



REPUBLIC OF KENYA



KENYA LAW
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**Kenya Aeronautical College Flying School v Kenya Civil Aviation Authority (KCAA)
(Civil Appeal 512 of 2022) [2025] KEHC 3859 (KLR) (Civ) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3859 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 512 OF 2022

SN MUTUKU, J

MARCH 27, 2025

BETWEEN

KENYA AERONAUTICAL COLLEGE FLYING SCHOOL APPELLANT

AND

KENYA CIVIL AVIATION AUTHORITY (KCAA) RESPONDENT

RULING

Notice of Motion

1. Kenya Aeronautical College Flying School (hereafter the Applicant) has brought the Notice of Motion dated 16.09.2024 (the Motion). The Motion is supported by grounds laid out on its face and in the Supporting Affidavit sworn on 16.09.2024 by Samson Aketch, the Director of the Applicant. the Motion seeks the following orders:
 1. Spent.
 2. Spent.
 3. Spent.
 4. That this Honourable Court be pleased to review and/or set aside the order for costs of Kshs. 305,000/- issued on 30.07.2024.
 5. That costs of the Application be provided for.
2. The Motion is brought under Sections 1A, 1B, 3, 3A and 80 of the [Civil Procedure Act](#) (CPA); and Orders 45 and 51, Rule 1 of the Civil Procedure Rules (CPR).



3. It is deposed in the Supporting Affidavit that upon delivering judgment in the present appeal, the Learned Judge awarded costs in the sum of Kshs. 305,000/- to Kenya Civil Aviation Authority (KCAA) (hereafter the Respondent) and yet the decision from which the appeal emanated was largely determined in favour of the Applicant.
4. The deponent has stated that an award of costs is discretionary in nature and hence the court ought to have considered the persuasive arguments of the parties before making such award. It is also the averment by the deponent that the costs awarded herein are excessive in nature and that the same ought to have been disallowed by the Learned Judge, upon taking into account the financial constraints being faced by the Applicant.
5. He has further averred that given the public nature of the dispute between the parties herein, it would go against the interest of justice for the Applicant to be ordered to pay costs of the appeal and that in the premises, it is of necessity that the orders sought herein be granted.

Replying Affidavit

6. The Motion is opposed through a Replying Affidavit sworn by Diana Githuku, advocate for the Respondent on 11.10.2024 in which she has deposed that upon delivery of the aforesaid judgment, the Respondent commenced the execution process, and that the Applicant is guilty of laches in bringing the instant Motion. The deponent has termed the Motion as an afterthought and an abuse of the court process. She denied the averments made by the Applicant that there is public interest in the dispute.
7. It is further deposed that the instant Motion does not meet the threshold for review set out under Order 45 of the CPR, adding that the question of costs was sufficiently canvassed in the parties' respective submissions in the appeal and the Learned Judge acted correctly in making a determination on the same and therefore the Applicant is asking this court to sit on appeal against a decision rendered by the same court.
8. The deponent maintained that in awarding costs, the Learned Judge, who heard and determined the appeal, properly exercised his discretion, upon considering all the relevant factors pertaining to costs and that in the circumstances, the Motion ought to be dismissed with costs.

Written Submissions

9. Directions were given for the Motion to be canvassed by way of brief written submissions. On the part of the Applicant, it is submitted that pursuant to Section 27 of the CPA, costs should ordinarily follow the event. That the special circumstances of the present matter would denote that costs should not issue in that the Applicant facilitated the timeous determination of the appeal and that the appeal falls within the category of public interest litigation and hence it was unjust for the Applicant to be ordered to pay costs arising therefrom. In submitting so, the Applicant has relied on *Petition of Appeal No. 18 of 2019, Director of Public Prosecution v Michael Sistu Mwaura Kamau & 4 others* [2020] eKLR in which the Supreme Court rendered itself thus:

“We have considered the rival submissions and are convinced that, whereas the Appellant has withdrawn the Petition when it was ready for hearing and while the Respondents have spent time and resources preparing for the hearing aforesaid, we must agree with both the High Court and the Court of Appeal that the issues raised in the Appeal were of great public interest – i.e. the extent of powers bestowed upon the Ethics and Anti-Corruption Commission and whether corruption related offences can be initiated when the said Commission was not properly constituted and whether the President of the Republic



of Kenya can direct the Commission or the Director of Public Prosecutions in the execution of their constitutional mandates. These matters transcended the specific interests of the parties and have settled in the public sphere thus attracting the public interest. An order of costs against any party would, in the circumstances, not be fair....”

