



**Plein v Kamuru & 3 others (Environment and Land Appeal
10 of 2022) [2024] KEELC 6458 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6458 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT AND LAND APPEAL 10 OF 2022**

AK BOR, J

SEPTEMBER 26, 2024

BETWEEN

PURITY MUTHONI PLEIN APPELLANT

AND

PASTOR TABITHA GATHIGIA KAMURU 1ST RESPONDENT

KINGDOM SEEKERS FELLOWSHIP, NYAHURURU 2ND RESPONDENT

PASTOR FRANCIS NDUNG’U GITHAIGA 3RD RESPONDENT

JESUS EXALTATION CENTRE NYAHURURU 4TH RESPONDENT

RULING

1. The Appellant had filed application dated 10/2/2022 seeking an injunction to restrain the 4th Respondent from constructing permanent structures on the land known as Nyahururu Municipality Block 8/1017 (“suit land”) in Nyahururu CM ELC Case No. 87 of 2018, which was dismissed in a ruling delivered on 7/6/2022. Being dissatisfied with that decision, the Appellant appealed to the ELC on the ground that the 4th Respondent did not have building plans approved by the County Government of Laikipia for construction on the suit land. She also sought a temporary injunction pending determination of her appeal claiming that the 4th Respondent had demolished the semi-permanent structures on the suit land and had begun constructing permanent structures thereon.
2. The application was argued and heard and a ruling was delivered on 16/2/2023, dismissing the Appellant’s notice of motion dated 23/6/2022. In delivering the ruling the Honourable Judge directed that the costs of the application would be in the appeal.
3. Subsequently, the appeal was dismissed on 15/3/2023 with no order as to costs by Judge Y. Angima. The 4th Respondent filed a bill of costs dated 22/3/2023. When the matter came up before the Deputy Registrar, the Appellant’s advocate argued that the bill was a non-starter because the Honourable Judge



had dismissed the appeal with no orders as to costs. The Deputy Registrar agreed with that position and dismissed the bill.

4. The 4th Respondent brought the application dated 8/9/2023 seeking an order that the Appellant pays the costs of the application dated 23/6/2022. The application was made under sections 1A, 1B and 3A of the [Civil Procedure Act](#), Order 51 rule 1 of the [Civil Procedure Rules](#) and Article 159 of the [Constitution](#).
5. The application is made on the grounds set out on the face of the application and those contained in the supporting affidavit sworn by John Kanyango Wachira, a representative of the 4th Respondent. Mr. Wachira averred that the Appellant did not prosecute the appeal because it had been overtaken by events after the suit in the Chief Magistrate's Court was dismissed on 20/12/2022. He contended that the 4th Respondent incurred costs defending the application, doing extensive research on it, filing and serving pleadings and attending court.
6. The Appellant opposed the application through the replying affidavit sworn on 19/2/2024, in which she averred that since the court directed that the costs of the application dated 23/6/2022 would abide the outcome of the appeal and the appeal was dismissed with no orders as to costs, the 4th Respondent was not entitled to the costs of the application. She contended that the court was functus officio, after it rendered itself on the issue of costs and the only avenue available to the applicant was to lodge an appeal.
7. The court directed parties to file and exchange written submissions. In its submissions dated 12/3/2024, the 4th Respondent urged that at the time the court made the orders on the costs of the application dated 23/6/2022, it was not envisaged that the appeal would not take off. It was conceded that costs are granted at the discretion of the court but the 4th Respondent urged that it deserved to be granted costs as the successful party. To this end, Section 27(1) of the [Civil Procedure Act](#) was cited. The 4th Respondent relied on [Cecilia Karuru Ngayu v Barclays Bank of Kenya & another](#) [2016] eKLR.
8. The Appellant filed submissions dated 21/3/2024 in which she contended that the 4th Respondent was not entitled to costs. She argued that the present application seeks to prompt a review of the court's prior decision, thus contravening the doctrine of functus officio. On this, the Appellant relied on [Telkom Kenya Limited v John Ochanda \(Suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Limited\)](#) [2014] eKLR.
9. The court has considered the application, response and the rival submissions filed by the parties. The issue for determination is whether this court should grant the costs of the application dated 23/6/2022 to the 4th Respondent. The Appellant filed the memorandum of appeal contemporaneously with the notice of motion dated 23/6/2022. That application was heard and dismissed. The 4th Respondent filed its party and party bill of costs dated 22/3/2023. The matter went for taxation before the Deputy Registrar whom, in his ruling dated 24/8/2023, dismissed the bill of costs and closed the file. The Deputy Registrar observed that when the Learned Judge dismissed the application dated 23/6/2022, he ordered that the costs were to abide the outcome of the appeal and that that appeal was subsequently dismissed by the same court with no orders as to costs.
10. The 4th Respondent filed the instant application dated 8/9/2023 and sought a hearing date before the judge. In this court's view, this application seeks to reopen a matter that was concluded. In essence, the 4th Respondent is asking this court to sit on appeal against the decision of a Judge of concurrent jurisdiction.

The court dismisses the application dated 8/9/2023.



Each party will bear its costs for the application.

DELIVERED VIRTUALLY AT NANYUKI THIS 26TH DAY OF SEPTEMBER 2024.

K. BOR

JUDGE

In the presence of:

Mr. Njoroge Mwangi for the Appellant

Mr. David Kaburu for the 1st Respondent

Mr. N. Wahome holding brief for Ms. N. Muriithi for the 4th Respondent

No appearance for the 3rd Respondent

