



**M'Abutu & another v M'Ithae & another (Environment and Land Appeal
41 of 2020) [2023] KEELC 17179 (KLR) (26 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17179 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL 41 OF 2020**

**CK NZILI, J
APRIL 26, 2023**

BETWEEN

JOSPHAT KALAINÉ M'ABUTU 1ST APPELLANT

CHARLES NKUNDURU M'ABUTU 2ND APPELLANT

AND

JOSPHAT M'NCHEBERE M'ITHAE 1ST RESPONDENT

NICHOLAS GITONGA 2ND RESPONDENT

RULING

1. The court by an application dated 26.1.2023 is asked to stay the execution of the decree herein and to review or set aside its orders made on 19.1.2022. The grounds are contained on the face of the application and a supporting affidavit signed by L. Mutinda dated 5.12.2022. It is averred that there was an error on the face of the record and that the orders for the arrest were prejudicial for they arose out of a dismissal of a suit through a preliminary objection.
2. In the affidavit, counsel for the applicant averred that allowing the appeal with costs was a mistake or error on the face of the record. Additionally, counsel averred that in all fairness and for the interest of justice, the orders sought should be allowed otherwise the applicants would stand prejudiced. The application is opposed through a replying affidavit sworn by Joseph Kalaine M'Abutu and Charles Nkunduru M'Abutu on the basis that the deponent is incompetent to swear the affidavit; costs follow the event; the respondents in opposing the appeal knew the likely consequences; the applicants addressed the court on the merits of the appeal including on the issue of costs; it was a foreseeable consequence of the outcome of the appeal; review was not available; the order was not aimed at punishing them but to enable the appellants benefit from costs of the appeal; the preliminary objection raised was ill-advised, unnecessary and therefore the applicant must suffer the pain of having exposed the respondents to unnecessary expenses; the application was an attempt to avoid the payment of costs;



- no error or mistake exists on the face of the record and lastly; that the application was a non-starter; frivolous; vexatious; an abuse of court and unsustainable in law since it is based on conjectures.
3. With leave of court, parties opted to file written submissions dated 22.2.2023 and 8.2.2023, respectively.
 4. On their part, the applicants submitted that the application has met the threshold under order 45 of the [Civil Procedure Rules](#) based on the holding in *Nyamongo & Nyamongo vs Kogo* (2001) E.A 170, that condemned them to pay costs arising out of the dismissal of the suit by way of preliminary objection in a suit awaiting rehearing was a case for review based on error or mistake apparent on the face of the record.
 5. As to whether the appellants were entitled to costs, the applicants relying on Section 27 of the [Civil Procedure Act](#) submitted that, whereas costs follow the events the principle was not cast in stone and the court could divert from it by considering not only the outcome but also the particular circumstances of the entire case as held in *Morgan Air Cargo vs Everest Enterprises Co. Ltd* (2014) eKLR and *Cecilia Karuru Ngayu vs Barclays Bank of Kenya & another* (2016) eKLR, *Rufus Njuguna Miringu & another vs Maritha Murithi & 2 others* (2012) eKLR. The court was urged to find that the appropriate order would have been that each party bears their own costs or for the costs to abide by the main suit in the trial court.
 6. On the side of the appellants, it was submitted that the alleged mistake or error apparent in the judgment delivered on 29.9.2021 has not been pointed out for this court to invoke its review power. The respondents submitted that the application was filed after an inordinate delay of 1 ¼ years, which was an afterthought and a scheme to avoid paying costs. The general rule under Section 27 of the [Civil Procedure Act](#) is that costs follow the event except where there were good reasons to depart therefrom, which the court in the judgment followed after it found merits in the appeal and should not, therefore, be faulted for it. Reliance was placed on *Eve Malenya vs ODM Party and another vs IEBC and others* (2020) eKLR, *Kbelef Khalifa & 20 others vs IEBC and another* (2018) eKLR.
 7. Lastly, the respondents submitted that the court exercised its discretion well and should not interfere with it since there was no misdirection or application of any wrong principles of law. Moreover, the respondent submitted that the court was now functus officio. Concerning stay the respondents submitted that no special circumstances have been shown and since the court was functus officio, the prayer lacked merits.
 8. At issue in this application is whether the court should review its judgment dated 19.1.2022 as regards costs and or stay the execution for the same.
 9. The history of this appeal began with a memorandum of appeal filed on 11.8.2020 following a decision dated 29.7.2020 at the lower court, which had been triggered by the respondents' preliminary objection dated 18.2.2020, based on Section 16 (2) [Civil Procedure Act](#) and order 29 rule 2 [Civil Procedure Rules](#) which was upheld. Thereafter, the appellants sought to stay the lower court suit by an application dated 7.9.2020, which the applicant herein opposed by a replying affidavit dated 13.10.2020.
 10. Additionally, the applicants also filed an application dated 22.1.2021 sought for an injunction against the appellants which was opposed through a replying affidavit dated 10.2.2021. The court proceeded to determine the two applications and by a ruling dated 29.9.2021 stayed the lower court suit, ordered that the land registrar visits the locus in quo to mark the boundary and avail the report before this court. Further, the court directed the parties to file written submissions to the main appeal. The respondents/ now applicants filed written submissions dated 8.11.2021 seeking that the lower court order be upheld



