

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT THIKA**

**FAMILY APPEAL NO. E007 OF 2024**

**IN THE MATTER OF THE ESTATE OF KIMANI KIGOTHO**

**alias KIMARI KIGOTHO (DECEASED)**

**GEORGE MBUGUA**

**KIMARI.....APPELLANT/APPLICANT**

**VERSUS**

**ELIZABETH NYAMWERU MUTHONI.....**

**RESPONDENT**

**R U L I N G**

**Brief facts**

1. The application dated 22<sup>nd</sup> September 2025 seeks for orders of review of this court's orders dated 12<sup>th</sup> June 2025 for payment of costs whereas the applicant was condemned to meet the costs of the appeal in favour of the respondents.
2. In opposition to the application, the respondent filed a Replying Affidavit dated 8<sup>th</sup> October 2025.

**Appellant's /Applicant's Case**

3. The applicant states that the instant court rendered its judgment and ordered him to meet half the costs of the appeal. Subsequently, the respondent's advocate filed a bill of costs claiming a sum of Kshs. 443,285/-.
4. The applicant argues that the matter is a family succession matter and he appealed against the decision of the lower court as he felt the trial court erred.
5. The applicant avers that he has never been employed and he has been a small scale farmer and a boda boda rider. Further, he avers that he sold all of his livestock in pursuit of the current matter. He states that he has run out of money and is currently completely broke. The applicant states that his current advocates are assisting him on a pro bono basis after he visited Kituo Cha Sheria on being served with the bill of costs.

### **The Respondent's Case**

6. The respondent states that the judgment delivered by the court on 12<sup>th</sup> June 2025 was clear that the applicant should meet half of the costs and the court expressly stated the reasons thereof. Thus, the applicant cannot now claim that he is a pauper because he lost the appeal. Further, justice does not operate on the basis of convenience or selective hardship. A party's financial status or loss in litigation does not automatically exempt them from their legal obligations, including payments of costs awarded by the court.

7. The respondent avers that to allow the instant claim would undermine the authority of the judgment and frustrate the principle that parties must bear costs related to litigation they initiated or contest. Furthermore, costs follow the event and parties are expected to honour costs regardless of their financial position.
8. The respondent argues that the application does not meet the threshold of review of the court orders.
9. Parties put in written submissions.

### **The Applicant's Submissions**

10. The applicant refers to **Order 45 Rule 1(b) of the Civil Procedure Rules** and the case of **Rai & 3 Others vs Rai & 4 Others (Petition 4 of 2012) [2014] KESC 31 (KLR)** and submits that he is completely broke and unable to raise money to pay costs.

### **The Respondent's Submissions.**

11. The respondent relies on **Order 45 Rule 1 of the Civil Procedure Rules** and the cases of **Rose Kaiza vs Angelo Mpanju Kaiza [2009] eKLR; National Bank of Kenya Limited vs Ndungu Njau [1997] KECA 71 (KLR)** and **Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others, SC Petition No. 4 of 2012 [2014] eKLR** and submits that the applicant fails to meet the threshold for review of the court's orders. The applicant's claim of being a pauper and jobless does not constitute new and important evidence nor was it

evidence that was unavailable to him after the exercise of due diligence. Furthermore, the applicant has not even demonstrated that he is a pauper.

12. The respondent further submits that the applicant's financial situation is not an error or omission on the face of the record. The record clearly indicates that the learned Judge considered the matter and made a well reasoned order for the applicant to bear half the costs due to his litigious conduct, which is a valid and common consideration in awarding costs. The respondent argues that the applicant is appealing against the judge's discretion which is impermissible through a review application. The respondent further submits that she was the successful party in the appeal and is entitled to be indemnified for the expense of litigation, an expense forced upon her by the applicant.

## **The Law**

### **Whether the orders sought for review are warranted**

13. **Order 45 of the Civil Procedure Code** sets out the parameters for an application for review as follows:-

**Rule 1 (1) Any person considering himself aggrieved:-**

**(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**

**(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or order made or made the order without unreasonable delay.**

**(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case which he applies for the review.**

14. It then follows that Order 45 provides for three circumstances under which an order for review can be made. The applicant must demonstrate to the court that there has been discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed. Secondly, the

applicant must demonstrate to the court that there has been some mistake or error apparent on the face of the record. The third ground for review is worded broadly; an application for review can be made for any other sufficient reason.

15. The applicant has grounded his application on personal reasons that he is a pauper and unable to raise the costs of this case. The applicant has further argued that the matter is a family matter and he ought not to be condemned to pay the costs. Evidently, the reasons given by the applicant do not fall under any of the grounds set out in **Order 45 Rule 1 of the Civil Procedure Rules** which is the law that provides for review. On further perusal of the record, the applicant instituted the instant appeal and the court found that it lacked any merit thus dismissing it accordingly. The court further noted that although the matter was a family matter, the applicant was condemned to pay half of the costs of the appeal due to his litigious conduct in several matters related to the deceased's estate which was evident in the appeal and were not disputed. The applicant seeks to challenge the exercise of the court's discretion in awarding costs. His application is brought under Order 45 of the Civil Procedure Act under whose grounds have nothing to do with costs in a suit.

16. Accordingly, it is my considered view that the application dated 22<sup>nd</sup> September 2025 lacks merit and is hereby dismissed with costs to the respondent.

17. It is hereby so ordered.

***RULING DELIVERED VIRTUALLY, DATED AND SIGNED  
AT THIKA THIS 4<sup>TH</sup> DAY OF DECEMBER 2025,***

**F. MUCHEMI  
JUDGE**