



REPUBLIC OF KENYA



KENYA LAW
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**Kenya Power & Lighting Company Ltd v Rustam (Civil Appeal
111 of 2012) [2023] KEHC 24710 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 24710 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 111 OF 2012
MN MWANGI, J
SEPTEMBER 22, 2023**

BETWEEN

KENYA POWER & LIGHTING COMPANY LTD APPELLANT

AND

KHAN NASSIR RUSTAM RESPONDENT

RULING

1. The application before this Court is a Notice of Motion dated 2nd November, 2021 brought under the provisions of Order 51 rule 1 of the [Civil Procedure Rules](#), 2010 and Sections 1A, 1B, 3(e), 3A & 27 of the [Civil Procedure Act](#), Cap 21 Laws of Kenya and any other enabling provisions of the law. The respondent seeks the following orders -
 1. That this Honourable Court be pleased to award costs of this appeal to the respondent; and
 2. Costs of this application be provided for.
2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on 4th November, 2021, by Kioko Maundu, learned Counsel for the respondent. In opposition thereto, the appellant filed a replying affidavit sworn on 24th January, 2022, by Justus Ododa, an employee of the appellant.
3. The application was canvassed by way of written submissions. The respondent's submissions were filed by the law firm of Kanyi, J & Company Advocates on 10th November, 2022, whereas the appellant's submissions were filed on 25th November, 2022, by the law firm of Kiarie Kariuki & Company Advocates.
4. Mr. Maundu, learned Counsel for the respondent cited the case of [Silvanus Kizito v Edith Nkirote Mwiti](#) [2021] eKLR where it was held that the Court does not become functus officio merely because it has delivered a final decision in civil proceedings, as the Court retains its power to undertake several



- actions including but not limited to stay, review, execution proceedings and such other acts and steps towards the closure of the file. Counsel stated that on 20th December, 2018, this Court made an order dismissing the suit pursuant to the provisions of Order 17 Rule 2 of the Civil Procedure Rules, 2010 but it did not make any pronouncements on costs. He stated that the application herein is not a re-litigation of the Court's decision but an application for the Court to decide on a matter incidental to the order of dismissal and thereafter make an order supplementary to the dismissal. Mr. Maundu asserted that a decision on costs would be incidental to or a natural consequence of the final decision of the Court or any other matter that the Court could exercise supplementary jurisdiction.
5. On whether the respondent is entitled to costs, Counsel cited the provisions of Section 27 of the Civil Procedure Act and submitted that the appellant has not shown any good reason why the Court should depart from the provisions therein. To this end Counsel relied on the decisions in *Republic v Rosemary Wairimu Munene, Ex-parte applicant v Ibururu Dairy Farmers Co-operative Society Ltd* Judicial Review Application No. 6 of 2014, Haruf Traders Limited v Narok County Government [2022] eKLR, and Robert Nyonga Angatia v Aggrey Taikosh Azelwa [2021] eKLR.
 6. Mr. Maundu submitted that the appellant dragged the respondent to Court as a result of being sued in this appeal, and that the respondent incurred costs. It was stated by Counsel that the appellant filed a Memorandum of Appeal, an application for stay pending appeal, and a supplementary affidavit together with submissions in support of the application for stay of execution. That the respondent on the other hand filed a replying affidavit and submissions in opposition to the application for stay of execution. He stated that a ruling on the said application was delivered by Hon. Lady Justice M. Kasango on 23rd August, 2013, wherein she allowed the application for stay of execution, and held that costs of the application shall abide the outcome of the appeal. In addition, Mr. Maundu submitted that the parties herein appeared before the Judge and the Deputy Registrar numerous times, and the respondent incurred costs in direct disbursements in filings, commissioning and in paying Process Servers.
 7. On the issue of delay, Counsel submitted that on 13th September, 2021, the respondent filed an application dated 2nd September, 2021 seeking this Court to dismiss the appeal herein for want of prosecution, and it was then that he became aware that the appeal had already been dismissed on 20th December, 2018. Counsel stated that the respondent then promptly filed the application herein therefore his conduct shows diligence.
 8. Mrs. Kabole, learned Counsel for the appellant relied on the case of Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others [2013] eKLR where the Supreme Court explained the concept of functus officio as understood in law. She cited the case of Brian Muchiri Waibenya v Jubilee Hauliers Ltd & another; Geminia Insurance Co. Ltd (Interested Party) [2018] eKLR and submitted that costs are a matter of discretion of the Court.
 9. She contended that upon the Court's dismissal of the appeal for want of prosecution, it became functus officio and it cannot deal with the instant application. She stated that if the respondent is aggrieved by the fact that no costs were awarded, he ought to have lodged an appeal to the Court of Appeal.
 10. It was submitted by Counsel that the application herein was filed two years and ten months after the appeal was dismissed, hence the late filing amounts to inordinate delay and shows that the instant application is an afterthought. Counsel relied on the case of Nginyanga Kavole v Mailu Gideon [2019] eKLR, where the Court held that a delay of five months was an afterthought and the applicant was under a duty to satisfactorily explain such delay. Mrs. Kabole contended that there is no evidence that the respondent perused the Court file despite the fact that he had a duty to prove that he was not aware of the dismissal of the appeal.