and the appeal be dismissed as lacking merits while on the other hand, the appellants took the view that the appeal had merits.

11. In a judgment dated 19.1.2022, this court found that there was no basis for the respondents to raise the preliminary objection in the first instance since the claim was based on titled land on account of fraud or illegality and that order 29 of the [Civil Procedure Rules](#) as read together with Section 16 (2) of the [Government Proceedings Act](#) had no relevance.
12. Further, the court made a finding that the respondents' defence and counterclaim were also seeking a permanent injunction, yet it was not struck out on account of jurisdiction. The court also found that the trial court proceeded with the matter at the request of the respondents yet it had found it lacked jurisdiction.
13. After this court's judgment, it appears that parties herein participated in the taxation of the costs before the taxing master who rendered a decision dated 18.11.2022 which has not been appealed against, and so is the judgment herein. In an attempt to stay the execution of the costs, the applicants herein filed a notice of motion dated 6.12.2022 through the firm of Wanjiku Muna Advocates, which this court struck out with costs on 18.1.2023. In the said application, the supporting affidavit was sworn by the 2nd respondent now an applicant herein was clear that they were satisfied with the judgment of this court.
14. Having set the background and genesis of this appeal, the applicants have urged the court to find that there was an error or mistake apparent on the face of the judgment as regards costs which it should review or stay its execution.
15. Order 45 [Civil Procedure Rules](#) as read together with Section 80 of the [Civil Procedure Act](#) provides that a party who has not appealed against an order or decree should without inordinate delay move to the court where the decree or order was made for review, inter alia, based on error or mistake apparent on the face of the record or such other sufficient reasons(s).
16. The alleged error or mistake according to the applicants is that the court should not have awarded costs of the appeal to the successful party guided by Section 27 of the [Civil Procedure Act](#), since the matter is still ripe at the lower court. Further, the applicants guided by the holding in [Morgan Air Cargo](#) (supra), Cecilia Karuru (supra), and [Rufus Njuguna](#) (supra) urged the court to find that they should have been spared from paying the costs for the appeal.
17. On the other hand, the appellants/respondents take the view that no error or mistake exists, there has been inordinate delay, and that the court has no basis to revert from the general rule that costs follow the event guided by the case law of [Eve Malenya](#) (supra) [Khelef Khalifa](#) (supra).
18. In the case of [Jasbir Singh Rai & 3 others v Tarlocharn Singh Rai Estate & 4 others](#) [2014] eKLR, at issue before Supreme Court was whether the principle that costs follow the event was binding on the court. The court cited with approval [Joseph Oduor Anode v Kenya Red Cross Society](#) [2012] eKLR, the words of Odunga J as he then was, that in awarding costs, the discretion to do so has to be exercised judicially and that if the court diverts from the general rule, reasons must be given. The Supreme Court held that the rule was not aimed at penalizing a losing party but rather aimed at compensating the successful party for the trouble taken in presenting or defending the suit.
19. As to what good reasons are, the Supreme Court held that there exists no clear definition though under the common law, courts must proceed on a case-to-case basis in identifying the good reasons, among them public interest litigation as held in [Amoni Thomas Amfry and another v Minister for Land](#) Nairobi High Court Petition 6 of 2013, [Harun Mwau & another v AG & another](#) Nairobi H.C



