REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC CASE NO. 118 OF 2013

VINCENT NARISIA KROP.....1ST PLAINTIFF/RESPONDENT

COX PATRICIA NASIRA.....2ND PLAINTIF/RESPONDENT

CHEMUTUKEN PALEELOUKOYUM.....3RD PLAINTIFF/RESPONDENT

JANE NASIRA CHEPOTUM.....4TH PLAINTIFF/RESPONDENT

VERSUS

MARTIN SEMERO LIMAKOU.....1ST DEFENDANT/APPLICANT

KAPCHONGE SHARTI.....2ND DEFENDANT/APPLICANT

SAMUEL ALUKUREN.....3RD DEFENDANT/APPLICANT

RIONGOSIA SAMAKITUK & 9 OTHERS.....DEFENDANTS/APPLICANTS

RULING

The Application

1. The Applicants moved this Court through a Notice of Motion dated **4/10/2021.** It was brought under **Section 80** and **95** of the **Civil Procedure Act, Order 45 Rule (1)**, **50 Rule (6)** and **51 Rule (3)** of the **Civil Procedure Rules**, and **Section 19 (3)** of the **Environment and Land Court Act (2011)** (herein referred as the **ELC**). The Application was supported by the Affidavit of the Seventh (7th) Defendant/Applicant, one **Karitor Psiken Losiangole,** sworn on **4/10/2021**. In it, deponent reiterated the contents of the grounds of the Application, as summed up in the next two paragraphs. The Applicants jointly sought orders that:

> **1. …spent**
>
> **2. That this Hon. Court be pleased to review and vary the order of 19/11/2020 and by which order the applicants/defendants were to settle the costs of the suit within 45 days of the taxation of the bill of costs or entry into a consent.**
>
> **3. That this Hon. Court be pleased to reinstate the order of stay of execution pending the hearing and determination of Court of Appeal at Eldoret Civil Appeal No. 38 of 2020 and whose record was served upon the respondent's counsel on 5/10/2020**
>
> **4. That this Hon. Court be pleased to extend the time for settlement of taxed costs by such days that the court may deem fit, but that would take effect after the determination of the intended reference against taxation of the plaintiff's bill of costs at Kshs. 2,121,471/=**

1. **…Spent**
2. **That any other order that this Hon. Court deems fit to grant be made.**
3. **Cost be in the cause.**

2. The grounds on which the applicants rely are that there is sufficient reason to warrant the review and variation of the order made on **19/11/2020** for settlement of costs within **45** days. Their argument was that by the ruling of **19/11/2020** the Applicants were granted a stay of execution pending appeal but on condition that the intended appeal was to be filed and served on the Respondents within **45** days of the order and the defendants were to settle taxed or agreed costs within **45** days of the taxation of the decree holders' bill of costs or entry into a consent. The order contained a further condition that in default of any one or both conditions the stay was to be automatically vacated. The Applicants then stated that the appeal was filed and served well before the delivery of the ruling of **19/11/2020**. They argued further that the bill was taxed on **4/5/2021** at **Kshs. 2,121,471/=**. Their contention was that being aggrieved by the taxation they wrote to the taxing officer raising objections to and requiring reasons for the taxation of a number of items. They served a copy of the notice on the Taxing Master and the Respondents. Unfortunately, to date the taxing master has not given the applicants the reasons for the taxation on the disputed items hence they are yet to file their reference to the judge.

3. On the **13/7/2021** respondents filed an application seeking the eviction of the applicants on the ground that they had not complied with the order on settlement of costs. The Applicants argued that the court order of **19/11/2020** did not address the situation where the taxation was to be objected to and a reference made to the judge. They then indicated that in **paragraph 32** of the ruling of **19/11/2020,** the Judge found that eviction of the applicants together with their families would render the intended appeal nugatory and the applicants should not be punished with eviction by reason of a delay by the Deputy Registrar to avail the reasons for her taxation. They pleaded with the Court to intervene and restore the order on stay and extension time for payment, lest the over 1000 persons be evicted from the suit land for no mistake on the part of the Applicants.

