



Ndetei & 2 others (All Suing in Representative Capacity for 56 others) v Director of Lands and Urban Planning County Government of Makueni & another (Environment & Land Case 321 of 2017) [2024] KEELC 7518 (KLR) (13 November 2024) (Ruling)

Neutral citation: [2024] KEELC 7518 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 321 OF 2017
TW MURIGI, J
NOVEMBER 13, 2024**

BETWEEN

**EDWARD MUTINDA NDETEI 1ST PLAINTIFF
JAMES MUTUA MUTHOKA 2ND PLAINTIFF
DANIEL MAKAU MWOLOLO 3RD PLAINTIFF
ALL SUING IN REPRESENTATIVE CAPACITY FOR 56 OTHERS**

AND

**DIRECTOR OF LANDS AND URBAN PLANNING COUNTY GOVERNMENT
OF MAKUENI 1ST DEFENDANT
COUNTY GOVERNMENT OF MAKUENI 2ND DEFENDANT**

RULING

1. This ruling is in respect of the Chamber Summons dated 11th December, 2023 brought under the provisions of Article 159 of *the Constitution*, Section 3A of the *Civil Procedure Act* and Rule 2 of the Advocates (Principal) Remuneration Order in which the Applicants seek the following orders: -
 1. Spent.
 2. Spent.
 3. That the Honourable Court be pleased to apportion the taxed amount of Kshs. 2,091,175/= according to the Plaintiffs' claims as their claims were distinct and severable in the Plaintiff.
 4. That the Honourable Court be pleased to restrain the Defendants from levying execution herein for as long as the Plaintiffs pay their respective apportioned amounts.



5. That the costs of this application be provided for.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Edward Mutinda Ndeti sworn on even date.

The Applicants Case

3. The Applicant averred that on 27th November, 2023, the Defendants' party and party bill of costs was taxed at Kshs. 2,091,175/=. He further averred that vide a letter dated 1st December, 2023, the Defendants demanded payment of the taxed costs within seven (7) days failure to which the Defendants would commence execution process to recover the same. He further averred that the Defendants filed their bill of costs against the 1st, 2nd and 3rd Plaintiffs at the exclusion of the other 57 Plaintiffs.
4. He argued that the taxed amount should be apportioned against each of the Plaintiffs in their individual capacities as they had individual claims against the Defendants. He contended that the 1st, 2nd and 3rd Plaintiffs will suffer substantial loss if the taxed amount is executed against them on behalf of the other Plaintiffs. He further contended that the Plaintiffs are desirous of settling their respective portions of the costs and urged the court to allow the application as prayed.

The Respondents Case

5. The Defendants opposed the application through the grounds of opposition filed on 12th January, 2024 raising the following grounds:-
 1. The Honourable Justice Mbogo C.G. in the ruling dated 5th February, 2019, dismissed the Plaintiffs' with costs to the Defendants.
 2. That in the said ruling the Honourable Judge did not apportion costs amongst the Plaintiffs.
 3. That there is no order of stay against the ruling issued on 5th February 2019.
 4. That the Honourable Deputy Registrar taxed and awarded the Defendants costs of Kshs. 2,091,175 vide a ruling issued on 21st November 2023.
 5. That there has been no appeal against the Deputy Registrar's ruling.
 6. That the Plaintiffs are jointly and severally liable and are equally responsible for the costs awarded.
 7. That each of the Plaintiff is liable to fully settle the costs.
 8. That the party upon whom execution if made can recover costs from the co-parties.
 9. That the application by the Applicants is a scheme to deny the Defendants of the enjoyment of their decree.
 10. That there must be an end to litigation.
 11. That the Plaintiffs have not consented to the manner of recovery nor paid any sum at all.
 12. That the court having pronounced itself on the matter of costs vide the ruling of 5th February, 2019 became functus officio and cannot amend its ruling and apportion liability on costs at this stage.



13. That the court does not have jurisdiction to issue the prayers sought in the Notice of Motion dated 11th December 2023.
 14. The Respondents urged the court to dismiss the application with costs.
6. The application was canvassed by way of written submissions.

The Applicants Submissions

7. The Applicants filed their submissions dated 5th February 2024. On their behalf, Counsel identified the following issues for the court's determination: -
 - i. Whether the Honourable Court should apportion the taxed amount of Kshs. 2,091,175/= according to the Plaintiffs, claims;
 - ii. Who should bear the costs of the application.
8. On the first issue, Counsel submitted that the bill of costs should be apportioned amongst the individual Plaintiffs since they had individual claims against the Defendants. Counsel submitted that the Court should sever the taxed costs so that each Plaintiff settles the costs according to their individual claims. Counsel contended that as long as the 1st, 2nd and 3rd Plaintiffs pay their respective apportioned amounts, the Defendants should be restrained from levying execution against them. Counsel relied on the provisions of Section 27 of the Civil Procedure Act to submit that the court has powers to determine the payment of costs.
9. Counsel submitted that it will be reasonable and equitable that the Plaintiffs should bear liability on costs according to their respective claims as they would have derived separate and individual benefits had the matter been ruled in their favour. Counsel outlined a schedule of the respective apportioned costs for all the 60 Plaintiffs. Counsel submitted that the 1st, 2nd and 3rd Plaintiffs will suffer tremendous hardship if they are condemned to pay the taxed amount on behalf of the other Plaintiffs.
10. With regards to second issue, Counsel submitted that the 1st, 2nd and 3rd Plaintiffs have sufficiently presented their case and urged the court to allow the application with costs. To buttress his submissions, Counsel relied on authorities annexed to the 1st, 2nd and 3rd Plaintiffs' submissions.

