



Langat & 5 others v Kiberu & another (Environment & Land Case 254 of 2015) [2024] KEELC 4432 (KLR) (30 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4432 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 254 OF 2015**

**A OMBWAYO, J
MAY 30, 2024**

BETWEEN

**JOHN LANGAT 1ST PLAINTIFF
ROBERT LANGAT 2ND PLAINTIFF
KENNETH KOSIMBEI 3RD PLAINTIFF
CYRUS KILONZI 4TH PLAINTIFF
JEFY RONO 5TH PLAINTIFF
PROF EDWARD TANUI 6TH PLAINTIFF**

AND

**NAFTALI KIBERU 1ST DEFENDANT
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 2ND
DEFENDANT**

RULING

1. The 1st Defendant filed the instant application dated 27th February, 2024 seeking the following orders:
 1. Spent.
 2. Spent.
 3. Spent.
 4. The order that costs of the suit be awarded to the plaintiff be reviewed and set aside as the litigation herein is public interest litigation and each party should bear their costs.
 5. Cost of this application be in the course.



2. The Application was based on grounds set out and supported by the Affidavit of Naftally Kaberu. The 1st Defendant/Applicant stated that he was willing to comply with the judgment but he could not do so within 30 days. That he has already started sourcing for funds for demolition and transfer of the wall but he cannot finish within the 30 days. That the said wall would require excavation by use of expensive machines which would cost him over 1 million which he does not have. He further stated that he needs to put up a very strong wall which requires various approvals from National and Local government which cannot be done within 30 days. The 1st Defendant stated that the litigation herein is public interest and practice and fairness has been for each party to pay its own costs thereof.
3. In conclusion, he stated that it will be unfair to condemn him to pay costs as he did not do any malicious or careless act deliberately aimed at infringing public rights.

Response

4. The 2nd Plaintiff filed his replying affidavit dated 8th March, 2024 where he deposed that judgment was delivered on 2nd February, 2024 where the court partly allowed the suit with costs to them. He further deposed that the court issued orders upon the Defendants which they ought to have complied with 30 days from the date of judgment. He deposed that the 1st Defendant has sought for extension of time to comply with the judgment. He added that the 1st Defendant has not explained the steps he has taken to comply with the court's judgment.
5. He also deposed that the 1st Defendant has not even attempted to partly comply with the judgment and is now seeking for extension of time by 120 days. The 2nd Plaintiff deposed that the 1st Defendant has not annexed an iota of evidence to substantiate his claim. He deposed that the instant application for extension of time is an abuse of the court process.
6. He deposed that the 1st Defendant has not demonstrated that there was an error apparent on the record or discovery of new evidence to warrant review of the court's order on costs. In conclusion, he deposed that the 1st Defendant is inviting this court to sit on an appeal of its own judgment. He urged the court to dismiss the instant application with costs.

Submissions

7. The Plaintiffs filed their submissions dated 12th March, 2024 where they identified one issue for determination, whether the court should review its judgment and set aside the order awarding costs of the suit to the plaintiffs. They relied on Order 45 of the *Civil Procedure Rules* and the Court of Appeal case in *National Bank of Kenya Ltd v Ndungu Njau* [1996] KLR 469. They also relied on Section 27 of the *Civil Procedure Act* and submitted that it is trite law that costs follow the event. The Plaintiffs argue that the award of costs to the Plaintiffs does not fall within the parameters of Order 45. They submitted that the 1st Defendant has not given any evidence to substantiate his claim for review. The Plaintiffs further submitted that costs being discretionary, an award thereof could only be challenged on appeal. In conclusion they urged the court to dismiss the instant application with costs.
8. The 1st Defendant on the other hand filed his submissions dated 12th April, 2024 where he submitted on whether the suit is a public interest case. He submitted that the Plaintiffs' complaint was that the 1st Defendant's act of constructing a slaughter house "was a health hazard to the community and the entire Eco-System". He submitted that the suit was brought for the benefit of the whole community thus a public interest suit. On costs, the 1st Defendant submitted that the court did not consider that the suit was a public interest suit while making its orders on the same. He submitted that public interest litigants ought not to seek costs should they succeed in litigation. He relied on the supreme court



decisions in Pet. E002 of 2021 *Okiya Omtatah Okoiti & Others v AG*, Pet. 18 of 2019 *DPP v Michael Sistu Mwaura & 4 Others* and Pet. 4 of 2012 *Jabir Singh Rai & Others v Estate of Tarlochan Singh Rai and Others*. In conclusion, he urged the court to review its orders on costs and substitute the same with an order that each party bears its own costs.

Analysis and Determination

9. This court has considered the application and supporting affidavit and submissions and is of the view that the main issue for determination is whether the orders of 2nd February, 2024 on costs should be reviewed.
10. The jurisdiction of this court for review of orders is provided for under Order 45 Rule 1 (1) of the *Civil Procedure Rules* which provides as follows:
 1. Application for review of decree or order
 - (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.”
11. It is this court’s view that the basis of an application for review of an order is on the recovery of new and important matters or evidence which after due diligence, was not within the Applicant’s knowledge or could not be produced by him at the time when the order was made. Further an application for review may also be made on account of some mistake or error apparent on the face of the record, or for any other sufficient reason.
12. The 1st Defendant claims that the suit was a public interest case and the court ought not to have awarded costs on the Plaintiffs.
13. In the Court of Appeal case in *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR, the court held as follows:

...The respondent’s case is now about an error on the face of the record. The learned Judge should have seen straightaway that the respondent had changed its case from one of review based on discovery of new and material evidence to one of an error on the part of the court apparent on the face of the record. He should have seen that the application as presented could not succeed and he should not have allowed the respondent to shift the goal post midway without amending the application thereby denying the appellant opportunity to respond. An application for review must be specific on the ground on which it is brought.” [Emphasis mine]
14. It is this court’s view that the 1st Defendant has not placed any new and important matter or evidence before the court for consideration. He has not demonstrated that there was an error apparent on the



face of the record and no other sufficient reason has been placed before the court to warrant review the order of 2nd February, 2024.

15. Consequently, I find that the instant application is without merit and is therefore dismissed with costs. It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY ON THE 30TH DAY MAY 2024.

A.O.OMBWAYO

JUDGE