10. For the foregoing reasons, the Applicant urges this court to allow the Motion.
11. The Respondent, on the other hand, reiterated the averments in the Replying Affidavit, that the Applicant has not satisfied the elements pertinent to the grant of a review, and argued that a review does not provide a party with an opportunity to re-litigate issues which have already been determined, a position which was reaffirmed by the Court of Appeal in the case of *National Bank of Kenya Limited v Ndungu Njau* [1997] KECA 71 (KLR).
12. The Respondent submitted, further, that the present matter does not fall within the ambit of public interest litigation as claimed, and that an award of costs is discretionary in nature; that the Applicant has not demonstrated the manner in which the costs awarded on appeal are excessive, in any event. The Respondent cited *Re Estate of JPN VG (Deceased)* [2021] KEHC 3972 (KLR) where it was held that an application which has been brought with undue delay constitutes an abuse of the court process and argued that the instant Motion is purely intended to delay its right to recover the costs awarded. The Respondent urged that the Motion with costs to the Respondent.

Analysis and Determination

13. The court has considered the Motion, the rival affidavits in support and in opposition, as well as the written submissions and authorities cited therein. The instant Motion seeks review and/or setting aside of the order for costs made pursuant to the judgment delivered on 30.07.2024.
14. The guiding principles in an application for review are found under Order 45 of the CPR Section 80 of the *Civil Procedure Act* Cap. 21 Laws of Kenya as follows:

“ 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.”
15. Flowing from the above provision, the following are the instances in which a court can review a decision already in place:
 - a. the discovery of new and important matter or evidence, or
 - b. some mistake or error apparent on the face of the record, or
 - c. any other sufficient reason.



16. The Supreme Court in the case of Parliamentary Service Commission v Martin Nyaga Wambora & others [2018] eKLR whilst quoting with approval the findings of the East Africa Court of Appeal in Mbogo and Another v Shah [1968] EA elaborated the principles of review in the following manner:

“Consequently, drawing from the case law above, particularly Mbogo and Another v Shah, we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows:

- i. A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a limited bench of this Court.
- ii. Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;
- iii. An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.
- iv. In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.
- v. During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.
- vi. The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:
 - a. as a result, a wrong decision was arrived at; or
 - b. it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.”

17. It is clear from the foregoing that the exercise of review is purely discretionary in nature. Consequently, an applying party ought to tender sufficient and credible evidence to convince the court to exercise its discretion in his or her favour.

18. From the court’s consideration of the Motion and supporting documents, it is clear that the reason for seeking review is primarily based on the averments that the matter is purportedly in the nature of public interest litigation and hence no costs ought to have been awarded, and that the award is excessive in nature. The court has likewise considered the opposing arguments by the Respondent in the manner set out hereinabove.

19. From a glance at the record, it is apparent that at the outset, the Applicant filed the appeal, seeking to challenge the dismissal order made by the National Civil Aviation Administrative Review Tribunal (the Tribunal) on 13.06.2022 in Appeal Case No. 1 of 2021. Upon consideration thereof, the court, vide the judgment delivered on 30.07.2024, dismissed the appeal and upheld the Tribunal’s decision, thus awarding costs to the Respondent, in the sum of Kshs. 305,000/- pursuant to Section 27 of the CPA which provides that:

- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge 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; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.....

20. From a reading of the foregoing provision, it is clear that an award of costs lies with the court's discretion and that costs shall follow the event.
21. Upon perusal of the record, the court observed that the instant Motion was brought less than two (2) months from the date of judgment. There is nothing on the record to indicate that the Respondent has commenced the execution process. The court does not therefore find the delay to be inordinate in the circumstances.
22. Nevertheless, upon further perusal of the record, the court has not come across any credible material to support the averments by the Applicant that the nature of the dispute touches on a matter of public interest. Moreover, and in addressing the sentiments by the Applicant that the costs awarded are excessive in nature, the court reiterates its position above that an award of costs is discretionary in nature. It therefore follows that in urging this court to review or set aside the award of costs made in the present appeal, the Applicant is essentially asking this court to sit on appeal against a decision rendered by the same court.
23. Upon consideration of all the foregoing circumstances, the court is of the view that no credible or sufficient material has been placed before it, to warrant an exercise of its discretion by reviewing the order for costs made on 30.07.2024. Consequently, there is no foundation upon which to set aside the award of costs in place.
24. The upshot of the reasoning in this Ruling is that the Notice Motion dated 16.09.2024 lacks merit and must fail. The Notice of Motion is hereby dismissed, with costs to the Respondent.
25. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 27TH MARCH 2025.

S. N. MUTUKU

JUDGE

