



**Kinyanjui & 5 others v Director of Public Prosecutions; Mwangi  
(Interested Party) (Judicial Review Miscellaneous Application 644 of 2016)  
[2025] KEHC 6001 (KLR) (Judicial Review) (14 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6001 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW MISCELLANEOUS APPLICATION 644 OF 2016  
RE ABURILI, J  
MAY 14, 2025**

**BETWEEN**

**DAVID KIMANI KINYANJUI ..... 1<sup>ST</sup> APPLICANT  
JOSEPH MUCHAI MUIRURI ..... 2<sup>ND</sup> APPLICANT  
AMOS NJENGA MUTHAMA ..... 3<sup>RD</sup> APPLICANT  
PETER KIMANI ..... 4<sup>TH</sup> APPLICANT  
PAUL NJUGUNA MBURU ..... 5<sup>TH</sup> APPLICANT  
BENAJAMIN NJOMO NDERITU ..... 6<sup>TH</sup> APPLICANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT**

**AND**

**SIMON PETER MWANGI ..... INTERESTED PARTY**

**RULING**

1. The application dated 10/6/2024 filed by the Director of Public Prosecutions who is the respondent in this case seeks for review and setting aside of this court's orders of 26/7/2017 awarding half costs of these proceedings to the applicants. The respondent claims that the said orders were issued by mistake given the background of the case. That the parties had a criminal case where they were the accused while the Interested Party was the complainant in a malicious damage of property criminal case before Kibera Chief Magistrate's Court.



2. It is asserted that the parties reconciled and the matter was communicated to the ODPP who reviewed the case and withdrew it under section Section 176 of the *Criminal Procedure Code*.
3. It is averred that the applicants had filed this Judicial Review case for review of the charges, but that when the criminal case was withdrawn, they also agreed to have this case withdrawn with no orders as to costs. Unfortunately, the respondent claims, that when Mr. Ondabu for the exparte applicants appeared in court, he never informed the court of the agreement to have the matter withdrawn with no orders as to costs, and that as a result, the court awarded the applicants half (½) costs.
4. The respondent avers that they learnt about the order for costs when they were served with certificate of costs on 22/3/2024. Further, that they were not served with the Bill of Costs for assessment.
5. On the contention by the applicants that an award of costs is in the discretion of the court and that the respondent should have appeared to challenge the costs, the respondents contend that in their view, there was an error apparent on record which can clearly be informed from previous proceedings. That the DPP should not have been condemned to pay costs in view of the reconciliation and agreement to withdraw this suit with no orders as to costs.
6. On alleged delay, the respondent maintains that they only learnt of the costs when they were served with certificate of costs by the applicants. That the delay is explained. They urge the court to exercise discretion and set aside the order on costs, this being a court of equity and that they did no wrong to be condemned to pay costs.
7. Opposing the application, applicants contend in the sworn replying affidavit by the 1<sup>st</sup> applicant on 10<sup>th</sup> July 2024 that the amount challenged is Kshs.171, 929.66 half costs awarded. That award of costs is discretionary and that the respondent was challenging the discretion of this Court. That the delay is inordinate and unexplained and that no reference was filed to challenge the taxed costs. That the application is a fishing expedition and an afterthought.
8. Counsel for the exparte applicants in submissions denied that there was any reconciliation under section 204 of the *Criminal Procedure Code*. He submitted that when they appeared for hearing, is when they learnt of the withdrawal of the criminal case hence the ½ costs awarded.
9. It was submitted that the order was made on 26/7/2017 while they filed their bill of costs which were assessed in 2022 and that they served the costs before assessment. It was submitted that the inordinate delay is unexplained and that the discretion of the court can only be appealed against and not reviewed. Counsel submitted that this application is an abuse of court process.
10. In a rejoinder, Mr. Maatwa for the respondent submitted that the proceedings of 23/5/2017 are clear. That the complainant and Applicants herein were negotiating to have the case withdrawn because they were negotiating for reconciliation under Section 176 of the *CPC* which was reconciliation and the parties agreed to have this case withdrawn with no orders as to costs. He reiterated that it was a mistake in awarding of costs. On delay, he maintained that they were not even aware of the taxation of the bill of costs. He urged the court to allow the application as prayed.

### **Analysis and Determination**

11. Having considered the application for review and setting aside of the order on costs as awarded by the court, and the opposition thereto, the issue is whether the application is merited.
12. I will first give the historical background of this matter. I have perused the court record and it shows that on 20<sup>th</sup> December, 2016, the exparte applicants filed a chamber summons for leave to apply for judicial review orders of certiorari and prohibition, challenging the decision by the DPP to charge them



and continue prosecuting them *vide* Kibera CM CR 4747 of 2014 for allegedly maliciously destroying Church property of AIPCA Riruta Satellite Church on Land Parcel No Dagoretti/Riruta/S 704. The applicants were members of the said church.

