



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC APPEAL NO. 34 OF 2019**

**JOHNSTONE MUTUA MBWIKA....**

**.....APPELLANT**

**-VERSUS-**

**COSMAS MUINDE KIVUVA.....**

**RESPONDENT**

**RULING**

1. This is a ruling concerning the notice of motion dated 16 June 2025, filed by the respondent, expressed to have been moved under the **Constitution of Kenya, Sections 1A, 1B, and 3A** of the **Civil Procedure Act**, and **Order 45** of the **Civil Procedure Rules, 2010**, along with all other relevant provisions of the law. She prays for the following orders:

***a. Spent.***

**b. Spent.**

**c. Spent.**

**d. THAT this honourable court be pleased to review its judgment dated 26 October 2022 on the part relating to costs.**

**e. THAT in the alternative, there be a stay of execution of the costs herein pending the hearing and determination of Kangundo ELC Case No. 36 of 2029 (formerly Civil case No 117 of 2018) pending in Kangundo law courts.**

**f. THAT in further alternative, this Honourable court do make orders for no payment of costs to the appellant until he obeys the orders given in Kangundo Principal Magistrate's court on 19th June 2019 restraining him from taking possession, occupying, alienating, trespassing, interfering, selling or dealing in any way with the respondents quiet possession of the land parcel comprised in the property known as Mwala/Kibau/170.**

**g. Spent.**

**h. Costs be in the cause.**

2. The motion is based on the grounds listed on the face thereof and the supporting affidavit sworn by the respondent on 16 June 2025. In summary, he asserts that the appellant has

issued a notice to show cause regarding the respondent's possible committal to civil jail. This case originates from an appeal about a contempt ruling in the Kangundo Chief Magistrate's Court, where the appellant was previously found in contempt. This court dismissed the contempt application and upheld the appeal, but the matter remains pending in the lower court.

3. Further injunction orders in the lower court remain in effect until they are set aside. The appellant admitted owing the respondent money for the land and expressed readiness to repay it. As the matter is still pending in the lower court, the issue of costs should be determined at the conclusion of the substantive suit on the merits. The respondent seeks a review of the judgment regarding costs, arguing that it unfairly punishes the respondent and benefits the appellant despite the respondent's ongoing defiance of court orders.
4. The motion is contested by the appellant's replying affidavit dated 26 June 2025. Essentially, he contends that the motion seeks this court to act as an appellate court regarding its own decision.
5. Subsequently, when the parties appeared before this court, **Mr. Ngolya**, counsel for the appellant, presented his oral submissions and stated that he relies on the appellant's

replying affidavit. Meanwhile, **Miss Mugo** preferred to file submissions, and her law firm, **Ms. Sheila Mugo & Co. Advocates** in compliance, filed written submissions dated 27 January 2026. Accordingly, after thoroughly examining the motion, including its grounds, the parties' affidavits, the rival submissions, as well as the provisions of law and judicial precedents relied upon-elements which shall be considered in the analysis and determination of this matter-the succinct issues for determination are (a) **whether the respondent has met the legal threshold to warrant the review of the orders issued in the judgment** and (b) **whether this court is *functus officio***. These two issues shall be handled concomitantly.

6. With respect to the first limb of this issue, the relevant provisions governing the review of court decisions are set out in **Section 80** of the **Civil Procedure Act** and **Order 45, Rule 1** of the **Civil Procedure Rules (CPR)**. **Section 80** states that;

***“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.”***

7. Further, **Order 45, Rule 1(1)**, of the **CPR** provides 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.”***

8. The salient conditions brought out in **Order 45 Rule 1 (1)** of the **CPR**, such as the discovery of new and important matter, mistake, and sufficient cause, have to be proved by an applicant, and in dealing with such applications, the court has to exercise its judicious discretion. With regard to the prevailing jurisprudence, this court aligns itself with **paragraph 32** of the Supreme Court's decision in **Parliamentary Service Commission v. Wambora & 36 others [2018] KESC 74 (KLR)**, in which it articulated the following non-exhaustive guiding principles for the consideration of applications for review of court decisions:

***(i) A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a Limited Bench of this Court. (ii) Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court; (iii) An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application. (iv) In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically. (v) During such review application, in***

***focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review. (vi)The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:(a)as a result a wrong decision was arrived at; or(b)it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.”***

9. Accordingly, in the circumstances of this case, the respondent has not indicated that the basis of the motion involves an obvious error on the face of the impugned ruling, a mistake, or sufficient cause. He is reiterating reasons why the costs should not have been imposed upon him. However, guided by the decision in the **Parliamentary Service (Supra)**, the court concludes that the respondent is attempting to re-argue his case, which is not permissible in review proceedings. This court further finds that it is *functus officio* and none of the other alternative prayers sought are available to him post judgment, and finds that the grounds raised are not suitable for review but are appropriate for an appeal. Consequently, this court finds that the reliefs sought are unmerited.

10. In the end, and for the above reasons and findings and considering this is a post-judgment application and the respondent is unsuccessful, costs are awarded to the appellant. In consequence, this court grants the following final orders: -

- a. The notice of motion dated 16 June 2025 is hereby dismissed with costs to the appellant.***
- b. This file is hereby effectively marked as closed.***
- c. Liberty applies to the appellant.***

Orders accordingly.

**Delivered and Dated at Machakos this 14<sup>th</sup> day of April, 2026.**

**HON. A. Y. KOROSS  
JUDGE  
14.04.2026**

**Ruling delivered virtually through Microsoft Teams Video Conferencing Platform**

In the presence of;

Ms. Kanja Court Assistant

Mr. Ngolya for respondent.

Miss Sheila Mugo for the applicant.

ORIGINAL