



**Big Tree Farm Limited v Rono & 25 others (Environment & Land Case  
104 of 2018) [2023] KEELC 674 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 674 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 104 OF 2018  
FO NYAGAKA, J  
FEBRUARY 9, 2023**

**BETWEEN**

**BIG TREE FARM LIMITED ..... PLAINTIFF**

**AND**

**MARY ANGOLA RONO & 25 OTHERS ..... DEFENDANT**

**RULING**

1. The plaintiff, a limited liability company, moved this court to determine a notice of motion dated October 6, 2022. It brought it under article 22, 23, 28, 40, 43, 45, 48, 50 and 159 of the Constitution of Kenya, sections 1A, 1B and 3A of the Civil Procedure Act, chapter 21 of the Laws of Kenya and order 45 rule 1, 2 and 5 of the Civil Procedure Rules and all enabling provisions of the law. It filed it on October 11, 2022. Therein it sought the following orders:-
  1. spent
  2. The honourable court be pleased and is hereby pleased to review its ruling delivered on September 22, 2022 and all consequent orders dismissing the plaintiff/applicant application for reinstatement of the suit.
  3. Costs of the application be granted to the plaintiff/ applicant.
2. The application was based on 16 grounds and supported by an affidavit sworn by one Gladys Nakhumicha Wabuge. The grounds of the application were that the plaintiff is a company registered under the laws of Kenya and the deponent is one of the directors; the defendants were trespassers who claimed to have purchased a portion of the plaintiff's land from the other people who were non-shareholders of the company; the plaintiff instructed the law firm of Ms Simiyu Wafula & Co Advocates to act for it in this suit; in 2022 Mr Simiyu Wafula himself did not appear in court but opted to send another learned counsel, one Mr Waliaula, to hold his brief and Mr Waliaula attempted to seek an adjournment on account of sickness on the part of the one of directors of the company but it was



- declined; Mr Waliaula requested the court to place the matter aside in order for learned counsel Mr Simiyu Wafula to attend court and address and the court did so; Mr Simiyu Wafula did not appear and after the court waited for long it therefore dismissed the plaintiff's case for non-attendance.
3. The other grounds were that upon the dismissal of the suit the said advocate did not inform the plaintiff about it; it was in May, 2022 when the plaintiff got to learn of the information from other sources and decided to change its advocates; thereafter the advocates currently on record perused the court file, filed a notice of change of advocates and applied for the reinstatement of the suit; on September 22, 2022 this court made a ruling dismissing the application on account of dishonesty or untruthfulness on the part of the previous advocate; that some crucial evidence was not tendered before court that the previous advocate was struck off the role of advocates and that is why he did not want to appear in court hence the suit was dismissed; and that the evidence was not in the knowledge of the applicant at the time when the suit came up for hearing and was dismissed and at the time of filing the application dated May 25, 2022.
  4. Further grounds were that the evidence (of counsel being struck off the roll) was suppressed by the previous counsel and it denied this court opportunity to determine the application dated May 25, 2022 on merits; there was a circular from the Law Society of Kenya indicating that the previous advocate was struck off the roll and it is new and crucial evidence which necessitates review of the ruling herein; mistake of counsel should not be visited on the client; there is an error apparent on the fact of record to warrant the granting of the orders sought; and the application was made in good faith purposely to help the court reach a just conclusion in the matter herein.
  5. As stated above the application was supported by the affidavit of one of the directors of the plaintiff, one Gladys Nakhumicha Wabuge. It was sworn on October 6, 2022. It repeated most of the contents of the grounds in support of the application save that to it was attached a copy of the ruling delivered on September 22, 2022. She deponed that through one of her sons whom she did not name, the plaintiff approached and instructed the firm of Ms Simiyu Wafula & Co Advocates in 2019 to act for it in this matter.
  6. After that deposition, she swore on matters which were in issue in the previous application and decided on. For instance, she stated that initially the advocate was very cooperative and could update them on the progress of the matter; that trouble came when the corona virus pandemic struck when he started being evasive. She maintained that she was not aware of the hearing of February 1, 2022. She deponed how she learnt that another advocate by name Waliaula had been sent to court to hold brief on the material date and how the suit was dismissed for want of prosecution. These were issues before the court in the previous application whose ruling was now sought to be reviewed.
  7. At this point I wish to single out a blatant lie and an exaggeration of facts by the applicant, which this court and I doubt indeed whether any other court can agree to. The deponed swore at paragraph 11 of the affidavit that, "This all (the above) comes despite having tried a million times to reach him vide his cell phone and even making attempts to reach his office but all in vain." While an issue relating to this assertion was determined by the court *vide* the ruling delivered on September 22, 2022, it is worth pointing out here that parties should be cautioned about exaggerations and deponing on lies. That is contrary to section 114 of the *Penal Code*, chapter 75 of the Laws of Kenya which prohibits false swearing. It is criminal and unbecoming of a party swear to such a fact which she knows to be untrue and present it before court. If indeed it is true that she did so, she ought to have presented evidence to support it. Needless to say, that this fact was deponed to on her affidavit sworn on May 25, 2022 at paragraph 9, 10, 11, 12 and 13 and the facts as were not as being presented now.