11. In relying on the case of *Kagwimi Kang'ethe & Company Advocates v A.A Kawir Transporters Limited* [2014] eKLR, she submitted that the appellant herein will be greatly prejudiced and that he will suffer injustice in the event the instant application is allowed.

Analysis And Determination.

12. I have considered the application filed herein, the grounds on the face of it, the affidavit filed in support thereof, the replying affidavit by the appellant and the written submissions by Counsel for the parties. The issues that arise for determination are-
 - i. Whether this Court is functus officio; and
 - ii. If costs should be awarded to the respondent.
13. In the affidavit filed by the respondent's Counsel, he deposed that he has incurred costs and expended efforts in defending the appeal this far, he has perused numerous documents, drawn, filed and served documents, attended Court and carried out other attendances in defence of this appeal therefore he is entitled to costs.
14. The appellant in its replying affidavit deposed that in dismissing the appeal for want of prosecution, this Court became functus officio and cannot deal with the instant application. It averred that costs are matters in the discretion of the Court as provided for under Section 27(1) of the *Civil Procedure Act*, Cap 21 Laws of Kenya and this Court cannot be invited to sit on appeal over the same.

Whether this Court is functus officio.

15. The doctrine of functus officio is one of the mechanisms by which the law gives expression to the principle of finality as was stated by the Supreme Court of Kenya in *Raila Odinga & Others vs. IEBC & Others* [2013] eKLR. In the said petition, the Supreme Court relied on the holding in the case of *Jersey Evening Post Limited vs Al Thani* [2002] JLR 542 at 550 to the effect that-

“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available.”
16. The appellant contends that this Court is functus officio and cannot deal with the application herein having dismissed the appeal on 20th December, 2018. It is not disputed that the Court on 20th December, 2018 in the absence of both parties dismissed the appeal for want of prosecution. As was correctly submitted by Counsel for the respondent, when dismissing the said appeal the Court was silent on the issue of costs. Therefore, it cannot be said that the Court already directed its mind and exercised its discretion on the issue of costs of the appeal.
17. Accordingly, I find that this Court is not functus officio in respect of the respondent's application as to whether he should be awarded costs of the appeal, as the same is yet to be adjudicated upon.



If costs should be awarded to the respondent

18. It was submitted by Counsel for the appellant that the application herein was filed two years and ten months after the appeal was dismissed thus the late filing of the said application amounts to inordinate delay and shows that the application herein is an afterthought. The respondent on the other hand contended that on 13th September, 2021, he filed an application dated 2nd September, 2021 seeking dismissal of the appeal for want of prosecution, and that was when he became aware that the appeal had been dismissed on 20th December, 2018. In this Court's view, the respondent's conduct shows diligence since he promptly filed the present application on discovery of the dismissal of the appeal.
19. It is trite that it is the duty of an appellant to pursue and prosecute his suit failure to which the respondent is at liberty to apply for the same to be dismissed for want of prosecution after one year has elapsed, if no action has been taken in the suit. In this instance, by the time the respondent filed his application for dismissal of the appeal for want of prosecution, the appeal had already been dismissed. The respondent contended that he became aware of this on 13th September, 2021, when he went to file the said application, and upon realizing that the appeal had been dismissed and the Court had not made any orders as to costs, he filed the instant application on 4th November, 2021.
20. In light of the above, it is evident that the application herein was filed approximately one and a half months after the respondent realized that the appeal had been dismissed and that the Court had not made any orders as to costs. It is my finding that the delay by the respondent was not so inordinate as to be inexcusable.
21. Costs are provided for under Section 27 of the [Civil Procedure Act](#), Cap 21 Laws of Kenya, which states the following-
 - “ 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.
 - 2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.”
22. In light of the above provisions, it is evident that costs of any action shall follow the event unless the Court or Judge orders otherwise for good reason. The respondent submitted that the appellant filed a Memorandum of Appeal, an application for stay pending appeal, and a supplementary affidavit together with submissions in support of the application for stay of execution. The respondent on the other hand filed a replying affidavit and submissions in opposition to the said application. In addition, the respondent averred that the parties herein have appeared before the Judge and the Deputy Registrar numerous times and he incurred costs in direct disbursements in filings, commissioning and in paying Process Servers. It was also stated by the respondent that Hon. Lady Justice M. Kasango on 23rd August,



2013, delivered a ruling allowing the appellant’s application for stay of execution, and directed that costs of the application shall abide the outcome of the appeal.

23. The appellant neither disputes the chronology of events from the institution of the appeal to the time it was dismissed as submitted by the respondent, nor has it given reasons, if any, as to why the respondent is not entitled to the costs of the appeal in view of the fact that the appeal herein was dismissed for want of prosecution. In the case of *Orix (K) Limited vs Paul Kabuu & 2 others* [2014] eKLR, the Court in addressing the issue of costs held that-

“...the court should have been guided by the law that costs follow the event, and the plaintiff being the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied costs or the successful issue was not attracting costs. None of the deviant factors are present in this case and the court would still have awarded costs to the plaintiff, which I do.”

24. In the result, the application dated 2nd November, 2021 is merited. The same is allowed in the following terms-

- i. That the respondent is awarded costs of the appeal; and
- ii. That the costs of the application dated 2nd November, 2021 are also awarded to the respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF SEPTEMBER, 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

