



**Maithya v Kavwele (Civil Appeal E173 of 2021)  
[2024] KEHC 2418 (KLR) (6 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2418 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E173 OF 2021**

**FR OLEL, J  
MARCH 6, 2024**

**BETWEEN**

**DANIEL MAKANDA MAITHYA ..... APPLICANT**

**AND**

**LYDIA KAVWELE ..... RESPONDENT**

**RULING**

**A. Introduction**

1. The application before this court is the notice of motion application dated June 21, 2023 brought pursuant to provisions of section 80 of the *Civil Procedure Act*, order 45 rules 1,2, and 3 and order 51 rule 1 of the *Civil Procedure Rules* and all other enabling provision of law. Prayers 1, & 2 of the said application are basically spent and the main prayer sought are prayers (3) and (4) where the applicant seeks that ;
  - a. That the order of January 18, 2023 awarding costs be reviewed, varied and/or set aside.
  - b. That the costs of this application be provided for.

**B. The Pleadings**

2. This application is supported by the ground on the face of the said application and the supporting affidavit dated June 21, 2023, of one Christopher Chengecha who deponed and swore the said affidavit on the basis that he is an advocate of the High court of Kenya, working for the firm named and styled Wangai Nyuthe & company Advocates, who were on record for the Applicant and he had all the facts herein within his knowledge.
3. The applicant averred that there existed sufficient reason as to why the orders sought should be granted in the interest of Justice as there was an apparent error on the face of the record .They had withdrawn this appeal with no orders as to costs on the basis that they had compromised the application giving rise



to the interlocutory appeal on February 24, 2022 and the primary matter had proceeded to its logical conclusion and thereafter the decree was fully settled. The appeal having been compromised, and the memorandum of appeal having not been served upon the respondent it was not prejudicial to have the appeal withdrawn with no orders as to costs.

4. The respondent only came to know about the appeal on September 8, 2022, upon being served with the court's notice dated August 3, 2022, while the notice to withdraw the Appeal was filed on September 29, 2022 before any proceeding had taken place in this Appeal. The applicant reiterated that the consent of the trial court was filed on February 24, 2022 allowing the reinstatement of the application dated July 28, 2021 the subject of this appeal. It would be unjust to award the respondent costs herein as it would go against the spirit of amicable resolution of disputes as provided for under article 159 of the [Constitution of Kenya 2010](#). It was thus in the best interest of Justice to allow the orders as sought.
5. This application is opposed by the respondent who filed a replying affidavit through his advocate one Francis Mulu dated October 7, 2023, where he deposed that, the said application herein was made in bad faith, was incompetent, an afterthought and otherwise constituted an abuse of the process of the court. There was no basis made upon which an order of review could be granted, the applicant did file the notice of withdrawal of the appeal but did not serve the said notice upon the respondent. Further the orders sought to be reviewed was granted in the presence of all the parties on January 18, 2023, and therefore this application had been filed as an afterthought long after the respondents bill of costs had been filed for taxation.
6. Finally the respondent did point out that the instant application had not been brought before court in a timely manner as there had been inordinate delay between the time the costs were awarded and when this application was filed, which period was about five (5) months. The applicant had further failed to serve this application on time and therefore was before court with unclean hands in equity. The respondent did pray that this application be dismissed with costs.

### **C. Analysis & Determination**

7. I have carefully considered the Application, Supporting Affidavit, and the Respondent's Replying Affidavit. I do find that the issue for determination is whether the court order of 18th January 2023 should be reviewed and/or set aside.
8. Section 80 of the [Civil Procedure Act](#) grants the court the power to make orders for review, order 45 of the [Civil Procedure Rules](#) sets out the jurisdiction and scope of review by hinging review to discovery of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason. The applicant alleges that there was an error on the face of the record as the appeal had been compromised given that the application giving rise to the interlocutory appeal dated July 28, 2021 was compromised and reinstated by consent of the parties before the trial court on February 24, 2022 and the respondent paid thrown away costs of Kes 7,400/=. Subsequently the suit before the trial court was heard on merit and judgement delivered on August 3, 2022, which judgement too had been settled together with costs arising therefrom.
9. The facts as pleaded by the applicant were not traversed or denied by the respondent in their replying affidavit. Their only grouse is lack of service of the memorandum of Appeal filed and late service of this application, which is indicative of bad faith and this process being an abuse of the process of this court.
10. The orders issued on January 18, 2023, allowing withdrawal of the appeal with costs to the respondent was issued in the presence of Advocate for the respondent and in the absence of advocate of the appellant/applicant. The fact that the orders as to costs were issued as against the appellant/applicant



was not an error and cannot be termed as such. But given the nature of the facts as pleaded, the same would constitute “sufficient reason” as to why review orders should be issued for the following reasons.

11. According to the current jurisprudential trend the right to be heard is now not only constitutionally entrenched, but it is also the corner stone of the rule of law. The right to be heard is a valued right; and that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice. See *Richard Nchapi Leiyagu v IEBC & 2 others* [2013]eKLR; *Mbaki & others v Macharia & another* [2005] 2EA 206.
12. I do therefore find that sufficient reason exists the basis upon which the orders of January 18, 2023 should be set aside and I do proceed to so set aside the said orders. Further given that the interlocutory application leading to this appeal was compromised through Alternative dispute mechanism, the primary suit heard on merit and determined and the decree/costs settled, It is my further finding that, the broader intention of the alternative dispute settlement undertaken was achieved and to burden the applicant again with the entire costs of this appeal would be unfair and unjust.
13. The respondent too has a valid concern, that the applicant proceeded in bad faith, by failing to serve the memorandum of appeal and/or the notice to withdraw the appeal on time or at all. They did attend court sessions and were therefore entitled to such attendant costs.

#### **Disposition**

14. Taking all relevant factors into consideration, while balancing the interest of both parties I do find and hold that;
  - a. There is merit in setting aside, the orders of this court dated January 18, 2023, condemning the appellant/applicant to pay the costs of this appeal to the respondent, which order I do hereby set aside and substitute the same with an order directing that this appeal is marked as settled on terms that the appellant/applicant do pay the respondent his attendance costs herein and costs of this application.
  - b. The said costs are assessed and taxed at Kes 35,000/= all-inclusive which amount shall be paid with the next 30 days from the date hereof, in default execution to issue for the same.
15. It is so ordered.

**RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 6<sup>TH</sup> DAY OF MARCH, 2024.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

**DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 6<sup>TH</sup> DAY OF MARCH, 2024.**

**In the presence of;**

No appearance for Applicant

No appearance for Respondent

Sam Court Assistant

