

REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
AT ELDORET

ELC CASE NO. 787 OF 2012

DAUDI KIPTUGEN.....
PLAINTIFF

-VERSUS-

COMMISSIONER OF LANDS..... 1ST
DEFENDANT

CHIEF LAND REGISTRAR, NAIROBI.....2ND
DEFENDANT

THE ATTORNEY GENERAL.....3RD
DEFENDANT

HELDO FOOD STUFF LIMITED..... 4TH
DEFENDANT

COUNTY LAND REGISTRAR.....5TH
DEFENDANT

HARAN CHEPKILOT KIPSANG
T/A HELDO FOOD STUFF.....6TH
DEFENDANT

**SILAS KIPTUI KIPCHILAT (Acting as the personal representative of
the estate of the late LEAH JELAGAT KIPCHILAT.....7TH**
DEFENDANT

RULING:

1. Vide a Notice of Motion dated 15th July, 2025 brought under Order 21 Rule 12, Order 51 Rule 1 Of the Civil Procedure Rules and Section 34 of the Civil Procedure Act, the 7th Defendant/Applicant sought the following orders:-

- 1) Spent.
 - 2) Spent.
 - 3) Spent.
 - 4) THAT this Honourable court be pleased to find that no interest was awarded in the taxation of the Plaintiff's party and party bill of costs.
 - 5) THAT this Honourable court be pleased to apportion the awarded costs among all the defendants in the suit.
 - 6) THAT this Honourable court be pleased to allow the 7th Defendant to pay his share in instalments.
 - 7) THAT the costs of this application be provided for.
2. The application is premised on the 6 grounds on its face and supported by the affidavit of Silas Kiptui Kipchilat, the 7th Defendant of even date. He deponed that judgment was delivered on 27th January, 2021 in favour of the plaintiff with costs awarded to him against all the defendants. That the plaintiff proceeded to file a party and party bill of costs which was taxed in the sum of Kshs. 2,031,103/=.
 3. The Applicant averred that pursuant to the ruling, an award on interest was not awarded on the taxed costs nor was the costs supposed to be executed jointly or severally. That the plaintiff intends to execute the said ruling/order against the applicant whilst leaving out the other defendants which the applicant contended would be unjust and unfair to him. He therefore prayed that the said costs be apportioned as against all the defendants with all the parties being compelled to pay their share.
 4. The Applicant stated that he was willing to pay the sum of Kshs. 200,000/= as part payment of his share of the taxed costs.

That he is not opposed to the execution of the said ruling/order save for the fact that he should not be compelled to pay the entire sum whilst the other defendants do not. The applicant contended that no prejudice will be occasioned to the parties if the prayers sought are granted as it is in the interest of justice that all the defendants pay their share of the taxed costs.

5. The application was opposed by the plaintiff who filed a replying affidavit dated 19th September, 2025. He dismissed the application as being without merit, incompetent, incurably defective, frivolous, vexatious and an afterthought and ought to be dismissed.
6. Relying on advice by his advocate, the plaintiff averred that the application is in the nature of review but has not meet the threshold of review.
7. It was his contention that the ruling on the plaintiff's costs having been delivered on 8/8/2022 which is a period of over 3 years, the application to pay by instalments has been made after an inordinate delay. It was also the plaintiff's contention that the issue of apportionment of costs does not arise owing to the fact that both this Court and the Court of Appeal directed that costs be borne by the defendants/appellants. The Plaintiff also averred that the doctrine of jointly and severally is applicable herein as such it is not necessary for the court to pronounce as such, and the plaintiff is entitled to nominate who to pursue in so far as costs are concerned.
8. The plaintiff contended that the Court of Appeal and the Superior Courts have pronounced themselves to the extent that costs attracts interest from the date of assessment of costs in decisions which include Nakuru HCCC No. 292 of 2005, ***Julius***

S. K. Cheruiyot -vs- Postal Corporation of Kenya & Another and Nairobi Civil Misc. No. 52 of 2012 between Lubullah & Associates Advocates -vs- N. K. Brothers Ltd.

