



**Gichuhi v Kagua & another (Land Case 308 of 2013)
[2022] KEELC 12799 (KLR) (3 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 12799 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
LAND CASE 308 OF 2013
FM NJOROGE, J
OCTOBER 3, 2022**

BETWEEN

SAMUEL NJOROGE GICHUHI PLAINTIFF

AND

GEORGE MACHARIA KAGUA 1ST DEFENDANT

COUNTY COUNCIL OF NAKURU 2ND DEFENDANT

RULING

1. This is a ruling on two consolidated applications, one seeking review orders and the other seeking stay of execution orders. I find it necessary to deal with the review application as it was filed first and in any event in the proper order of things the execution of the judgment would not in my thinking be preferred by the plaintiff before the review sought is considered.
2. The Plaintiff filed an application dated 11/5/2021 seeking the following orders:
 1. That this honourable court be pleased to review its judgment given on the 28/4/2022 so as to indicate the specific period within which the 1st Defendant should be remove himself and his property from Plot No. 668 Gilgil Site & Service Residential belonging to the Plaintiff.
 2. That further, the court be pleased to review its judgment of 28/4/2022 so as to provide for interest on the award of General damages for trespass of Kshs. 50,000/= of which the interest at court rates should run from the date of judgment until payment in full.
 3. That still, the court be pleased to review the judgment of 28/4/2022 so as to award interests on costs at court rates (14% p.a) from the date of assessment until payment in full as per terms of Section 27(2) of the *Civil Procedure Act*.
 4. That the costs of this application be borne by the Defendant/Respondents.



3. The application at hand filed by the Plaintiff therefore seeks to have the judgment dated 28/4/2022 reviewed threefold: first that the timelines within which the 1st defendant should remove himself and his property from the suit land be set by this court; secondly, that interest be provided for on the award of general damages to run from the date of judgment until the date of payment in full; thirdly, that interest on costs be awarded from the date of assessment until payment in full as per Section 27(2) of the *Civil Procedure Act*.
4. In his grounds, the applicant states that the court failed to give a specific period within which the 1st defendant should surrender a vacant possession of the Plaintiff's plot No. 668- Gilgil Site and Service Residential; that the court awarded general damages and failed to consider the issue of interest thereon which had been requested for in the plaint; thirdly, that the court did not consider the issue of costs. It is stated that failure to consider an issue provided for by law is itself an error warranting review orders.
5. Grounds of opposition were filed by the 1st defendant on 24/5/2022 terming the application as incompetent, frivolous and an abuse of the court process. It is stated in those grounds that a review application must be premised on an error on the face of record which must be self-evident and not requiring argument or elaboration and that the errors claimed in the application are merely the applicant's personal preferences on the manner the judgment should have been rendered; they are therefore errors merely on the perception of the applicant.
6. The further grounds relied on by the 1st respondent are that an award of damages for trespass and an award of costs amount to exercise of discretion by the trial court which cannot be faulted by terming it an error on the face of the record. It is further urged that in any event, failure by court to award interest on costs and interest on the decretal sum is not a sufficient reason to warrant review of decree and that the application is a disguised appeal.
7. In the applicant's submissions filed on 28/6/2022, he states that the only issue is whether the court should review its judgment as sought. In regard to the time set for the 1st defendant to remove himself from the suit premises, he cites Order 45 Rule 1 as empowering the court to issue review orders on account of discovery of new and important matter not within the knowledge on the applicant as the time of delivery of judgment and also mistake or error apparent on the face on the record or any other sufficient reason. It also stated that the court has power to amend judgments, decrees and orders to correct accidental slips, mistakes of omissions for the purposes of giving the actual effect of the judgment, decree or order. The applicant relies on Section 99 of the *Civil Procedure Act* for that proposition and Order 21 (3) (3) of the *Civil Procedure Rules*.
8. There is no doubt that the plaintiff made a specific pleading for relief in his further amended plaint as follows:
 - (b) "Eviction orders and/or demolition orders against the 1st defendant from the property Plot LR. No. 668 Gilgil Site and Service Residential and the defendant be compelled within 14 days to demolish all the structures on the Plaintiff's Plot No. 668..."
9. In its judgment the court gave the following order:
 - (b) "The 1st defendant shall remove himself and his property from Plot No. 668 Gilgil Site and Service Residential forthwith and in default the relevant officials of the Nakuru County Government shall enter the premises... and evict the 1st defendant and remove his structures from the plot... to give vacant possession to the plaintiff"