8. That aside, she then deponed on further events leading to the ruling impugned herein. She stated that the ruling turned on only one issue, that her advocate then on record was dishonest by giving different accounts for the adjournment sought then which was disallowed. The applicant then annexed to the affidavit and marked as GNW”2” a notice by the Law Society of Kenya, North Rift branch dated September 16, 2022 which showed that the advocate then on record had been struck off the roll of advocates. She alleged that because the former advocates was not fit to practice law, counsel who held brief suppressed information from the court about the said former advocate. That the said suppression prejudiced her case hence the dismissal thereof for want of prosecution. She swore that the counsel who was sent to hold brief then misdirected the court.
9. She deponed that the notice by the Law Society was crucial evidence which if it had been in the knowledge of the court, it could have arrived at a different finding in the application. She also deponed to a strange ‘fact’ that this court “...wrongly misconceived my stating that my former advocate did not swear (sic) an affidavit admitting that he did not inform me about the hearing date of February 1, 2022. It is common knowledge that any attempt to swear (sic) such kind of affidavit amounts to admitting professional misconduct and not advocate will dare do that.” For this reason, she deponed that there was an error apparent on the fact of record. She prayed for the review of the ruling of the court.
10. The application was opposed strongly. One Anthony David Sabwani swore an affidavit in reply on October 17, 2022 on his behalf and that of the 7<sup>th</sup>, 11<sup>th</sup> 21<sup>st</sup> and 24<sup>th</sup> respondents. He deponed that the application was vexatious, misconceived, bad in law and an abuse the process of this court. He stated that the orders sought were dealt with in the ruling delivered on September 22, 2022. Further, he stated that the applicant had become a vexatious litigator. He then deponed that the application was unmerited and made in bad faith and should dismissed with costs.
11. On November 3, 2022, the 1<sup>st</sup> defendant also swore an affidavit in response to the application. She deponed that the application was a test in murky waters in which the applicant found itself after failing to prosecute its case. Hers was that the application was a replica of the one determined on September 29, 2022 and that the applicant had an option to appeal against the ruling but opted not to.
12. She deponed that there was nothing new discovered by the applicant and that the applicant knew well her advocate was misbehaving but she chose not to appear in court herself and follow up her matter. She stated that it was not the responsibility of the advocate but the applicant’s to inquire from court the position of its matter.
13. Her deposition was that despite the advocate being struck off the roll of advocates, Mr Waliaula had been appearing and continued to do so and there was no evidence whatsoever that the said Mr Waliaula had also been struck out.
14. The respondent then stated that despite her health challenges she had been attending court but had never seen any representative from the applicant on any of the occasions. she then stated that the plaintiff/ applicant was only changing from its earlier position that there was a communication breakdown between it and its advocates to rely on something else that her advocate had been barred from practising. She swore that the applicant was misleading the court and that it had inundated the court with a litany of applications hence the instant one should be dismissed with costs.

