



REPUBLIC OF KENYA



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**National Land Commission v Estate of Sisiwa Arap Malakwen & 2 others (Environment and Land Case 112 of 2016) [2025] KEELC 5634 (KLR) (29 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5634 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**  
**ENVIRONMENT AND LAND CASE 112 OF 2016**  
**EM WASHE, J**  
**JULY 29, 2025**

**BETWEEN**

**THE NATIONAL LAND COMMISSION ..... APPLICANT**

**AND**

**THE ESTATE OF SISIWA ARAP MALAKWEN ..... 1<sup>ST</sup> INTERESTED PARTY**

**THE HON ATTORNEY GENERAL ..... 2<sup>ND</sup> INTERESTED PARTY**

**RURAL HOUSING ESTATE ..... 3<sup>RD</sup> INTERESTED PARTY**

**RULING**

1. The Applicant filed a Notice of Motion Application dated 10.02.2025 (hereinafter referred to as “the present Application”) seeking the following orders; -
  - A. That the Taxation Ruling delivered on 17.12.2021 be reviewed.
  - B. That the Certificate of Costs issued and signed on 20.12.2023 by the Deputy Registrar of the Eldoret Environment and Land Court be reviewed.
  - C. That the costs of this Application be in the cause.
2. The present Application is founded on the facts and grounds contained in the body of the Application as well as the Supporting Affidavit sworn by one Brian Ikol on 10.02.2025 which are summarised as follows: -
  - i. That the 3<sup>rd</sup> Interested Party prepared and presented a Bill of Costs dated 18.06.2021 before the Taxing Officer against the Applicant herein.
  - ii. The Bill of Costs dated 18.06.2021 was duly assessed by the Taxing Officer through a Ruling dated 17.12.2021.



- iii. Unfortunately, the Applicant has pleaded that the said Bill of Costs dated 18.06.2021 was never served on them and the date of Taxation was never communicated to enable them defend themselves during the assessment of Bill of Costs.
  - iv. Based on the failure to serve the Bill of Costs dated 18.06.2021 and the relevant Notice of Taxation on the Applicant, the Ruling pronounced on the 17.12.2021 by the Taxing Officer contravenes the right to fair trial due to lack of participation by the Applicant.
  - v. Similarly, the Applicant has challenged the decision of the Taxing Officer to rely on a Valuation Report by the 3<sup>rd</sup> Interested Party which assesses the value of the suit property to be Kshs. 7,000,000,000/=
  - vi. The Applicant's position is that according to the Director, Land Valuation in the Ministry of Lands, the subject matter in these proceedings is valued at Kshs. 83,569,925/= only.
  - vii. In essence therefore, the Applicant sought this Court to exercise its powers and review the ruling pronounced on 17.12.2022 as well as the Certificate of Costs issued on 20.12.2023
3. The present Application was duly served on the 1<sup>st</sup> to 3<sup>rd</sup> Interested Parties herein.
  4. The 3<sup>rd</sup> Interested Party opposed the present application by filing a Replying Affidavit sworn on 27.03.2025 in which it adduced the following reasons for opposing the application; -
    - i. The 3<sup>rd</sup> Interested Party began its opposition to the present application by stating that the present application is not merited, made in bad faith and in fact, *res judicata*.
    - ii. The 3<sup>rd</sup> Interested Party confirmed that the dispute between the Applicant and the 1<sup>st</sup> and 3<sup>rd</sup> Interested Parties relates to the Compulsory acquisition of a property known as LR. No. 776/4/2 (hereinafter referred to as the "suit property") in the year 1978.
    - iii. After the present suit was filed, the Applicants withdrew the proceedings but were condemned to pay costs.
    - iv. Based on the Judgment on costs in favour of the 3<sup>rd</sup> Interested Party against the Applicant, a Bill of Costs dated 18.06.2021 was lodged by the 3<sup>rd</sup> Interested Party for taxation.
    - v. The 3<sup>rd</sup> Interested Party confirmed that the Bill of Costs dated 18.06.2021 together with the Taxation Notice was served through email on 13.10.2021 and delivered.
    - vi. The Taxation Notice served with the Bill of Costs informed the Applicant that the Bill of Costs would be taxed notwithstanding their participation.
    - vii. On the 17.12.2021, the Taxing Officer delivered a Ruling assessing the Bill of Costs dated 18.06.2021 at a sum of Kshs. 79,917,036.45/= in favour of the 3<sup>rd</sup> Interested Party against the Applicant.
    - viii. Based on the taxation Ruling pronounced on 17.12.2021, a Certificate of Costs was issued on 21.12.2021.
    - ix. Upon receipt of the Certificate of Taxation dated 21.12.2021, a copy of the same was emailed to the Applicants through their known email address and which email was acknowledged by the applicant on 31.03.2022.
    - x. The Applicant then began engaging the 3<sup>rd</sup> Interested Party with a view of settling the same but the negotiations did not bear fruits.



