



**LN v Barclays Bank Limited & 5 others (Matrimonial Cause 8 of 2017) [2023] KEHC 21640 (KLR) (31 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21640 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MATRIMONIAL CAUSE 8 OF 2017**

**HM NYAGA, J**

**JULY 31, 2023**

**BETWEEN**

**LN ..... PLAINTIFF**

**AND**

**BARCLAYS BANK LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**ANTIQUE AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**CNN ..... 3<sup>RD</sup> DEFENDANT**

**OIL CROP CO LTD ..... 4<sup>TH</sup> DEFENDANT**

**PM DICK AUCTIONEERS ..... 5<sup>TH</sup> DEFENDANT**

**SAMUEL ARAMA (ORTAMA GENERAL SUPPLIES ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

1. Before me is an Application dated August 2, 2022, brought under Section 27 of the [Civil Procedure Act](#) and Order 51 of the [Civil Procedure Rules](#). The applicant seeks the following orders;
  1. That this Honourable Court be pleased to award the costs of the suit to the 6<sup>th</sup> Defendant being a successful party in this suit in so far as its position was concerned and to further specify who as between the Plaintiff and the 1<sup>st</sup> Defendant ought to meet the awarded costs.
  2. That the cost of the Application also be awarded.
2. The Application is founded on the grounds set out on the face of it and is supported by the Affidavit of Kaiga Waitindi.
3. In a nutshell, the Applicant states that the 5<sup>th</sup> Defendant was wrongly sued herein, as its individual involvement was in its capacity as an officer of the Court in line with Section 5 of the [Judicature Act](#).



That while the 6<sup>th</sup> Defendant was mandated by court to carry out execution of orders in Nakuru CMCC 135 of 2021, which it did legally while being supervised by the OCS Nakuru.

4. The Applicant further avers that while delivering its judgment, the court interrogated the culpability of the 6<sup>th</sup> Defendant and held that it was not liable for the wrongful eviction that took place against the Plaintiff on March 22, 2011.
5. It is further averred that the 6<sup>th</sup> Defendant was vilified by the Plaintiff by being sued and has incurred legal costs in defending its rightful court backed execution. That as a successful party, the 5<sup>th</sup> Defendant ought to be indemnified for the expenses incurred.
6. The Applicant further avers that the judgment delivered was silent on the issue of costs in regard to the 5<sup>th</sup> Defendant.
7. The Application was opposed by the Plaintiff/Respondent. She filed a Replying Affidavit sworn on February 15, 2023. In brief the Respondent avers that this court is *functus officio*, having rendered judgment on August 28, 2021 and it cannot be called upon to vary its judgment through the present Application.
8. The Respondent further states that if the 6<sup>th</sup> Defendant/Applicant is dissatisfied with the judgment as regards costs. Such dissatisfaction should be taken up on Appeal.
9. The Respondent further avers that the costs are at the discretion of the Judge, who exercised it as set out in the Judgment.
10. Lastly, the Respondent states that the Applicant was a necessary party to the suit as they had been involved in the intended eviction from her home. The parties filed Submissions.

### **Applicants Submissions**

11. The Applicant framed the following issues as falling for determination.
  - (a) Whether the costs in relation to the suit should issue to the 6<sup>th</sup> Defendant.
  - (b) Who should bear the cost of this Application.
12. The Applicant submitted that the court inadvertently failed to make any decision in respect to costs which was one of its prayers. That this inadvertence can be cured through a review of the Judgment and thus an Appeal would not be necessary.
13. The Applicant cited Section 27, 80 and 99 of the [Civil Procedure Act](#) and Order 45 of the [Civil Procedure Rules](#) to buttress their case. They also referred me to [Nation Media Group and Another vs Awale Transporters Ltd.](#) [2022] eKLR.
14. It was further argued that although costs are at the discretion of the court, that discretion is not absolute and reasons for the decision ought to be provided to the parties. That the discretion ought to be exercised judiciously and not arbitrarily. I was referred to the case of [Farah Awadh Gullet vs CMC Motors Group Ltd.](#) [2017] eKLR which was cited in [Limuru County Club & 6 Others vs Rose Wangui Mambo & 15 Others](#) [2019] eKLR.
15. The Applicant further submitted that the failure by the court to pronounce itself on the issue of costs was an inadvertent error given the court's finding at Paragraph 49 of its Judgment.
16. It was also submitted that it is a well established principle that costs generally follow the event and that a successful party is typically entitled to costs and ought not to be unduly burdened by the costs