### **Submissions**

15. The application was disposed of by written submissions. the applicant begun its submissions by restating the prayers of the application and giving a brief summary of the facts thereof. I will not repeat them here since they were all given in the grounds of the application and deponed to in the supporting



- affidavit. It then listed three issues this court would consider and discussed them. These were whether the application satisfied the conditions for review as set out under order 45 rule 5 (sic) of the [Civil Procedure Rules](#); whether counsel's mistake should be visited on the client; and who to bear the costs of the application.
16. When submitting on whether the application satisfied the conditions for review, it stated that order 45 of the rules gave three grounds to be satisfied by an applicant. These were, discovery of new and important matter or evidence, on account of mistake or error apparent on the face of record, and any sufficient reason. Then it submitted on each of the three.
  17. Regarding discovery of new and important evidence it relied on the Court of Appeal case of [Pancras T Swai v Kenya Breweries Limited](#) (2014 eKLR. In it the court held that discovery of new and important matter or evidence or mistake or error apparent on the face of the record or sufficient reason were the factors courts consider. About discovery of new and important matter relates to issues of fact which may emerge from evidence and not law. Again, the court added that the exercise of due diligence still related to evidence and not law. Following that the applicant then submitted that this court was not afforded the opportunity to consider crucial evidence that the former advocate was not allowed to practice law and he was indeed untruthful to both court and the client. They then relied on the case of [Mbaki & others v Macharia & another](#) (2005) EA 2006, 210. It is an authority on the right to be heard which is that a party would be prejudiced if he were not given an opportunity to be heard.
  18. They submitted that there was an error apparent on the face of the record because the court erred in holding that the former counsel should have sworn an affidavit indicating that the applicants had lost touch with him. They relied on the case of [National Bank of Kenya v Ndingu Njau](#) (CA) No 211/1996 UR. The decision was on what amounts to an error apparent on the face of the record.
  19. Lastly, they submitted that mistakes of counsel should not be visited on the client. They relied on the case of [Bamanya v Zaver](#) (200) 2 EA, 329 at page 333. Again, they relied on the case of [Nuh Nassir Absi v Ali Wario & 2 others](#) 920130 eKLR which is on the discretionary power of the court, that is, should be exercised if it were to serve a useful purpose.
  20. The 1<sup>st</sup> defendant submitted that the applicant had the option of appealing against the ruling sought to be reviewed but did not hence was not entitled to the orders sought. She summarized the issues she raised and then listed four issues this court should consider in an application of this nature. these were, the grounds for review, whether the applicant had met the conditions for review, what orders to be made, and condition (sic) for review.
  21. In addition to summarizing the application and the opposition to it, the 7<sup>th</sup>, 11<sup>th</sup>, 21<sup>st</sup> and 24<sup>th</sup> defendants submitted that the application had been dealt fully by this court on September 22, 2022 and the applicant had become a vexatious litigant by filing another application. They then argued that in this era of technology, it was not difficult for the applicants to ascertain the status of their advocates by checking online before instructing him. They then stated that the applicant had not shown sufficient reasons to warrant the grant of the orders sought hence the notice of motion was unmeritorious.
  22. Regarding the grounds for review she cited section 80 of the [Civil Procedure Act](#) and order 45 rule 1 of the [Civil Procedure Rules](#). She then relied on the High Court decision of [Nabiswa Wakenya Moses v University of Nairobi and another](#) (2019) eKLR which outlined the grounds for granting an order of review.
  23. On the issue of the right to be heard she relied on the decision of [Richard Nchapi Leiyagu v IEBC and 2 others](#) (2013) eKLR. Regarding delay she relied on the case of [John Gitbinji Gichue v Bernard Munge Gichira](#) (2017) eKLR and that one of [Jairo Angote Okonda v Kenya Commercial Finance Co Ltd](#) (2000)



eKLR where the court stated that if there was any delay that cannot aid the applicant. She also relied on that the Court of Appeal case of *Mburu Kinyua v Gacheru Tuti* (1978) KAR 69.

24. About whether the applicant had met the conditions of review, she submitted that it had not and they would rather have appealed than to apply for review. Lastly, she prayed that the application be dismissed with costs since the applicant was indolent in prosecuting the case yet the respondent was sickly and she would be prejudiced by any delay in the matter any longer.

### **Issues, Analysis and Determination**

25. This court considered the application before me, the law and facts, and the submissions by the parties. It formed the view that the following were the issues for determination herein:
- a. What the applicable provisions of law are?
  - b. Whether the application is merited.
  - c. Final disposition and who to bear costs.
26. I will embark on analyzing the issues this court identified in this matter for determination.