The Defendants Submissions

11. The Defendants filed their submissions on 4th March, 2024. On their behalf, Counsel outlined the following issues for the court's determination: -
 - i. whether, at this stage, the court can apportion costs payable by each Plaintiff; and
 - ii. which party bears the costs of the application.
12. On the first issue, Counsel submitted that the Plaintiffs' suit was dismissed with costs to the Defendants vide the ruling delivered on 5th February, 2019. Counsel further submitted that the court did not apportion costs amongst the Plaintiffs and each of the Plaintiffs is personally responsible for the entire taxed amount. Counsel argued that that if the Plaintiff's pays more their fair share, they can ask for reimbursement from their co-plaintiffs.
13. Counsel submitted that this court is functus officio as the Applicant is inviting this court to undertake a merit-based re-engagement of the individual liability of each Plaintiff and to vary its earlier decision. Counsel submitted that the application is irregular, unmerited and an abuse of the court process.



14. On the second issue, Counsel submitted that the application is devoid of merit and urged the court to dismiss the same with costs. To buttress his submissions, Counsel relied on the following authorities: -
- i. Republic v Independent Electoral & Boundaries Commission Ex parte Musikari Nazi Kombo [2019] eKLR
 - ii. Joseph K. Gachomba & 3 others v Thika Sports Club & 7 others [2019] eKLR

Analysis And Determination

15. Having considered the application, the respective affidavits and the rival submissions the only issue that arises for determination is whether the taxed costs should be apportioned amongst the Plaintiffs.
16. Vide a plaint dated 01/08/2017, the Applicants instituted this suit against the Defendants on their own behalf and on behalf of 57 Plaintiffs. It is not in dispute that the Plaintiffs' suit was struck out with costs vide the ruling delivered on 5th February, 2019. This court is called upon to determine whether the Plaintiffs are jointly and severally liable to pay the taxed costs.
17. The concept of joint and several liability is defined in Black's Law Dictionary 10th Edition as follows: -
- “Liability that may be apportioned either among two or more parties or to only one or a few select members of the group, at the adversary's discretion. •Thus, each liable party is individually responsible for the entire obligation, but a paying party may have a right of contribution and indemnity from nonpaying parties.”
18. In the case of R v PS in Charge of Interior Security ex parte Joshua Mutua Paul(2013) eKLR the court held 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, each tortfeasor is only liable to settle the sum due to the tune of his liability. Where however the liability is joint and/or several, the Plaintiff has the option of either directing his claim against any one to the tortfeasors or making his claim against each one of the tortfeasor according to their individual liability.. Either he cannot recover more than the total sum decreed, However the Defendants are entitled to reimbursement from the co-defendants in the event that the Plaintiff only opts to recover from one of them.”
19. Similarly, In Dubai Electronics v Total Kenya & 2 Others High Court (Milimani Commercial and Admiralty Division) Civil Case No. 870 of 1998 held that:
- 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. Where, however, the liability is joint and/or several the plaintiff has the option of 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 reimbursement 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.



20. In the case of Kenya Airways Limited vs. Mwaniki Gichohi (supra) Ringera, J (as he then was) stated as follows:

“The concept of joint and several liability comprehends one judgement and decree against two or more persons who are liable collectively and individually to the full extent of such decree; however double compensation is not allowed and accordingly whatever portion of the decree is recovered against one of such defendant cannot be recovered from the other defendant(s).”

21. In its ruling delivered on 5th February 2019, this court did not apportion costs amongst individual Plaintiffs. The suit had been filed jointly and severally by each of the Plaintiffs. The Plaintiffs had sought orders jointly. This therefore means that their liability is joint and several and hence, costs are recoverable from any of the Plaintiffs. The Defendants are therefore at the liberty to pursue the Plaintiffs either jointly or separately.

22. The Defendants submitted and rightly so that the Applicants can pay the costs and seek indemnity from their co-Plaintiffs.

23. In the end, I find that the application is devoid of merit and the same is hereby dismissed with costs.

HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 13TH NOVEMBER, 2024.

In The Presence Of:

Nyanchera holding brief for Ms. Cheriyou for the 1st - 3rd Plaintiffs.

Muuo for the Defendants.

Court Assistant Alfred