- xi. The 3<sup>rd</sup> Interested Party having realized that the negotiations will not bear fruits, filed the proceedings known as Eldoret ELC Misc. Application No. E005 of 2023 between *Akenga Kimuti & Associates Advocates versus The National Land Commission* seeking to have the Certificate of Costs dated 21.12.2021 to be adopted as a Judgment against the Applicant.
  - xii. The Applicant was served with the proceedings known as Eldoret ELC Misc. Application No. E005 of 2023 between *Akenga Kimuti & Associates Advocates versus The National Land Commission* and filed a Replying Affidavit dated 31.12.2023 seeking that the said proceedings be dismissed on the ground that the Bill of Costs had been taxed without their participation occasioned by non-service.
  - xiii. The Court then took time and considered the issues raised in Eldoret ELC Misc. Application No. E005 of 2023 between *Akenga Kimuti & Associates Advocates Versus The National Land Commission* and thereafter made a finding that the Applicants had been properly served with the Bill of Costs dated 8.06.2021 but elected not to defend the same hence the ruling pronounced on 17.12.2021.
  - xiv. Consequently, the Court declined to set aside the Ruling of 17.12.2021 and/or the Certificate of Costs dated 21.12.2021 in favour of the 3<sup>rd</sup> Interested Party against the Applicant.
  - xv. The 3<sup>rd</sup> Interested Party concluded its Replying Affidavit by terming the present Application to be *res judicata* and further stated that the present Application before Court invoking the provisions of Order 45 of the Civil Procedure Rules 2010 was misguided.
  - xvi. The 3<sup>rd</sup> Interested Party informed the Court that the Applicant has never filed a Reference to challenge the Assessment of the Taxing Officer made on 17.12.2021
5. The Replying Affidavit by the 3<sup>rd</sup> Interested Party was served on the Applicant who filed a Further Affidavit sworn on 30.05.2025 in response.
  6. In the Further Affidavit dated 30.05.2025, the Applicant stated as follows: -
    - i. The Applicant denied the allegation that the present Application was *res judicata*.
    - ii. The Applicant reiterated the fact that there was no proper service of the Bill of Costs dated 18.06.2021 and that if any service was ever done, then the same was done on the firm of Mbuthia & Company Advocates who never acted on behalf of the Applicant in this matter.
    - iii. The Applicants denied knowledge of any negotiations between the 3<sup>rd</sup> Interested Party and itself as regards the Certificate of Costs dated 21.12.2021.
    - iv. The Applicant insisted that the Taxing Officer made a grave error by using a Valuation Report giving the value of the suit property to be Kshs. 7,000,000,000/= yet according to the valuation by the Director, Lands Valuation in the Ministry of Lands, the subject matter was valued only at Kshs 83,569,925/=.
    - v. In essence, the Applicant pleaded that there is a huge disparity between the Valuation Report relied upon by the Taxing Officer and the one done by the Director, Land Valuation in the Ministry of Lands hence there will be a great loss to the public coffers if the same was to be paid as assessed.
    - vi. In conclusion, the Applicant stated that there would be no prejudice if the Ruling of the Taxing Officer pronounced on 17.12.2021 is reviewed together with the Certificate of Costs dated 21.12.2021.



