



Kenya Power & Lighting Co Ltd v Gichure (Suing on his own capacity and as the administrator of the Estate of the Late Julius Gichure Wanjiru) (Civil Appeal E005 of 2020) [2024] KEHC 6522 (KLR) (4 June 2024) (Ruling)

Neutral citation: [2024] KEHC 6522 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E005 OF 2020
GL NZIOKA, J
JUNE 4, 2024**

BETWEEN

KENYA POWER & LIGHTING CO LTD APPELLANT

AND

SIMON KARUMI GICHURE (SUING ON HIS OWN CAPACITY AND AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE JULIUS GICHURE WANJIRU) RESPONDENT

RULING

1. By a notice of motion application dated 27th November 2023, brought under the provisions of; section 1A, 1B, 3A and 80 of the *Civil Procedure Act*, Order 45 Rule 1 (b), and Rule 2(2) of the *Civil Procedure Rules* (herein “the Rules”), and all enabling provisions the applicant is seeking for the following orders:
 - a. Spent
 - b. That this honourable court be pleased to review orders issued on the 19th of July 2022 with respect to the issue of costs and interest of the lower court case.
 - c. That this honourable court be pleased to direct and order that the appellant herein to pay full costs and interest of the lower court matter.
 - d. That the costs of this application be borne by the appellant.
2. The applicant avers that by a judgment delivered on 19th July, 2022, the court directed each party bears its own costs for the appeal and the respondent to have full costs of the trial court. However, the appellant’s advocate has failed to release costs and interest alleging that the trial court did not make an order for payment of interest.



3. Further the trial court's judgment on liability was substituted with a finding on liability at 50:50% among the parties therefore the respondent is only entitled to 50% of the costs.
4. Furthermore, the issue of whether the respondent is entitled to costs and interest was raised before Hon. Kelly Aoma (PM) who directed the parties to seek clarification from the High Court necessitating the filing of this application.
5. The application is further supported by an affidavit sworn by Simon Karumi Gicheru sworn on 27th November, 2023. He avers that the appellate court ordered that he be paid full costs of the trial court.
6. That on 3rd August, 2022, his advocate forwarded a tabulation of costs including interest awarded in the lower court to the appellant's advocate. However, by a letter dated 23rd August, 2023 the appellant's advocate stated that the applicant was only entitled to half of the costs with no interest as none had been awarded by the High Court.
7. That, the fact the learned Judge did not specifically indicate he was entitled to interest in the lower court did not set aside the orders of Honourable Martin N. Mutua (RM) made on 17th November 2020 on costs and interest.
8. That, the decretal sum was deposited in a joint interest account for the benefit of both parties, however, the appellant's advocate has frustrated his efforts to access the decretal sum. That it took the intervention of this court in Civil Appeal No E038 of 2023 to have the amount therein released on 31st May 2023.
9. The applicant urged the court to review the order of the court issued on 19th July, 2022 to include interest and direct that it runs until the decretal amount in paid in full.
10. However, the application was opposed vide the replying affidavit dated 16th January, 2024 sworn by Caroline Warui wherein she deposes that the application is frivolous, misconceived and without merit as it offends the overriding objective principles under sections 1A & 1B of the Civil Procedure Code on efficient disposal of the business of the court, efficient use of available judicial resources, and timely disposal of proceedings.
11. Further, the application has not satisfied the settled grounds of review, and neither do the grounds therein and the supporting affidavit support the prayers sought. That, issue of costs and interest is at the discretion of court that was well exercised.
12. Furthermore, the application is an afterthought intended to convolute issues in a bid to delay the determination of High Court Civil Appeal No, E038 of 2023 between the same parties and which raises same issues as in the present application.
13. The respondent submitted that the application was filed on 6th December, 2023, being seventeen (17) months after delivery of the judgment on 19th July 2022. That, the delay in filing the application is inordinate, unexplained and unreasonable.
14. That, the appellant provided security in the sum of Kshs 3,287,036 as a condition of stay of execution of the trial court's decree pending the outcome of the appeal, which amount was deposited in a joint bank account to which the applicant's advocate is a co-signatory.
15. That, Hon. Lady Justice G.W. Ngenye-Macharia (as she then was) in a judgment delivered on 19th July 2022 apportioned liability between the parties as 50:50%, assessed downwards the trial court's award of damages to Kshs 1,266,625, and awarded the applicant costs of the trial cost, however the learned Judge did not make any pronouncement on the issue of interest.



16. That subsequently the applicant's advocate served the appellant's advocate with a letter dated 2nd August, 2023, tabulating damages, costs and interest at Kshs 1,756,401. The appellant's advocate vide a letter dated 23rd August, 2023 sought to have costs subjected to 50% liability contribution, and interest be excluded as none was awarded by the trial court but the applicant's advocate did not respond.
17. That on 23rd September, 2023 the appellant was served with warrants of attachment and sale together with a proclamation notice by Direct "O" Auctioneers claiming an alleged decretal sum of Kshs, 2,020,999, and a fee note for auctioneer's costs of Kshs 238,327.18.
18. That, the proclamation notice sought to attach respondent's nineteen (19) motor vehicles and sell in a public auction despite existence security of Kshs 3,287,036 in the joint bank account. That the vehicles are critical to the discharge of the appellant's public duties and responsibilities.
19. That as a result the appellant filed a notice of motion application dated 26th September 2023 in Naivasha CMCC 452 of 2018, seeking to stop the irregular execution process. However, Hon. Eunice Kelly (PM) delivered a ruling dismissing the application.
20. However, being aggrieved by the ruling therein, the appellant lodge an appeal against it in High Court Civil Appeal No E038 of 2023 that has been heard and pending decision.
21. The respondent deposed that the applicant has been paid the uncontested sum of Kshs 1,266,625 from the joint account. That, other substantial judicial processes have taken place overtaking and outweighing the necessity of the present application.
22. Furthermore, the proclamation of the appellant's motor vehicles is based on the judgment delivered on 19th Jul, 2022, that the applicant is now seeking to review. In the circumstances, the application is unmerited and should be dismissed with costs
23. I have considered the application and note that it simply seeks for interpretation of the appellate court decision being a judgment of the High Court delivered by the Hon. Lady Justice G.W. Ngenye (J) (as she then was),
24. The plain reading of the judgment reveals that the court made an order of costs follows: -

"The Respondent will however have full costs of the trial court"

The afore order is clear and requires no further interpretation.
25. Thus the costs payable relate to the matter in the trial court. The decision in the trial court did not apportion liability among the parties at 50:50%. Indeed, had the High Court intended that the costs be awarded based on apportionment of liability of 50:50%, it would have ordered as such expressly.
26. As such the argument that costs be based on the findings of the High Court on liability at 50% is therefore not tenable. If there is a dispute as to how much is payable, that becomes a matter for taxation before the Taxing master.
27. As regard interest, I note that the decision in the appellate court did not specify the commencement date. The interpretation thereof is that; interest is payable on the adjusted sum from the date of judgment in the trial court until payment in full. The afore is informed by the fact that had the High court intended to interfere with the trial court's order on interest, it would have stated as such.
28. Those then are the orders of the court.

DATED, DELIVERED AND SIGNED THIS 4TH DAY OF JUNE 2024



GRACE L. NZIOKA

JUDGE

In the presence of:

Ms. Amboko for the applicant

Mr. Mabeya for the respondent

Ms. Ogutu Court Assistant

