



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CIVIL APPEAL NO. E033 OF 2016

JEREMIAH & BROTHERS CONTRACTORS.....1ST APPELLANT

JULIUS NYONGESA.....2ND APPELLANT

-VERSUS-

FEK.....APPLICANT/RESPONDENT

RULING

1. The application before the court for determination is the Respondent's Notice of Motion dated 16th September, 2021 brought under **Section 80** of the **Civil Procedure Act**, **Order 45** of the **Civil Procedures Rules** and the **Persons With Disabilities Act No. 14 of 2003**.

2. The application seeks two substantive orders namely: the order for costs made against the Respondent be reviewed and set aside; and in the alternative and without prejudice to the first prayer, that if the court is not moved to set aside costs against the Respondent the court be pleased to order the National Council for Persons with Disabilities pays the costs and that Notice of the instant Application be served on the National Council for Persons with Disabilities.

3. Judgment had been entered by Hon. Mwangi, J on 21st May, 2020 wherein on page 6 of the Judgment at paragraph 25, the court stated:

“The Appellant shall have the costs of the Appeal”

4. The Application was canvassed by way of oral submissions submitted on 31/02/2021. The Appellant's counsel failed to turn up to canvass the application. The respondent was represented by learned counsel, Mr. Muturi who made a very brief submission. Counsel only submitted that, under The Persons With Disabilities Act, persons with disabilities are not required to pay costs. Counsel however did not mention any provision in the Act that makes that provision. He only added that his submission spoke to the letter and spirit of the Act.

Analysis and determination

5. The Applicant\Respondent contends that he is a person with disability, to wit: a totally blind man as per the Persons with Disabilities Act under which he is exempted from costs.

6. **Section 80 of the Civil Procedure Act** gives the power of review and **Order 45 Rule 1** the threshold for grant of the relief for review of an order or decree. The rule restricts the grounds for review. Review therein is limited to the following grounds;

(a) Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;

(b) On account of some mistake or error apparent on the face of the record, or

(c) For any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.

7. In **Muyodi vs Industrial Commercial Development Corporation & Another (2006) 1 EA 243** the court stated:

“For an application for review under Order 45 Rule 1 to succeed, the applicant was obliged to show that there had been

discovery of new and important evidence which, after due diligence, was not within his knowledge or could not be produced at that time. Alternatively, he had to show that there was some mistake or error apparent on the face of the record or some other sufficient reason. In addition, the application was to be made without unreasonable delay”

8. The Applicant has stated that he seeks the prayers under the circumstances that the order for costs be set aside as against the him as he is totally blind. He moots that under the People With Disabilities Act prohibits payment of costs of such persons. It behooves this Court to thus interrogate the **People With Disabilities Act** on the submissions made by the Applicant.

9. **Section 42** provides for the Exemptions for People with Disabilities. It states that:

“42. Exemptions and deductions-general requirements

(1) The following apply with respect to exemptions and deductions described in subsection (2)—

(a) No person is eligible for an exemption or deduction unless the exemption or deduction has been recommended by the Council and approved by the appropriate government authority;

(b) No person is eligible for an exemption or deduction unless any additional requirements or conditions prescribed in the regulations made by the Minister are satisfied;

(c) An exemption or deduction may be refused on the basis that it has not been provided for in the allocation of public resources.

(2) The exemptions and deductions referred to in subsection (1) are the exemptions and deductions under the following

(a) Section 12;

(b) Section 16;

(c) Section 35;

(d) Section 36(1); and

(e) Section 40

I shall now duplicate each of the sections referred to above for clarity purposes.

10. **Section 12** states that:

“(1) No person shall deny a person with a disability access to opportunities for suitable employment.

(2) A qualified employee with a disability shall be subject to the same terms and conditions of employment and the same compensation, privileges, benefits, fringe benefits, incentives or allowances as qualified able-bodied employees.

