



**Kamwara v Kagembe (Environment & Land Case E001 of 2021)
[2023] KEELC 19030 (KLR) (26 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19030 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT & LAND CASE E001 OF 2021**

CK YANO, J

JULY 26, 2023

BETWEEN

GEOFFREY KIANIA KAMWARA APPLICANT

AND

MWIKAMBA KAGEMBE RESPONDENT

RULING

1. Before me is a notice of motion dated 30TH March 2023 seeking for orders that;
 1. That due to the nature and urgency of the instant application, the same be heard on priority basis.
 2. That this honourable Court be pleased to grant Leave for the firm of M/S WAKLAW Advocates to come on record for the Applicant/plaintiff in place of M/S Mutegi Kithaka Advocates of P.O Box 3043-60100 Embu.
 3. That this Honourable Court be pleased to suspend the prosecution of the Respondent's/Defendant's Bill of costs dated 22/02/2023 and fixed for hearing on 6/04/2023, pending the hearing and final determination of the application for Review of the judgement delivered on 9/11/2022 and on issue of costs of the suit.
 4. That the Honourable court be pleased to Review the Judgement delivered on 9/11/2022 and on the issue of costs of the suit and which Judgement dismissed the Applicant's/plaintiff's Suit with costs to the Respondent/Defendant.
 5. That the court do grant such further orders appropriate for the interest of Justice.
 6. That the cost of this application be costs in the Cause.
2. The application is premised on the following grounds:



- a. That the Applicant's/plaintiff's Suit was dismissed on a technicality on 9/11/2022 and despite the Applicant/plaintiff being in occupation of the suit land LR. Tharaka/Chiakariga "A"/1485, since the year 1992.
 - b. That on 9/11/2022, the Applicant/plaintiff further instructed M/S Mutegi, Kithaka Advocates to file appropriate application for the Review of the Judgement delivered on 9/11/2022, on the grounds that the Respondent/Defendant and who had not filed any counterclaim to the Applicant's/Plaintiff's suit was not entitled to any costs of the suit.
 - c. That M/S Mutegi, Kithaka Advocates did not file the application for the Review of the Judgement delivered on 9/11/2022 despite further instructions from the Applicant/Plaintiff after the delivery of the Judgement.
 - d. That it is in the interest of Justice that the Applicant/Plaintiff be allowed to engage another law firm of Advocates to pursue the intended application for Review of the judgement delivered on 9/11/2022 and which application has overwhelming chances and/or probability of success.
 - e. That the Applicant/plaintiff ought not to be condemned on the delay (if any) to file the said application for Review of Judgement delivered on 9/11/2022.
 - f. That the Respondent/Defendant and who is only occupying 1.82Acres or thereabout on the suit land L.R Tharaka/Chiakariga "A"/1485, stands to suffer no loss and/or damage, if the instant application is allowed.
 - g. That the issue of costs payable in a suit qualifies to be "any Sufficient reasons for Review" as contemplated under order 45 of the Civil Procedure Rules 2010.
3. The application is supported by the affidavit of Geoffrey Kiania Kamwara, the applicant sworn on 30th March, 2023. The Applicant depones that on 9/11/2022 the court dismissed his suit which he had filed against the Respondent/Defendant on 17/02/2021. That his suit against the Respondent/Defendant was dismissed on a technicality since he has occupied the suit land LR Tharaka/Chiakariga "A"/1485 since the year 1992 on a portion of land measuring 7.00 Acres or thereabout and that it is the said Land parcel he calls his only home. That the Respondent/Defendant only occupies a portion of land measuring 1.82 Acres or thereabout on the suit land LR. Tharaka/Chiakariga "A"/1485.
 4. The applicant avers that he had instructed M/S Mutegi, Kithaka & Co. Advocates to institute a suit against the Respondent/Defendant for a declaration that the Respondent/Defendant holds 7.00 acres on the Suit Land L.R Tharaka/Chiakariga "A"/1485 in trust for him and was obligated in law to transfer the same to him and where he has been in occupation since the year 1992.
 5. The applicant states that he did not instruct M/S Mutegi, Kithaka & Co. Advocates to file Adverse Possession Claim, since the statutory period of 12 years had not elapsed as required in Law since the suit land was registered in the Respondent's/Defendant's name in the year 2016. That his former Advocates filed a non-starter suit against his express instructions and the Court ought not to condemn him on costs of the suit.
 6. The Applicant avers that the boundary dispute issues which came out during the canvassing of the instant suit can clearly attest his claim of 7.00 acres and the Respondent's/Defendants interest of 1.82 acres or thereabout on the suit land.
 7. The Applicant depones that immediately his suit was dismissed he instructed his former Advocates to file appropriate Application for review of the said Judgement and in particular on payment of costs, but the said Advocates did not file the necessary Application for Review of the Judgement delivered



