

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ELCA NO. E020 OF 2021

JULIUS MUNENE KIBUCHI
APPELLANT/APPLICANT

VERSUS

ALBERN MUGO GITHINJI
RESPONDENT

RULING

[Notice of Motion Dated 6th March 2025]

1. The appellant moved the court through the notice of motion dated 6th March 2025, seeking for a multiplicity of reliefs arising from the judgment of this Court delivered on 1st October 2024, by which his appeal was dismissed with costs to the Respondent both in the appellate court and in the trial court. The orders sought are inter alia:

a. Spent.

b. Spent.

c. Spent.

d. That this Honourable Court be pleased to grant leave to the Applicant to admit the following new evidence:

- i. Area chief's letter dated 2nd December 2024;
 - ii. The Kirinyaga County Surveyor's report dated 17th February 2025;
 - iii. A private survey report by David Murimi dated 29th January 2025; and
 - iv. Area chief's letter dated 20th February 2025.
- e.** That this Honourable Court be pleased to summon the Kirinyaga County Surveyor to attend court and produce the report dated 17th February 2025.
- f.** That this Honourable Court be pleased to review, set aside and/or vary its judgment delivered on 1st October 2024.
- g.** That this Honourable Court be pleased to find that the Respondent is not entitled to costs, both at the trial court and on appeal.
- h.** That the Court be pleased to grant such further or other orders as it may deem fit.
- i.** That the costs of the application be provided for.

The application is premised on the fourteen (14) grounds on its face marked (1) to (14) and is supported by the affidavit of the Julius Munene Kibuchi, Appellant/applicant, sworn on 6th March 2025.

The gravamen of the application is that subsequent to the delivery of judgment, there has been discovery of new and important evidence arising from a ground survey undertaken in implementation of the Court's decree, which evidence, according to the Applicant, demonstrates that both parties had encroached onto each other's land. On that basis, the Applicant contends that the award of costs in favour of the Respondent ought to be reviewed.

2. The Applicant deposes that this Court, Mutungi J, delivered judgment on 1st October 2024 dismissing his appeal with costs to the Respondent, both in the appellate court and in the trial court. Following that judgment, the Respondent has initiated the taxation process and forwarded a bill of costs to him.

The Applicant states that he now seeks review of that judgment, particularly on the question of costs, on the basis of discovery of new and important evidence which, despite the exercise of due diligence, was not within his knowledge and could not be produced at the time the judgment was rendered.

He explains that the dispute between the parties concerns a boundary conflict involving **Land Parcels Kabare/Njiku/1241**, belonging to the Respondent, and **Kabare/Mutige/567**, belonging to the Applicant.

He recalls that on 10th March 2016, the trial court directed the Land Registrar to prepare a boundary report. In compliance, the District Land Registrar prepared a report dated 22nd February 2018 which concluded that it was only the Applicant who had encroached onto the Respondent's land. That finding informed the trial court's judgment dated 23rd September 2021, which ordered rectification of the boundary to conform with the Registry Index Map (RIM). The Applicant's subsequent appeal was dismissed, thereby affirming that position.

3. The Applicant further deposes that following the trial court's judgment, the parties initiated steps to implement the court's decision on the ground. A site visit scheduled for 27th November 2024, to be conducted in the presence of surveyors and the area administration, did not proceed after the Respondent attended without his surveyor and expressed dissatisfaction with the process, leading to its cancellation.

A subsequent site visit was conducted on 22nd January 2025 in the presence of the parties, their respective witnesses, security personnel, the area chief and assistant chief, the Nyumba Kumi chairman, and the County Surveyor, alongside the Applicant's private surveyor.

The Applicant avers that the survey undertaken during that visit revealed the earlier Land Registrar's report to be erroneous. According to him, the Registry Index Map demonstrated that both parties had encroached onto each other's parcels, each by approximately **0.015 hectares**.

The applicant referred to report by the Kirinyaga County Surveyor dated 17th February 2025, a private survey report by one David Murimi dated 29th January 2025, and letters from the area chief dated 2nd December 2024 and 20th February 2025, which he contends confirm both the occurrence of the site visit and the finding that the boundary affected both parcels.

