Kengas Link Limited & another v Murila (Civil Appeal 167 of 2016)
[2025] KEHC 11896 (KLR) (11 August 2025) (Ruling)

Neutral citation: [2025] KEHC 11896 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL 167 OF 2016

RN NYAKUNDI, J

AUGUST 11, 2025

BETWEEN

KENGAS LINK LIMITED ..... 1ST APPELLANT

AHMED FARAH ALI ..... 2ND APPELLANT

AND

STEPHEN MUNGAI MURILA ..... RESPONDENT

RULING

1. By way of a Notice of Motion dated 28th February 2025, the Applicant seeks the following orders;

   i. That this honourable court be pleased to review/rectify the judgment delivered by the court on 9th March, 2021 for failure to make a finding on the issue of the costs of the appeal.

   ii. That costs of this application be provided for.

2. The Application is premised on the grounds on the face of it and the averments of the applicant in the affidavit in support of the application. In his affidavit, the applicant deponed that judgment in this suit was delivered on 9th March,2021, whereby the Appeal was dismissed and the court inadvertently failed to make an order as to costs of the appeal. He urged that there is an apparent error on the face of the record by the court failing to make an order as to costs of the Appeal. Further, that on 1st September, 2023, his Advocates on record filed the party and party bill of costs for taxation a copy of which he annexed and marked as Annexure SMM1. He stated that they did not anticipate any objection to the taxation of bill of costs from the Appellants/Respondents in view of the provisions of Section 27 of the *Civil Procedure Act*.

3. The deponent averred that on 25th February, 2025, the Appellants/Respondents served an objection to the Bill of Costs hence the present application. Further, that on 9th October, 2018, the honourable Justice Hellen Omondi ordered the Appellants/Respondents to deposit in court Ksh.50,000/= as

security for costs of the Appeal which amount was duly deposited. That the intention of ordering the provision for security for the appeal was in no doubt to give effect to the provisions of section 27 of the *Civil Procedure Act* and thereby ensuring that the successful party is not deprived of costs upon success. That in view of the chequered history of this matter having originated from the ruling of the subordinate court, it will be against the rules of natural justice to deny the applicant the costs of the hard-fought Appeal culminating in success. She urged that in the circumstances, it is necessary that the orders sought be granted to enable the court to make a finding as to whether as the successful party herein is entitled to costs of the appeal.

4. Counsel for the Respondents filed a replying affidavit dated 7th March 2025 in opposition to the Application. She deponed that the application is misplaced, an afterthought and a clear abuse of the Court process. That this Court delivered its judgment on 9/3/2021 having considered what was presented before it and further, that the award of costs is discretionary and if the court wanted to award the same nothing would have been easier that to make an order for costs. She maintained that there is no error or omission in the judgment as claimed by the Respondent/Applicant that would warrant a review of this Court's judgment. Further, that it is evident from the reasons advanced that the Respondent Applicant re-evaluate the issue of whether or not costs ought to be awarded to the Respondent which is outside the mandate of this Court as the court is functus officio. She urged that the Court having properly exercised its mind and made a determination not costs, it thus follows that the issue of failure by the Court to award costs cannot be construed to amount to an error capable of being rectified and granting the orders being sought by the Respondent/Applicant would amount to this court sitting on its own appeal which is outside this court's jurisdiction. She stated that the application is brought too late in the day and should thus not be allowed.

5. There were no submissions on record for the Applicant. However, the respondents filed submissions dated 29th July 2025.

6. In their submissions, the respondents urged that the Applicant has not demonstrated sufficient cause or at all to warrant a grant of the orders sought. Counsel submitted that the principles upon which a Court will act in exercising its jurisdiction to review a judgment is firmly established. This Court's power to review its own judgment is limited and must be exercised cautiously and only in clearly defined circumstances. He placed reliance on the Court's decision in *Jeremiah Chelanga (Suing as the Guardian Ad Litem of John Chelanga Chepkonga) vs Board of Management Kamatony Primary School & 3 others* [2021] SJEHC1865 (KLR) where the Court in setting out the conditions under which a judgment or order may be reviewed.

7. Counsel submitted that from the application presented it apparent that the Respondent/Applicant has not met any of the conditions to warrant grant of the orders sought. Further, that it is not sufficient that cause to warrant the review of a judgment just because the Respondent/Applicant merely disagrees with the outcome of the appeal. Counsel cited Order 45, rule 2(1) of the *Civil Procedure Rules* and submitted that the Respondent/Applicant has not presented any fresh evidence, exceptional circumstance or a mistake or error apparent on the face of the record that would warrant the exercise of the Court's jurisdiction to review its judgment. The Respondent's/Applicant's dissatisfaction with the outcome of this Court's judgement is not and cannot be a valid basis for review. There is no new important matter that has come to light to warrant review.