on 9th November 2022 despite his express instructions to them. That he should not be condemned on accounts of the mistakes of his former Advocates who failed and/or ignored to file his application for Review of the Judgement without unreasonable delay.

8. The Applicant further depones that the Respondent/Defendant who did not file any counterclaim against his instant suit did not deserve any costs of the suit and that it is in the interest of justice that his Application be allowed.
9. In response, the Defendant/Respondent filed a Replying Affidavit dated May 2, 2023 sworn by Dennis Kimakia Advocate for the Defendant/Respondent wherein he depones that the application herein is scandalous, frivolous and an abuse of the courts time. That filing of an application for review 5 months after dismissal of suit is the applicant's tactic to delay justice and an attempt to deny the Defendant/Respondent the fruits of his successful judgement.
10. The respondent's advocate pointed out that the plaintiff/Applicant's claim in his Affidavit claims to have instructed his previous advocates to file for review after his suit was dismissed and attached a receipt for payment marked "GKK1" but that receipt is for payment for instructions to obtain the Judgement and proceedings and not to file an application for review.
11. That the grounds provided by the plaintiff/Applicant in support of his application herein are not only preposterous but also baseless.
12. The respondent's advocate further states that the principle costs follow the event is well recognized by the law under section 27 of the *Civil Procedure Act* and the same is used for compensating the successful party for the trouble taken in prosecuting or defending the case. That the defendant/Respondent successfully defended his case and the court was right and within the law in awarding him the costs of the suit.
13. The respondent's advocate further depones that the Application is purely an act to delay justice and waste the court's time and if allowed, the defendant/respondent will stand prejudiced. That for reasons advanced above the plaintiff/Applicant has not met the threshold for grant of the prayers sought, adding that the Plaintiff/Applicant has failed to provide sufficient grounds for a review and his application should be dismissed with costs

Analysis & Determination

14. I have considered the application and the response filed. The issues for determination are:
 - i. Whether the Court should grant Leave to the firm of M/S WAKLAW Advocates to come on record for the Applicant/plaintiff in place of M/S Mutegi Kithaka Advocates.
 - ii. Whether the court should review the judgement delivered on 9/11/2022 on the issue of costs of the suit.
15. In regards to the first issue order 9 rule 9 of the *Civil Procedure Rules* provides as follows:
 - "9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-
 - a. Upon an application with notice to all the parties,



- b. Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”
16. In this matter, there is no dispute that the Applicant was being represented by the firm of M/S Mutegi Kithaka Advocates. There is also no dispute that judgment was entered by this court on November 9, 2022. Order 9 rule 9 is clear that no new advocate can take over the conduct of a suit which was finally determined without the leave of the court through a formal application or by consent of the outgoing advocate. In this case, the firm of M/S. Waklaw Advocates is seeking for leave of court to come on record in place of M/s. Mutegi Kithaka Advocates. I note that the application was served on all parties as required by Order 9 Rule 9. Leave is therefore granted in terms of prayer 2 of the application herein.
17. Order 9 Rule 10 of the [Civil Procedure Rules](#) provides:
- “An application under Rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.”
18. It follows therefore that the application as drawn is properly before the court and I will proceed to determine the other issue.
19. The second issue herein is that the applicant seeks to review the orders that were made on 9.11.2022 in regard to costs.
20. Section 80 of the [Civil Procedure Act](#) Cap 21 provides as follows: -
- “Any person who considers himself aggrieved—
- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”
21. Order 45 rule 1 of the [Civil Procedure Rules, 2010](#) provides as follows: -
- “1.
- (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.”



