



**Musa & another v Kenya Railways Corporation & 2 others (Environment & Land  
Petition E020 of 2021) [2023] KEELC 612 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 612 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND PETITION E020 OF 2021  
SO OKONG'O, J  
FEBRUARY 2, 2023**

**BETWEEN**

**SOLOMON MUSA ..... 1<sup>ST</sup> PETITIONER**

**DANIEL OTIENO ARWA ..... 2<sup>ND</sup> PETITIONER**

**AND**

**KENYA RAILWAYS CORPORATION ..... 1<sup>ST</sup> RESPONDENT**

**PRINCIPAL SECRETARY, STATE DEPARTMENT OF HOUSING AND URBAN  
DEVELOPMENT ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. On July 15, 2022, the court entered judgment for the petitioners against the respondents jointly and severally for;
  1. A declaration that the respondents jointly and severally had violated the petitioners' rights and fundamental freedoms in the bill of rights.
  2. An order that the 1<sup>st</sup> respondent does engage the petitioners and all the project-affected persons in Shaurimoyo, Bondeni and Swahili villages in Muhoroni Sub-County in crafting a relocation action plan.
  3. A sum of Kshs 20,600,000/- as general damages for breach of the petitioners' fundamental rights.
  4. The costs of the suit.
2. On September 23, 2022, the petitioners filed their bill of costs for taxation by the deputy registrar together with their submissions in respect of the bill. The 1<sup>st</sup> respondent filed its submissions in respect



of the said bill of costs on October 7, 2022. The petitioners' bill of costs was fixed for taxation on October 11, 2022. On October 11, 2022, the petitioners' advocates did not appear in court for the taxation. At the request of the 1<sup>st</sup> respondent's advocate, the bill of costs was stood over to December 8, 2022 for mention for directions.

3. While the matter was pending directions by the deputy registrar on the taxation of the petitioners' bill of costs in respect of which the parties had filed submissions, the petitioners filed the notice of motion application dated October 27, 2022 now before me seeking leave of the court to execute the judgment of the court entered in their favour on July 15, 2022 before taxation of their bill of costs aforesaid. The application that was brought under section 94 of the *Civil Procedure Act* was based on the grounds set out on the face thereof and on the affidavit of the 1<sup>st</sup> petitioner, Solomon Musa sworn on October 27, 2022. The petitioners contended that the orders that were given by the court in favour of the petitioners in the said judgment were meant to redress breaches of the petitioners' fundamental rights and that the respondents were yet to comply with the same. The petitioners averred that failure on the part of the respondents to comply with the said orders meant that breaches of the petitioners' fundamental rights were continuing. The petitioners averred further that the taxation of the bill of costs filed by the petitioners would take some time thereby delaying the execution of the judgment of the court in favour of the petitioners.
4. The application was opposed by the 1<sup>st</sup> respondent through grounds of opposition dated December 14, 2022. The 1<sup>st</sup> respondent termed the petitioners' application an abuse of the process of the court. The 1<sup>st</sup> respondent contended that the application is contrary to the provisions of section 88 of the *Kenya Railways Corporation Act*. The 1<sup>st</sup> respondent averred that the taxation of the petitioners' bill of costs was underway and what the parties were waiting for was for the deputy registrar to give a ruling date. The 1<sup>st</sup> respondent submitted that there was no urgency that would warrant execution before taxation of the petitioner's bill of costs.
5. The application came up for hearing on December 19, 2022 when the petitioners' advocate relied entirely on the affidavit in support of the application and urged the court to allow the same. On his part, the 1<sup>st</sup> respondent's advocate also relied on the 1<sup>st</sup> respondent's grounds of opposition. He submitted that the parties had already filed submissions in respect of the petitioners' bill of costs and that in any event, execution cannot be levied against the 1<sup>st</sup> respondent. The advocates for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents informed the court that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were not affected by the application.
6. I have considered the application together with the affidavit filed in support thereof. Section 94 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya under which the present application was brought 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.'
7. The power to grant leave to a decree-holder to execute a decree before taxation is discretionary. The court's discretion must be exercised judiciously. The rationale behind the judicious exercise of



discretionary powers was underscored in *Patriotic Guards Ltd v James Kipchirchir Sambu [2018] eKLR* where the court stated as follows:

' It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.'

8. The burden was upon the petitioners to establish that it is necessary to execute the decree of the court issued herein before taxation. I am not satisfied that the petitioners have discharged this burden. I am of the view that this application was unnecessary. As at the time the application was being filed, the parties had already filed submissions in respect of the petitioners' bill of costs and what they were waiting for was a ruling date. I am not persuaded that there was such extreme urgency in the execution of the judgment of the court that the petitioners could not wait for the ruling on the taxation of their bill of costs. I have set out earlier in the ruling the orders that were made by the court on July 15, 2022. The petitioners have not convinced me that there is a compelling reason for the said orders to be executed before taxation. The only order capable of immediate execution is the monetary award of Kshs 20,600,000/-. I am in agreement with the petitioners that due to the circumstances under which they were evicted from their residential and business premises by the respondents, they need this money to reorganize their lives. This alone is however not a sufficient reason to allow them to execute the decree for the recovery of the said amount before taxation. The reason why a decree holder is required by the rules to execute a decree after taxation is to ensure that execution is carried out once for the principal award and the costs of the suit. This protects the judgment debtor from the costs and inconvenience associated with repeat executions. This protection accorded to the judgment debtor can only be waived for good reason. No such reason has been put forward by the petitioners.
9. The upshot of the foregoing is that the notice of motion application dated October 27, 2022 has no merit. The application is dismissed with costs to the 1<sup>st</sup> respondent.

**DELIVERED AND DATED AT KISUMU ON THIS 2<sup>ND</sup> DAY OF FEBRUARY 2023**

**S OKONG'O**

**JUDGE**

**Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

**Mr Omondi for the Petitioners**

**Ms Kavagi for the 1<sup>st</sup> Respondent**

**Mr Mwamba for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents**

**Ms J Omondi-Court Assistant**

