



REPUBLIC OF KENYA



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**Omote & another v Ogutu (Civil Appeal E005 of 2021)
[2022] KEHC 16441 (KLR) (19 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16441 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL APPEAL E005 OF 2021
F GIKONYO, J
DECEMBER 19, 2022**

BETWEEN

EVANS ONERA OMOTE 1ST APPELLANT

MARY ARIRI EVANS 2ND APPELLANT

AND

DAVID OGINGA OGUTU RESPONDENT

RULING

- [1] Before me is a Notice of Motion dated June 21, 2022 expressed to be brought under the provisions of article 50(1) of the Constitution, section 80, 1A and 1B of the Civil Procedure Act and order 45 rule 1 of the Civil Procedure Rules.
- [2] The application is one for review, but more specifically seeking the following orders:
- i. That the honourable judge be pleased to review and/or revise his own orders on costs on the judgment delivered on May 24, 2022.
 - ii. That the honourable court be pleased to direct and order the appellant to pay costs both of the appeal and lower court and interest thereof to the respondent.
 - iii. That costs of this application be borne by the appellant.
- [3] The grounds upon which the application is premised are set out in the application and the Supporting Affidavit sworn by David Oginga Ogutu.

Applicant's case

- [4] The respondent/applicant seeks a review of the judgment dated May 26, 2022 where this court found the appellant's appeal unmerited and dismissed it with an order that each party shall bear its own costs



of the appeal. The respondent/applicant argues that the said order on costs is prejudicial and unfair to the applicant as he will have to meet all litigation costs that have been incurred by the advocates in opposing a frivolous appeal. Further, that the order will encourage parties to file frivolous appeals. That even though the courts have ultimate discretion in awarding costs the same must be exercised judiciously.

- [5] The respondent/applicant stated he is fully aware of the provision to section 27 of the [Civil Procedure Act](#) that in as much as costs follow the event the court may for good reason order otherwise; in this instance, the court is silent on the reason for denying the applicant costs yet this is a running down matter and not a public litigation cause or matrimonial matter or children matter and therefore he should not be deprived of his costs.
- [6] The respondent/applicant submitted that the order as to costs was an error or mistake on the face of the record which is one of the grounds for seeking review.
- [7] The respondent/applicant has relied on the following authorities;
- i. Section 80 of the [Civil Procedure Act](#)
 - ii. Misc Application 455 Of 2016, [Paul Mwaniki Vs National Health Insurance Fund Board of Management](#) [2020] eKLR
 - iii. [Ajiit Kumar Rath v State of Orisa & Others.](#)
 - iv. [Nyamogo & Nyamogo v Kogo](#) [2001] Ea 170.
 - v. *Attorney General & Ors v Boniface Byanyima* (Hcma no 1789 Of 2000)
 - vi. [Aribam Tuleshwar Sharma vs Aribam Pishak Sharma](#) [1979] 4 SCC 389
 - vii. Section 27 of the [Civil Procedure Act](#), 2010.
 - viii. Nairobi Civil Appeal no 59 of 2007 *Michael Murimi Kimanzi v Jameson Industries Limited & Another* [2016] eKLR.
 - ix. Nyahururu Civil Case no E002 of 2021, [DGM v EWG](#) [2021] eKLR
 - x. *Republic v Rosemary Wairimu Munene [ex parte applicant] v Ibururu Dairy Farmers Co-Operative Society Ltd* Judicial Review Application no 6 Of 2004.
 - xi. Supreme Court Petition no 4 of 2012, [Jasbir Singh Rai & 3 Others Vs Tarlochan Singh Rai & 4 Others](#) [2014] eKLR.
 - xii. [Halsbury's laws of England](#), 4th edition (re-issue), [2001] vol 10
 - xiii. Section 26 of the [Civil Procedure Act](#), 2010.
 - xiv. Nairobi Civil Appeal no 8 of 2018, [Center for Mathematics Science and Technology Education In Africa \(Cemestea\) v Apex Security Services Limited](#) [2021] eKLR.
 - xv. *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Limited (no 2)* [1970] EA 469 At 475.

Appellants/espondents case

- [8] On October 12, 2022, Mr Njuguna holding brief for Ms Chichi indicated to this court that Mr Chichi requires 14 days to file replying affidavit and submissions. The same was granted.