22. In *Republic v Public Procurement Administrative Review Board & 2 others* [2018] e KLR it was held: -
- “Section 80 gives the power of review and order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”
23. In *Pancras T. Swai v Kenya Breweries Limited* [2014] eKLR the Court of Appeal held: -
- “Order 44 rule 1 (now Order 45 rule 1 in the 2010 *Civil Procedure Rules*) gave the trial Court discretionary power to allow review on the three limbs therein stated or “for any sufficient reason.....”
24. In *Sarder Mohamed v. Charan Singh Nand Sing and another* (1959) EA 793 the High Court held that section 80 of the *Civil Procedure Act* conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate.
25. Discussing the scope of review, the Supreme Court of India in the case of *Ajit Kumar Rath vs State of Orisa & others*, 9 Supreme Court Cases 596 at Page 608. had this to say:-
- “The power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason” means a reason sufficiently analogous to those specified in the rule”
26. In *Tokesi Mambili and others v Simion Litsanga* the Court held as follows: -
- i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.
 - ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.”
27. In this application, the Applicant is seeking review on costs that were awarded on the judgment delivered on November 9, 2022. In that judgment, the court dismissed the Plaintiff’s claim and awarded costs to the Defendant.



28. Section 27 of the Civil Procedure Act provides as follows:

27“(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 power to determine by whom and out of what property and to what extent such costs are to be paid, and give all the necessary directions for the purposes aforesaid; and the fact that the court 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 direct.”

29. In Republic v Rosemary Wairimu Munene (Ex-parte Applicant) v Ibururu Dairy Farmers Co-operative Society Ltd (2014) eKLR, the court held as follows:

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event...it is well recognized that the principle costs follow the event is not to be used to penalize the losing party, rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”

30. In Jasbir Singh Rai & 3 others v Tarlochan Rai & 4 others [2014] eKLR, the Supreme Court of Kenya held good reason for departing from the general rule would include public interest and the circumstances of the case.

31. In this case, the Plaintiff filed case against the Defendant claiming adverse possession over 7 acres out of land parcel LR No. Tharaka/Chiakariga “A”/1485. The Defendant filed a response denying the Plaintiff’s claim. Both parties testified and filed submissions after which the court delivered judgment dismissing the case with costs to the Defendant. Considering the circumstances of this case and the various steps taken by the parties, I did not see any good reason for departing from the general principle that costs follow the event. I believe that I exercised my discretion fairly in awarding costs to the Defendant as compensation to the Defendant for the trouble he took in defending the case.

32. In my view, the Applicant has not met the pre-requisites set out in order 45 of the Civil Procedure Rules. First, the application has been brought after about four months after the order on costs was made and only after taxation. I am not persuaded that the application was filed timeously. Secondly, there is no new evidence that has been discovered by the Applicant that has been brought to my attention or any error apparent on the face of the record, and there is no sufficient cause shown why the costs should not follow the event. I find no reason to review the order on costs as sought by Applicant herein.

33. In the result, I hereby make the following orders:

- a. Leave is granted to the firm of Waklaw Advocates to come on record for the Plaintiff in place of M/s. Mutegi Kithaka Advocates.
- b. Prayers 3 and 4 of the Notice of motion dated 30th March, 2023 are dismissed.
- c. Considering that the Applicant has partly succeeded, I order that parties bear their own costs of the application.

Orders accordingly.

DATED, SIGNED AND DELIVERED at CHUKA this 26th day of July, 2023.



In the presence of:

CA: Martha

Ms. Musyimi h/b for Kirimi for Plaintiff/Applicant

N/A for Defendant/Respondent

C. K. YANO,

JUDGE.

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