9. The plaintiff urged the court to uphold the assessed costs and interest and dismiss the application with costs.
10. The application was canvassed by way of written submissions which were filed by both parties. The 7th Defendant/Applicant filed his submissions dated 6th November, 2025 while the Plaintiff/respondent filed his dated 27th October, 2025.
11. The Applicant's counsel cited section 34(1) of the Civil Procedure Act Cap. 21 Laws of Kenya. It was pointed out that vide a warrant of arrest issued on 23rd April, 2025, the plaintiff seeks to inter alia, recover interest on taxed costs amounting to Kshs. 189,569.00. That the 7th Defendant has moved the court for determination of the question as to whether interest was awarded on the taxed party and party costs. Learned counsel for the applicant submitted that by the amended plaint dated 11th November, 2016, the plaintiff in prayer (Vii) only sought for costs of the suit and no prayer for interest on the said costs was sought. It is his submissions that the settled position is that relief not expressly pleaded cannot be granted. That the plaintiff never sought interest hence the court had no jurisdiction to grant it. The applicant's counsel relied on the Court of Appeal decision in the case of **Caltex Oil (Kenya) Limited V Rono Limited (2016) eKLR.**
12. It was further submitted that in the judgment delivered in the matter, the court never made any award of interest on the party and party costs. That for an order of costs to attract interest, the judge has to make an order on the same. The

applicant's counsel cited section 27(2) of the Civil Procedure Act.

13. It was further submitted that during the taxation of the party and party costs, no interest on costs was awarded in the ruling of the taxing officer. In this regard, the applicant's counsel submitted that the authority of **Julius S. K. Cheruiyot -vs- Postal Coerparation of Kenya & another** relied on by the plaintiff is distinguishable from the circumstances in this matter. That in that case, the judgment of the court was explicit that an award of interest on costs was made. That in the judgment delivered herein, Hon. Justice Ombwayo did not award interest on party and party costs, and the plaintiff cannot recover that which was not decreed.
14. On apportionment of party and party costs, the applicant's counsel submitted that the plaintiff in his amended plaint prayed for costs and the Judge in the judgment awarded costs of the suit to the plaintiff. That the plaintiff filed only one party and party Bill of costs against all the defendants, and the bill was taxed by the Taxing officer on 18th August, 2022 in the sum of Kshs. 2,031,103/=. Counsel submitted that in this matter the party and party costs ought to be split amongst the 7 defendants with each defendant being liable to pay his/its portion of Kshs. 290,157.60/=:, and urged the court adopt this position so that each defendant is liable for his/its separate share of the costs as apportioned.
15. It was further submitted that the plaintiff himself in executing for the party and party costs has adopted the position apportioning the costs amongst the defendants. An example is given of the warrant of arrest issued on 23rd April, 2023 which

directed that Kshs. 2,031,103/= be recovered from Haron Chepkilot Kipsang and Silas Kiptui Kipchilat and his conduct of entering into a consent on 9th, October, 2025 with 4th Defendant. Counsel submitted that the court in determining the question of apportionment can be guided by the doctrine of estoppel as provided for in section 120 of the Evidence Act. That by obtaining the said warrant of arrest, the plaintiff waived the right to collect the full amount of the taxed costs from only one defendant. The applicant's counsel cited the **Halbury's Laws of England, 4th Edition, volume 16 at page 992** and relied on the case of **Sita Stell Rolling Mills Ltd vs Jubille Insurance Co. Ltd (2007) eKLR.**

16. Regarding the prayer to pay in instalments, counsel submitted that the jurisdiction to grant the relief is provided for in Order 21 Rule 12(2) of the Civil Procedure Rules. That in his replying affidavit, the plaintiff has not expressly opposed the prayer to pay in instalments and submissions by the plaintiff's advocate cannot amount to proper opposition of that prayer. The applicant's counsel relied on the case of **Daniel Toroitch Arap Moi v Mwangi Stephen Muriithi & Another (2014) KECA 642** and submitted that the 7th Defendant has so far paid Kshs. 300,000/= towards the party and party costs which amount is substantial considering the apportionment of the costs as between the 7 defendants. The court was therefore urged to allow the application.

17. With regard to the issue whether costs once taxed attracts interest, the plaintiffs' counsel cited the case of Julius S. K. Cheruiyot vs Postal Corporation of Kenya & another, Nakuru HCCA No. 292 of 2005 where the court observed and held that

interest on taxed costs be computed from the date of taxation at the rate of 14% per annum and invoked the provisions of section 7 of the Advocates Remuneration Order.

