



**Republic v Minister for Lands & another; Muthoka & 3 others (Exparte Applicants)  
(Judicial Review Application 1 of 2017) [2023] KEELC 17295 (KLR) (3 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17295 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
JUDICIAL REVIEW APPLICATION 1 OF 2017  
TW MURIGI, J  
MAY 3, 2023  
IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR  
ORDERS OF CERTIORARI AND PROHIBITION.  
AND  
IN THE MATTER OF SECTION 8 & 9 OF THE LAW REFORM ACT.  
AND  
ARTICLES 23(3)(F) OF THE CONSTITUTION OF THE REPUBLIC OF  
KENYA, 2010**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**MINISTER FOR LANDS ..... 1<sup>ST</sup> RESPONDENT**

**PASCAL MUIVA NZYUKO ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**PETER SILETA MUTHOKA ..... EXPARTE APPLICANT**

**DANIEL MUTUNE MUTHOKA ..... EXPARTE APPLICANT**

**JOHN MUTISYA MUTHOKA ..... EXPARTE APPLICANT**

**JULIUS MUTINDA MUTHOKA ..... EXPARTE APPLICANT**



## RULING

1. Before me for determination is the Notice of Motion dated December 22, 2022 brought under Order 9 Rule 9, Order 21 Rule 12(2), Order 22 Rule 22, Order 51 of the Civil Procedure Rules, Sections 1A, 1B of the Civil Procedure Act and all other enabling provisions of the law, in which the Applicant seeks the following orders:-
  1. Spent.
  2. That the firm of Makundi & Co Advocates be allowed to come on record on behalf of the Applicant.
  3. That upon grant of prayer 2 above the Court be pleased to allow the Applicants herein to pay the taxed costs of Kshs 170,885/- by way of instalments of Kshs 15,000/- on or before the 15<sup>th</sup> day of every month.
  4. That a stay of execution of the certificate of costs dated August 18, 2021 be issued pending the hearing and determination of this application.
  5. That the costs of this application be provided for.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Julius Mutinda Muthoka sworn on his own behalf and on behalf of the 1<sup>st</sup> - 3<sup>rd</sup> Applicants on even date.

### **The Applicants Case**

3. The Applicants averred that subsequent to the dismissal of the judicial review application, the 2<sup>nd</sup> Respondent filed a Party and Party bill of costs which was taxed at Kshs 170,855/-.
4. The Applicants further averred that they are not in employment and proposed to liquidate the taxed costs with an initial payment of Kshs 35,000/- and thereafter in monthly instalments of Kshs 15,000/- payable on or before the 15<sup>th</sup> day of every month. They argued that they are apprehensive that the firm of Faith Agencies Auctioneers will attach and sell the proclaimed goods whose value exceeds Kshs 173,856/- if the orders sought are not granted.

### **The 2<sup>nd</sup> Respondent's Case**

5. Opposing the application, the 2<sup>nd</sup> Respondent vide his replying affidavit sworn on January 23, 2022 averred that the application is a delaying tactic aimed at denying him the fruits of his judgment. He averred that the Applicant has not offered security for the performance of the decree.
6. He further averred that it was not true that the Applicants never got an opportunity to challenge the bill of costs as the Applicants filed a preliminary objection dated March 4, 2020 which was dismissed. He further averred that the Applicants are endowed with wealth as 1<sup>st</sup> Applicant is employed as a pastor in Ebenezer Church Katunyoni while the other Applicants are engaged in meaningful employment.
7. The application was canvassed by way of written submissions.

### **The Applicants Submissions**

8. The Applicants submissions were filed on January 20, 2023.



9. On whether the firm of Andrew Makundi & Co Advocates should be granted leave to come on record for the Applicants, Counsel submitted that the Applicants are seeking leave for the firm of Makundi & Co Advocates to come on record on their behalf post judgment. He cited the provisions of Order 9 Rule 9 of the Civil Procedure Rules to buttress his argument.
10. Counsel further submitted that the Applicants are small scale farmers and they are unable to settle the taxed costs in lump sum but are willing to defray the same in monthly instalments of Kshs 15,000/-.
11. He contended that the Applicants have satisfied the requirements of Order 22 Rule 22 of the [Civil Procedure Rules](#) and urged the Court to allow the Applicants to liquidate the taxed costs in monthly instalments of Kshs 15,000/-.
12. To buttress his argument, Counsel relied on the case of [Freight Forwarders Ltd Vs Elsek & Elsek \(K\) Ltd](#) (2012) eKLR.