The Response

4. The Application was opposed. The Plaintiffs/Respondents did so through a Replying Affidavit sworn on **14/10/2021** by one **Vincent Narisa Krop** on his own behalf and that of his co-plaintiffs/respondents. He deponed that the Application lacks merit and is an abuse of court process. Further, to him, the orders sought cannot be granted hence the Application is only meant to delay the case further and deny the plaintiffs fruits of judgment. He then stated that there were no compelling reasons to warrant the review of the orders made on **19/11/2020** and the application had not been brought without undue delay. He deponed further that the orders were clear on the conditions for stay of execution and the Applicants failed to fully comply with the conditions stipulated by the orders. He then went on to depone status of the Appeal being that the Applicants filed their record of appeal on **5/10/2020** and did not serve it upon their counsel whose email address they gave as kariukimwanikiadvocates@gmail.com and not kariukimwanikiadvocate@gmail.com. He then swore that the documents purportedly served did not reach their advocate. It was his deposition that the defendant/applicants have never settled the taxed costs and filing a notice of objection to taxation does not absolve them from paying the costs of the suit even after promising to pay the sum of **Kshs. 400,000/=**. He stated on oath that the Applicants had not cared to deposit and leave the balance to be determined in the reference and for that reason the applicants did not come to court with clean hands.

5. The Respondents contended that the Applicants had deprived them of the use of their land through force and it was only right and just that they be removed from it without further delay. They argued through the Replying Affidavit that the Applicants had not met the conditions set out in **Order 45 Rule 1** of the **Civil Procedure Rules**. The deponent swore further that the fact that the learned judge did not address the situation where taxed costs are objected to is not a ground for review. They then stated that there can never be stay of execution pending appeal without provision of security hence the Applicants should offer security. He deponed that as at the time of the Application, there were no orders of stay of execution since they lapsed automatically when the defendants failed to comply as ordered on **19/11/2020**. He argued that Application is an afterthought which should not be used to challenge the application dated **13/7/2021**. He then deponed that the Applicants do not have an arguable appeal with any chances of success and that this court became *functus officio* upon delivery of its judgment and should not entertain such an application. It was the Respondents' further contention that the presence of 1000 persons on the suit land was not sufficient reason to warrant a review. They then stated that the appeal would not be rendered nugatory if the defendants were evicted from their land since they are in illegal occupation of the respondents' land.

Response to the Replying Affidavit

6. The Applicants filed a further affidavit sworn on **25/10/2021** in response the Respondents'. It was done by the same deponent of the Supporting Affidavit. He reiterated that by the **19/11/2020,** the record of appeal had been filed and forwarded to the Hon. Attorney General's Office as well as the Respondents' counsel. He repeated that although the Deputy Registrar had scheduled the ruling on taxation on the **11/5/2021** but read it on the **4/5/2021** hence the objection dated **5/5/2021** and received in Court the same date. He then swore that in **Paragraph 11** of the Replying Affidavit the Respondents admit that the ruling dated **19/11/2020** did not address the situation where a notice of objection to taxation was filed hence that was sufficient reason for review. He went on to depone that the Application did not seek a review of the judgment but the ruling dated **19/11/2020**. He blamed the Deputy Registrar for the delay by reason of failure to avail reasons for taxation hence the not paving way for filing of a reference and that the eviction if carried out will render the pending appeal nugatory since any success in the appeal will not reverse the eviction.

Submissions

7. On **5/10/2021**, this Court directed that the Application be disposed of by way of written submissions in terms of **Rule 33 (a)** and **(b)** of **Gazette No. 5178 of 2013**. The applicants filed theirs on **26/10/2021.** The respondents did not: none were on the Court file if they were filed.

