



**Masilia & another v Makau & another (Environment & Land Case 482 of 2017) [2024] KEELC 391 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 391 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 482 OF 2017  
A NYUKURI, J  
JANUARY 31, 2024**

**BETWEEN**

**DANIEL KISESE MASILIA ..... 1<sup>ST</sup> PLAINTIFF**

**LOKO MBITHI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**DAVID MUSYOKA MAKAU ..... 1<sup>ST</sup> DEFENDANT**

**MUTUKU KITALI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**Introduction**

1. Before court is a Notice of Motion dated 8<sup>th</sup> December 2023 filed by the plaintiffs seeking the following orders;
  - a. Spent
  - b. Spent
  - c. That pending hearing and determination of the applicants' party and party bill of costs the Honourable Court be pleased to stay the execution of the decree dated 25<sup>th</sup> October 2023 and warrants of attachment of property issued on 4<sup>th</sup> December 2023.
  - d. That costs of this application be provided for.
2. The application is premised on the grounds on its face and the affidavit in support thereto sworn on 8<sup>th</sup> December 2023 by Daniel Kiseke Masilia the 1<sup>st</sup> plaintiff. The applicants' case is that on 17<sup>th</sup> March 2021, the plaintiffs withdrew their suit herein because their grant was revoked and that the defendants were awarded costs. That subsequently on 30<sup>th</sup> January 2023, the defendants withdrew their counterclaim and the plaintiffs were awarded costs.



3. He further deposed that on 4<sup>th</sup> September 2023, the court taxed the defendants costs at Kshs. 140,010/- and that on 5<sup>th</sup> December 2023, the applicants were served with warrants of attachment and sale in execution of costs. He stated that although they were willing and able to pay the costs, it would be nugatory if their costs on the counterclaim are not taxed, having filed their party and party bill of costs on 7<sup>th</sup> December 2023. The applicants state that they should only pay costs after their bill of costs is taxed. They attached the defendants party and party bill of costs dated 7<sup>th</sup> December 2023 which was filed on the even date.
4. The application is opposed. Maurice Muli Nzavi advocate representing the defendants swore a replying affidavit sworn on 14<sup>th</sup> December 2023 opposing the application. He deposed that the 1<sup>st</sup> defendant had no counterclaim to the suit and it is the 2<sup>nd</sup> defendant who had a counterclaim. Further that the bill of costs dated 7<sup>th</sup> December 2023 is between the plaintiff and the 2<sup>nd</sup> defendant who had filed a counterclaim and withdrew it. He stated that as the 1<sup>st</sup> defendant's costs were assessed at Kshs. 140,010/- the plaintiff must pay the same and that the execution was regular, proper and justified. He attached a copy of the defence by the 1<sup>st</sup> defendant, certificate of taxation and a copy of proclamation.
5. Parties were granted the liberty to file and serve written submissions on or before 10<sup>th</sup> January 2024 and none complied.

### **Analysis and determination**

6. I have carefully considered the application, the supporting affidavit and the replying affidavit. The only issue for determination is whether there is justification for this court to stay execution of the decree and warrants of attachment issued herein, pending determination of the taxation of the applicant's party and party bill of costs filed on 7<sup>th</sup> December 2023.
7. The record shows that the plaintiff filed suit against the defendants herein on 28<sup>th</sup> December 2017, which was amended on 2<sup>nd</sup> May 2018. Subsequently, the 1<sup>st</sup> defendant filed his defence on 4<sup>th</sup> October 2018 through the law firm of Nzavi & Company Advocates. On 17<sup>th</sup> March 2021, the plaintiffs' suit was withdrawn with an order for costs to the defendants. Thereafter on 30<sup>th</sup> January 2023, the 2<sup>nd</sup> defendant withdrew his counterclaim and the court granted costs of the counterclaim to the plaintiff. Therefore the persons ordered to pay costs in this suit are the plaintiffs and the 2<sup>nd</sup> defendant. The 1<sup>st</sup> defendant is only to receive costs from the plaintiff, while the plaintiff's costs are to be borne by the 2<sup>nd</sup> defendant only. Therefore the party and party bill of costs filed by the plaintiff can only be against the 2<sup>nd</sup> defendant.
8. In view of the above position, and bearing in mind that what is being executed are taxed costs for the 1<sup>st</sup> defendant as against the plaintiffs, it follows that the 1<sup>st</sup> defendant has nothing to do with the plaintiffs bill of costs filed on 7<sup>th</sup> December 2023, as the same cannot be taxed against him.
9. The plaintiff having not faulted the execution process and having not demonstrated that the same is irregular or unprocedural, I do not find any justification to halt that process pending taxation of the plaintiff's bill of costs, when those costs will not be borne by the 1<sup>st</sup> defendant. The upshot is that I find no merit in the application dated 8<sup>th</sup> December 2023 and I proceed to dismiss the same with costs to the 1<sup>st</sup> defendant.
10. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 31<sup>ST</sup> DAY OF JANUARY, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**



**A. NYUKURI**

**JUDGE**

In the presence of:

Mr. Mutara for plaintiff/applicant

Mr. Nzavi for 1<sup>st</sup> defendant/respondent

Josephine - Court Assistant