4. It is on the basis of this material that the Applicant contends that the Respondent was equally at fault in the boundary dispute and ought not to have been awarded costs. He deposes that he has requested the Respondent to waive the costs in light of these developments, but the Respondent has declined, and has instead proceeded with the taxation process. The Applicant maintains that unless execution is stayed, including the taxation of costs, his application for review will be rendered nugatory and he will suffer substantial loss. He asserts that the application has been brought without delay and urges the Court to grant the orders sought in the interest of justice.

5. The application is opposed through the replying affidavit of Albern Mogo Githinji, Respondent, sworn on 2nd April 2025. The Respondent characterizes the application as scandalous, vexatious, made in bad faith, and an abuse of the court process. He takes the position that the orders sought are, in any event, incapable of being granted, the Court having already delivered its final judgment on appeal on 1st October 2024.

He further deposes that the Applicant has not satisfied the legal threshold governing the admission of additional evidence at the appellate stage, and that the attempt to introduce such material after judgment is both procedurally improper and legally untenable.

With regard to execution, the Respondent avers that the judgment of this Court merely dismissed the appeal, and therefore no executable decree arises therefrom save for the recovery of costs. He adds that the decree issued in **Kerugoya Chief Magistrate's Civil Case No. 215 of 2015** has already been executed, and the boundary between the parties' respective parcels has since been fixed in accordance with that judgment.

6. The Respondent recounts that the dispute originated from the Applicant's encroachment onto his parcel of land, namely **Kabare/Njiku/1241**, where the Applicant had constructed a house extending into his property. He states

that there had been prolonged back-and-forth efforts to resolve the boundary issue, but the Applicant was unwilling to have the boundary rectified, thereby necessitating the institution of the suit before the lower court. According to him, it was only through court intervention that the matter was ultimately resolved. On that basis, the Respondent maintains that the outcome of the suit, both at the trial court and on appeal, was in his favor, and that the award of costs was a natural and lawful consequence of that success. He invokes the principle that costs follow the event and asserts his entitlement to recover costs incurred in both courts.

7. The learned counsel for the appellant/applicant and respondent filed their submissions dated the 1st July 2025 and 6th October 2025 respectively, which the court has considered.
8. The learned counsel for the applicant has in their submissions, largely reiterated the factual depositions in the application and frames two issues for determination namely; whether the Applicant has met the threshold for the admission of additional evidence; and whether this Court can review and set aside the orders on costs.

On the first issue, counsel anchors the application on the statutory and procedural framework governing the admission of additional evidence at the appellate stage. Reliance is placed on **Section 78(1) of the Civil**

Procedure Act, which vests in an appellate court the power to take additional evidence or require such evidence to be taken, subject to prescribed conditions.

Counsel further invokes **Order 42 Rule 27 of the Civil Procedure Rules, 2010**, which restricts the admission of additional evidence on appeal save in limited circumstances, including where the court requires such evidence to enable it to pronounce judgment or for any other substantial cause.

To buttress this position, counsel cited the case of **Kenya Electricity Transmission Company Limited versus Onsongo & Another (2024) KEELC 4871 (KLR) and Gerard versus Njenga (2024) KEELC 5173 (KLR)**, submitting that the principles distilled in those decisions have been satisfied in the present case.

9. Counsel argued that the additional evidence sought to be introduced is directly relevant to the dispute, which concerns a boundary conflict between neighbouring parcels of land, and that it has been brought in the interest of justice. It is contended that the survey reports and the area chief's letters demonstrate that, contrary to the earlier Land Registrar's report, both parties had encroached onto each other's land. It is further submitted that the additional evidence is capable of influencing the outcome of the Court's decision, particularly on the issue

of costs, as it reveals that the Respondent was equally at fault. Counsel maintains that the evidence could not, with reasonable diligence, have been obtained or produced at the time of trial, noting that the trial court had relied on a Land Registrar's report dated 22nd February 2018 which indicated that only the Applicant had encroached.

According to counsel, it was only during the subsequent implementation of the court's decree, when a fresh survey was conducted, that the alleged mutual encroachment was discovered. Counsel also contends that the additional evidence is credible, limited in scope, and not intended to fill gaps or patch up weaknesses in the Applicant's case, but rather to address the discrete issue of whether the Respondent is entitled to costs.

It is further argued that the admission of such evidence would not occasion prejudice to the Respondent, particularly as the substantive findings on encroachment remain undisturbed, whereas the Applicant stands to suffer prejudice if condemned to pay costs in circumstances where the Respondent is alleged to have been equally culpable.

