

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ELCLA NO. E025 OF 2024

BENSON NYAGA

NJUE.....APPELLANT/APPLICANT

VERSUS

DAVID ODERO

OPIYO.....RESPONDENT

RULING

1. This Ruling arises from the Notice of Motion Application dated 13th October 2025 filed by the Appellant/Applicant, Benson Nyaga Njue ("the Applicant"), seeking a review of the Judgment of this Court delivered on 11th September 2025 to the extent that it awarded costs of the Appeal to the Respondent, David Odero Opiyo. The Applicant contends that the award of costs to the Respondent constitutes an error apparent on the face of the record, given that the Appeal was allowed in his favour.
2. By a Judgment dated 11th September 2025, this Court allowed the Appeal filed by the Applicant, set aside the Ruling of the learned Magistrate delivered on 12th June 2023, the interlocutory judgment entered on 23rd August 2023, and the ex-parte judgment delivered on 25th October 2023 in Siakago ELC Case No. E014 of 2022. The matter was remitted to the trial court for hearing and determination afresh. Despite allowing the Appeal, the

Court awarded the costs of the Appeal to the Respondent. It is this order on costs that is the subject of the present Application.

3. The jurisdiction of this Court to review its own decisions is founded on Section 80 of the Civil Procedure Act, Cap 21, and Order 45 Rule 1 of the Civil Procedure Rules, 2010. Order 45 Rule 1 provides, *inter alia*, that a party may apply for review of a decree or order on the ground of an error or mistake apparent on the face of the record. An error apparent on the face of the record is one that is self-evident, requires no elaborate reasoning to be established, and does not call for any fresh examination or re-assessment of the evidence. See: *Nyamogo & Nyamogo Advocates v Kogo* [2001] EA 173.
4. The governing principle on costs is contained in Section 27(1) of the Civil Procedure Act, which provides that costs of and incidental to all suits shall be in the discretion of the court, and the court shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. The proviso to that subsection states that costs shall follow the event unless the court, for good reason, otherwise orders.
5. The import of the proviso is that the default rule is that costs follow the event — the successful party is ordinarily entitled to costs. A departure from this rule is permissible, but such a departure must be justified by good reasons, which the court is obliged to articulate. See: *Zablon*

Mokua v Solomon M. Choti & 3 Others [2016] KEHC 683 (KLR); Farah Award Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR).

ANALYSIS AND DETERMINATION

6. The sole issue for determination is whether the order awarding costs of the Appeal to the Respondent constitutes an error apparent on the face of the record warranting review.
7. It is common ground that this Court allowed the Applicant's Appeal. By so doing, the Applicant was the successful party. The Respondent does not dispute the fact that the Appeal was allowed in the Applicant's favour; he merely contends that the award of costs was a proper exercise of the Court's discretion under Section 27 of the Civil Procedure Act, having regard to the circumstances of the case.
8. The Court has carefully examined the Judgment of 11th September 2025. The Judgment allowed the Appeal and made consequential orders setting aside the decisions of the trial court. However, a review of the said Judgment reveals that no reasons were articulated by the Court for departing from the default rule that costs follow the event. The order awarding costs to the Respondent, who was the unsuccessful party, stands unsupported by any reasoning within the body of the Judgment.
9. The Respondent submits that the costs were intended as "throwaway costs" given that the Applicant was accorded

a retrial. While this Court appreciates that the circumstances of a remittal may in appropriate cases justify a departure from the default rule on costs — for instance, where the appeal succeeds only on procedural grounds attributable to the conduct of the appellant — any such reasoning must be expressly stated in the judgment. In *Asbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others*, the court affirmed that the exercise of judicial discretion on costs must be accompanied by reasons, particularly where the court departs from the principle that costs follow the event. The absence of any such reasons in the Judgment of 11th September 2025 renders the order on costs internally inconsistent with the substantive finding that the Applicant had succeeded on appeal.

10. The Respondent further argues that costs are discretionary and that the Court properly exercised that discretion. The Court agrees that costs are indeed discretionary. However, discretion is not exercised in a vacuum. The discretion must be exercised judicially and, where exercised against the grain of the default rule, the reasons for doing so must appear on the face of the record. In *Limuru County Club & 6 Others v Rose Wangui Mambo & 15 Others* [2019] KECA 101 (KLR), the Court of Appeal affirmed that while courts have wide discretion on costs, such discretion must be exercised on sound principles and not capriciously. The absence of reasons here falls short of that standard.

11. In the result, this Court finds that the order awarding costs to the Respondent in the Judgment of 11th September 2025 was made without accompanying reasons and is inconsistent with the substantive determination allowing the Appeal. This constitutes an error apparent on the face of the record within the meaning of Order 45 Rule 1 of the Civil Procedure Rules, 2010. The Application for review on this narrow ground is therefore merited.

ORDERS

12. Accordingly, the Court makes the following Orders:
- i. The Application dated 13th October 2025 is hereby ALLOWED.
 - ii. The order on costs contained in the Judgment of this Court dated 11th September 2025, to the extent that it awarded costs of the Appeal to the Respondent, is hereby SET ASIDE.
 - iii. In substitution thereof, the Applicant/Appellant, being the successful party in the Appeal, is hereby awarded the costs of the Appeal.
 - iv. The costs of this Application shall be borne by the Respondent.

DATED, SIGNED AND DELIVERED AT EMBU THIS 14TH DAY OF MAY, 2026.

HON. E.C CHERONO
ELC JUDGE, EMBU

In the presence of;

- 1. Applicant/ Advocate - Absent**
- 2. Respondent/ Advocate - Absent**
- 3. Ruth C/A**