18. The plaintiffs' counsel further submitted that the prayer for apportionment of the taxed costs amongst the defendants is untenable considering that this Court and the Court of Appeal ordered the defendants to bear costs incurred in the suit. That in the absence of the judge who delivered the judgment apportioning the costs are payable by the defendants jointly and severally. It is submitted that the plaintiffs cause of action was that the defendants jointly connived to tamper with his registration as proprietor of the suit land as such they bear the costs jointly and severally and the plaintiffs is entitled to nominate any of the defendants to recover costs from.
19. With regard to the prayer by the 7th defendant to be allowed to settle costs in instalments, the plaintiff's counsel submitted that the principles that guide the court were set out in the case of **Keshval Jethabai & Brothers Ltd v Saleh Abdul (1959) EA 260; Hildegard Ndelut V Letkina Dairies Ltd & another (2005) eKLR and Mohamed Akbar Khan vs Kasturchand Daga**, which held that each case must be considered on its own merit and that the mere inability to pay in full at once is not sufficient reason for exercising discretion. That the debtor should show bona fides by arranging prompt payment and though hardship may be a factor, the court has to consider whether indulgence should be given to the debtor without prejudice to the decree holder. That the judgment debtor must show sufficient cause and justify the indulgence. Relying on the case of **KTK Vs Baringo County Government (2018) eKLR**,

the plaintiff's counsel submitted that the application to pay by instalments having been made more than three years after taxation and the amount becoming due, the application ought to be dismissed in its entirety.

20. The court has considered the application, the response thereto and the rival submissions. The issues for determination are:-
- i. Whether the taxed costs attract interest.
 - ii. Whether the court ought to apportion the taxed costs amongst the 7 defendants.
 - iii. Whether the 7th Defendant ought to be allowed to settle the costs in instalments.

i. Whether the taxed costs attract interest;

21. In the application herein, one of the prayers sought by the 7th Defendant is an order that no interest was awarded in the taxed plaintiff's party and party costs. On his part, the plaintiff maintained that interest on the costs taxed is payable from the date of taxation at the rate of 14% per annum. The plaintiff's counsel cited the provisions of section 7 of the Advocates Remuneration Order and relied on the case of **Julius S. K. Chemjor vs. Postal Corporation of Lenya & another (Supra)**.

22. The application has been brought under Order 21 Rule 12 and Order 51 rule 1 of the Civil Procedure Rules and Section 34 of the Civil Procedure Act. Section 34 of the Civil Procedure Act provides as follows:-

34. Questions to be determined by court executing decree,

- 1) All questions arising between the parties to the suit in which the decree was passed, or their representatives,

and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

- 2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.
- 3) Where a question arises as to whether any person is or is not the representative of a party, such a question shall, for the purposes of this section, be determined by the court.

Explanation - For the purpose of this section, a plaintiff whose suit has been dismissed, and a defendant against whom a suit has been dismissed, are parties to the suit.

23. Order 21 Rule 12 of the Civil Procedure Rules provides for the power to postpone payment of amount decreed or settled by way of instalments. Order 21 Rule 9 deals with costs and provides as follows:-

- 1) Where the amount of costs has been:-
 - a)
 - b)
 - c) Certified by the registrar (sub. Les. Cap. 16); and
 - d) Taxed by the court, the amount of costs may be stated in the decree or order.
- 2) In all other cases, and where the costs have not in fact been stated in the decree or order in accordance with sub-rule (1), after the amount of the costs has been taxed or otherwise ascertained, it shall be stated in a separate

certificate to be signed by the taxing officer, or in a subordinate court, by the magistrate.

24. In addition, Section 27 of the Civil Procedure Act is the substantive provision on costs and states as follows:-

- 1) Subject to such condition and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or Judge shall have power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid, and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
- 2) The court or Judge may give interest on costs at any rate not exceeding fourteen percent per annum, and such interest shall be added to the costs and shall be recovered as such.

(Emphasis added).

25. The successful plaintiff in this case was awarded costs but the Judge (A. O. Ombwayo -J;) made no order as to the interest thereon. In view of the provision of section 27 above, in my opinion when the costs were awarded the plaintiff, they did not carry interest unless there is an order for interest on costs as expressly stipulated in Section 27(2) of the Civil Procedure Act. (See **Shadi Ram Mahindra v. B. C. Mohindra (1957) E.A**

708 and Sanatana Fernandes v Kara Arjan & Sons and others (1962) E.A 47.

ii. Whether the court ought to apportion the taxed costs amongst the 7 defendants;

26. In this case, it is not in dispute that judgement was delivered on 27th January, 2021 in favour of the plaintiff with costs awarded to him against all the defendants. The plaintiff proceeded and filed his party and party bill of costs which was taxed in the sum of Kshs. 2,031,103/= . Further, the plaintiff went ahead and executed the said costs against the 7th Defendant only. Now the 7th Defendant wants the said costs apportioned as against all the 7 defendants and each of them compelled to pay their respective share. However, the plaintiff argued that he is entitled to nominate who to pursue in as far as the costs are concerned since this Court and the Court of Appeal in their respective judgements did not apportion the costs, and the same was payable jointly and severally.
27. It is not in dispute that the certificate of costs herein was a product of the decision of this court whereby, the court ordered the defendants to pay costs. It therefore means the liability of the defendants was solidary liability.
28. The Black's Law Dictionary 10th Edition defines solidary liability as follows: -

“The liability of any one debtor among two or more joint debtors to pay the entire debt if the creditor so chooses. This is equivalent to joint and several liability in the common law.”

