

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MOMBASA
ELCC NO. 230 OF 2010

MARGARET SOMMER CHARO
PLAINTIFF

VERSUS

ISAAC NJUGUNA NJOROGE
DEFENDANT

RULING

[NOTICE OF MOTION DATED 22ND APRIL 2025]

1. The Defendant has moved this court through a notice of motion dated 22nd April 2025 seeking for the following prayers:

1. "Spent.

2. *THAT this Honourable Court be pleased to issue stay of execution of the Certificate of Cost dated 12th day of March, 2025 and issued 24th day of March, 2025.*

3. *THAT this Honourable Court be pleased to issue arrest any order on to attach any property belonging to the Defendant to satisfy the certificate of cost.*

4. THAT this court to issue any order declaring that the Bill of Cost and certificate of costs was fraudulently acquired, without the knowledge of the defendant herein.

5. THAT the costs of this application be borne by the Respondents.”

The application is based on the five grounds on its face marked (a) to (e) and supported by the affidavit of Isaac Njuguna Njoroge, the defendant, sworn on the 22nd April 2025, deposing inter alia that he is the judgment debtor in the suit herein after delivery of judgment on 12th July 2017 in favour of the plaintiff herein; that after the said delivery, he was never served with a decree, bill of costs or any other court documents; that in 2023 he filed a suit in Malindi ELC E008 of 2023 challenging the jurisdiction of this court in hearing and delivering a judgment over suit property in Mtwapa, Kilifi County, that was coming up for hearing on 8th May 2025; that he was served with a demand letter from Balala & Abed Advocates demanding settlement of the certificate of costs in seven days; that he has further filed Miscellaneous Application

No. E011 OF 2025 seeking orders to set aside the eviction order dated 17th November 2020 and the said bill of costs.

2. The application is opposed through the replying affidavit sworn by Margaret Sommer Charo, the plaintiff, sworn on 30th May 2025, inter alia deposing that this court has already rendered a judgment and that no other court of concurrent jurisdiction can sit and determine matters touching on the suit; that the defendant was served with a mention notice for 6th November 2024, and affidavit of service sworn on 30th October 2024 was filed; that the defendant failed to appear on 6th November 2024, and the court fixed a further mention on 27th November 2024, and a mention notice for 27th November 2024 was on 13th November 2024 served upon him as evidenced by the affidavit of service of that same date; that the defendant yet again failed to appear on 27th November 2024 and the matter was fixed for assessment of costs on 22nd January 2025; that thereafter the defendant was served with a notice of taxation as can be seen from the affidavit of service sworn on 11th December 2024; the defendant failed to appear in court and a ruling date was

slated for 19th February 2025, and he was served with a ruling notice as can be seen from the affidavit of service sworn on 4th February 2025; that the allegation that the bill of costs was obtained by fraud cannot stand; that no error of principle has been proved; that no proof has been tendered that the costs as taxed is manifestly high or low or inconsistent with the principles of taxation; that the application is fatally defective, brought in bad faith and an abuse of the court process.

3. The defendant and the plaintiff filed their submissions dated 23rd June 2025 and 7th July 2025 respectively, which the court has considered.

4. The following are the issues for determination by the court:

a) Whether the defendant has met the threshold for an order of stay of execution to issue.

b) Whether the defendant has shown that the certificate of costs was fraudulently acquired without him being served.

c) Who bears the costs of this application?

5. The court considered the grounds on the application, the affidavit evidence, the submissions by counsel, the record and come to the following determinations:

a. The main prayer here is a challenge on the certificate of costs and not the main judgment. Although the defendant has claimed that he has a case, being Malindi ELC No. E008 OF 2023, challenging the jurisdiction of this court, it is important to point out that Malindi ELC and this court are of concurrent jurisdiction, and neither of the two can sit on appeal over the decision issued by the other. The proper forum for such a pursuit is the Court of Appeal, and as no decision emanating from ELC Malindi can nullify this court's judgment, the court will proceed to consider whether the court should set aside the certificate of costs dated 12th March 2025.

b. From the heading on the defendant's application it is clear it is premised on *section 3, 3A & 63(e)* of the Civil Procedure Act and *Order 10 Rule 11, order 7 Rule 1, Order 50 Rule 6 and Order 51 Rule 1* of the Civil Procedure Rules. These provisions do not specifically

deal with applications for stay of execution of a decree pending determination of another suit or suits between the same parties. In my view, *Order 22 Rule 25* of the Civil Procedure Rules would have been more relevant as it provides for stay of execution of a decree pending hearing and determination of a suit between the decree holder and judgment debtor. See Ngathiko & 6 others versus Mwarire & 2 Others [2022] KEELC 15023 (KLR).

- c. The defendant did not mention the pending suit in the prayers sought, but in the supporting affidavit, as ELC Miscellaneous Application No. E011 of 2025. He has deposed at paragraph 13 of the supporting affidavit inter alia that *“the applicant herein filed a miscellaneous application in E011 of 2025 for orders that the court set aside orders of eviction dated 17th day of 2020 and further challenging the Bill of Cost by the plaintiff herein.....”* The defendant has however not disclosed the outcome of that application, yet he again filed the instant application seeking for inter alia *“stay of execution of the Certificate of Cost dated 12th day of*

March, 2025 and issued 24th day of March, 2025;arrest any order on to attach any property belonging to the Defendant to satisfy the certificate of cost;..... order declaring that the Bill of Cost and certificate of costs was fraudulently acquired, without the knowledge of the defendant herein.” In my view, the prayers sought in ELCL Miscellaneous Application No. E011 of 2025, are the same as those sought in the current application. The court therefore runs the risk of issuing contradictory orders due to the action of the defendant filing multiple applications in different over the same subject matter. That as it is apparent ELC Miscellaneous Application No. E011 of 2025, was filed first, the application herein therefore offends *section 6* of the Civil Procedure Act chapter 21 of Laws of Kenya.

d. I find no merit in the application, and as *section 27* of the Civil Procedure Act Chapter 21 of Laws of Kenya provides that costs follow the event unless otherwise ordered for good cause, the plaintiff is awarded costs.

6. From the foregoing determinations, the court finds and orders as follows:

- a. That the defendant's notice of motion dated 22nd April 2025 is without merit and is dismissed.*
- b. The defendant to bear the costs of the application.*

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 8TH DAY OF OCTOBER 2025.

S. M. Kibunja, J.
ELC MOMBASA.

IN THE PRESENCE OF:

PLAINTIFF : M/s Julu

DEFENDANT :Mr Piemo

KALEKYE-COURT ASSISTANT.

S. M. Kibunja, J.
ELC MOMBASA.