#### **(a) What the applicable provisions of law are**

27. The applicant sought a review of a ruling delivered on September 22, 2022. In bringing the application, the applicant relied on articles 22, 23, 28, 40, 43, 45, 48, 50 and 159 of the *Constitution* of Kenya. This court is of the view that the applicants did not explain the relevance of the articles cited. The applicant ought to have submitted on the relevance of these provisions of the *Constitution*. This court finds that they are not relevant to the procedure of review of either a judgment, ruling, decree or order. Regarding sections 1A, 1B and 3A of the *Civil Procedure Act*, which the applicant cited, this court is of the view that since section 1A refers to the objective of the Act and 1B on the duty of the court while 3A is on the inherent jurisdiction of this court, only the last of the section 3A is directly relevant.
28. This court is left with considering the relevance of order 45 rule 1, 2 and 5 of the *Civil Procedure Rules*. Rule 1 is about the one that gives the conditions for review and I will deal with it in the next paragraph onward. In regard to rule 2, it is about a party who is not appealing against a decree or order presenting to the appellate court the case upon which he relies for review except where it is common with that of the appellant. Therefore, it is not relevant since this is not an appellate court in relation to the ruling of September 22, 2022.
29. About rule 5 which was cited, there is none in the rules hence this court has no duty to consider a 'law' that does not exist. And counsel who brought this applicant ought to have known what he wished the court to consider as not to draft the application basing it on such a 'provision'. That goes for the phrase, "all enabling provisions of the law." This court has always taken the view that it is worthless of a party placing such an unsupported and unclarified phrase in any application.
30. The applicant failed to cite section 80 of the *Civil Procedure Act*. Though relevant, this court will not take time to analyze it since it was not cited. What then is left is for this court to consider the import of order 45 rule 1 of the *Civil Procedure Rules* which it considers relevant. It will do so in the next segment.



**(b) Whether the application for review is merited**

31. In the instant suit, the applicant claimed that it was entitled for review of the ruling of this court. It relied on order 45 rule 1 of the [Civil Procedure Rules, 2010](#) which provides as follows:

- “(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 a 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 judgement to the court which passed the decree or made the order without unreasonable delay.”

32. It beyond peradventure that the rule lays three conditions for the grant of orders of review. These are:

- i. discovery of new and important matter or evidence,
- ii. some mistake or error apparent on the face of the record or,
- iii. any other sufficient reason.

33. The provision gives one other fourth condition which interplays with the other three. It is on the time an application of the nature should be filed. It should be made without unreasonable delay. It is understandable that the law expects that such application is made timeously since such an order is discretionary. It is an equitable one hence any delay in bringing it will definitely defeat equity. Equity aids only the vigilant hence the maxim *vigilantibus non dormientibus aequitas subvenit* is applicable thereto.

34. About unreasonable delay, it is obvious that what it constitutes it is a matter of fact: The court must consider the facts of each case and the nature of the judgment or decision impugned. Some of the decisions of the court are so immediate in obligation that delay of even a day amounts to unreasonable delay. Therefore, in [Jaber Mohsen Ali & another v Priscillah Boit & another](#) E&L No 200 of 2012[2014] eKLR, the court stated that:

- “The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case.”

35. When considering whether delay is unreasonable or not, attendant to it is the explanation for the delay. The applicant must explain to the satisfaction of the court why the delay came about. Thus, in [Vincent Narisia Krop & 3 others v Martin Semero Limakou & 12 others](#) [2021] eKLR, this court stated as follows:

- “The rule then imposes a further (fourth) condition which embraces and applies to the three above: that the application be made without unreasonable delay. It goes without saying that the applicant must satisfactorily explain the delay however small it may be besides, it not



being unreasonable. That is to say, he ought to give convincing reasons as to why he delayed in bringing the application.”

