the correction of the slip is to give effect to the actual intention of the Judge and/or ensure that the judgment/order does not have a consequence which the Judge intended to avoid adjudicating on.
21. A court will, of course, only apply the slip rule where it is fully satisfied that it is giving effect to the intention of the court at the time when judgment was given or, in the case of a matter which was overlooked, where it is satisfied, beyond doubt, as to the order which it would have made had the matter been brought to its attention. In either case, the court may proceed on its own motion or on application by any party. As for the procedure, none is provided for under the Section 99 and therefore, under Order 51 Rule 1 of the Civil Procedure Rules a ‘Notice of Motion’ is the prescribed procedure.”
22. Be that as it may, while applying these legal reasoning and principles to the instant application, I find merit in the application and the prayer shall be granted as sought and the Court shall also put clarity on the fact that the amendment shall attract an interest for the five (5) years 2017, 2018, 2019, 2020, 2021 and 2022 when the matter was filed. There shall however be no orders as to costs of the same.

Issue No. b). Who will bear the Costs of Notice of Motion application dated 9th September, 2024.

23. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “Jasbir Rai Singh – Versus - Tarchalan Singh (2014) eKLR” and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, (2014) eKLR”.
24. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR”, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances. In this case, this Honourable Court has reserved its discretion in not awarding costs.

VI. Conclusion & Disposition

25. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, this court arrives at the following decision and makes below order:-
 - a. That the Notice of Motion application dated 9th September, 2024 be and is hereby found to have merit. Thus, the following shall apply:-
 - i. That the Petitioner herein be and is hereby awarded Kenya Shillings Eighteen Million Only (Kshs 18,000,000/-) being General damages of 5% of the quantified damages of Kenya Shillings Three Hundred Sixty Million Only (Kshs 360,000,000/-) for loss of user on the unconstitutional and unlawful acquisition of land to the Government with



interest from the 2017, 2018, 2019, 2020, 2021 and 2022 being a total sum of Kenya Shillings One Hundred and Eight Million (Kshs. 108, 000, 000.00/=).

- b. That there shall be no orders as to costs to the Notice of Motion application dated 9th September, 2024.

It is so ordered accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 5TH DAY OF NOVEMBER 2024.

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HON. MR. JUSTICE L. L. NAIKUNI,

ENVIRONMENT AND LAND COURT AT MOMBASA

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. M/s. Moolraj Kasmani Advocate for the Petitioners/ Respondent.
- c. M/s. Waswa holding brief for Mr. Makuto for the 1st, 2nd, 4th & 5th Respondents/ Applicants.
- d. No appearance for the 3rd Respondent.

