



**CIVIL PRACTICE AND PROCEDURE**

*S. 27 of the Civil Procedure Act affords the court.*

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**HIGH COURT CIVIL APPEAL NO. 100 OF 2002**

**MUKIRI M'MBUI ..... APPELLANT**

**VERSUS**

**RINGERA MUKIRA ..... 1<sup>ST</sup> RESPONDENT**

**SIMON KIAMBI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

The appellant by this court’s decision dated 17<sup>th</sup> February 2011 succeeded in setting aside the decision made by the Eastern Provincial Appeals Committee in Appeal Case No. 67 of 1999. The appellant had been ordered by the Land Dispute Tribunal Meru Central to vacate the suit property. Being dissatisfied with that decision, the appellant filed his appeal before the Eastern Provincial Appeals Committee Embu. The said Appeals Committee dismissed that appeal on the basis that the appellant had not filed a memorandum of appeal. The appellant was dissatisfied with that dismissal and filed this appeal. As stated before, this court by its judgment of 17<sup>th</sup> February 2011 set aside the dismissal of that appeal by the Appeals Committee and ordered that the appellant’s appeal be heard afresh by a different panel of members of the Eastern Appeals Committee. In setting aside the dismissal by the appeals committee, this court awarded costs of this appeal to the appellant. That award of costs is now the subject of the notice of Motion dated 7<sup>th</sup> March 2011 which is the subject of this ruling. The Notice of Motion is filed by the two respondents who seek that this court do review the orders of 17<sup>th</sup> February 2011 in respect of payment of costs to the appellant. The respondent in support of that Notice of Motion deponed in the supporting affidavit that they had no direct involvement in the decision reached by the Appeals Committee. They stated that the Appeals Committee struck out the appellant’s appeal *Suo Motto* and that the Appeals Committee proceeded with the hearing of the appeal on the date they struck it out. The respondent further deponed that they had been dragged into this proceedings right from the Land Dispute Tribunal Meru Central up to the Eastern Provincial Appeals Committee by the appellant. That it was the appellant who instituted the proceedings. It is for that reason they argue that they should not be ordered to pay costs for the misdeeds of the Appeals Committee. The learned counsel for the respondent Mr. Muriuki submitted that section 27 of the Civil Procedure Act provides the court with discretion to order either party is to pay the costs of litigation. He further submitted that taking that section into account, and taking into account the facts set out in the application on how the Appeals Committee dismissed the appeal, that the court should review its order of costs as awarded by its judgment of 17<sup>th</sup> February 2011. The appellant in the replying affidavit deponed that the respondent argument that they were not associated with the decision of the Appeals Committee was not sufficient reason for this court to grant orders of review. The appellant termed the respondent application as an afterthought and that the issues now raised in the application

should have been raised at the hearing of the appeal. Learned counsel for the appellant Mr. Rimita submitted in opposition to the application that the respondents opposed the appellant appeal and in their written submission had sought the dismissal of the appeal with costs. He further submitted that the grounds upon which the respondents rely in the present application should have been the basis of an appeal to the Court of Appeal. Order 45 which relates to the court power to review decree of orders is in the following terms.

**“45 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.”**

Although it was argued by the appellant that the respondent had not brought their application within the ambit of order 45, I beg to differ with that submission. As can be seen from the reproduced order 45 above, the court can review its decree or orders for any other sufficient reason. In my view, that is sufficient to accommodate the respondent's application. The question that the court should consider is whether the respondents have shown any sufficient reason why the court should review its order of payment of the appellant's costs in this appeal. Section 27 (1) of the Civil Procedure Act Cap 21 provides that costs in action shall follow the event unless the court or judge shall for good reason otherwise order. The Appeals Committee dismissed the appellant appeal on the basis that the appellant had failed to follow the correct format. This court by its judgment of 17<sup>th</sup> February 2011 found that that dismissal was illegal and without any basis. When the appeal in this case came for hearing, the respondents vigorously opposed the appeal. To give but just snippet of the respondent submission to show the submissions made by the respondents, I shall quote from the submission as follows:-

**b) Section 8(3) of the Land Disputes Tribunal Act stipulates as below:-**

**“The appeal should be in documentary form and shall contain a brief statement to be divided into separate grounds of appeal of the reasons upon which the party appealing wishes to rely.”**

*The above section requires that the appellant before the Provincial Appeal's Committee must file an appeal in documentary form and must contain a brief statement divided into separate grounds of appeal. The said scenario envisages a document similar to a Memorandum of Appeal, since a Memorandum of Appeal contains features the likes of a brief statement, divided into separate grounds of appeal as envisaged in the said section. The appellant did not file any such document as captioned in the said section. Indeed the catch word in section 8(3) is shall which connotes a mandatory requirement. In fact looking at the entire record of appeal as well as the documentation from the Appeals Committee, it will reveal that no such document containing a brief statement divided into grounds of appeal was filed. That being the position the Appeals Committee had the jurisdiction and were justified to dismiss the appeal for failing to comply with section 8(3). Moreover, in the absence of a document containing the grounds of appeal, the committee had no basis on which it could hear and determine the appeal, and hence justifiably dismissed the same.”*

The respondents in their final submissions sought the dismissal of the appellants appeal with costs being awarded to them. As stated before, section 27 (1) of Cap 21 provides that costs should follow the event. The discretion which is granted by that section is very wide. The courts by virtue of that section have power to determine by whom and what extent the costs of an action are to be paid. I am aware however that the discretion just like any other discretion ought to be exercised judicially. In exercising that discretion, one of the circumstances that the court can consider is the extent to which a party opposed or

contested the opposite parties case. In this case, the court did find that the appeals committed erred to have struck out the appellants appeal which had followed the rules in the Land Dispute Tribunal Act. The respondents as stated before opposed the appellant's appeal and having opposed the appellant's appeal this court in my view rightly exercised its discretion in ordering that the respondent pay the costs of the appeal. That being the finding of this court, the respondent's Notice of Motion dated 7<sup>th</sup> March 2011 is dismissed with costs being awarded to the appellant.

**Dated, signed and delivered at Meru this 12<sup>th</sup> August 2011.**

**MARY KASANGO**  
**JUDGE**