Analysis, Issues and Determination

8. I have carefully considered the Application, the Affidavits in support and in opposition, the submissions on record, the case law cited by the applicants and the law. It is important to point out at this point that some of the arguments raised in this Application were matters considered in the Application dated **28/8/2020** (herein referred to as "earlier application") which gave rise to the orders of **19/11/2020** and others are the subject of the judgment appealed from hence a subject of the appeal itself while others stem from a misapprehension of the law on post-judgment procedures hence it will not be necessary to consider them again here. For instance, as to whether the appeal has or has no merits or if it will be rendered nugatory or whether the applicants should provide security in order to be given chance to prosecute their Appeal, those were issues squarely before the Court in the earlier application. Regarding whether or not the Applicants were illegally on the

land or not is an issue of appeal. Lastly, as to whether this Court is or is not *functus officio*, this is a misguided argument since execution or otherwise of the Court's decree is a post judgment process which is integral to the judgment of the Court hence the Court is not *functus officio* when considering it. If the Court is *functus officio* in relation to this matter is would be likewise in relation to the Application dated **13/07/2021**. Therefore, in my view, the following are the issues for determination:

a. Whether the Applicants fulfilled the conditions of the order dated 19/11/2020.

b. Whether the Court should review the order of 19/11/2020

c. What orders should issue?

d. Who bears the costs?

9. I now proceed to analyze each of the issues.

a. Whether the Applicants fulfilled the conditions of the order dated 19/11/2020.

10. The findings in this issue will determine whether it is not necessary to consider the merits of **prayers 3** and **4** of the instant Application. If this Court finds that the Applicants failed to fulfil the conditions in the order of **19/11/2020**, it will have reason to consider whether or not to grant prayers **3** and **4** herein. If it finds that the Applicants fulfilled conditions, then a determination of the merits of the two prayers will be a mere academic exercise hence unnecessary. I consider the content of the orders of **19/11/2020**.

11. The order given by this Court on **19/11/2020** contained two conditions which were to be fulfilled by the Applicants separately and/or jointly. The conditions were to the effect that the Applicants were to file and serve the intended appeal on the Respondents within **45** days of the order. The other condition was that the Applicants were to pay costs of the suit within **45** days of taxation of the Plaintiffs' bill of costs or recording of a consent thereon.

12. As can be ascertained from the facts herein as presented by way of the Supporting, Replying and Further affidavits filed herein, there was no agreement regarding some items in or the entire Plaintiffs' bill of costs hence no consent recorded thereon. The bill was thus taxed before a taxing master. The taxing master gave the date for the delivery of her determination on the bill as **11/5/2021**. Instead, she delivered the same on **4/5/2021**.

13. Following the delivery of the result of taxation, the Applicants herein gave a written objection to the taxation and made a request for the taxing mater to give the reasons for taxation. Both the Applicants and Respondents agree, from their depositions, and it is borne by the court record that the taxing master has never given the reasons for taxation to date. It is not in dispute that the Respondent having formed an opinion that the Applicants had failed to meet the conditions of the order of **19/11/2020** formed a further opinion that the stay of execution granted by the Court had been vacated automatically and applied on **13/07/2021** for orders of eviction against the Applicants.

14. From the arguments by the contending parties in the instant Application, it is common belief, but mistakenly so, that there are no orders of stay for execution in place. That explains why the Applicants prayed for, among others, in **prayer 3** for an order that *"… this Hon. Court be pleased to reinstate the order of stay of execution pending…"*, and they swore some paragraphs to that effect. It is also demonstrated by the fact that the Respondents initiated the Application for execution and opposed the instant application basing their arguments on that belief, among others.

15. The law regarding taxation of bills of party and party costs where costs are awarded by a Court is governed by the **Advocates Remuneration Order, 2014**. At **Paragraph 11 (1) and (2)** of the Order it is provided as follows:

"(1) should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

(2) the taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection."

16. From the provisions of the law it is clear that taxation of a bill of costs is not an event but a process. It does not start at the point where the taxing master makes a finding on what is due to a party. It does not end there either. It begins with a successfully party who has been awarded costs filing his/her/its bill of costs for assessment or taxation in case the matter was a lower court or superior court one respectively. Where the matter was of the superior Court, as in the instant case, the taxing master shall proceed to tax it and deliver his ruling.