Petition 65 of 2011, Raila Odinga vs IEBC & others Petition No. 5 of 2013, Samuel Kamau Macharia & another v KCB and others [2013] eKLR.

20. In sum, the Supreme Court held that a party who calls forth the event in a successful suit, then the defendant or respondent will bear the costs unless there were vitiating factors or special circumstances to depart from the rule, among them the ends of justice, the motivation and the conduct of the parties before, during and after the actual process of litigation, bonafides of the dispute, history of the matter, missed opportunities for Alternative Dispute Resolution, legitimacy of the cause of action, the constitutional right to submit oneself to the judicial process and want of due diligence.
21. As regards error or mistake on the face of the record, in *Otieno Ragot and Co. Advocate v NBK* [2020] eKLR, the court cited with approval *NBK v Ndugu Njau* [1997] eKLR, that such an error or mistake on the part of the court must be self-evident and should not require an elaborate argument to be established. Similarly, in *Mugodi vs ICDC* [2006] 1 E.A 243 and in *Nyamongo* (supra) it was held that a mere error or wrong view was certainly not among the grounds for review but maybe one for an appeal. Further, the court in *Hosea Nyandika Mosagwe & others v County Government of Nyamira* [2022] eKLR cited with approval *Ajit Kumar Rath v State of Orisa & others* Supreme Court Cases 596 at 608, that a review cannot be claimed or asked merely for a fresh hearing or arguments or correction of an erroneous view taken earlier. Additionally, the court cited with approval *Republic vs Advocates Disciplinary Tribunal Exparte Apollo Mboya* [2019] eKLR, that an erroneous decision cannot be corrected under the guise of review and that a mistake has to be visible.
22. Applying the foregoing case law to the present circumstances, the applicants are the ones who triggered the appeal following a preliminary objection filed at the lower court. Before this court, the applicants never conceded to the appeal including any interlocutory applications therein. Even after the court gave directions for the land registrar to visit the locus in quo and bring a report, the applicants never took that option to mitigate the costs. Similarly, after the judgment, the applicants participated in the taxation of the costs. It was only after the application dated 6.12.2022 was struck out, that the applicants came back to this court for review. The applicants also participated in the determination of whether the appeal should be allowed with costs or not. They now seem to be seeking a second bite of the cherry when it is too late and when their conduct before, during, and after the determination of the appeal indicates that there have been no special circumstances or that they expressed an intention of mitigating the costs by any of the avenues alluded to above.
23. In the circumstances, I find no error or mistake on the part of the court. The court in determining the appeal followed the general rule based on the circumstances obtaining at the time and based on sound grounds that a successful litigant was entitled to costs. Therefore, the court finds no basis disclosed to revisit the judgment and review it as regards costs. See *Stanley Kaunga Nkarichia vs Meru Teachers College & another* (2016) eKLR, *Supermarine Handling Services Ltd vs KRA* (2010) eKLR *Devram Daltani vs Haridas Kaluda Danda* (1949) 16 E.A.C.A 35, as cited with approval in *James Mosomi Moseti vs BOM Nyataro Secondary School* (2020) eKLR.
24. Additionally, the second prayer for stay lacks merit and is also rejected. The upshot is the application dated 26.1.2023 is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 26TH DAY OF APRIL, 2023

In presence of:

C/A: John Paul

Miss Gatwiri Mwiti for Mwendwa for the respondent



Miss Kiyuki for Mutinda for the applicant

HON. C.K. NZILI

ELC JUDGE