(3) An employee with a disability shall be entitled to exemption from tax on all income accruing from his employment.”

11. **Section 16** states that:

“(1) A private employer who engages a person with a disability with the required skills or qualifications either as a regular employee, apprentice or learner shall be entitled to apply for a deduction from his taxable income equivalent to twenty five percent of the total amount paid as salary and wages to such employee: Provided that –(i) such an employer shall present proof certified by the Ministry responsible for labour that the persons with disabilities in respect of whom he claims the deduction are under his employ; and (ii) the persons with disabilities so employed are accredited

2) A private employer who improves or modifies his physical facilities or avails special services in order to provide reasonable accommodation for employees with disabilities shall be entitled to apply for additional deductions from his net taxable income equivalent to fifty per cent of the direct costs of the improvements, modifications or special services.”

13. **Section 35** provides that:

“35. Exemptions

(1) All persons with disabilities who are in receipt of an income may apply to the Minister responsible for finance for exemption

from income tax and any other levies on such income.

(2) The Minister responsible for finance may, by notice in the Gazette, prescribe the procedure for application for and grant of exemption under this section.

(3) Materials, articles and equipment, including motor vehicles, that are modified or designed for the use of persons with disabilities shall be exempt from import duty, value added tax, demurrage charges, port charges and any other government levy which would in any way increase their cost to the disadvantage of persons with disabilities.

(4) All goods, items, implements or equipment donated to institutions and organizations of or for persons with disabilities shall be exempt from import duties, value added tax, demurrage charges, port charges and any other government levy which would in any way defeat the purposes of or increase the cost of the said donations.”

14. Section 36 (1) states that:

“36. (1) Any donations, bequest, subsidy or financial aid which may be made to government agencies involved in the rehabilitation of persons with disabilities or to organisations involved in such rehabilitation and registered with the Council for the purposes of this section shall, subject to the provisions of the Income Tax Act, be allowed as deductions from the donor's gross income for the purpose of computing taxable income.”

15. Section 40 reads:

“All persons providing public telephone services shall as far as possible install and maintain telephone devices or units for persons with hearing disabilities and tactile marks on telephone sets to enable persons with visual disabilities to communicate through the telephone system.”

16. From the foregoing, it is clear that the Persons With Disabilities Act does not provide for the exemption of payment of court costs by people with disabilities. Succinctly put Section 12 only deals with exemptions arising from Employment, Section 16 with exemptions accruing to Employers who employ People With Disabilities, Section 35 with Exemptions arising from income made by people with Disabilities, Section 36(1) exemptions on paying income tax by people with Disabilities on donations received and Section 40 on exemptions afforded to people with Disabilities who shall utilize public telephones.

17. Further, the learned Judge in issuing the order for costs was within the law pursuant to **Section 27(1) of the Civil procedure Act** which deals with costs and states:

“(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. [emphasis my own]

25. I would disagree with counsel for the Applicant that persons with disabilities within the meaning of the subject Act should not be condemned to costs. If the exemption were to apply, it would open a *pandoras box* where any person with a disability within the meaning of the Act would institute a suit with little regard to the inconveniences litigations come with; not because they believe in the course they advance but merely because they would not be condemned to costs.

26. As **Section 27(1) of the Civil Procedure Act** envisages, in as much as costs follow the event, the court has the discretion to exempt a party from paying costs depending on the circumstances of the case. I cannot delve into such circumstances as the situation herein reflects a purely civil dispute and the losing party ought to know that costs follow the events.

27. I therefore find no fault in the learned judge's order condemning the Respondent in the appeal to pay costs. This is not a suitable case for review. I find that the application lacks merit and the same is hereby dismissed. In this instance, I give no orders as to costs.

28. It is so ordered.

Dated and Delivered at Naivasha this 24th Day of February, 2022.

G. W. NGENYE-MACHARIA

JUDGE

In the absence of the parties who were well aware of the ruling date.