17. At that point two things are likely to occur: the parties will agree to the taxation or one party may be aggrieved by the decision. In case the parties agree, then execution shall ensue or payment shall be due. In my view, that can only be ascertained after the end of **14 days** of the delivery of the decision or up to the time an aggrieved party writes to the taxing master intimating that he wishes to be given reasons for the taxation of certain or all items, whichever is earlier. The reason is that under **paragraph 11 (1)** of the **Order** any party aggrieved by the findings of the taxing master has up to **14 days** to consider the decision and notify the taxing master. If after the end of **14 days** there is no notice of objection to the taxation, the execution may proceed. That is when the execution shall have crystallized, and the road is clear. It would be advisable for taxing masters to always give a stay of execution for at least **14 days** of the delivery of their decisions so that this sub-rule is given effect.

18. The second occurrence is where a party is aggrieved by the taxation. There is no doubt that such a party will have to lodge an objection in

writing to the taxing master. He needs to do so within **14 days** of the decision of the taxing master. He should list the specific items he has an issue with and ask the taxing master to give reasons for his decision. Upon receipt of the notice the taxing master is under duty to give him or her the reasons for the taxation. Thus, it would be advisable that taxing masters ought to have their reasons on the ready just in case they are asked to account for how and why they taxed each item as they did. This would avoid delays and going through the bill twice, so to say.

19. In terms of **paragraph 11(2)** of the **Order,** once the aggrieved part receives the reasons, he may take two of the options herein: he may see the light and agree with the taxing master or he may disagree with the taxing master. In case the earlier option is taken he will comply or wait for execution. In case he takes the second option, he is obligated to file a reference to a judge, setting out the grounds of the objection. He has to do so within **fourteen (14) days** upon receipt of the reasons from the taxing officer. Once a reference is filed, the costs cannot be said to be ascertained in terms of the taxation unless and until the reference is determined on merits, struck out or dismissed for whatever reasons.

20. In ***Magdalena Alphonce Cheposowor v Cheposupko Lonyareng & 5 Others [2021] eKLR*** in considering whether or not the Court can extend time to file a reference to a judge when the taxing master has not given reasons for the taxation, this Court stated, "*Based on the finding,…that the taxing master has not given reasons for his/her decision …, this court is of the view then that the second issue as to whether or this court has the discretion to extend time for filing of reference is neither here nor there. The Court cannot extend that which has not even began or existed*." That finding, looked at ***mutatis mutandis*** to the issues herein, since the reasons for the taxation of the items objected to have not been given by the taxing master, there was no basis for commencing execution because the stay of execution had not been vacated by the time execution was applied for, and there was nothing in terms of compliance regarding payment of taxed costs for this Court to extend because they have not been ascertained fully. In the related matter of ***Anthony Thuo Kanai T/A A. Thuo Kanai Advocates v John Ngigi Ng'ang'a [2014] eKLR*** in which my sister Pauline Nyamweya J (as she then was) looked at the time when a reference can be filed from a taxation, the learned Ladyship was of the view that once a party files a reference within the **14 days** of the delivery of the reasons requested for, the reference is properly filed or before the judge. Thus, it is safe to conclude in this matter that the only time costs can be said to have been ripe for execution is when reasons are given one or other of the events explained to above occurs.

21. The situation could have been different if the reasons where contained in the ruling itself. Then there could have been no need to wait for **14 days** or to fail to consider whether or not to extend the time for compliance or so to state to make a finding that the orders of the Court had not been complied with as at the time of making the application dated **13/07/2021** or the instant one. In the case of ***Ahmednasir Abdikadir & Co. Advocates vs National Bank of Kenya Ltd (2) (2006) 1 EA 5*** it was held:-

> **"…where the reasons for the taxation on the disputed items in the Bill are already contained in the considered ruling, there is no need to seek for further reasons simply because of the unfortunate wording of sub rule (2) of rule 11 of the Advocates Remuneration Order demands so. The said rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling."**

22. This is not the case herein. In this matter, both parties swore to the fact that reasons had not been given up to the time the instant application was made. Thus, there was need for that to be done in order to kick-start other steps in the execution or compliance requirement.

