



REPUBLIC OF KENYA



**M'mbwiria v Murithi (Environment and Land Appeal 107 of 2019)  
[2023] KEELC 21941 (KLR) (29 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21941 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL 107 OF 2019**

**CK NZILI, J**

**NOVEMBER 29, 2023**

**BETWEEN**

**AYUB KIINGE M'MBWIRIA ..... APPELLANT**

**AND**

**LAWRENCE MURITHI ..... RESPONDENT**

**RULING**

1. By an application dated 2.10.2023, the court is asked to review or set aside the judgment dated 8.12.2021 to the extent that costs be to the appellant in the appeal and to stay the taxation of the bill of costs before the Deputy Registrar. The grounds are set out on the face of the application and in the affidavit in support sworn by Ayub Kiinge M'Mbwiria on 2.10.2023.
2. The applicant avers that though his appeal was successful, paragraph 49 of the judgment has an error apparent on the face of the record; he should not have been condemned to pay costs, and should the order subsist, he would suffer grave injustice.
3. The application is opposed through an affidavit filed on 16.10.2023 by Lawrence Murithi. He terms the application as irregular and defective, for it has not annexed the decree or order sought to be reviewed. Further, the respondent avers that the application falls short of the requirements of Order 45 *Civil Procedure Rules* and Section 80 of the *Civil Procedure Act*. Additionally, the respondent terms the application an afterthought to forestall the bill of costs.
4. In a supplementary affidavit of an unsworn date, Ayub Kiinge Mbwiria terms the replying affidavit as misguided in law, since the judgment sought to be reviewed forms part of the court record. He avers a delay of two years as alluded was untrue for he only discovered the new facts when he was served with a bill of taxation. The respondent avers that under Section 27 of the *Civil Procedure Act*, costs follow the event.



5. With leave of court, parties were directed to canvass the application through written submissions to be filed by 1.11.2023. By written submissions dated 30.10.2023, the respondent terms the application unmerited since costs were at the court's discretion. Reliance was placed on *Moses Kipkolum Kogo v Nyamogo & Nyamogo Advocates* (2000) eKLR and *Evans Onera Omote & another v Ogotu* (2022) KEHC 16441 (KLR) (10<sup>th</sup> December 2020) (Ruling).
6. Additionally, the respondent submitted a delay of almost two years after the judgment had not been explained. Reliance was based on *Rai v Rai* (2014) eKLR. Lastly, the respondent submitted that his case was not dismissed but varied regarding some awards granted by the trial court, which did not entitle the appellant to the costs of the appeal.
7. The issue for determination is whether there was an error apparent on the face of the judgment dated 8.12.2021. The general rule is that costs follow the event. In *Rai v Rai* (*supra*), the court cited with approval *Joseph Oduor Anode v Kenya Red Cross Society* (2012) eKLR, that where a court decides not to follow the general rule, it must give reasons for not doing so and had to exercise that power judiciously and not arbitrarily. The court cited with approval *S. Kamau Macharia & another v KCB & others* (2012) eKLR where a provision of the statute was in conflict with a *Constitution*, the court found it was a proper occasion for awarding costs against the losing party. In *Rai v Rai* (*supra*), the court said the exceptional circumstances of each case have to be considered.
8. In *Evans Onera Omote* (*supra*), the court said the party's conduct was one of the considerations on whether to award costs. The court said that the fact that a party believes that the court should have reached a different conclusion or that the decision was erroneous was a matter of appeal rather than a review.
9. In paragraph 29 of the judgment, this court found that the appellant was dishonest in seeking a refund of Kshs.78,000/= since the acknowledgment receipts showed otherwise. The court also found that the appellant had not justified compliance with Section 6 (1) of the *Land Control Act*. The court established that the respondent was only entitled to Kshs.210,000/=, as opposed to Kshs.360,000/=.
10. In paragraph 39 of the judgment, the court made a finding that the appellant had resold the land during the pendency of a court order dated 19.11.2014 and in contempt of court proceedings, making a profit of Kshs.134,000/= which fact had not been disclosed in his affidavit sworn on 7.11.2015 and a letter dated 7.11.2014. In paragraph 40 of the judgment, the court said the appellant was dishonest and had attempted to defeat the cause of justice by backdating the sale agreement. In paragraph 41 of the judgment, the court observed that the appellant had neither tendered a refund before the trial court when he filed his defense nor disclosed the land's disposal to a third party.
11. For those reasons, the court found the appellant did not deserve an award of costs, even though his appeal partly succeeded. Instead of reading the judgment in context, the applicant has only isolated paragraph 49.
12. In *Stanley Kaunga Nkarichia v Meru Teachers College and another* (2016) eKLR, the court cited *Wambugu v Public Service Commission* (1972) EA 296 that good reasons must be given to deny a successful party his costs, which include any omissions of procedure and the parties' conduct, especially before and during the hearing, which might have been averted. See *Devram Dattani v Haridas Kalidas Dawda* (1949) 16 EACA 35 as cited in *Kioko Ltd v De Angelis Arimi* NRB C.A, and *Patrick Mutuma Arimi v Elias Mutethia Murira* (2021) eKLR.
13. In *DGM v EWG* (2021) eKLR, the court cited with approval *Morgan Air Cargo Ltd v Everest Enterprises Ltd* (2014) eKLR, that circumstances differ from case to case including the conduct of parties, the subject of litigation, circumstances of the proceedings, events leading to the termination



stage at which the proceedings were terminated, how they were terminated, the relationship between the parties and the need to promote reconciliation under Article 159 (2) (c) of the *Constitution*.

14. The delay of two years has not been explained. The applicant has not pointed out where the error was, yet the court explained in its judgment the circumstances leading to the litigation, the disposal of the suit land during the pendency of the suit and while a court order existed. The applicant has not said the reasons to deny him costs were insufficient or unjustified. The applicant has not termed the discretion exercised by the court as injudicious or was based on the wrong principles of law. See *Super Marine Handling Services Ltd v Kenya Revenue Authority* C.A No. 85 of 2006 and *Republic v Kenya National Authority & another exparte Kanyingi Wabome* (2015) eKLR.
15. The upshot is that I find the application lacking merits. The same is dismissed with costs.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 29<sup>TH</sup> DAY OF NOVEMBER 2023**

**In presence of:**

C.A Kananu/Mukami

Gikundi holding brief for Miss Kiyuki for respondent

Mutuma for appellant

**HON. CK NZILI**

**JUDGE**