7. The Court directed the present application to be heard by way of written submissions wherein the Applicant filed their submissions dated 30.05.2025 while the 3<sup>rd</sup> Interested Party filed their submissions dated 27.03.2025.
8. The Court has indeed gone through the present application, Replying Affidavit, Further Affidavit and both submissions by the parties and identified the following issues for determination: -
  - Issue No. 1 – Is the present application *res judicata* to the proceedings known as Eldoret ELC Misc. application no. e005 of 2023?
  - Issue No. 2 – Whether or not the bill of costs dated 18.06.2021 was duly served on the applicant?
  - Issue No. 3 – Whether the present application is in the right forum?
  - Issue No. 4 – Who bears the costs of the present application?
9. The Court having identified the above-mentioned issues, the same will now be discussed as provided herein below: -

**Issue No. 1 – Is the Present Application Res Judicata to the Proceedings Known as Eldoret ELC Misc. Application No. E005 Of 2023?**

10. The first issue for determination is whether or not the present application is *res judicata* to the proceedings in known as Eldoret ELC Misc. Application No. E005 of 2023.
11. According to the 3<sup>rd</sup> Interested Party, the present application deals with the legality of the Ruling pronounced on the 17.12.2021 by the Taxing officer against the Applicant.
12. On the other hand, the Applicant in the present application pleads that he is seeking to review the Ruling by the Taxing officer pronounced on the 17.12.2021.
13. The issue of *res judicata* is provided for under Section 7 of the [Civil Procedure Act](#), Cap 21 which states as follows: -

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally determined.”
14. Looking at the prayers sought in the proceedings known as Eldoret ELC Misc. Application No. E005 of 2023 and the present application, it is clear that the prayers are different.
15. In the proceedings known as Eldoret ELC Misc. Application No. E005 of 2023, the Applicant was seeking to have the Certificate of Costs dated 21.12.2021 adopted as a Judgment of the Court pursuant to Section 51 (2) and 52 of the [Advocates Act](#).
16. On the other hand, in the present application, the Applicant is seeking for a Review of the Ruling dated on 17.12.2021 pursuant to the provisions of Order 45(1) of the Civil Procedure Rules, 2010.
17. In essence therefore, the proceedings known as Eldoret ELC Misc. Application No. E005 of 2023 and the present application are at variance and cannot be *res judicata* of each other.



### **Issue No. 2 – Whether or Not The Bill of Costs Dated 18.06.2021 Was Duly Served on the Applicant?**

18. The second issue has been raised by the Applicant and forms one of the two reasons relied upon in seeking a Review of the Ruling pronounced on the 17.12.2021.
19. The Applicant has repeatedly pleaded that the Bill off Costs dated 18.06.2021 was never served on them and neither was the Taxation Notice.
20. The Applicant insist that the failure to be served with the Bill of Costs dated 18.06.2021 and the relevant Notice of Taxation resulted to a failure of their participation.
21. The Applicant insisted that the ex-parte proceedings undertaken by the Taxing Officer omitted their participation in the taxation process hence condemning them unheard.
22. On just this one ground, the Applicant sought this court to Review the Ruling dated 17.12.2021 by the Taxing Officer.
23. On the other hand, the 3<sup>rd</sup> Interested Party opposed this ground by stating that both the Bill of Costs dated 18.06.2021 and the relevant Notice of Taxation were duly served on the Applicant.
24. In fact, the 3<sup>rd</sup> Interested Party pointed out to the Court that the issue of whether the Bill of Costs dated 18.06.2021 and the Notice of Taxation had been properly served was captured in the Ruling contained in the proceedings known as Eldoret ELC Misc. Application No. E005 of 2023.
25. The Court has taken time to go through the Ruling in the proceedings known as Eldoret ELC Misc. Application No. E005 of 2023 dated 12.11.2024 and notes the following finding to the issue of service;  
-

“Having established that there was proper service of the Bill of Costs and the Certificate of Costs has not been set aside.....”