23. In regard to the instant case, it means that once the Applicants notified the taxing mater on **5/5/2021** of their dissatisfaction of the taxation and asked for the reasons thereof, the costs remained disputed. The sum they were supposed to pay is not ascertained to date. The **45 days** given by the court for payment if the plaintiffs' costs have not started to run. The delay was not of the applicants' own making and they should not be faulted. In my view then, any step towards execution for failure to comply was premature and in error since the conditional stay of execution was and is still in place. It would be proper for the party feeling that there was delay to write to taxing master to inquire why there is such a delay in giving reasons of the taxation rather than punishing the Applicants.

24. Again, it was argued by the Respondents that execution ought to proceed because the Applicants did not fulfil the first condition: that of filing and serving the appeal within **45 days** of the Order. The Respondents argued that the email address used to serve the appeal was a wrong one and not their counsel's. The Applicants on the other hand argued that they served the Appeal upon both the Attorney-General and the Respondents through their correct addresses even before the orders were issued. These are two contending arguments which go to root of the competency of the appeal filed. By being asked to determine the correctness or otherwise of the service of the Appeal, this Court is indirectly being called upon to make a finding on an issue which, in its view, are not within its jurisdiction but for the Court of Appeal. I say so because, if this Court were to determine whether or not the address is the correct one or not, it will essentially be determining an issue that is the preserve of the Court of Appeal under **Rule 84** of **Court of Appeal Rules, 2010**. In any event, the Applicants indicate they served while the Respondents deny receipt. All the Applicants needed to show was that they filed an appeal and served it. That is it. What is not clear is why, if indeed the Respondents were not served with the appeal within the **45 days** as ordered by the Court, they took eight clear months before they would launch the Application for execution yet, if their word is taken to be true, the orders of **19/11/2020** had automatically been vacated by early **February, 2021**. For these reasons, I decline to make a finding on whether or not service of the appeal was proper.

b. Whether the Court should review or vary the order dated 19/11/2019*?*

25. The starting point in determining this issue is understanding the text and import of the order made on **19/11/2020**. I have indicated at **paragraphs 11** and **24** above that the Court gave a stay of execution of its decree herein contingent on two conditions, namely, the filing and serving of the appeal preferred from its judgment and decree within **45 days**, and the payment of ascertained plaintiffs' party and party costs within a similar period. Failure of either or both of the conditions would lead to automatic lapse of the orders and trigger execution.

26. The Applicants herein argue that while making the decision of **19/11/2021**, the judge did not envision a situation where a reference would be filed against the taxation of the bill of costs. What the parties seem to be saying in a clever way is that the judge made an error apparent on the face of record. In my view, thing can be further from the truth than that proposition. I have stated above that taxation of a bill of costs where costs have been found due to a successful party is a process and not an event. The fact that the judge did not specifically state that the forty-five days were to run from the time when costs were due does not make the record bear an error warranting a review. The judge was

aware of the steps always taken when taxation takes places. That is borne out by the fact that my brother judge went ahead to even give the options of how the actual costs would be ascertained - the taxation or recording of a consent.