13. The chamber summons was considered by Odunga J as he then was and he directed the applicants to serve the other parties to the application, for interpartes hearing.
14. The respondent and the interested party upon being served with the chamber summons, they filed grounds of opposition and when the matter came up on 8/3/2017, counsel for the applicant Mr. Nyangau informed the court that the criminal case had been withdrawn and he requested for a date for the parties to record a consent, with Mr. Kirimi counsel for interested party informing the court that parties were negotiating.
15. On 26/7/2017 when the matter came up, only the applicant's counsel appeared and informed the court that the respondent had withdrawn the criminal case against the applicants. Counsel did not ask for any costs. The court on its own motion ordered that although the respondents had been served for that day, they were absent. The Judge marked the matter as compromised with half costs to the applicants.
16. The *ex parte* applicants then filed their bill of costs which was taxed *vide* ruling of 22/3/2022. I observe that the order for costs did not say as to who was to pay those costs since there is the respondent and interested party complainant. Further, when the matter came up for taxation on 1/3/2022, the applicant's counsel Mr. Ondabu informed the Court that he had served the respondent and that there was a return of service. However, there is no such affidavit of service on record filed. Only the notice of taxation dated 11<sup>th</sup> February 2022 is on record with no evidence of service, in the form of an acknowledgement by the ODPP.
17. The question is whether that prayer to review and to set aside the order of costs made by Odunga J on 26/7/2017 awarding half costs to the applicants is merited.
18. Order 45 Rule 1 of the *Civil Procedure Rules*, 2010 provides as follows:
  - “ 45 Rule 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 review of judgment to the court which passed the decree or made the order without unreasonable delay.”
19. The above provisions operationalize section 80 of the *Civil Procedure Act*. According to the respondent, they were not aware of the said costs until 22<sup>nd</sup> March, 2024 when they were served with a number of documents including certificate of costs demanding for payment and upon their perusal of the court file is when they discovered that there was an order for costs.



20. The respondent asserts that the costs were awarded by error because the criminal case was compromised by reconciliation between the applicants and the interested party hence no costs were awardable against the respondent as there was no wrong doing on the part of the respondent to warrant a condemnation in costs.
21. I have perused the entire court file and although there is a mention notice for 26/7/2017 addressed to DPP and is dated 12<sup>th</sup> July 2017, again, there is no evidence that the respondent was served with the said mention notice for 26<sup>th</sup> July 2017 when the order on costs was made.
22. Therefore, although there is no reference filed by the respondent, there is no evidence that the respondent was made aware of the date when the matter came up before justice Odunga when he made the order on costs and not even when the said costs were taxed. The taxation was done *exparte* devoid of service of the bill of costs and notice of taxation upon the respondent.
23. It is clear to this court therefore that the only time that the respondent learnt that there was an order against them on costs which had already been taxed was on 22<sup>nd</sup> March, 2024 when they were served with a demand for payment of the taxed costs upon which they wrote to court on 19/4/2024 and came to court to peruse the court file.
24. Although costs are in the discretion of the court, in this case, the costs were awarded in the absence of the respondent who was not served to attend court to be heard before such an order could be made and this was on a mistaken belief that the respondent had been served to attend court on that date. Again, as the costs were taxed *exparte*, there is no way the respondent could have been expected to file a reference challenging the taxation. A reference can only be an issue if the taxation was undertaken with the respondent's full knowledge and having been given an opportunity to challenge the bill of costs. That was not the case here.
25. It is for that reason that albeit there was delay, the delay was not deliberate and has been satisfactorily explained.
26. Courts have consistently held that failure to serve a party with notice amounts to a violation of the right to a fair hearing, which is a principle of natural justice and also protected under Article 50(1) of the *Constitution* (right to a fair and public hearing). In *MRAO Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR, the court stressed the importance of service and giving parties an opportunity to be heard. Furthermore, it is trite law that an order made in the absence of a party who was not served with notice is liable to be set aside.
27. In *Shah v Mbogo* [1967] EA 116, it was held that discretion to set aside a judgment or order entered in absence of a party should be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake.
28. This Court is satisfied that on the material placed before this court, there was no service of notice upon the Respondent to attend court to have a say when the order for costs was made and neither was the respondent served with notice of taxation or even the actual bill of costs for the respondent to contest. It is therefore clear that the Respondent was denied an opportunity to address the Court on the issue of costs and the resultant bill which was taxed *exparte*.
29. The omission to serve the respondent with the notices to attend court and defend its position amounts to a sufficient cause under Order 45 Rule 1 of the *Civil Procedure Rules* to warrant review and setting aside of not only the order for costs but also the *exparte* taxation ruling and the resultant certificate of costs and certificate of order of costs against the Government.



30. This Court reiterates that it will not countenance any attempt by a party to steal a march on the adverse party by obtaining orders through misrepresentation or deliberate concealment.
31. The integrity of the judicial process demands that all parties are accorded a fair and equal opportunity to be heard. Where it is established that an ex parte order was obtained through mischief, deception or false assurances to the court regarding service of notice, such an order is liable to be set aside ex debito justitiae, as a matter of right.
32. No party should be allowed to enjoy the fruits of an order obtained in breach of the principles of fair hearing and procedural justice. This principle also reflects a long-standing position in law that justice must not only be done, but must also be seen to be done.
33. Consequently, I find the application by the ODPP dated 10<sup>th</sup> June, 2024 is merited.
34. Therefore, the applicant having failed to serve the respondent with notice to attend court on 26<sup>th</sup> July 2017 when the order for costs was made and when the bill of costs were taxed; and having failed to serve the bill of costs and notice of taxation upon the respondent; I hereby order that the order for costs made on 26<sup>th</sup> July 2017, the ruling on the bill of costs as taxed ex parte and the certificate of costs as well as the certificate of order of costs against the Government and all consequential proceedings are hereby set aside and vacated.

#### Disposition

- a. The order on costs issued on 26<sup>th</sup> July 2017 is hereby set aside and vacated.
- b. The ruling on taxation and certificate of costs dated 15<sup>th</sup> March, 2022 and all consequential orders including certificate of order against the government dated 12<sup>th</sup> April, 2022 are hereby set aside and vacated.
- c. Parties to appear before this court on to argue orally whether costs are payable in this matter and if so, by who, on 10<sup>th</sup> June, 2025. The respondent to serve the applicant's counsel with hearing notice.
- d. Each party to bear their own costs of the application as allowed.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 14<sup>TH</sup> DAY OF MAY 2025**

**R.E. ABURILI**

**JUDGE**