8. Counsel urged that all necessary amendments to a judgment or order are made on an apparent error on the face of the record for the purpose of determining the real question or issue raised by or depending on the proceeding. Further, the Respondent/ Applicant has not demonstrated in any way that the Judge acted upon some wrong principle or overlooked some material facts resulting the Court to enter an erroneous judgment on costs. In the present application the Respondent/Applicant seeks a review

of the judgment under Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules* for the sole purpose of securing an award of costs. It is well settled in law that the decision of whether or not to make an award for costs is discretionary and that the exercise of that discretion should not be interfered with lightly. The exercise of this Court's discretion under Section 27 of the *Civil Procedure Act* is a well beaten path.

9. Counsel urged that the judgment delivered by this Court was arrived at judiciously without any mistakes errors or omissions to warrant the orders sought for review of the judgment. The Court was plainly aware it was not making an order for costs and the absence of an order for costs was a deliberate and reasoned aspect of the Court's determination and cannot be said to have been an error to warrant a review as purported. He stated that the Respondent/ Applicant has failed to demonstrate any error apparent on the face of the judgment and/or any exceptional circumstances that would warrant interference with the Court's discretion. The court's decision not to award courts cannot be misconstrued to amount to an error in the judgment that needs to be rectified.

10. The granting of the orders sought by the Respondent/Applicant amounts to nothing sort of this Court sitting on its own appeal disguised as a review which is outside this Court's jurisdiction. He cited the Court's decision in *Ribiru vs Mwaniki & 2 others* (Civil Appeal 27 of 2023) [2024] KEHC 10417 (KLR) and reiterated that there is no basis for the Respondent/Applicants Bill of Costs on record and the same should be struck out as the judgment delivered on 9th March, 2021 by Lady Justice H.A Omondi does not have an order for costs.

11. Counsel urged that this application is brought too late in the day, nearly 5 years after the appeal was heard and determined and therefore ought not be allowed. The present application is misplaced, an afterthought and a clear abuse of the Court process as it is an impermissible attempt to re-Iitigate matters that were already considered and resolved. Counsel urged the court to dismiss the application.

Analysis and determination

12. The issue for determination is; Whether this court should review its judgement of delivered by the court on 9th March, 2021.

13. Section 80 of the *Civil Procedure Act* provides as follows:

> " 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 judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

14. Order 45 of the *Civil Procedure Rules* reiterates the power of the court to review its own judgments or orders but proceeds to specify the circumstances under which the court may exercise its power of review. Order 45 Rule 1 (b) expressly provides that a court can review its judgment or order if an applicant satisfies any of the following conditions:

(i) That he has discovered new evidence which after the exercise of due diligence was not within his knowledge or was not available at the time the order was made;

(ii) That there was a mistake or error apparent on the face of the record; and

(iii) That there is sufficient reason to warrant the review sought and that the application had been made timeously.

15. The present application is premised on the grounds that there was a mistake or error on the face of the record. In the case of *National Bank of Kenya Limited v Ndungu Njau* [1997] eKLR, the Court of Appeal stated: -

> " A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court.
>
> The error or omission must be self-evident and should require no elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review."

16. In *Edison Kanyabwera vs. Pastori Tumwebaze* (2005) UGSC 1, he Supreme Court of Uganda had this to say on the issue of what constitutes an error apparent on the face of the record: -

> " It is stated that in order that an error maybe a ground for review, it must be one apparent on the face of the record, i.e. an evident error which does not require any extraneous matter to show its incorrectness. It must be an error so manifest and clear that no court would permit such an error to remain on the record. The error maybe one of fact, but it is not limited to matters of fact, and includes also error of law."

17. The error on the record that the applicant seeks review upon is the alleged failure of the court to make a finding on the issue of costs of the appeal. Section 27 of the *Civil Procedure Act* provides;

(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.

18. In *Cecilia Karuru Ngayu vs. Barclays Bank of Kenya & another* [2016] eKLR, Mativo J (as he then was) while deciding on whether or not to award costs to a party; stated as follows;

> " ...I find useful guidance in the following passage from the Halsbury's Laws of England; "The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice".

19. It is my considered view that the award of costs is a discretionary one and cannot be equated to an error apparent on the face of the record. If the court is to interfere with the same, it would be tantamount to sitting on appeal in its own decision, a scenario greatly abhorred by law. I have also considered the fact that the impugned judgement was delivered in March 2021 whereas the Applicant filed the present application on 28th February 2025. The applicant has not explained the delay of 4 years in filing the application which lends credence to the averment that the same is an afterthought as the application was not filed timeously.

In the premises, the application dated 28th February 2025 is dismissed in its entirety with costs to the respondents.

DATED, SIGNED AND DELIVERED VIA AT ELDORET THIS 11TH AUGUST 2025

.....

R. NYAKUNDI

JUDGE