10. On the second issue, counsel submitted that this Court retains discretion on the question of costs under **Section 27 of the Civil Procedure Act**, and that such discretion is not absolute but must be exercised

judiciously and for good reason. It is argued that the phrase “*for good reason*” admits of a case-by-case evaluation.

Counsel advanced several grounds as constituting “*good reason*” to revisit the award of costs.

First, it is submitted that had the Respondent’s alleged encroachment been disclosed at the trial stage, the Applicant would have amended his defence to include a counterclaim, which would have succeeded alongside the Respondent’s claim. Reliance is placed on the case of **Kenya Power & Lighting Co. Ltd versus Andy International (2021) eKLR** in that regard.

Second, counsel addressed the interplay between review and appeal under **Order 45 Rule 1**, submitting that although a party cannot pursue both remedies concurrently, the present case is distinguishable because the new evidence was not available at the time of the appeal, thereby justifying recourse to review.

Third, it is submitted that both the trial court and the appellate court awarded costs without the benefit of the additional evidence, and that the emergence of that evidence fundamentally alters the equities of the case.

Fourthly, counsel contends that the Applicant is placed in a procedural dilemma, as instituting a fresh suit to ventilate the alleged encroachment by the Respondent would risk duplicity of proceedings over a dispute that has already been adjudicated, albeit on incomplete facts.

Finally, counsel urges the Court to take into account the nature of the dispute, noting that the parties are neighbours and that the matter concerns a boundary dispute.

It is argued that an award of costs in such circumstances would undermine prospects of reconciliation. In that regard, reliance is placed on **David Kiptum Korir versus Kenya Commercial Bank & Another (2021) eKLR.**

On the whole, counsel submitted that these considerations constitute sufficient cause to warrant the Court's intervention, and prays that the Court admits the additional evidence and revisit the award of costs.

11. In their submissions, the counsel for the respondent identified three issues for determination, namely; whether the Applicant has met the threshold for the admission of additional evidence; whether the Respondent is entitled to the costs awarded in the lower court and on appeal; and who should bear the costs of the present application.

On the first issue, counsel submitted that the Applicant's motion is in substance, one for review and must therefore satisfy the requirements set out under **Order 45 Rules 1 and 2 of the Civil Procedure Rules**, as read together with **Section 80 of the Civil Procedure Act**. Counsel relied on the case of **D.J. Lowe & Company Ltd versus Banque Indosuez, Civil Application No. Nai. 217 of 1998**, as cited with approval in the case of **Rose Kaiza versus Angelo Mpanju Kaiza (2009) KECA 422 (KLR)**, for the proposition that the jurisdiction of review is circumscribed and cannot be invoked to re-open a matter or to enable a party to strengthen its case.

It is submitted that the Applicant has not met the threshold for review, and that the purported "new evidence" is being introduced not because it was unavailable, but as an attempt to fortify the Applicant's case after the conclusion of the appeal.

Counsel further argued that the decree in **Kerugoya Chief Magistrate's Civil Case No. 215 of 2015** has already been executed and the boundary fixed, thereby rendering the present application not only untenable but also an abuse of the court process.

12. On the second issue, counsel submitted that the Respondent is properly entitled to the costs awarded both in the trial court and on appeal. It is contended that the principle that costs follow the event is well settled, and

that the Respondent, having been the successful party in both courts, is entitled to the benefit of that principle. Counsel further argues that this Court is *functus officio* on the question of costs, and that the Applicant has not demonstrated any sufficient cause within the meaning of **Order 45** to warrant interference with that award.

On the third issue regarding the costs of the present application, counsel submitted that the application is devoid of merit and constitutes an abuse of the court process, and should be dismissed with costs to the Respondent.

13. In this application, the following issues arise for the court's determinations:
 - a. *Whether the Applicant has met the threshold for review of the award of costs made in the judgment delivered on 1st October 2024 under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules,*
 - b. *Whether the applicant has met the threshold for admission of the alleged new evidence;*
 - c. *Who pays the costs?*

14. I have considered grounds on the application, the affidavit evidence, the rival submissions of the learned counsel, superior court decisions cited thereon, and come to the following determinations:

- a. The jurisdiction of this Court to review its own decision is anchored in **Section 80 of the Civil Procedure Act** and **Order 45 Rule 1 of the Civil Procedure Rules**. **Section 80 of the Civil Procedure Act** provides:

“80. Review

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 the 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(1) of the Civil Procedure Rules provides:

“1. Application for review of decree or order [Order 45, 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 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.”