29. In the case of **Hellen Njenga vs. Wachira Murage & another (2015) eKLR** cited in Dubai Electronics Vs. Total Kenya & 2 others Civil Case No. 870 of 1998, the concept of joint and several liability was explained as follows:-

“Clearly therefore, where you have joint liability all the tortfeasors are and each one of them is liable to settle the full liability. However, in a purely several liability, each tortfeasor is only liable to settle the sum due to the tune of his liability. When, however, the liability is joint and /or several the plaintiff has the option either directing his claim against any one of the tortfeasors or making his claim against each one of the tortfeasors according to their individual liability. Either way he cannot recover more than the total sum decreed. However, the defendants are entitled to reimbursements from the co-defendants in the event that the plaintiff only opts to recover from one of them. That is my understanding of joint and several liability.”

30. Based on the above, it is my understanding that when a court orders that the defendants shall pay the costs but does not specify whether liability is joint, several, or joint and several, the default rule is that costs are joint and several. Consequently, the plaintiff’s prayer to have the costs apportioned amongst the 7 defendants cannot succeed since that amounts to a review of the judgment of the court, which is not the case herein.

iii. **Whether the 7th Defendant ought to be allowed to pay the costs in instalments;**

31. Order 21 Rule 12 of the Civil Procedure Rules gives the court a wide discretion as to whether payment of amount decreed will be postponed or settled by way of instalments. The same provides as follows:-

“After passing of 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 be 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.”

32. Whereas the above provision of law gives the court a wide discretion, this discretion must be exercised in a judicial and not in an arbitrary manner. An applicant is therefore required to show sufficient cause for the courts to exercise its discretion in his favour.

33. The applicable principle were set out in **Botanic Kenya Ltd vs Ensign Food (K) Ltd (1959) E.A and A. Rajabah Alidina vs Remtuli Alidina & another (1965) E.A 565** thus:-

“ a) The circumstances under which the debt was contracted.

b) The conduct of the debtor.

c) His bona fide in offering to pay a fair proportion of the debt at once.”

34. In the case of freight **Forwaders Ltd vs. Elsek (K) Ltd (2012) eKLR**, the court narrowed down the principles as regards to what amounts to sufficient cause to include the following: -

“ a) The debtor is unable to pay in lump sum.

b) The debtor can pay by reasonable monthly instalment.

c) The application is made in utmost good faith.”

35. It is therefore upon the applicant to demonstrate how his case falls into the applicable principles. It is also trite that each case must be considered on its own merits and the mere fact of inability to pay the full sum at once is not sufficient reason. Further any indulgence given to the judgement debtor must not prejudice the decree holder.

36. In this case, the applicant, in his affidavit in support of the application has not stated the reason he wants to pay the costs by instalments. Whereas the applicant has submitted that he has so far paid Kshs. 300,000/= towards the party and party costs, which he calls substantial, the applicant has not given a proposal of the instalments he seeks the court to allow him to pay. Other than praying to be allowed to pay his share of the costs in instalments, the applicant has not demonstrated his financial position to enable the court to ascertain the reasonable amount he can pay. It is therefore my finding that the applicant has not demonstrated how his case falls within the applicable principles for payment by instalment to enable the court exercise its discretion in his favour.

37. In the result, I make the following orders:-

- a) The application dated 15th July, 2025 is allowed only to the extent that the costs awarded did not carry interest.
- b) Prayers (5) and (6) of the application are dismissed.
- c) Each party to bear his/its own costs of the application.

38. Orders accordingly.

DATED, SIGNED and DELIVERED virtually at **ELDORET** on this **27TH** day of **NOVEMBER, 2025** vide Microsoft Teams.

HON. C. K. YANO
ELC, JUDGE

In the virtual presence of;

Mr. Korir for Defendants.

No appearance for Plaintiffs.

Court Assistant - Laban.

ORIGINAL