36. Similarly, what amounts to sufficiency of a reason is a question of fact. Each case must be assessed on its own merits. In the Supreme Court decision of *Wachira Karani v Bildad Wachira* (2016) eKLR the court explained that sufficient cause is a question of fact.
37. In the instant case, the applicant contends that there was an error apparent on the fact of record. Through the deponent of the supporting affidavit its contention is that the court was not presented with the ‘crucial evidence’ in her possession to enable it reach a proper determination. In her view that was an error on the record. I disagree.
38. To begin with, the respondents herein strongly opposed the instant application on the ground that it was similar to the one made on May 25, 2022. Their arguments were that the issues raised in the instant application had been determined on the September 22, 2022. They then contended that the applicant was a vexatious litigator. The applicant did neither respond to these allegations and nor submit on them. But the court is enjoined to examine the merits of the same.
39. The applicants brought the application dated May 25, 2022 praying for, among others, that “...the proceedings and orders of this honorable court of February 1, 2022 and orders dismissing the plaintiff’s case/suit and all the consequential orders thereto be reviewed, varied and/or set aside...”. In the instant application they have prayed for the review of the ruling delivered on September 22, 2022.
40. On the face of it, the prayers seem to be different. However, on the facts support or opposition to the previous and instant application, they are basically the same. I indicated earlier, in paragraph 6 above that the applicant repeated most of the issues litigated in the application whose determination was the ruling of September 22, 2022. Thus, many of the issues raised herein were settled by the court in the ruling. If the applicant was dissatisfied by the finding that this court found that the applicants had not gotten an affidavit by Mr Simiyu Wafula to explain both his absence and that of the client, they ought to have appealed against that ruling. That was a finding on the merits of the application and not any suppression of evidence.
41. The only difference in the issues that the applicant raises herein with those raised in the application dated May 25, 2022 was the argument that the then advocate Silmiyu Wamalwa had been struck off the roll of advocates. However, as indicated elsewhere in this ruling, the validity or otherwise of the practice of the said advocate was not any of the considerations made in determining the application for adjournment on February 1, 2022. Thus, it cannot form any new or crucial evidence that would have made the court hold differently from the manner it did.
42. Regarding the right of the applicants to be heard as was submitted by the parties, it is trite law that the right to be heard by any party is a fundamental right which our courts cannot depart from. To do so would herald a dark day in the life of the legal system. It has to be given as it consists one of the rules of natural justice. But must the right be abused? What if a party is given the right and squanders the chance? Should the court keep giving him the opportunity? I do not think so. A party who has been given an opportunity to be heard and squanders it cannot be successfully heard to argue that he has been denied the right to be heard because the right has already been utilized. For instance, in this case, the court was gracious enough to give the parties time the whole of the morning of February 1, 2022 and up to the mid part of the afternoon to almost end of the day before it dismissed the suit. Was that not the right to be heard which was granted to the applicants? I believe and hold so.



43. As was held by the Court of Appeal in in *Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 others* civil appeal No 25 of 2002 [2009] KLR 229 opined that:
- “In our view, the often quoted principle that a party should have his day in court should not be taken literally. He should have his day only when there is something to hear. No party should have a right to squander judicial time. Hearing time should be allocated by the court on a need basis and not as a matter of routine...”
44. In the succession matter of in the *Estate of Joab Odera (deceased)* [2020] eKLR after the court assessing the conduct of both the party and advocate remarked as follows:-
- “From the foregoing, I find that there is no substance in the argument that the applicant was denied an opportunity to be heard. It is him and his advocate who squandered the opportunity of being heard.” I would repeat the same view as was on February 1, 2022 and September 22, 2022 that both the applicants and their then counsel misused their opportunity to be heard. It is gone and they should rest their quest. Litigation comes to an end, and justice does not favour one side of the dispute.
45. Regarding the submission by the applicants about a mistake of counsel not being visited on the client, this court is of the view that there was no mistake on the part of their advocate that was visited on them. On the material date, the February 1, 2022, the former advocates sent a learned counsel by name Mr Waliaula, to represent them in court and also deliver their client’s reason of not attending the hearing. There was no mistake of counsel in doing that. The reasons were presented to the court and upon the court weighing them it found them wanting or inadequate and declined the adjournment. It was then that the learned counsel failed to turn up in court to prosecute the case and the suit was dismissed. At that, there was no mistake of advocate visited on the client. And even if the advocate turned up in court later in the day and was not ready to proceed, it could not have changed the earlier order of the court in denying the adjournment since the reasons given had been found insufficient. Thus, that submission fails.
46. Again, the applicant argues that this court relied on suppressed information about the then advocate who was acting for it having been struck off the roll of advocates and fact made him not to attend court on the material date when its suit was dismissed. Its further contention was that the advocate who held brief that time failed to inform the court as much and that the court found him dishonest. It stated further that since there was a circular by the Law Society of Kenya that counsel who was on record at the time had been struck off, this court have made the court to arrive at a different conclusion about the non-attendance of the advocate in court and perhaps the applicants. Nothing can be further from the truth in these assertions by the applicant. A brief examination of the events of the material dates, that is to say, when the suit was dismissed and when the application dated May 25, 2022 was brought and finally when it was ruled on would demystify these clouded facts.
47. In the ruling of September 22, 2022 this court noted that the applicant herein and also then argued before court that the reason for their absence from court on February 1, 2022 was that they had lost contact with their advocates. They argued that the advocate who held brief failed to give enough reasons to procure an adjournment, that an advocate’s mistake should not be visited on a client. After the court considered that and other reasons advanced, it found that the reason given was unsatisfactory; that the advocate had misled or lied to the court; the applicant had not been vigilant in its matter; and there was no reason why the attendance of the other director apart from the one said to be ill then was not procured. In the earlier decision of February 1, 2022 when the adjournment was sought, indeed there was in court an advocate by name Mr Waliaula who sought adjournment, he asked the court to



