

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ELCA NO E004 OF 2024

JOSEPH KIARIE N
GACHU.....APPELLANT

VERSUS

HANNAH WANJIRU KIRATHI & 3
OTHERS.....RESPONDENT

RULING

In the Application dated 1/10/2025, the Appellant seeks that: -

- a. This Court be pleased to review, vary and/or set aside the orders of the Court issued on 21/5/2025.
- b. In the alternative to the above prayer, the Court be pleased to grant leave to the Applicant to file a Notice of Appeal against the Order of 21/5/2025 out of time and the Notice of Appeal attached herewith be declared as properly filed.
- c. Costs of the Application.

The Application is based on the grounds that: -

1. The Appellant appealed against the Ruling of the Honourable Trial Magistrate in Nyahururu CMELC No. 238 of 2018.
2. The Appeal was admitted and parties were directed to file submissions.

3. This Court then directed its Judgment and set aside the Ruling of the lower Court and did not make an award for costs.
4. On 21/5/2025 costs were prayed for in Nyandarua ELC Appeal No. 18 of 2024.
5. The Appellant was awarded costs in the case on account of Section 100 of the Civil Procedure Act, Slip Rule.
6. Counsel dealing with the matter, Mr Gakenia, Advocate lacked instructions to deal with the matter.
7. The said Mr Gakenia, Advocate did not inform his office of the issue of costs until the bill of costs was filed and served on the firm of Waichungo & Co. Advocates.
8. The Applicant did not instruct the firm in good time due to his age and shock.
9. The Appellant was not deserving of the cost of the Appeal as errors noted by the Court in the impugned Judgment were occasioned by the Trial Magistrate and not the Respondents in the Appeal which Mr. Gakenia did not bring out on the 21/5/2025 as he had no instructions to prosecute the matter and he also did not have the office file.
10. On the 21/5/2025, the suit was not scheduled for mention or hearing when the Judgment was reviewed and the Orders of costs were issued but that Mr. Gakuhi only happened to be in Court dealing with other matters and heard the case being called out.
11. In the Orders of 21/5/2025, there is an error on the face of the record and the same ought to be reviewed in the interest of justice.

12. The Applicant cannot understand how costs were awarded without her knowledge and without a formal Application.

The above grounds are on the face of the Application and are also deponed to in the Affidavit of Hannah Wanjiru Kirathi, the 1st Respondent in the current Appeal and the Applicant herein sworn on even date of the Application before Court.

On the part of the Appellant, Mr. Nderitu Komu, Advocate swore a Replying Affidavit on 21/10/2025 in which he depones that the Application is totally misconceived, untenable and is an abuse of the Court process and it has been filed with the aim of obstructing the course of justice. There is nothing to demonstrate error apparent on the face of the record and that the Application is brought in bad faith and is an attempt at obstructing the Appellant from enjoying what is rightly his. This is in view of the fact that Section 100 of the Civil Procedure Act gives the Court the general power to amend proceedings including a Judgment, either on its own Motion or on an Application by either party which power can be exercised at any time. And since costs follow the event, the Court rightly found as such and in the presence of parties' Advocates .

Finally, Mr Komu depones that the Applicant has not given plausible reasons as to why she did not file the Notice of Appeal in time, and accordingly, the prayer for extension of time to file the Notice of Appeal is purely an afterthought.

I allowed both parties time to file their respective submissions which I did consider prior to writing my Ruling.

I have been serving in this Court for well slightly over 1 year now and although I didn't know under what arrangement, I take Judicial Notice of the fact that Mr. Gakenia has been handling a number of matters before me emanating from the firm of Waichungo Martin and Company Advocates. Either as a partner, associate or in any other capacity. I believe that even in this matter, he must have had instructions to handle it on 21/5/2025 and that if it is indeed true that on that day Mr. Gakenia did not have instructions from either the Applicant or Mr. Waichungo to deal with the matter which the Applicant would not be able to authoritatively tell, and that he duly happened to be in Court attending to other matters (which he has not specified) and that he did not have the Court file he ought to have told the Court as much. I have always said that every counsel coming to Court should do so with his file so that he is of assistance to the Court. The Court cannot also be faulted for counsel not informing the Applicant or Office or Mr. Waichungo on the issue of costs since after attending Court., Counsel handling the matter should inform the client of the Decision or Directions of the Court.

Now, what then transpired in Court on 21/5/2025? When Mr. Komu for the Appellant prayed that costs be granted to the Appellant in respect to the Judgment of the Court in ELCCLA No. E004 OF 2024 which was delivered on the 27/4/2025, Mr. Gakenia for the Respondent said

“ I leave it to the Court....”.

and the Court went ahead to say that since costs follow the event, the failure to grant costs on 27/2/2025 to the Appellants was inadvertent. And the Court applied the Slip Rule under Section 100 of the Civil procedure Act to grant the Appellant costs of the Appeal and of the suit in the lower Court. This is because the Respondent had lost in the lower Court and in the Appeal.

As to Review, Section 80 of the Civil Procedure Act Cap 21 provides as follows: -

“Any person who considers himself aggrieved—

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

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows: -

“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 made the order without unreasonable delay.”

In Republic v Public Procurement Administrative Review

Board & 2 others [2018] eKLR it was held: -

“Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

In Pancras T. Swai v Kenya Breweries Limited [2014]

eKLR the Court of Appeal held that: -

“Order 44 rule 1 (now Order 45 Rule 1 of the 2010 Civil Procedure Rules) gave the trial Court discretionary power to allow review on the three limbs therein stated or “for any sufficient reason.....”

In **Sarder Mohamed v. Charan Singh Nand Sing and Another (1959) EA 793** the High Court held that Section 80 of the Civil Procedure Act conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate.

Discussing the scope of review, the Supreme Court of India in the case of *Ajit Kumar Rath vs State of Orisa & Others*, 9 Supreme Court Cases 596 at Page 608. had this to say:-

“.....It may be pointed out that the expression “any other sufficient reason” means a reason sufficiently analogous to those specified in the rule”

In *Tokesi Mambili and others vs Simion Litsanga* the Court held as follows:-

- i. *In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.*
- ii. ***Where the application is based on sufficient reason it is for the Court to exercise its discretion.***

I don't agree with the Applicants that 6 months is not inordinate delay. However, I agree with the Applicant that why we find ourselves where we are is due to some incomplete and incoherent

proceedings from the lower Court which would not be blamed on any of the parties and also since the Orders I issued on the 21/5/2025 were so issued without a Notice that the issue of costs would be reviewed on that day, and also bearing in mind that this matter has been returned to Nyahururu Chief Magistrate's Court for Hearing afresh It is only fair that I vacate the Orders I made on the above said date, 21/5/2025 for costs to the Appellant and order that each Party bears its own costs.

The sins of the Lower Court ought not to and should not be visited on any of the parties in a suit. But I must warn all Counsel herein and in any other matter not to attend Court without their files, whether they are substantively in the matter or just holding brief. I will not entertain Counsel coming to Court to set aside Orders because they came to Court unprepared. It is only that in this matter, I believe the Respondents ought not to have been compelled to pay costs because the proceedings of the lower Court were incomplete and therefore it was not clear how the Appeal should have been determined . Equally, I make no Orders as to costs in respect to the current Application.

Ruling dated, signed and delivered at Nyandarua this 25th Day of February 2026.

MUGO KAMAU

JUDGE

In the presence of:

C/A Samson.

Advocate for the Appellant.....Mr. Komu.

Advocate for the 1st Respondent.....Mr. Waichungo.