of enforcing their rights. To buttress this point the Applicant referred to the decision in Republic vs Rosemary Wairimu Munene. Ex-parte Applicant vs Ihururu Dairy Farmers Co-op Society as cited in [Cecilia Karuru Ngayu vs Barclays Bank Ltd. & Another](#).

17. The Applicant concluded by stating that litigation is costly and an award of costs to the 5<sup>th</sup> Defendant ought to be made. That the absence of an order made. That the absence of an order of costs would be to discourage parties from actively engaging in litigation to defend their rights, thus undermining the principles of justice and fairness.

### **The Plaintiff/Respondent's Submissions**

18. The Respondent reiterated her averments that this court is *functus officio* and that the matter at hand is *res judicata*, having been determined by the court in its Judgment.
19. On the principle of *res judicata*, I was referred to [IEBC vs Maina Kiai & 5 Others](#) [2017] eKLR.
20. The Respondent avers that the issue of costs was conclusively dealt with by the court while delivering its judgment.
21. On the Principle of *functus officio*, I was referred to the case of [Telkom Kenya Ltd. vs John Ochanda & Others](#) [2014] eKLR. Also cited was [Salama Mohammed Saad vs Kikas Investments Ltd. & Another](#) [2014].
22. It was further submitted that the Application is barred by the doctrine of finality of litigation as stated in [Jasbit Singh Rai and 3 Others](#) [2007] eKLR.
23. The Respondent further submitted that the Applicant is guilty of laches, having waited for 1 year after delivery of Judgment. Cited was [Halbury Laws of England](#) 4<sup>th</sup> Edition Vol. 16(2).
24. The Respondent further cited the Privy Council decision in [Lindsay Petroleum Co. Ltd vs Hurd](#)(1874) L.R. 5 P.C. 2. Lastly the Respondent cited [Githae vs Nairobi City Commission](#) 1991 KLR.

### **Analysis and Determination**

25. It is not in dispute that Judgment herein was delivered by J. Ngugi J (as he then was). In his judgment, the Learned Judge granted the orders set out in the judgment.
26. Upon delivery of the said Judgment, the Court also addressed the issue of costs when Mr. Mungai made a query on the same. The court's directions were as follows;-

“The Judgment did not specifically address the issue of costs in which case it will follow the events. There will be a 30 days stay of execution.”

27. It is this decision that the Applicant wants to be reviewed and he be awarded costs.
28. A look at the Application shows that though touted as an Application for review, the Applicant did not come under the provisions that provide for review, that is Section 80 [Civil Procedure Act](#) and Order 45 of the [Civil Procedure Rules](#). These were cited in the Submissions.
29. A party seeking review ought to categorically state so, since there are very clear grounds to be relied on in an Application for review. Order 45 Rule (1) [Civil Procedure Rules](#) provides as follows;-
  - (1) Any person considering himself aggrieved—
    - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or



(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

30. In my opinion, the Applicant failed to apply one of the reasons cited. Nevertheless I find that the failure is not fatal to the Application and I will proceed to address it.

31. The next issue to be determined is whether this court is *functus officio* having delivered its Judgment.

32. The principle of *functus officio* was aptly enunciated in *Telkom Kenya* Case (*supra*) as follows;

“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19<sup>th</sup> Century. In the Canadian case of *Chandler v Alberta Association of Architects* [1989] 2 SCR 848, Sopinka J traced the origins of the doctrines as follows (at p 860): ”

The general rule that a final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal *In re St Nazaire Co*, (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions: Where there had been a slip in drawing it up, and, where there was an error in expressing the manifest intention of the court. See *Paper Machinery Ltd. vs. J.O. Rose Engineering Corp.*, [1934] S.C.R. 186”

33. It is well settled that a court will not ordinarily address a matter it has conclusively dealt with save for situations like an application for review, under Section 80 or application of the slip rule under Section 99 of the *Civil Procedure Act*.

