



**Moseti v Omao (Civil Appeal E041 of 2024)  
[2025] KEHC 12492 (KLR) (9 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12492 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL E041 OF 2024  
DKN MAGARE, J  
SEPTEMBER 9, 2025**

**BETWEEN**

**ALLOYS MATAYA MOSETI ..... APPELLANT**

**AND**

**VINCENT MARHTA OMAO ..... RESPONDENT**

**RULING**

1. The applicant filed an application dated 2.05. 2025 seeking review of orders c and d of the judgment delivered on 24.02.2025. The review was on the basis that there is an error apparent on the face of the record. The court allowed the appeal and dismissed the suit in the court below. The application was not opposed.
2. The power to review is set out in section 80 of the *civil procedure Act* states that:
  - “ 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”.
3. This is also enunciated in Order 45 of the Civil Procedure Rules provides for Review and it states as follows:
  - “(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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review”

4. The power to review a court’s own decision was succinctly addressed by Kuloba J (as he then was) in *Lakesteel Supplies vs. Dr. Badia and Anor* Kisumu HCCC No. 191 of 1994 where he opined that

“The exercise of review entails a judicial re-examination, that is to say, a reconsideration, and a second view or examination, and a consideration for purposes of correction of a decree or order on a former occasion. And one procures such examination and correction, alteration or reversal of a former position for any of the reasons set out above. The court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used in Order 44 rule 1, of the Civil Procedure Rules. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. It can only lie if one of the grounds is shown, one cannot elaborately go into evidence again and then reverse the decree or order as that would be acting without jurisdiction, and to be sitting in appeal. The object is not to enable a judge to rewrite a second judgement or ruling because the first one is wrong...On an application for review, the court is to see whether any evident error or omission needs correction or is otherwise a requisite for ends of justice. The power, which inheres in every court of plenary jurisdiction, is exercised to prevent miscarriage of justice or to correct grave and palpable errors. It is a discretionary power. In the present application it has not been said or even suggested that after the passing of the order sought to be reviewed, there is a discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the applicant’s knowledge or could not be produced by him at the time when the ruling was made.”

5. In making the decision the court found as follows:

- 32. The special damages were not properly proved though pleaded. In the circumstances, the same are set aside. The court ought to have dismissed the Respondent’s suit in the lower court with costs.
- 34. The Appeal is thus allowed, the award of damages set aside, and in lieu thereof, the Appellant, is entitled to costs.

6. While transposing the final results to the orders section I indicated as follows:



36. The upshot of the foregoing is that I make the following orders:
- a. The Appeal is allowed, the judgment set aside, award of damages is set aside. In lieu thereof, the Respondent's suit is dismissed with costs.
  - b. Costs of Ksh 55,000/= to the Respondent for the Appeal
  - c. The counterclaim is dismissed with costs of 55,000/=
  - d. Costs of the suit in the subordinate court to the Appellant
  - e. 30 days stay of execution
  - f. The file is closed.
7. Order No. c appears to have been erroneously included as it was not discussed in the main judgment. There is thus an error apparent on the face of the record. Order No. c is accordingly deleted.
8. The order c included a counter claim, which was neither discussed by the parties or the court. It is an appendage that came as an error. Consequently, the application dated is allowed. The order number (c) is set aside. The rest of the orders remain.
9. Further the order for costs is indicated twice. Order number d is therefore superfluous and is set vacated. There is no error on the body of the judgment.
10. The only issue is costs. The issue of costs is governed by section 27 of the [Civil Procedure Act](#), which provides as follows:
- (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.
  - (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.
11. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -
18. It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.
  22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is



the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

12. There shall be no order as to costs as the application was not opposed.

#### **Determination**

13. The consequence of the foregoing is that the court makes the following orders:

- a. The application dated 2.05.2025 is allowed and the judgment and decree of this court given on 24.02.2025 is reviewed by deleting order number (c) and (d) as it was an error apparent on the face of the record.
- b. Each party to bear its own costs.
- c. The file is closed.

**DELIVERED, SIGNED AND DATED AT NYERI ON THIS 9<sup>TH</sup> DAY OF SEPTEMBER, 2025.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE Platform.**

**KIZITO MAGARE**

**JUDGE**

In the presence of: -

N/a for the Applicant

N/a for the Respondent.

Court Assistant – Matiko

