



REPUBLIC OF KENYA



Kingori Investments Limited v Sigma Limited & 9 others (Environment & Land Case 1581 of 2016) [2025] KEELC 115 (KLR) (23 January 2025) (Ruling)

Neutral citation: [2025] KEELC 115 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1581 OF 2016**

**AA OMOLLO, J
JANUARY 23, 2025**

BETWEEN

KINGORI INVESTMENTS LIMITED PLAINTIFF

AND

SIGMA LIMITED 1ST DEFENDANT

JAMES GICHUKI WAMBUGU 2ND DEFENDANT

SAMUEL MWANGI 3RD DEFENDANT

GARANCO FIVE LIMITED 4TH DEFENDANT

SAADIA OMAR SHURIE 5TH DEFENDANT

NURU SAID AHMED 6TH DEFENDANT

ABBAS IBRAHIM KHALIF 7TH DEFENDANT

NAIROBI COUNTY GOVERNMENT 8TH DEFENDANT

CHIEF LAND REGISTRAR 9TH DEFENDANT

WHITE LOTUS PROJECTS 10TH DEFENDANT

RULING

1. The 6th Defendant/Applicant filed the notice of motion applicant dated 23rd November, 2022 under the provisions of section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules. She sought for the following orders that:
 - a. The Ruling dated 22nd September 2022 be reviewed and the 6th Defendant be at liberty to pursue costs against the plaintiff.



- b. The court do clarify that the compromise recorded on 28th November, 2019 was only between the Plaintiff, the 4th and 10th Defendants.
 - c. The court do order that the 6th Defendant's Notice of Motion dated 12th April, 2021 be heard on priority basis.
 - d. The Plaintiff, 4th and 10th Defendants be ordered to produce under oath the terms of the settlement that compromised the suit on their terms save as to costs.
 - e. The Costs of this Application be awarded to the 6th Defendant.
2. The application is premised on the grounds stated on its face and on the affidavit of Nuru Said Ahmed. The Applicant deposes that he had filed a defence to the claim and an application to have the suit dismissed as she had wrongly been sued. That she had also filed an application dated 12th April, 2021 seeking for dismissal of the suit for want of prosecution after the Plaintiff failed to disclose the details of the settlement recorded on 24th November, 2020.
3. The applicant deposes that following directions of the court her advocates filed submissions on costs. A ruling on costs was delivered on 22nd September, 2022 on which she faults the Court on the following grounds inter alia;
- a. The court erred by extending a compromise between the Plaintiff and the 4th and 10th Defendants to all the other defendants.
 - b. There is no order in terms of Order 25 Rule 5 of the Civil Procedure Rules that was extracted setting out the terms of compromise that adjusted the suit wholly or in part and no judgment has been entered to give effect to compromise.
 - c. The compromise recorded on 28th November 2019 should have read that the suit was settled only as between the Plaintiff, the 4th and 10th Defendants.
 - d. The other Defendants were condemned unheard contrary to Article 50 of *the Constitution* as the terms of compromise was never brought their attention nor their views sought.
 - e. The 6th Defendant was condemned unheard and should be allowed to prosecute its application for dismissal of the suit for want of prosecution.
 - f. The Ruling denied the 6th Defendants costs of the suit when in fact the suit was not settled with her consent.
 - g. Since the consent was between the Plaintiff, the 4th and 10th Defendants, the same was only binding as between them and not the Applicant herein. Therefore, the same should not apply to the extent of the Applicant as she was not privy to it.
4. The plaintiff filed grounds of opposition dated 23rd September, 2024 and listed four grounds inter alia;
- i. That the application is bad in law since the Applicant has masked an appeal against the decision dated 22nd September, 2022 as an application for review. The Applicant is therefore inviting the court to sit on appeal against its own decision.
 - ii. The application is bad in law since the applicant seeks to relitigate the issue of costs yet she was invited to file written submissions on the issue of costs and the same was ruled upon in the decision dated 22nd September 2022.