- [9] The appellants/ respondents have stated in their submissions that they filed a replying affidavit dated October 19, 2022 opposing the application herein. However, the said replying affidavit is not in the court file.
- [10] The appellants/respondents submitted that award of costs is not cast in stone but courts have ultimate discretion. This court exercised its discretion judiciously. Therefore, the application herein is misconceived and ought to be dismissed with costs.
- [11] The appellants/respondents submitted that this court noted the mix-up of findings and final orders of the trial court and clarified the same in paragraph 35 of the judgment.
- [12] The appellants/respondents submitted that among the factors for consideration in awarding costs is the conduct of the parties. The appellants/respondents conducted themselves well and adhered to all directions of this court including depositing security in the joint account within the prescribed time, filing a record of appeal and submission, and prosecuting the appeal within the shortest time possible. The appeal was not frivolous or meant to delay justice.
- [13] The appellants /respondents submitted that the applicant is coming to this court with unclean hands as this court was gracious enough to award them costs of the trial court and interest and also ordered the release of the full security from the joint account together with all accrued interest to the applicant.
- [14] In the end, the appellants/respondents urged this court to dismiss the instant application with costs.
- [15] The appellants/respondents have relied on the following authorities;
- i. Section 27 (1) of the *Civil Procedure Act*.
 - ii. *Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] eKLR
 - iii. *Halsbury's Laws of England*, 4th Edition (Re-Issue), [2010], Vol. 10. Para. 16.

Analysis and determination

Issues for determination

- [16] From the application herein, the supporting affidavit, and the written submission by the respondent/ applicant. I find the only issue for determination to be;
- i. Whether there is a mistake or error on the face of the record or any sufficient reason to justify review of the judgment herein.
- Under section 80 of the *Civil Procedure Act* and order 45 rule 1 of the *Civil Procedure Rules*, the court may review its decision, *inter alia*: - on account of some mistake or error apparent on the face of the record, or for any other sufficient reason.
- [17] An error or mistake apparent on the face of the record is one that is self-evident and does not require elaborate arguments to be established. See *Paul Mwaniki v NHIF Board of Management* [2020] eKLR;
- [18] Is there any such mistake or error on the face of the record?
- [19] The judgment containing the order in question was delivered on May 26, 2022. The specific order subject of review application is on costs and reads as follows;

‘[36] Each party shall bear its own costs of this appeal. It is so ordered.’



- [20] From the submissions made by the applicant, he believes he was the successful party and ought to have been awarded costs of the appeal. This is akin to asking the court to sit on appeal of its decision and reverse it. The fact that a party believes that the court should have reached a different conclusion or that the decision was erroneous are matters fit for appeal rather than review which is limited in scope. Notably also, courts have held that; ‘the process of reasoning cannot be treated as an error apparent on the face of the record justifying the exercise of the power of review.’ And that; ‘an erroneous order/ decision cannot be corrected in the guise of exercise of the power of review.’ ([Republic v Advocates Disciplinary Tribunal Ex Parte Apollo Mboya](#) [2019])
- [21] Similarly, the request herein entails a re-appraisal of the evidence and re-analyzing its decision to establish whether or not the applicant is entitled to costs- something which is beyond the scope of review jurisdiction.
- [22] Accordingly, the supposedly ‘mistake or error apparent on the face of the record’ is not a misstate or error in the sense of the law for which review may be granted.
- [23] I do note, however, that it was argued that this kind of order would encourage parties to file frivolous appeals to the detriment of the respondent. But, is this a sufficient reason upon which review may be granted?
- [24] Of sufficient reason: ‘Any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the court by section 80 of the [civil procedure act](#); and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous’ ([Shanzu Investments Limited v Commissioner for Lands](#) (Civil Appeal No 100 of 1993)).
- [25] On the claim that the order will encourage filing of frivolous appeals; an order for costs is ordinarily specific to the case; but of course being guided by the applicable law; and, it is never an order in rem. In any event, costs follow the event, and the event is determined by the sum total of the circumstances of each case. Therefore, in light of the law, I do not see how an order for costs specially tailored to suit the circumstances of an individual case would encourage parties to be filing frivolous appeals in other cases. I do not also find any sufficient reason to review the order assailed herein.
26. The foregoing analysis points to only one thing; that the application herein does not meet the legal threshold for review under section 80 of the [Civil Procedure Act](#) and order 45 of the [Civil Procedure Rules](#).

The muddle-up

- [27] Before I close, it is worth mentioning that, in paragraph 35 of the decision of this court, an apparent mix-up of the findings and final orders in the judgment of the trial court was noted. And, the mix-up or error apparent on the face of the record of the trial court was duly corrected. The respondent accordingly noted and appreciated the correction. Also of significance, the order on costs by the trial court was not altered or varied.

Conclusions and orders.

- [28] For the reasons stated above, the court makes the following findings and determinations;
- i. The Notice of Motion dated June 21, 2022 does not meet the threshold for an order of review; thus, devoid of merit and it is hereby dismissed;



- ii. Granted the result of this decision and the circumstances of this case, each party shall bear its costs of the application herein.

29. Orders Accordingly.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 19TH DAY OF DECEMBER, 2022

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F Gikonyo M

Judge

In the Presence of:

1. Ms Chichi for the appellant/respondent
2. The respondent/applicant
3. **Kasaso – C/A**