10. I think the operative word given by court is the word “forthwith” instead of granting a specific date in future in which the self-removal or eviction of the 1st defendant should have occurred, the court by using that word demonstrated the peremptory nature of its orders. The Collins English Dictionary defines the word “forthwith” to mean “immediately.” It therefore should not be over emphasized that the task facing the 1st defendant was to remove himself and his property from the suit property as soon as practicably possible. Similarly, the duty of the 2nd defendant was to remove the 1st defendant and his effects from the suit property as soon as practicable after the judgment if he failed to vacate the premises. I would not think that there was any error on the face of the record in that order. Neither would this court be persuaded that there is any discovery of new and important matter or evidence within the province of Order 45 Rule 1 of the [Civil Procedure Rules](#) and rely on it for the issuance of review orders sought.
11. However, though that order is very clear, it is quite evident from the mere existence of the application at hand that the 1st defendant has not removed himself from the suit premises and neither has the officer of the 2nd defendant moved to demolish his structures and evict him as ordered or otherwise given the plaintiff vacant possession. Judgments are issued to be complied with in the terms in which they are expressed. I find this order to be quite self-explanatory and requiring no other elaboration. Nevertheless, litigation must be brought to conclusion expeditiously and where as in the present case the task of eviction was not placed on the plaintiff’s shoulders but on the 2nd defendant who has no proprietary interest in the premises, a loophole can be detected in which much vacillation may lead to delay in the plaintiff’s realization of the fruits of his judgment. This is where the court’s intervention under the last option of “any other sufficient reason” comes in to save the situation. For the reason that this court must assist the Plaintiff to realize the fruits of his judgment in the most expeditious manner possible, it is necessary for it to review its judgment. In the case of [Stephen Kathua Kimani Vs. Nancy Wanjira Waruingi t/a Providence Auctioneers](#) [2016] eKLR, Mativo J, considered the overriding objective of the rules and stated as follows:
- “In my view the overriding objective was brought to ensure that justice is served to both parties and further where there is a conflict of the Oxygen Rules Principles with the substantive law, the law ought to be interpreted in such a manner that will ensure the administration of justice.”
12. He also referred to Section 3 (A) of the [Civil Procedure Rules](#) and observed as follows:
- “In *Abdulrahman Abdi v Safi Petroleum Products Ltd & 6 others* [39] the court stated: -
- “The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party.”
13. It is clear that the reluctance of the 1st defendant to give vacant possession to the plaintiff has led to the delayed conclusion of this dispute. This court would be quite amiss if in the circumstances of this case it failed to find that the orders given require to be adjusted or reviewed for a much more expeditious finalization of the dispute by way of execution of the judgment. In that regard I am inclined to review the judgment to extent that a timeline of 14 days shall be granted to 1st defendant to remove himself from the suit premises in default of which both the plaintiff and the 2nd defendant jointly and severally shall have the mandate of, barring any other valid court orders in existence, effecting eviction against the 1st defendant.
14. Regarding the review of the interest on damages, and on costs this court agrees with the 1st respondent that the award of interest is at the discretion of the court and can only be subjected to an appeal.



Ordinarily, the court is deemed to have taken full cognizance of all the circumstances of litigation in arriving at the decision to award damages and costs and that its decision on quantum and non-award of interest was informed by such circumstances. I am persuaded by the decision in *Patrick Mwaura Wagatira v Equity Bank Ltd and another* [2021] eKLR cited by the applicant where the court stated as follows:

“The defendant contends that interest was in the court’s discretion and in failing to award the same the court had merely exercised that discretion. It is correct that the award of interest in the discretion of the court. However, it cannot be in the discretion on the court not to address a matter or issue that is expressly submitted to it for determination without giving a reason therefore”

15. In that case the court granted the review application order that the damages awarded would attract interest at court rates from the date of filing suit until payment in full and that costs would attract interest from the date of judgment. I need not differ in my approach in this case. The reasons are that the further amended plaint expressly sought general damages with interest for trespass and costs of the suit. I would interpret prayer number (c) of the plaint as having omitted a claim for interest on costs because it merely states as follows: “interest on (prayer no.) (d) above ...” at court rates from date of filing suit until payment in full. Consequently, I would review the judgment to award interest on the general damages in the manner sought in the application.
16. Section 57 (2) of the *Civil Procedure Act* provides as follows:

“The court or Judge may give interest on costs at any rate not exceeding 14% per annum and such interests shall be added to the costs and shall be recoverable as such.”
17. The plaintiff submitted that he had sought to be awarded costs and interest in his final submissions filed in court dated 8/2/2021 and this is correct. In those circumstances I find that the plaintiff did not leave it entirely at the full discretion of the court to award interest on costs. Submissions are ordered by a court that heard a matter as an aid in putting forth each litigant’s case in a clearer and more persuasive form. It is in submissions that the court’s attention may be drawn to provisions of the law which may not be expressly stated in the pleadings as the litigants seek relief. Although submissions are in another case (Nairobi Civil Appeal No. 240/2011 *Daniel Toroitich Arap Moi v Mwangi Stephen Mureithi and another* [2014]eKLR) referred as “parties’ marketing language, each side endeavoring to convince the court that its case is the better one” and that “they do not constitute evidence at all,” I am convinced that having regard to Section 27 (2) of the *CPA*, no evidence from the parties is necessary regarding the issue of interest on costs and all a party requires to do is seek the court’s attention and granting of interest on the basis of its discretion as provided for in the law at the court should not ignore that; where by error the interest on costs in not awarded and the court has been drawn to the existence of submissions seeking interest, a review order would be appropriate.
18. The next application is dated 17/5/2022 and is seeking a stay of execution of decree in this matter pending hearing and determination of the intended appeal. It is supported by the affidavit of George Macharia Kagua, the 1st defendant who has averred that he has filed a notice of appeal and bespoken copies of proceedings and that the respondent herein may transfer the parcel of land to third party thus render the appeal nugatory. He avers that he has an arguable case.
19. In an application of stay for execution, Order 42 Rule 2 is applicable. The applicant must demonstrate that he has filed an appeal and in my view the mere filing of a notice of appeal on 9/5/2022 by the defendant is clear evidence of such appeal for purposes of a stay of execution application. Secondly, the applicant also must demonstrate that he has moved the court expeditiously and in this regard I



am not also in any doubt that the applicant moved the court timeously the judgment having been delivered less than one month earlier on 28/4/2022. However, the last two grounds to consider are whether substantial loss would result as would render the appeal nugatory. I have considered the grounds of appeal in the affidavit. The court has already found for the plaintiff in its judgment against the defendant and stated that the Surveyor identified the suit plot to belong to the plaintiff, meaning that the plaintiff has been kept out of his property for a great many years by the 1st defendant. On the other hand, the defendant demonstrated how he acquired plot No. 677 which is clearly not the one that he is in occupation of. He admitted that in the year 2004 he was informed that he was in occupation of the wrong plot and was served with a demolition order but still went on to construct more houses on the disputed land. This court found the Surveyor's report to be sufficient to prove on a balance of probability that the 1st defendant is in occupation of the plaintiff's plot. Consequently, I find no arguable appeal on the part of the defendant. I do not also find that failure to grant the stay order would render the appeal nugatory. The successful party in this litigation was the plaintiff and while dealing with the stay application, it is necessary to consider the court of appeal's holding in *Machira t/a Machira & Co Advocates vs East African Standard (No 2)* [2002] 2 eKLR that a successful party is entitled to the fruits of his judgment.

20. The upshot of the foregoing is that the stay of execution application dated 17/5/2022 lacks merit and it is hereby dismissed with costs.
 21. Further, I find that the application for review dated 11/5/2022 has merit in respect of all the four prayers sought and I order that the judgment dated 28/4/2022 in this suit is hereby reviewed to the extent that:
 - (a) Order number (b) is hereby reviewed to read as follows:
 - b. The 1st defendant shall within 14 (fourteen) days of the date of this judgment remove himself and his property from plot No. 668 Gilgil Site & Service Residential forthwith and in default, the relevant officials of the Nakuru County Government or the plaintiff herein shall enter the premises known as Plot No. 668 Gilgil Site & Service Residential and evict or cause the eviction of 1st defendant and remove his structures from the plot No. 668 Gilgil Site & Service Residential to give vacant possession to the plaintiff.”
 - (b) Order number (d) is hereby reviewed to read as follows:
 - d. The 1st defendant shall pay to the plaintiff the sum of Kshs 50,000/= (in words, Fifty Thousand shillings only) as general damages for trespass on the plaintiff's parcel and that award of damages shall attract interest at the rate of 14 per cent per annum from the date of judgment until payment in full.”
 - (c) Order number (e) is hereby reviewed to read as follows:
 - e. Owing to the circumstances of this case the defendants shall jointly and severally bear the costs of this suit and such costs shall attract interest at court rates from the date of assessment until payment in full.”
 - (d) The period of 14 days in order no (a) provided for in review in this ruling as hereinabove shall, in view of this ruling and in the interests of justice, be extended and be deemed to run from the date of this ruling.
 - (e)
- It is so ordered.



**DATED, SIGNED AND ISSUED AT NAKURU VIA ELECTRONIC MAIL ON THIS 3RD DAY
OF OCTOBER, 2022.**

MWANGI NJOROGE

JUDGE, ELC, NAKURU

