



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kenya Commercial Bank Limited v Massey (Civil Appeal E026 of 2019)  
[2024] KEHC 15890 (KLR) (Commercial and Tax) (16 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15890 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL APPEAL E026 OF 2019  
JWW MONG'ARE, J  
DECEMBER 16, 2024**

**BETWEEN**

**KENYA COMMERCIAL BANK LIMITED ..... APPELLANT**

**AND**

**ANNE SANAIPEY MASSEY ..... RESPONDENT**

**RULING**

1. The Applicant has by an application dated 17<sup>th</sup> November 2023 filed under a certificate of urgency and brought under Order 51 Rule 1 of the Civil Procedure Rules, sections 1A,1B, 3A and 100 of the [Civil Procedure Act](#), seeking the following prayers:-
  1. Spent
  2. Spent
  3. That this honourable court be pleased to rectify and or correct its judgment of 28<sup>th</sup> August 2023, dismissing the Appeal, by granting the costs of the Appeal to the Respondent to the Appeal.
  4. That costs of this application be provided for.
2. The Application is supported by the grounds set on its face and the supporting affidavit of Ruth Kulohoma, an advocate of the High court of Kenya in conduct of this case for the Petitioner/ Applicant.
3. The Applicant argues that while the court delivered its judgment dismissing the Appeal against it, the court failed and or omitted to order that costs follow the event and hence denied the Applicant, who was the winning party, an opportunity to pursue its costs for the litigation and by this application, the



Applicant seeks a revision of the said judgment and urges the court to revise the same and make an order for costs, in the interest of justice. The Applicant argues that this court has the requisite power under section 27 of the Civil Procedure Act to do so and vindicate the Applicant's legitimate expectation to protection of the law.

4. The Application is opposed and the Appellant (Now Respondent in the present application) has filed a response through a replying affidavit sworn by Eric Karuti, also an Advocate of the High Court of Kenya in conduct of this case on behalf of the Respondent (Appellant).
5. The Respondent argues that this application is disguised as an invitation to the Court to sit on appeal on its own judgment and that the court having rendered its judgment to the parties on 28/8/2023 became functus officio subsequently and is not now legally competent to make any judicial pronouncements on the matter at hand unless properly moved by an application for review. The Respondent further argues that no sufficient reason has been provided to warrant the re-opening of the Judgment by the court. The Respondent contends that the provisions of section 27 of the Civil Procedure Act are couched in mandatory terms in that providing for an award of costs is left purely to the discretion of the court.
6. I have considered the arguments put forward by both parties. Section 27 of the Civil Procedure Act, Laws of Kenya provides as follows:-

S. 27. Costs

- (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) .....

7. I therefore agree with the arguments put forward by the Respondents herein that there is no automatic right to the successful party to a suit for an award of cost and section 27 of the Civil Procedure Act leaves it to the discretion of the court to either grant or deny a successful party costs related to litigation. I also further concur with the Respondent that having rendered its judgment, the court became functus officio and therefore it cannot be invited back to open the same to make any further orders. In view of the same, I find no merit in the present application and hereby dismiss the same. The court makes no orders as to cost and therefore each party shall bear its own costs of the application. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY at NAIROBI this 16<sup>TH</sup> DAY OF DECEMBER 2024**

.....

**J.W.W. MONG'ARE**

**JUDGE**

In the Presence of:-

1. Mr. Karuti for the Appellant/Respondent.



2. Ms. Kulohoma for the Respondent/Applicant.

3. Amos- Court assistant

