



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Monica Wanjiru Macharia (Deceased) (Family Appeal
15 of 2023) [2024] KEHC 14780 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14780 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
FAMILY APPEAL 15 OF 2023
FN MUCHEMI, J
NOVEMBER 21, 2024**

IN THE MATTER OF THE ESTATE OF MONICA WANJIRU MACHARIA (DECEASED)

BETWEEN

ESTHER MURUGI MACHARIA APPELLANT

AND

TABITHA WANGARI KARANJA 1ST RESPONDENT

RACHAEL NYAMBURA KIMANI 2ND RESPONDENT

JAMES NJOROGE MACHARIA 3RD RESPONDENT

MARGARET MUGURE GITAU 4TH RESPONDENT

MARIAM NJERI NJUGUNA 5TH RESPONDENT

RULING

Brief facts

1. The application dated 18th September 2024 seeks for orders of review the orders made on 20th August 2024 and setting aside costs awarded to the respondents.
2. In opposition to the application, the respondents filed a Replying Affidavit dated 9th October 2024.

Appellant's/Applicant's Case

3. The applicant states that judgment was delivered by this Honourable Court on 20th August 2024 whereby the court dismissed the appeal and awarded costs to the respondents. The applicant argues that since the matter is a family matter, each party ought to bear its own costs. The applicant further states that no prejudice will be occasioned to the respondents.



The Respondents' Case

4. The respondents argue that this Honourable Court cannot be faulted for awarding costs to them as costs follow the event and they were entitled to costs as the appeal was dismissed in their favour. Further, the respondents state that an award of costs to the successful party is discretionary and therefore no error on the face of the record to be remedied by review.
5. The respondents state that whereas in some instances in ordinary family disputes the courts may direct that each party bear their own costs, there is no general rule to that regard as courts have a wide unfettered discretion to award costs based on among other factors, the conduct of the parties. In any event, the respondent argues that the applicant in her memorandum of appeal, prayed for costs therefore she cannot claim that costs are not awarded in family matters.
6. The respondents state that the applicant's conduct was not aimed towards fostering harmony in the family and an award of costs was vital to make the ends of justice meet. The applicant through her greed and lack of compassion has all along been intent on disinheriting her siblings despite having benefited through a gift inter vivos from the deceased's estate and thus prolonging the matter since the year 2014.
7. The respondents argue that the applicant's prayer for review is misguided as the applicant had failed to demonstrate that there is an error on the face of the record and/or discovery of new material which was not in her possession.
8. Directions were issued that the application be canvassed by way of written submissions and from the record only the respondents complied by filing their submissions on 14th October 2024. The applicant on the other hand had not filed her submissions by the time of writing this ruling.

The Respondents' Submissions

9. The respondents submit that the applicant has not satisfied the requirements for review but simply grounded her application on the fact that the matter is a family matter thus each party ought to bear its own costs. The respondents rely on the cases of *Party of Independent Candidate of Kenya & Another vs Mutula Kilonzo & 2 Others* (2013) eKLR and *Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others* [2014] eKLR and submit that an award of costs is discretionary based on various factors amongst them the conduct of the parties. The respondents argue that the applicant was greedy and lacked compassion towards her siblings in attempting to disinherit them despite herself having benefited greatly through a gift inter vivos and further from her conduct of vexatious litigation since the year 2014. Thus the applicant's conduct warrants an award of costs irrespective of them being a family.

The Law

10. It is trite law that the issue of costs is a discretionary one that is awarded to a successful party. Furthermore, this discretion must be exercised judiciously and a party cannot be denied costs unless it can be shown that they acted unreasonably.
11. Section 27(1) of the *Civil Procedure Act* provides:-
 - (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 purpose 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 for good reasons otherwise order.

12. Section 27 of the Act is clear that it lies in the discretion of the court to award costs in a suit. This discretion must be exercised judiciously. Furthermore, in *Morgan Air Cargo Limited vs Everest Enterprises Limited* [2014] eKLR, the court set out factors that ought to be taken into consideration when determining the costs of a suit. They include:-
 - a. The conduct of the parties;
 - b. The subject of litigation;
 - c. The circumstances which led to the institution of the proceedings;
 - d. The events which eventually led to their termination;
 - e. The stage at which the proceedings were terminated;
 - f. The manner in which they were terminated;
 - g. The relationship between the parties and
 - h. The need to promote reconciliation amongst the disputing parties pursuant to Article 159(2) (c) of *the Constitution*.
13. From the record, the applicant has not demonstrated how the Honourable Court exercised its discretion wrongly. It has applicant has only stated that since the matter is a family matter, each party ought to bear its own costs. That notwithstanding, it is clear that one of the factors the court will look into in awarding costs is the conduct of the parties. In the instant matter, the court noted that the applicant in both the appeal and the succession cause before the Magistrate's court, demonstrated a sense of greed and lack of compassion for her siblings. The applicant instituted the suit in 2014 declaring herself as the sole beneficiary yet failed to disclose to the court that she had initially benefited through a gift inter vivos during the lifetime of the deceased.
14. After the grant was revoked, the applicant still wanted to solely benefit from the estate of the deceased yet the respondents who are her siblings had not inherited any shares in the deceased's estate. The court took note of the conduct of the applicant in its judgement was of the view that she had taken the other beneficiaries through unnecessary litigation. Finally, the court found that the appeal lacked merit thus dismissing the same. The court further exercised her discretion judiciously and awarded costs to the respondents who were the successful parties in the matter. The court also considering the vexatious nature of the applicant who had consistently kept the other beneficiaries in court since 2014.
15. That notwithstanding, the applicant has not demonstrated existence of any error on the face of the record, discovery of new facts or any sufficient reasons to warrant a review of the orders made on 20th August 2024. The applicant in my considered view has not met the conditions to warrant her the orders of review.
16. Accordingly, the application dated 18th September 2024 lacks merit and is hereby dismissed with costs to the respondents.
17. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 21ST DAY OF NOVEMBER 2024.

F. MUCHEMI



JUDGE