27. The law on review and setting aside of judgments and decrees or rulings and orders is now settled. It is found in **Section 80** of the **Civil Procedure Act** and **Order 45** of the **Civil Procedure Rules, 2010** as amended in **2020**. **Section 80** of the **Act** provides as follows:

> **"any person who considers aggrieved-**
>
> **a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred, or**
>
> **b. by a decree or order from which no appeal is allowed by this Act may apply for review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.**

28. Order 45 Rule 1(1) of the **Rules** provides in the same manner as **Section 80 (1)** and **(2)** save that **Sub-rule (b)** adds the following phrase **"…, and who from the discovery of a new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order may apply for a review of judgement to the court which passed the decree or made the order without unreasonable delay."**

29. Therefore, in accordance with **Order 45 Rule 1**, the conditions for the grant of orders of review may be summarized as follows:

> **a. discovery of new and important matter or evidence,**
>
> **b. Some mistake or error apparent on the face of the record or,**
>
> **c. Any other sufficient reason.**

30. The **Rule** then imposes a further (fourth) condition which embraces and applies to the three above: that the application be made without unreasonable delay. It goes without saying that the Applicant must satisfactorily explain the delay however small it may be besides, it not being unreasonable. That is to say, he ought to give convincing reasons as to why he delayed in bringing the application. These conditions have been enunciated in a number of many decisions which I need not repeat in this decision. But for avoidance of doubt about the clarity thereof, the parties herein are referred to the Supreme Court decision of ***Wachira Karani v Bildad Wachira [2016] eKLR*** where the Court explained that sufficient cause (or reason) is a question of fact and the Court of Appeal decision of ***Muyodi -v- Industrial and Commercial Development Corporation & Another (2006) 1 EA 243*** and the persuasive decisions of ***re Estate of Japhet Avugwi Luseno (Deceased) [2020] eKLR*** and **Francis Njoroge Vs Stephen Maina Kamore [2018] eKLR** which emphasize the need to proof the four conditions before an order of judicial review issues. Moreover, the ***Avugwi Luseno cause*** brought out clearly the idea that applications for review are not meant to substitute the remedy of appeal. I agree. The remedy of review should be of strict application and limitation to the grounds which the Act and Rules provide for.

31. About the issue whether there was discovery of new and important matter or evidence which after the exercise of due diligence was or was not within the applicant's knowledge, I am guided by the holding in the case of ***Republic -v- Advocates Disciplinary Tribunal Exparte Apollo Mboya [2019] eKLR*** where the court held that:

> **".....for material to qualify to be new and important evidence or matter, it must be of such a nature that could not have been discovered had the applicant exercised due diligence. It must be such evidence or material that was not available to the applicant or the court."**

32. Having considered the arguments advanced by the Applicants and the facts they rely on in the Application herein, I am of the view that none of the issues raised amount to proof of the four requirements for review of the Court's orders. To start with, the Court was clear that the two conditions were to be fulfilled separately and in the case of failure of one or both then execution would issue. The fact that one party has misconstrued one or the other does not amount to sufficient reason to review the orders.

33. I am left with two issues to determine, that is to say, what orders should issue and who bears the costs of the Application. It is trite law that except in public interest litigation, an only in rare circumstances to inform the Court otherwise, costs follow the event. I am alive to the fact that I have made a finding that the execution commenced herein was premature in the sense that the taxing master has not gone through all the steps contemplated in **paragraph 11(2)** of the **Advocates Remuneration Order**. But the Applicants being apprehensive of the events that ensued as a result of actions not occasioned by their mistake they moved this Court vide the present application. They should not be faulted for this step even if the Application succeeds or not. The taxing master ought to give reasons for taxation of the objected items first and a consideration was to whether or not to file a reference be made within **14 days** of the reasons being given.

34. The upshot is that the Application lacks merit and is therefore dismissed. Each party is to bear their own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 14TH DAY OF DECEMBER, 2021.

DR. *IUR* FRED NYAGAKA

JUDGE, ELC, KITALE.

Further Note and Order

This Ruling is delivered by electronic means in view of the restrictions regarding court operations due to the **COVID-19 Pandemic**. More so, the step is pursuant to the directions issued by His Lordship, the Chief Justice on **15th March, 2020** and those of **21st April 2020**, that judgments and rulings shall be delivered through video conferencing or via email. Parties having been duly notified of the same waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules**.

DR. *IUR* FRED NYAGAKA

JUDGE, ELC, KITALE.