



**Kimani (Suing as Personal Representative of Samuel Kimani Ng'ang'a - Deceased) v Ndichu
(Civil Appeal E011 of 2021) [2024] KEELC 995 (KLR) (27 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 995 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
CIVIL APPEAL E011 OF 2021
MN GICHERU, J
FEBRUARY 27, 2024**

BETWEEN

**YUSTER NYAMWITHA KIMANI (SUING AS PERSONAL REPRESENTATIVE
OF SAMUEL KIMANI NG'ANG'A - DECEASED) APPELLANT**

AND

JOHN KISEMBEI NDICHU ALIAS JOHN MBUGUA NDICHU .. RESPONDENT

RULING

1. This ruling is on the notice of motion dated 26/10/2023. The motion which is by the respondent is brought under order 51 rule 1 of the *Civil Procedure Rules*, Section 1A, 1B, 3A and 27 (1) and (2) of the *Civil Procedure Act* and all the other enabling provisions of law. The motion seeks the following residual orders.
2. That costs awarded to the respondent vide the ruling delivered in this appeal on 6/12/2021 which costs have subsequently been taxed and allowed in the sum of Kshs. 21,600/- be paid out of the joint account held between the appellant's and respondent's advocates at Equity Bank Limited, Community Branch, Nairobi; Account Number 01701xxxxxxx.
3. That costs of this application be awarded to the respondent.
4. That interest of 14% per annum be given on the costs of the appeal from 6/12/2021, and of this application from the date of its determination, until payment in full which interest shall be added to the costs and shall be recoverable as such.
2. The motion is supported by eight grounds and an affidavit by the respondent's counsel dated 26/10/2023, which has six (6) annexures. The gist of the above material is as follows.
Firstly, this appeal was determined on 6/12/2021 and thereafter costs of Kshs. 121, 600/- taxed in favour of the respondents.



Secondly, before the appeal, the lower court had ordered the appellant to deposit security for costs in the sum of Kshs. 1 million in a joint interest earning account in the names of the advocate for the parties.

Thirdly, the account was opened as ordered and a sum of Kshs. 1 million deposited as per the court order.

Fourthly, despite being prompted to settle the taxed costs, the appellant's advocates have refused to do so making the filing of this application necessary.

Fifthly, the appellant permanently resides in the United States of America and there is no other known asset within Kenya that she owns and there is no other reasonable means of executing for costs within Kenya other than the deposited sum.

3. The motion is opposed by the appellant who has sworn a replying affidavit dated 14/11/2023 in which she replies as follows.

Firstly, the dispute between the parties is not over yet because there is Appeal No. E006/2023 against the judgment in Ngong ELC 130 of 2018.

Secondly, the appeal was interlocutory because it arose after the appellant was dissatisfied with the order of payment of Kshs. 1 million as security for costs.

Thirdly, the respondent does not suffer any prejudice as there is already the Kshs. 1 million deposited as security for costs.

Fourthly, no interest on costs was awarded in the judgment of 6/12/2021 and there being no law making such payment mandatory, no interest on costs should be awarded at this stage.

Finally, the appellant has no intention of delaying the dispute as she has already filed the record of appeal and is only waiting for directions of the court on how the appeal will be concluded.

For the above and other reasons, he prays for the dismissal of the application.

4. Counsel for the parties were to file and serve submissions by 16/11/2023 but the only submission on record are those of the respondent. The appellant did not file any submission within the set timeline.

5. I have carefully considered the motion in its entirety including the grounds, affidavits, annexures and the submissions on record. I find that there are only two issues to be decided in this application which are as follows.

- a. Whether the respondent's costs of the appeal against the payment of security for costs should be paid at this stage or should await the conclusion of the main appeal?

- b. Whether the court should order for payment of interest on costs?

On the first issue, I find that the costs should be paid in this stage but not at the conclusion of the appeal. The reason for saying this is that there is no further appeal on the issue of payment of security for costs. If there was such an issue, it would not be pending before this court because this court pronounced itself on the issue on 6/12/2021. The appellant cannot avoid these costs even if she was successful on the other aspects of the pending appeal.

6. On the second issue, I find that the respondent is entitled to interest on costs. There is no good reason for denying the respondent interest on costs. Costs and interest on costs always go together as per Section 27(2) of the *Civil Procedure Act*.

For the above stated reasons, I allow the motion dated 26/10/2023 in terms of prayers 2, 3 and 4.

It is so ordered.



DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 27TH DAY OF
FEBRUARY 2024.

M.N. GICHERU

JUDGE

