



REPUBLIC OF KENYA



**Ngara v Njeri & another (Civil Appeal 127 of 2019)
[2024] KEHC 9597 (KLR) (3 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 9597 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 127 OF 2019
DO CHEPKWONY, J
MAY 3, 2024**

BETWEEN

ESTHER NUNGARI NGARA APPELLANT

AND

MONICA NJERI 1ST RESPONDENT

MARGARET MITHIRI 2ND RESPONDENT

RULING

1. This is a ruling in respect of the Notice of Motion Application dated 20th March, 2023 where the Respondents are seeking the following orders:-
 - a. Spent.
 - b. Spent.
 - c. That this Honourable Court be pleased to review its judgment on costs decreeing the Respondents to pay costs of Kshs 80,000/= to the Appellant and set it aside.
 - d. That costs of the Application be in the cause.
2. The Application is based on the annexed affidavits of the Respondent and Fredrick Otieno Okeyo, an Advocate of the High Court representing the said Respondents sworn on 20th March, 2023 and wherein the following grounds have been as set out:-
 - a. The Respondents are elderly adults, jobless, penniless, sickly and cannot afford the costs as ordered by the court.
 - b. The Respondents have no source of income since the 1st Respondent is a widow and the 2nd Respondent is unmarried.



- c. The Respondents are not even paying for representation in this matter as they are being represented on pro bono basis.
 - d. In the event that the judgment on costs cannot be set aside, then the same be deferred to await confirmation of grant herein so that the same can be paid out of the shares of the Respondent of the estate.
 - e. That it will be in the interest of justice to grant the orders sought herein.”
3. According to the Applicant, since the issue is a family dispute, the court should review the judgment on costs and set it aside and or allow the parties to meet their own costs. The Applicant’s Counsel contends that his clients are unable to pay the costs as ordered since they are jobless and with no source of income. He has urged that in the event the court finds it cannot set aside the Order, then the same be deferred for payment out of the distribution of the estate.
 4. In response the Appellant opposed the application through Replying Affidavit sworn on 11th November, 2023, wherein it is stated that she filed Summons dated 18th February, 2019 seeking to have the Protest she had initially filed to be heard by way of viva voce evidence. She has also stated that despite it being a simple application. The Respondents vehemently opposed the same through a Replying Affidavit and Grounds of Opposition whereby a ruling was delivered against her which prompted her, prompting to file the instant Appeal.
 5. According to the Appellant, the Respondents are still opposed to the Appeal and have filed submissions, thus are authors of their own misfortunes and should be ordered to meet the costs of the Appeal. She avers that she instructed an Advocate to represent her and hence incurred costs which should be compensatory and not meant to penalize them. The Appellant states that costs should follow the event and having been awarded costs, the same should be paid. She adds that if the Respondents were dissatisfied with the decision of the court, they ought to have filed an Appeal for the court’s consideration.
 6. The Appellant disputes that the Respondents retained their Counsel on pro bono basis and contends that the Respondents are persons of means, thus have misled the court. She holds that the Respondents have not given any plausible explanation to warrant a review or setting aside of the order for costs.

Analysis and Determination

7. To determine the application dated 20th March, 2023, I have read through the grounds upon which the same is premised, the response thereto alongside the written submissions filed by their respective counsel. I find the issue for determination being whether the application for review of Judgment on costs has met the legal threshold set for review of court orders or Judgment.
8. The law on review of court orders or review is provided for under Section 80 of the [Civil Procedure Act](#) as follows:-
 - “ Any person who considers himself aggrieved—
 - a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”



9. The jurisdiction and scope of review are set out under Order 45 Rule 1 of the *Civil Procedure Rules* and states:-

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

10. From this provision, review of a court order or decree is hinged on discovery of new and important evidence, mistake or error on the face of the record and or on any other sufficient reason.

11. In the instant case, the Applicant/Respondents seeks for the court to review its Judgment of 10th March, 2022 on costs decreeing the Respondents to pay Kshs 80,000.00 to the Appellant and set the same aside on the ground that the issue from which the same arose is a family dispute where each party ought to bear its own costs, and hence the same was an error on the record.

12. [13]The law on costs is enshrined under Section 27 of the *Civil Procedure Act* which provides as follows:-

[27]. “(1)Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

13. [14]The issue of costs is dependent on the discretion of the court which discretion is exercised depending on the circumstances of each case. In the case of *Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] eKLR, the Court held that:-

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

14. [15]In this case, it is the Applicant’s argument that since the dispute involves family members the court ought to have ordered each party to bear their own costs. The court has acknowledged the approach



the courts have adopted that costs are not awardable in family disputes so as to assist families to resolve the disputes without imposing financial burdens on either family member. This was the position in the case of *Re Estate of Priscillah Cherono Chepkwony (Deceased)* [2021] eKLR, where the court held as follows:-

“However, it is a practice that has developed (to the extent that it has now received judicial seal of approval) that in family disputes costs are not usually awardable. The reasoning behind this position is simple; the court is mandated to assist families’ resolve their disputes without imposing further burden on them to pay costs. It also ensures that harmony is promoted within the family. The normal order that ensues upon such disputes being resolved is that each party to bear his/her/their costs. There is however an exception to this general rule; costs may be awarded by the court where the conduct of the losing Party is such that the award of costs will meet the ends of justice. In that case where such costs are awarded, the court specifically makes an order to that effect and gives reasons for making such an order.”

15. [12] In the case of *Republic v Public Procurement Administrative Review Board & 2 others* [2018] eKLR, the court held that:-

“Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

16. [16] Guided by the finding in the above-cited, this court finds that the reason given by the Applicant for seeking review of the Judgment delivered on 10th March, 2023 is sufficient to warrant a review thereof. This is because in as much as it is trite that costs should follow the event, this being a family dispute, each party should bear its own costs. Therefore, this court finds that the application has merit and the same is allowed accordingly on the following terms:-

- a. The Judgment delivered on 14th March, 2023 is hereby reviewed but limited to the order decreeing the Respondent to pay Kshs 80,000.00 as costs to the Appellant.
- b. Subsequently, the order decreeing the Respondents to pay Kshs 80,000.00 to the Appellant is set aside and substituted with an order that each party bears its own costs.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 3RD DAY OF MAY, 2024.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Okeyo counsel for Applicants

Court Assistant - Martin

