



Anganya (Suing as the Legal and Personal Representative of the Estate of Lawrence Odero Abuor - Deceased) & another v Owuor & 2 others (Legal representatives of Okodo Opondo) (Environment & Land Case E025 of 2020) [2023] KEELC 17173 (KLR) (4 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17173 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE E025 OF 2020**

E ASATI, J

MAY 4, 2023

BETWEEN

MONICAH AKEYO ANGANYA (SUING AS THE LEGAL AND PERSONAL REPRESENTATIVE OF THE ESTATE OF LAWRENCE ODERO ABUOR - DECEASED) 1ST PLAINTIFF

FELIX ODHIAMBO ABUOR 2ND PLAINTIFF

AND

PAUL ODHIAMBO WERE 1ST DEFENDANT

JENIFFER AKUMU OWUOR 2ND DEFENDANT

JARED OLIMA WERE 3RD DEFENDANT

LEGAL REPRESENTATIVES OF OKODO OPONDO

RULING

1. This ruling is in respect of the Notice of Motion application dated August 30, 2022 and filed in court on August 31, 2022 by the Defendants/applicants. The application is expressed to be brought pursuant to the provisions of section 159 (2) of the Constitution of Kenya 2010, section 1A, 1B, 3A, 27(1) and 80 of the Laws of Kenya and Order 45 Rule 1 (1) of the Civil Procedure Rules 2010. It seeks for an order of review of the ruling dated July 15, 2020 so as to add thereon an order directing that the Defendants/applicants do get the costs of the proceedings herein. The applicants also pray for the costs of the present application.
2. The grounds upon which the application is brought are that by a ruling dated July 15, 2022 the court allowed the Defendants application and made an order striking out the suit in its entirety but did not express any statement on the Defendant's prayer for costs. That it is in the interest of justice and fairness



that the Defendants/applicants be compensated for the burden, inconvenience and costs they incurred to defendant themselves against the proceedings, that under section 27 of the *Civil Procedure Act*, costs follow the event. That order 45 Rule 1 of the Civil Procedure Rules 2010 recognizes that a ruling may be reviewed on the grounds prescribed thereunder and for any other sufficient reason. That there is sufficient reason to review the ruling. That the application has been presented without unreasonable delay since the ruling sought to be reviewed was delivered without notice to the applicants of the date of delivery.

3. The application was supported by the averments in the Supporting Affidavit of George Otieno Ochichi Advocate sworn on August 30, 2022 and the annexures thereto.
4. The application was opposed vide the grounds of opposition contained in the Replying Affidavit sworn by Felix Odhiambo Abuor, the 2nd Plaintiff herein on March 13, 2023.
5. While the applicant argued the application by way of written submissions dated March 20, 2023 and filed in court the same day, the Respondents elected to rely solely on the contents of the Replying Affidavit.
6. Vide the written submissions, Counsel for the applicants submitted that the law governing award of costs in civil proceedings is expressed in Section 27 of the *Civil Procedure Act* which provides that the decision of whether or not to award costs to a party and the quantum thereof are matters for the discretion of the court and that costs of any action shall follow the event unless the court or judge shall for good reason otherwise order. Counsel relied on the case of *Peter Muriuki Ngare vs Equity Bank (K) Ltd [2018]eKLR* where it was held that the purpose of costs should always be to indemnify fully or partially the successful party for the expenses incurred in hiring Counsel to defend or enforce their rights and submitted that the applicants herein are not seeking to penalize the Plaintiffs but to be indemnified for the cost incurred in hiring Counsel to represent them. That the proceedings initiated by the Plaintiffs against the Defendants were unnecessary and uncalled for as the Defendants are not the administrators of the estate of Okodo Opondo. Counsel submitted further that the application has satisfied the requirements under Order 45 Rule (1) for review. That a ruling can be reviewed on any other sufficient reason. Regarding the Replying Affidavit of Felix Odhiambo Abuor relied on by the Plaintiffs, Counsel objected to its admissibility on the grounds that the signature on the Affidavit is prima facie not authentic. That the signature is not the same as the signature of Felix Odhiambo Abuor on the Supporting Affidavit and on a copy of the National Identity card of Felix Odhiambo Abuor annexed to the Supporting Affidavit.
7. I have carefully considered the application and the contents of the Supporting Affidavit, the contents of the Replying Affidavit and the written submissions made. The application is brought, inter alia, under the provisions of section 80 and order 45 Civil Procedure Rules 2010. Order 45 Rule 1 (1) provides

' 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 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 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.'

8. The current application was premised on the ground of any other sufficient cause as provided for in order 45 (1) Civil procedure Rules. Any other sufficient reason is one of the grounds upon which an application for review can be made. In the case of [Pancras T Swai v Kenya Breweries Limited \[2014\] eKLR](#) held that;

' 29. Order 44 rule 1 (now Order 45 rule 1 in the 2010 Civil Procedure Rules) gave the trial Court discretionary power to allow review on the three limbs therein stated or 'for any sufficient reason.' The appellant did not bring his application within any of the limbs nor did he show that there was any sufficient reason for review to be granted. As repeatedly pointed out in various decisions of this Court, the words, 'for any sufficient reason' must be viewed in the context firstly of Section 80 of the [Civil Procedure Act](#), Cap 21, which confers an unfettered right to apply for review and secondly on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order.'

9. The Respondent's case is that the award on costs is a discretionary power exercised by the court or judge pursuant to section 27 of the [Civil Procedure Act](#) and is not punitive or punishment tool to any unsuccessful litigant. The Respondents relied on the case of *R vs Rosemary Wairimu Munene Ex parte Applicant vs Ihururu Dairy Farmers Co-operative Society JR No 6 of 2014* where the court held that in exercising discretion under section 27 of the [Civil Procedure Act](#), the objective should not be to penalize the losing party, neither is it for compensating the successful party for the trouble taken in prosecuting or defending the case. That the court considered all the aspects of the case and exercised his discretion accordingly. That the application is intended to interfere with the court's discretion which has already been exercised judiciously. The Respondents also relied on the cases of [Scherer vs Counting Instruments Ltd \(1986\)IWLR 615](#) and [County Government of Tana River & Another vs Hussein Fumo Hiribae \[2021\]eKLR](#) to support their submission. They contended further that the application is made in bad faith, is bad in law, fatally defective and an abuse of the process of the court.
10. I have read the ruling sought to be reviewed. It is clear from the ruling that the court did not address its mind to the issue of costs. It appears to have been an oversight as submitted by Counsel for the applicants because under the provisions of section 27 costs follow the event. The court is obligated under that law to award costs and where it does not award cost to the successful party give reasons. It is not true that the court exercised its discretion on the issue of costs. The applicants had prayed for costs in their application which was allowed.
11. The circumstances of the case were that parties who had no capacity to be sued were sued, had to secure the services of an advocate to defend the suit to the point the suit was struck out. They were entitled to costs. Had the court exercised its discretion, it could have awarded the costs. This case is to be distinguished with one where the court has addressed itself to the issue and declined to award cost. In the present case the court said nothing on costs.
12. I find merit in the application and allow it. The order dated July 15, 2022 is hereby reviewed by adding an order that costs of the suit and of the application dated February 7, 2022 are awarded to the applicants. Since the error in the ruling of July 15, 2022 was by no fault of the Respondents, each party shall bear own costs of the present application.

Orders accordingly.



RULING DATED AND SIGNED AT KISUMU, DELIVERED VIRTUALLY THIS 4TH DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen- Court Assistant.

for the Defendants/Applicants

for the Plaintiffs/Respondents

