



**The Chairman BOG, Mbaikini High School & another v Simecor Merchants 2002 Limited & 2 others (Civil Appeal 67 of 2020) [2024] KEHC 15693 (KLR) (9 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15693 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL 67 OF 2020  
FR OLEL, J  
DECEMBER 9, 2024**

**BETWEEN**

**THE CHAIRMAN BOG, MBAIKINI HIGH SCHOOL ..... 1<sup>ST</sup> APPELLANT**

**THE PRINCIPAL, MBAIKINI HIGH SCHOOL ..... 2<sup>ND</sup> APPELLANT**

**AND**

**SIMECOR MERCHANTS 2002 LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**MUNYAO MUA ..... 2<sup>ND</sup> RESPONDENT**

**PATRICK MUTULA ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

**Introduction**

1. The application before this court is the Notice of Motion application dated 25th September 2024 brought pursuant to provisions of Section 1A, 3 and 3A, Section 80 of the *Civil Procedure Act*, Order 45 rule 1, Order 51 Rule 1 of the Civil Procedure Rules, and all other enabling provision of law. The applicants seek for orders that;
  - a. Spent
  - b. That this Honorable court be pleased to review, clarify, rectify and/or pronounce itself on the claim against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and their costs of both Appeal and the trial in its judgment that was delivered on 16.09.2024 and order that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents shall have costs of the Appeal and the primary suit.
  - c. That the costs of this Application be provided for.
2. The application is supported by the ground on the face of the said application and the attached supporting affidavit dated 25<sup>th</sup> September 2024, sworn by the Applicant's advocate Mr Dominic



M Mulyungi while the Appellant/respondent though served, did not file any response to the said Application.

3. The 1<sup>st</sup> Respondent, through their advocate indicated that they were not opposed to the orders sought.
4. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents averred that they were not sued in the primary suit and it was the Appellants who applied to have them enjoined in the said suit as “Third (3<sup>rd</sup>) parties”. They fully participated in the trial and also called witnesses to defend their position. Ultimately the suit against them was dismissed with costs on 22.10.2022, which triggered this Appeal.
5. It was their contention that they also actively participated in this Appeal, their advocate attended court sessions and filed pleadings, but when judgment was ultimately rendered on 16.09.2024, the court did not pronounce itself on the Appellant's case against them and/or if they were also entitled to costs of the primary suit and the Appeal.
6. The Appellant school and the 1<sup>st</sup> respondent had already commenced negotiations on how to settle the decree and it was therefore important that the error apparent on the face of the judgment dated 16.09.2024 be rectified and they too be awarded costs of the primary suit and this Appeal.

### **B. Analysis & Determination**

7. I have carefully considered the Application, and its supporting Affidavit and first note that this application despite being served is not opposed by the Appellants.
8. Secondly Section 100 of the Civil Procedure Code, allows the trial court to amend its judgment at any time to correct a defect or error in the proceedings for purposes of determining the real question or issue in dispute. The averments of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are correct that they fully participated in the primary proceedings and were awarded costs. The Appeal record also confirmed that the Applicants were represented by counsel throughout in this Appeal, though they did not file their submissions but associated themselves with submissions filed by the 1<sup>st</sup> Respondent.
9. Section 27 of the *Civil Procedure Act* also allows the court to award costs to the successful party. Since the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants were dragged into this dispute by the Appellants, it is only fair that the said Appellants do bear the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' costs for both the primary matter and costs of this Appeal.

### **C. Disposition**

10. I do find that this application is merited and allow it in terms of prayer (2) thereof. Since the costs of the 1<sup>st</sup> Respondent had been assessed by this court at Kshs 250,000/=, I do similarly award the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent's costs of this Appeal jointly assessed at Kshs 250,000/=.
11. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents are also awarded costs of the primary suit to be agreed upon or to be assessed.
12. The costs will attract interest at court rates until date of payment in full.
13. It is so ordered.

**READ, SIGNED, AND DELIVERED VIRTUALLY AT MACHAKOS ON THIS DAY 9<sup>TH</sup> OF DECEMBER 2024.**

**FRANCIS RAYOLA OLEL**

**JUDGE**



Delivered on the virtual platform, Team this 9<sup>th</sup> day of December, 2024.

In the presence of: -

Appellant - Absent

Mr. Njuguna for 1<sup>st</sup> Respondent

Mr. Muumbi for 2<sup>nd</sup> & 3<sup>rd</sup> Respondent

Susan/Sam - Court Assistants

