

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC APPEAL NO. E019 OF 2023

VITALIS KENGE ODEKAPPELLANT

VERSUS

ODERA NYANG'ORO RESPONDENT

R U L I N G

This ruling is in respect of the Notice of Motion application dated 30th April, 2025, brought by the Appellant pursuant to the provisions of sections 3 and 43 of the Small Claims Court Act and Articles 48 and 159 of the Constitution of Kenya 2010.

The application seeks orders that:-

- (a) The Honourable court be pleased to review and/or vary the orders issued on 30th January, 2025 by reinstating the default judgement delivered on 9th March, 2020 and allowing the Plaintiff/Appellant to proceed with execution thereof.
- (b) The honourable court be pleased to give further orders and directions as it deems fit and just.
- (c) Costs of the application be provided for.

The application was supported by the averments in the Supporting Affidavit sworn by Vitalis Kenge Odek on 30th April, 2025, and the annexures thereto.

The Applicant contends that on 30th January, 2025, this court delivered judgment and gave directions that the Respondent do pay the thrown-away costs of Kshs. 30,000/-, which the Respondent has deliberately failed to comply with. That, unless the court intervenes by reinstating the lower court judgment delivered on 9th March, 2020, the Appellant will suffer great injustice. That the application has been brought in good faith and timeously.

The application was not opposed. Affidavit of service sworn by Martin Ochieng Ondiege on 11th March, 2026, shows that the Respondent was served with a hearing Notice for the application but failed to attend court and/or respond to the application.

The substantive relief sought is a review of the judgment herein. The judgment delivered on 30th January, 2025, had upheld the ruling of the trial court that had set aside the ex parte judgment and only reviewed and varied that part of the ruling which had directed that costs be in the cause and replaced it with an order

awarding the costs thrown away of Kshs. 30,000/- to the Applicant herein.

The Applicant now seeks to have the judgment reviewed by setting it aside, upholding the lower court judgment dated 9th March, 2020, and allowing the Appellant to execute the same.

The grounds for review of a judgment are set out in section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules.

These grounds are;

- (i) discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him/her at the time when the decree was passed or the order made.
- (ii) or on account of some mistake or error apparent on the face of the record or
- (iii) for any other sufficient reason
- (iv) the application must be brought without unreasonable delay.

None of the grounds has been disclosed in the present application.

The judgment of the lower court was not the subject of the appeal herein. The appeal herein was against the ruling of the trial court dated 6th September, 2023 that set aside the judgment dated 9th March, 2020. And the court, having decided the appeal, became *functus officio* and has no jurisdiction to deal with the judgment dated 9th March, 2020, which was not a subject of the appeal.

The main ground of the application is that the Respondent has failed to pay the thrown-away costs awarded to the Applicant by this court.

However, failure to pay the thrown-away costs is not one of the grounds for review.

I find no merit in the application. The Applicant has the remedy of executing for the recovery of the costs. The application is dismissed.

As the application was not opposed, there is no order as to costs.

Orders accordingly.

Ruling dated and signed at Kisumu, read this 7th day of May, 2026, virtually through Microsoft Teams Online Application.

E. ASATI

JUDGE

In the presence of:

Atika: Court Assistant.

Imainata h/b for Nyameino for the Appellant.

No appearance for the Respondent.