



**Kawamara v Glajoes Enterprises Limited & another (Civil Appeal  
88 of 2013) [2024] KEHC 16904 (KLR) (18 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 16904 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 88 OF 2013  
F WANGARI, J  
NOVEMBER 18, 2024**

**BETWEEN**

**SWEETBAT KAWAMARA ..... APPELLANT**

**AND**

**GLAJOES ENTERPRISES LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**WAMBUA MASENO ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This application arises from a judgment on appeal delivered on 12/06/2023 where the appeal was allowed. The court did not pronounce itself on costs, hence the filing of this application, praying for award of costs of the appeal and in the lower court.
2. The Respondent in the Grounds of Opposition dated 21/09/2024 stated that this court was functus officio and cannot sit on appeal in its own judgment. Further, what was not addressed is deemed not to have been granted. Awarding of costs being an exercise of discretion, it is not amenable to change by the same court.
3. Directions were taken that the application be disposed of by way of written submissions, where all parties duly complied and relied on various decisions in support of their rival positions. I have duly considered the said submissions together with the various cited authorities.
4. This application was brought about 9 months after the delivery of the judgement on appeal. No explanation has been given as to why it took the Appellant such a long time to file the application. I find this as an afterthought and the delay was inordinate.
5. On this court being functus officio, I have considered both submissions by the parties. It is a fact that this court did not pronounce itself on costs in both the lower court proceedings and in the appeal. The Applicant prays for determination of costs I respect to the primary suit and the appeal.



6. Both parties relied on the case of Mombasa Bricks & Tiles Ltd & 5 others v Arvind Shah & 7 others [2018] eKLR. The Applicant argued that the court was not functus officio as the issue of costs was not a determination on merits that would not reopen the litigation.
7. On the other hand, the Respondent submits that the court was functus officio as it was being asked to do a separate ruling on costs that would make it an appendage of the main judgment. He relied on the case of Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others (2016) eKLR.
8. I am in agreement with the Respondent that the manner in which the Applicant has approached the court would amount to this court sitting on appeal on its own decision. The best way the Applicant ought to have approached the court is by way of an application for review under Order 45, Rule 1 as read with Rule 2 of the Civil Procedure Rules as the court still ‘retains the duty and jurisdiction to undertake and handle all incidental proceedings even after a final judgment’. (See Leisure Lodge Ltd v Japhet Asige and another (2018) eKLR.
9. Following the foregone discourse, the upshot is that the following orders do hereby issue;
  - a. The application lacks merit and hereby dismissed.
  - b. Each party to bear its own costs.
  - c. File is hereby closedOrders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28<sup>TH</sup> DAY OF NOVEMBER, 2024.**

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**F. WANGARI**

**JUDGE**

In the presence of;

Maundu Advocate for the Appellant/ Applicant

Kioko Advocate for the Respondent

Brian, Court Assistant