### **The 2<sup>nd</sup> Respondent's Submissions**

13. The 2<sup>nd</sup> Respondent's submissions were filed on February 6, 2023.
14. Counsel raised the following issues for determination:-
  - a. Whether the firm of Andrew Makundi & Co Advocates should be allowed to come on record for the Applicant.
  - b. Whether stay of execution and payment of monthly instalments should be granted.
  - c. Who should bear costs.
15. On whether the firm of Andrew Makundi & Co Advocates should be allowed to come on record for the Applicants, Counsel submitted that the Applicants right to representation is derogable as they have contrary to the provisions Article 159 2(b) of the [Constitution](#) instructed four law firms to act on their behalf in a bid to delay and/or obstruct justice.
16. On whether a stay of execution and payment of monthly instalments should be granted, Counsel submitted that the Applicants have not demonstrate any sufficient cause to warrant the grant of the orders sought.
17. Counsel further submitted that the Applicants have not met the requirements of Order 21 Rule 12(2) and Order 22 Rule 22 of the [Civil Procedure Rules](#) as they have not demonstrated that they will suffer if the orders sought are not granted. In addition, Counsel submitted that the Applicants are men of means as the 1<sup>st</sup> Applicant is a pastor while the other Applicants are security officers.
18. It was argued that the Applicants are deceitful and have come to court with unclean hands as they have peddled a narrative that they were not given an opportunity to challenge the party and party bill of costs. On costs, Counsel submitted the application is devoid of merit and the same should be dismissed with costs to the 2<sup>nd</sup> Respondent.

### **Analysis And Determination**

19. Having considered the application, the affidavits and the rival submissions, the following issues arise determination:-
  - i. Whether the firm of Andrew Makundi & Co should be granted leave to come on record for the Applicants.



- ii. Whether the Applicants can be allowed to pay the taxed costs in instalments.
20. The Applicants are seeking leave for the firm of Andrew Makundi & Co Advocates to come on record on their behalf post judgment. The applicable law that settles this issue is Order 9 Rule 9 of the [Civil Procedure Rules](#) which provide as follows:-
- “When there is change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court;
- a. Upon an application with notice to all parties; or
  - b. Upon consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”
21. It is therefore clear that under the provisions of Order 9 Rule 9 of the [Civil Procedure Rules](#) leave of Court must be obtained when an Advocate seeks to come on record post judgment.
22. The Respondent averred that the Applicant’s right to legal representation is derogable as he has been changing Advocates in a bid to delay or obstruct justice. Article 50(g) of the [Constitution](#) provides for fair hearing as follows;
- “Every accused person has the right to a fair trial which includes the right to choose and be represented by an Advocate and be informed of this right promptly.”
23. It is clear from the above provision that the Applicants right to legal representation cannot be taken away or compromised. In the present case, the Applicants did not file a consent but sought leave from the Court which I hereby grant.
24. The issue of whether the Applicants can be allowed to settle the taxed costs by way of instalment is a matter of discretion. Order 21 Rule 12 of the [Civil Procedure Rules](#) grants the Court power to order a judgment debtor to pay the decretal sum by instalments. The rule provides as follows:-
1. Where and in so far as a decree is for the payment of money, the court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be paid by instalments with or without interest, notwithstanding anything contained in the contract under which the money is payable.
  2. After passing of any such decree, the court may on the application of the judgment debtor and with the consent of the decree holder or without the consent of the decree holder for sufficient cause shown order that the payment of the amount decreed postponed or be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment debtor or the taking of security from him or otherwise as it thinks fit.”
25. It is clear from the above provision that the Court may allow the settlement of a decree by way of instalment. It is also clear that the Court in exercising its discretion must do so judiciously. In the case of *Keshval Jethabhai & Brothers Ltd Vs Saleh Abdul* (1959) EA 260 the court stated that;
- “the principles that should apply considering such an application namely each case must be considered in its own merit, mere inability to pay in full at once is not sufficient reason for exercising the discretion, the debtor should show bona fides by arranging prompt payment and that though hardship maybe a factor, the court has to consider whether indulgence



should be given to the judgment debtor without prejudice to the decree holder to show sufficient cause and justify indulgence.”

26. The Applicants submitted that the Court is empowered to grant a stay orders of execution of the taxed costs. In this regard Counsel cited Order 22 Rule 22 of the Civil Procedure Rules which provides as follows;

“22(1) The Court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for reasonable time to enable the judgment debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, decree of execution which might have been made by the court of the first instance or appellate court if execution has been issued thereby, or if application of execution has been made there.”

27. It is common ground that the Judicial Review Application was dismissed on September 6, 2019 with costs to the Respondents. Following the dismissal, the 2<sup>nd</sup> Respondent filed a Party and Party bill of costs which was taxed at Kshs 170,885/=. The Applicants are seeking to be allowed to liquidate the taxed costs in instalments of Kshs 15,000/- till payment in full. The Applicants averred that the taxed costs together with the Auctioneers costs amounts to Kshs 218,885/=. There is no dispute that the Applicants were aware of the costs. The Applicant s moved this Court after their goods were proclaimed and expressed their willingness to pay the taxed costs.

28. It is my considered view that the Applicants have shown *bona fides* in their willingness to settle this matter. I will therefore in the interest of justice allow the Applicants to settle the taxed costs as follows:-

1. The initial payment of Kshs 35,000/- to be made on or before the May 30, 2023.
2. The balance shall be made in four equal instalments effective from the 15<sup>th</sup> day of every subsequent month.
3. In default of any one instalment execution shall issue.
4. Each party to bear its own costs.

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**HON. T. MURIGI**

**JUDGE**

**RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 3<sup>RD</sup> DAY OF MAY, 2023.**

**IN THE PRESENCE OF: -**

**Court Assistant – Mr. Kwemboi**

Mukula for the 2<sup>nd</sup> Respondent.

Ms Nzilani for the Applicant.