26. Based on the above observation and finding by the Court on 12.11.2024, the issue of whether the Bill of Costs dated 18.06.2021 was served or not is now a settled issue and this Court is not inclined to tamper with this finding.

### **Issue No. 3 – Whether the Present Application is in the Right Forum?**

27. The third issue is whether the present application is before the right forum or not.
28. According to the Applicant, the second main reason which this Court is being requested to review the Ruling by the Taxing Officer dated 17.12.2021 is the use of a Valuation Report which values the subject property to be Kshs. 7,000,000,000/=.
29. The Applicant is of the view based on a Valuation Report from the Director, Land Valuation in the Ministry of Lands that the suit property is should be valued at Kshs. 83,569,925/= only.
30. The Applicant therefore has pleaded that if the Ruling of 17.12.2021 based on the Valuation of Kshs. 7,000,000,000/= is not reviewed and the Taxing Officer uses the Valuation of Kshs. 83,569,925/=, then the public coffers stand to suffer a substantial loss in having to settle an exorbitant Certificate of Costs dated 21.12.2021.
31. The Applicant has moved this Court through the provisions of Order 45 Rule 1 of the Civil Procedure Rules, 2010.



32. However, the Ruling dated 17.12.2021 which the Court is being asked to review emanates from a Taxing Officer exercising his/her powers under the *Advocates Act*.
33. The question that then arises is whether this Court can exercise its discretionary powers provided under Order 45 of the *Civil Procedure Rules, 2010* to review a Ruling made pursuant to the powers vested on the Deputy Registrar through Rule 10 of the *Advocates (Remuneration) Order*.
34. To begin with, the provisions of Order 45 Rule 1 should be read in line with the provisions of Order 45 Rule 2.
35. The provisions Order 45 Rule 1 states as follows; -
- “(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.
- (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 on which he applies for the review.”
36. Based on the above provisions and numerous judicial authorities, a party seeking for a review of any decree and/or order issued by a Court must make the application for review at the first instance to the court that made the decision.
37. In the present application, the Ruling pronounced on 17.12.2021 was made by the Taxing Officer based on their powers under Rule 10 of the *Advocates (Remuneration) Order*.
38. In other words, the first forum in which the Applicant herein should have filed an Application for Review under Order 45 Rule 1 is before the Deputy Registrar who assessed the Bill of Costs dated 18.06.2021 and delivered the Ruling dated 17.12.2021.
39. This Court cannot review the Ruling pronounced on 17.12.2021 in the first instance unless it is on an appeal emanating from a Ruling of a Review Application heard and determined by the Deputy Registrar at the first instance.
40. In the alternative, this Court can review the Ruling dated 17.12.2021 through a Reference which is the Appeal avenue once a Taxing Officer assesses a Bill of Cost and a party feels aggrieved by the Ruling of the assessment.



41. In other words, this Court makes a finding and determination that the present application is before the wrong forum and should not be considered by this Court but instead referred to the correct forum in the interest of justice.

**Issue No. 4 – Who Bears the Costs of the Present Application**

42. Keeping in mind that the present application is before the wrong forum, the Court makes a finding that the costs will be directed by the Deputy Registrar upon determination of the same.

**Conclusion**

43. In conclusion, the court hereby makes the following orders as regards the present application: -
- a. That the Notice of Motion application dated 10.02.2025 be and is hereby transferred to the Deputy Registrar Environment and Land Court for consideration and determination.
  - b. Costs will be contained in the Deputy Registrar’s determination of this application.
  - c. This ruling shall also apply to the Notice of Motion dated 10.02.2025 in the file known as Eldoret Misc. Application No. 24 of 2017.

**DATED, SIGNED & DELIVERED VIRTUALLY AT ELDORET ELC THIS 29<sup>TH</sup> DAY OF JULY 2025.**

**EMMANUEL M. WASHE**

**JUDGE**

In the presence of:

Court Assistant: Brian

Advocate for the Applicant: Ms. Obino

Advocate for the Interested Party: Mr. Oguttu for 3<sup>rd</sup> Interested Party