- iii. That the application is bad in law since it offends the provisions of Order 45 of the Civil Procedure Rules since none of the grounds therein has been pleaded to warrant a review of the orders issued on 22/09/2022.
 - iv. That the application is mischievous since the settlement of the suit was because the 4th defendant returned its fraudulent title for cancellation thereby making the entire suit odious with the only issue for determination being the issue of costs.
5. Parties filed their respective submissions in prosecuting the application and which submissions I have read and considered. Order 45(1) of the Civil Procedure Rules states thus;
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.
 2. A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.
6. It is the Applicant's contention that the issue of costs was between the plaintiff, the 4th and 10th Defendants as no compromise was ever reached with the 6th Defendant. She also argued that the failure by the Plaintiff to controvert the facts contained in her supporting affidavit (by way of filing a replying affidavit) amounted to admission of evidence. The application before me is seeking review of a decree or order and therefore the burden is on the Applicant to prove that the grounds for seeking review under order 45 of the Civil Procedure Rule have been met. Secondly, the law allows parties to respond to an application by way of grounds of opposition and or replying affidavit.
7. Under paragraphs 17 – 22 of the Applicant's submissions, she addresses reason why costs should be awarded to Defendants. These grounds in my view ought to have been put forth in the submissions made in support of request to be awarded costs (before the impugned ruling). The applicant submits that her rights under article 50 was breached as she was condemned unheard. That she had legitimate expectation to prosecute her pending application for dismissal of the suit for want of prosecution with costs.
8. Dismissal of a suit is one of the ways of settling/compromising a suit. Had that application been allowed, the end result would be for the trial court to determine whether to award her costs or not. Once this suit was marked as compromised as between the plaintiff and 4th and 10th Defendants, parties were given opportunity to file their respective submissions on costs. The Applicant confirms that through her advocates on record, she filed her submissions which are dated 22nd November, 2021.
9. The proposition that the Applicant was condemned unheard is not true. Nothing stopped her from addressing the court that she is entitled to costs through those submissions and which she did. Her



position is distinguishable from the cited case of JMK Vs MWM & Another (2015) eKLR which held that;

“The suit is marked as settled save for the issue of costs. The parties shall endeavor to agree on the issue of costs failure to which the parties shall address the court on the same and the court shall make a determination.”

10. Other than claiming breach of article 50 of *the constitution*, the Applicant has not addressed this court on the mistake or error on the face of the impugned or Ruling that there was discovery of new and important evidence or the heading of sufficient cause. As correctly pointed out, by the Plaintiff/ Respondent, the Applicant is trying to litigate the issue of costs. Justice Okong’o rendered himself on the issue that the Applicant was not entitled to costs.
11. This is found at paragraph 17 of the ruling which read in part thus;

“.....of these defendants only the 5th and 6th Defendants have insisted on being paid their costs (complete).”
12. It is trite law that a point which may be good ground of appeal cannot be a basis to review a decree or order (Chitaley & Rao on the Code of Civil Procedure 4th Edition Vol. 3 page 3227). The Court of Appeal in the case of Francis Origo & Another vs Jacob Kumali Mungala Court of Appeal Civil Appeal No. 149 of 2001 held that;

“....an erroneous conclusion of law or evidence is not a ground for review but may be a good ground for appeal.”
13. The Applicant wanted the court to clarify that the compromise entered between the Plaintiff, the 4th and 10th Defendants did not include her. The 6th Defendant did not file a counter-claim against the Plaintiff, at least she has not stated so. The order marking the matter as settled was made in November 2019 so the application is late in bringing the application seeking to clarify its terms. The claim was brought by the Plaintiff who was satisfied with the terms of the settlement and the Applicant has not disclosed the prejudice it caused him other than wanting to be paid costs.
14. A consent judgement can only be reviewed or set aside where there is proof of fraud, mistake and or misrepresentation. She has not pleaded or submitted on any of the grounds for setting aside.
15. The Applicant herein is unhappy that Justice Okong’o did not award them costs despite the arguments she put forth, her recourse lie in appealing that decision and not coming back for review on grounds that amounts to asking this court to sit on its own appeal. Consequently, I hold that the current motion dated 23rd November, 2022 is without merit. It is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JANUARY, 2025

A. OMOLLO

JUDGE