34. In the instant case, the Applicant is asking the court to revisit the issue of costs. That issue was duly and conclusively dealt with by the court in it’s remarks after the Judgment. It declined to grant any other reliefs apart from the one it specifically issued. It has to be assumed, in light of the express terms of Paragraph (h) of the Judgment, the award of costs to the applicant was one of the prayers that were not specifically awarded but directions were given that they would follow the event. The event was that the plaintiff’s claim succeeded.

35. I am of the view that the correct course is for any party not satisfied with these orders was to Appeal.

36. I am aware of the provisions of Section 27 of the *Act*. It provides as follows;-

“(1)Subject to such conditions 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 full 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.”

37. However, looking at the nature of the orders of the court, especially Paragraph (h), it amounted to denial of all other prayers, save for the ones set out. Thereafter, the costs were ordered to follow the event, which was in favour of the plaintiff. Though the court held that the applicant was not blame for the situation, it did not expressly grant him any orders. It is not in my place to begin to seem to start interpreting the Judgment in any other way than it appears.
38. I am thus of the opinion even if I was to consider this Application as one for review, then no satisfactory grounds have been laid.
39. Another crucial question that arises is even if I am to review the orders, who should be ordered to pay the costs. Certainly, it could not have been the Plaintiff, who was successful in her case. The fact that the 6<sup>th</sup> Defendant was found not liable for the wrong eviction did not necessarily mean that he would be awarded costs to be paid by the Plaintiff. The court could have ordered that applicant’s costs be paid by any of the other parties. It did not do so and I cannot start to rewrite the judgment.
40. Therefore, I find that in so far as the final orders of the court are concerned, and in the absence of any ground for review or application of the slip rule, this court is *functus officio*. The applicant ought to appeal against the judgment.
41. The principle of *res judicata* was discussed in *IEBC vs Maina Kiai & 5 Others* [*supra*] as follows;
- “Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms:
- i. The suit or issue was directly and substantially in issue in the former suit.
  - ii. That former suit was between the same parties or parties under whom they or any of them claim.
  - iii. Those parties were litigating under the same title.
  - iv. The issue was heard and finally determined in the former suit.
  - v. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”
42. As stated, the remarks by the court after delivery of the judgment settled the issue of costs. It is thus my finding that on the basis of the above grounds, the issue raised by the Applicant is also *res judicata*.
43. The Applicant has been accused of being lethargic in coming to court. The Application was filed on September 14, 2022, 13 months after the Judgment in question was delivered. The Judgment was delivered virtually, in application of the Covid 19 Practice Rules. The period in question must be put into perspective. The country had just emerged from Covid 19 restrictions. Court operations were severely affected. It is not clear when the parties obtained the copy of the Judgment and perused it. Given these circumstances, I cannot state that the Applicant was guilty of laches.
44. In the end, I find that the Application as incapable of being granted by this court. Even though I understand the applicant’s situation, I would not want to cloth myself with powers that I do not possess. Therefore, I decline to grant the orders sought.



45. On costs of the application, I find that the circumstances of the case call for me to relieve the parties of extra burden. I am not sure if the Appeal by the 1<sup>st</sup> Defendant is active, and if it is, then the Court of Appeal will handle all the issues, including the applicant's costs.

46. Therefore, I direct that each party bears their own costs. Right of Appeal explained.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 31<sup>ST</sup> DAY OF JULY, 2023.**

**HESTON M. NYAGA**

**JUDGE**

**In the presence of;**

C/A Jeniffer

Ms Kinuthia for Defendant/Applicant

Mr. Ndung'u for Plaintiff/Respondent

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