place the matter aside to get Mr Simiyu Wafula or their client and the court waited all day up to late afternoon when neither he nor Mr Simiyu Wafula attended court hence the dismissal of the suit.

48. Thus, first of all, by the time the court considered the application dated May 25, 2022, it was aware that the circulate relied on had been released by the Law Society of Kenya branch of the North Rift to the public the week before, besides the court had been made aware of the fact of the long before. The applicant contended that the fact of the then advocate having been struck off the roll of advocates was suppressed and for that reason he could not attend court and could never swear an affidavit that he did not inform his clients/applicants of the hearing date. The deponent on behalf of the applicant swore "...my former advocate did not swear (sic) an affidavit admitting that he did not inform me about the hearing date of February 1, 2022. It is common knowledge that any attempt to swear (sic) such kind of affidavit amounts to admitting professional misconduct and not advocate will dare do that.
49. First, it is clear from the summary of the previous rulings as given in paragraph 41 above, this court did not base its decision of the ruling delivered on September 22, 2022 on the fact of the then advocates having been struck off the roll of advocates. It did on merits based on different considerations. Further, this argument by the applicant departs from the reasons that the applicant advanced in the application about whose ruling made on September 22, 2022 and it depicts the deponent and applicant as individuals bent on misleading the court. Besides, apart from mere allegations and subterfuge designed to paint the entire legal profession in bad light by swearing that, "...to admitting professional misconduct ...not advocate will dare do that " there was no affidavit evidence from Mr Similyu Wafula that he failed to attend court for fear of being vilified. Moreover, Mr Waliaula who attended court twice that morning in the matter and promised to get back with Mr Simiyu Wafula did not come back to give a feedback over what became of the principal counsel. He too did not swear any affidavit to support the applicant's wild deposition about advocates. This court finds this deposition strange. I find that the applicants used the most flimsy reason to bring the instant application to vex not only the court but the parties herein while abusing the process of the court. The 'discovery' of the fact of the former advocate having been struck of the roll of advocates is not new evidence that could have made this court to reach a different conclusion from the one it did on September 22, 2022. The absence or otherwise of the information from the court by the time the decision to refuse an adjournment on February 1, 2022 did not in any way influence the decision of the court. In any event no material has been placed before this court, apart from mere allegations and conjecture, that the act of being struck off the roll of advocates made Mr Simiyu Wafula to keep away from court when required. in any event, the reason for dismissal of the suit was the unexplained non-attendance of the plaintiff and not its advocates. Order 12 rule 3 of the *Civil Procedure Rules* guided the court in the action it took at the time. Thus, no new material has been placed before me and there is no error apparent on the face of the record to warrant a review of the ruling of this court delivered on September 22, 2022. The application is wholly unmeritorious and therefore lost.

**(c) Final disposition and who to bear costs**

50. I have found that the application before me is unmeritorious. Costs will always follow the event. Therefore, the applicant will bear the costs of the application.
51. This matter is hereby fixed for mention on February 28, 2022 for fixing a date for judgment.
52. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**HON. DR. JUR FRED NYAGAKA**



**JUDGE, ELC, KITALE**