From the foregoing provisions, it is clear that for an applicant to succeed in an application for review, he must demonstrate, inter alia, discovery of new and important evidence which, despite the exercise of due diligence, was not within his knowledge or could not be produced at the time the judgment was delivered.

- b.** The Applicant’s case is premised on survey reports and administrative letters generated after the delivery of this Court’s judgment, which he contends reveal that both parties had encroached onto each other’s land. On that basis, he urges the Court to admit the said material and to review its judgment.

In my view, the difficulty with the Applicant’s case lies at the very threshold. The material relied upon by the Applicant does not constitute “*new and important evidence*” within the meaning of **Order 45**. It is not evidence that existed at the time of trial or appeal, but was unavailable despite due diligence. Rather, it is evidence that arose subsequent to the determination of the appeal, in the course of implementing the decree of the Court. Such post-

judgment developments, however material they may appear, do not fall within the scope of discovery contemplated under **Order 45**. To hold otherwise would be to permit parties to reopen concluded litigation on the basis of events arising after judgment, thereby undermining the principle of finality in litigation.

- c. The Applicant has also sought to invoke the provisions of **Section 78 of the Civil Procedure Act** and **Order 42 Rule 27 of the Civil Procedure Rules** on admission of additional evidence.

It should be noted however, that those provisions apply in the context of a pending appeal, while in the present case, the appeal was heard and conclusively determined on 1st October 2024. The Court is therefore *functus officio* in respect of its appellate jurisdiction, and cannot admit additional evidence after the conclusion of the appeal under the guise of review. Even on the merits, the material sought to be introduced is clearly intended to challenge findings already made on the basis of the record then before the Court. That falls outside the scope of additional evidence contemplated under **Order 42 Rule 27**.

In the premises, I am not satisfied that the Applicant has met the threshold for review, nor has he laid a proper basis for the admission of additional evidence.

- d.** The Applicant urges this Court to revisit the award of costs on the ground that the newly obtained evidence demonstrates that the Respondent was equally at fault and that, had that position been known, he would have pursued a counterclaim. There is no doubt that under **Section 27 of the Civil Procedure Act**, the award of costs is a matter within the discretion of the Court, to be exercised judiciously, and for good reason. However, that discretion must be exercised within the confines of the law and the procedural posture of the case. In the present matter, the issue of costs was determined in the judgment of this Court delivered on 1st October 2024, in which the appeal was dismissed with costs to the Respondent, both at the trial court and on appeal. That determination formed part of the final disposition of the appeal.
- e.** The Applicant's argument that he would have raised a counterclaim had the alleged encroachment by the Respondent been known is with respect, speculative. It does not displace the fact that the Respondent was the successful party in both courts on the basis of the evidence then available. Moreover, the decree of the trial court has already been executed and the boundary fixed. To revisit the issue of costs at this stage, on the basis of post-judgment developments,

would unsettle the finality of the Court's determination and risk opening the door to endless litigation.

While the Court is alive to the fact that the dispute concerns a boundary between neighbours, and the desirability of fostering harmonious relations, such considerations cannot override settled principles governing review and the finality of litigation. In the circumstances, no sufficient cause has been shown to warrant interference with the award of costs.

In the result, the Notice of Motion dated 6th March 2025 is devoid of merit.

f. Under Section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya, costs follow the event unless where on good grounds, the court directs differently. In this application, I find no reasonable cause to deviate from that edict.

15. In view of the foregoing conclusions on the notice of motion dated the 6th March 2025, the court finds and orders as follows:

a. That the said application is devoid of merit and is dismissed.

b. That the appellant/applicant will meet the respondent's costs.

It is so ordered.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS
13TH DAY OF MAY 2026.**

Kibunja

JUDGE

S. M.

ELC

In the presence of:

Appellant/Applicant – M/s Awuor for Kariuki

Respondent – Mrs Makworo

Court Assistant - Kinyua/Charles

Kibunja

JUDGE

S. M.

ELC