



**Samburu v Mwereca & another (Environment and Land Appeal
11 of 2016) [2023] KEELC 21553 (KLR) (15 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21553 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND APPEAL 11 OF 2016
A KANIARU, J
NOVEMBER 15, 2023**

BETWEEN

CYPRIAN NGARI MACHAKI SAMBURU APPELLANT

AND

NGARI MWERECA 1ST RESPONDENT

ALEX KYALO MUTEMI 2ND RESPONDENT

RULING

1. The application before me for determination is a Notice of Motion application dated 09.10.2021 and filed on 12.10.2021. It is expressed to be brought under section 3A of the *Civil Procedure Act*, order 45 rules 1 & 2, order 10 rule 11 of the *Civil Procedure Rules* and any other provisions of the law. The Applicant – Cyprian Ngari Machaki - was the Plaintiff in the lower court case while the Respondents were the Defendants. The prayers sought are as follows:
 - i. That the original file of the Civil Case No. 24 of 2012 be returned to Siakago for hearing of prayers two and three of this application.
 - ii. That the judgement delivered by the Honourable Court on 16th September 2016 in this civil case be reviewed and or stayed pending the hearing and determination of this application.
 - iii. That the taxation of the Bill of costs be stayed pending the hearing and determination of the application.
2. The application is based on the grounds set out in the application and also anchored on a supporting affidavit sworn on 09.10.2021. It was deposed, inter alia, that there is a criminal case filed in the lower court against the Respondents whose outcome will determine whether the Appellant shall apply for



review of the lower courts judgment because of the important and crucial evidence that was not available in the lower court.

3. The application was responded to through a replying affidavit dated 8.12.2021 and filed on 09.12.2021 sworn by the Respondent's Advocate and it was agreed that the application be disposed of by way of submissions.
4. The Applicant filed his submissions on 20.09.2023 where he mainly reiterated his grounds in his application and Supporting Affidavit.
5. The Respondents submissions were filed on 04.08.2023 where they submitted that this court need not be moved to return the lower court file to the trial court after determining an appeal. That this court has no power or basis to review the judgement of the lower court delivered on 16.09.2016, a judgement which was clearly the subject of this appeal. That the fact that there has been a pending criminal case is no ground to stay taxation of the Respondents bill of costs herein. They submit that this is an outright abuse of the court process and pray that the application be dismissed with costs to the Respondents.
6. I have considered the application, the response made to it, and the rival submissions. The issue for determination is whether the application has merit.
7. From the material before me, the applicant had filed a suit in the lower court against the Respondents seeking compensation for damage that was allegedly caused by them on his land. The suit was dismissed through a judgement dated 8.03.2016. The applicant then preferred this appeal, which appeal was heard and determined on 17.10.2019. I agree with the Respondents that this court cannot be moved to return a file to the lower court to review a judgement that was appealed against. The only remedy that would be available would be to file an application for review of the judgement issued by this court on 17.10.2019 and giving satisfactory reasons for the same. I also don't see how a lower court would be able to stay the taxation of a bill of costs filed in a court superior to itself.. Ultimately I find no merit in the Notice of Motion dated 09.10.2021 and hereby dismiss the same.
8. The Respondents shall have costs of this application.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 15TH DAY OF NOVEMBER, 2023.

In the presence of

Mutiso for Njiru Mbogo for appellant

Njeru Ithiga (absent) for respondent.

Court assistant: Leadys

A.K. KANIARU

JUDGE

15.11.2023

