



Leeward Islands Limited v Kioko & 4 others (Environment & Land Case 160 of 2013) [2023] KEELC 18542 (KLR) (14 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18542 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 160 OF 2013**

**LL NAIKUNI, J
JUNE 14, 2023**

BETWEEN

LEEWARD ISLANDS LIMITED PLAINTIFF

AND

PETER MUTUNGI KIOKO 1ST DEFENDANT

SHABBIR MOHAMED HAJI 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

LAND REGISTRAR, MOMBASA 4TH DEFENDANT

UNITED CARE LIMITED 5TH DEFENDANT

RULING

I. Introduction

1. The Ruling before this Honorable Court for its determination emanates from the oral application made out on 16th November, 2022 and 16th February, 2023 upon the closure of the Plaintiff's case by the Learned Counsels – Mr. Karega and M/s. Onesmus for the Plaintiff. Currently, it is instructive to note that the matter is part heard – the Plaintiff having closed its case and it's now the Defence Case to commence testifying. The Learned Counsels, raised an objection urging court not to accord the 1st, 3rd and 4th Defendants any audience in this proceedings on the grounds that they had failed to comply with the orders of this Court issued by Justice Omollo on 26th May, 2016 and in particular prayer No. 3 read with prayers 1 and 2 thereof. According to the Learned Counsels, the objection was only meted against the 1st, 2nd, 3rd & 4th Defendants as the 5th Defendant, United Care Limited, was exonerated from the said breach of the court order. Juxtapose, the Learned Counsels further held that they would be willing to indulge the 1st, 2nd, 3rd & 4th Defendants if they undertook to pay the said costs within the next 14 days.



2. The oral application by the Plaintiffs was vehemently opposed by Mr. Ngure Advocate for the 1st Defendant. While opposing this application also submitted orally and which will be reproduced herein under while M/s. Waswa Advocate for the 3rd and 4th Defendants filed and served a 12 Paragraphed Replying Affidavit sworn and dated 18th November, 2022 and also had an opportunity to highlight. On 16th November, 2022, the Honorable Court directed that the parties filed replies within stipulated time and it would render its ruling.

ii. The Plaintiff's Case.

3. The Learned Counsels for the Plaintiff oral objection is based on the ascertain that 1st, 2nd, 3rd and 4th Defendants were in contempt of the courts order and unless they purge the contempt they had no audience of the following orders made by Justice A. Omollo on 18th May, 2016:-
 - a. "That the 1st, 2nd and 3rd Defendants are granted an adjournment.
 - b. That since the Plaintiff has been inconvenienced, an order is made awarding the Plaintiff the following costs:-
 - i. AirfareKshs. 150,000/=
 - ii. Food and accommodation for 3 nights – Kshs. 24,000/=
 - iii. Advocate's Attendance Kshs. 10,000/=Total Kshs. 184,000/=
 - c. That the costs will be paid to the Plaintiff directed equally amongst the 3 Defendants to be paid within sixth (60) days of the date hereof.
4. The Learned Counsels argued that court orders were never a formality. They were never given in vain. They are to be obeyed at all costs. To them they needed to purge the contempt or be denied audience of the matter. They offered to indulge them if they paid.

iii. The 1st Defendant Responses.

5. Mr. Ngure Advocate opted to make a brief response. He submitted that this was an ambush to him taking that this was a matter he came on record much later after the said orders were issued by the court. He represented the estate of the 1st Plaintiff who was not deceased. He asserted that the matter had been proceeding on smoothly from the 18th May, 2016 which was close to 6 years and wondered this objection came from all of a sudden. He urged court to let the matter proceed and the issue of costs to be in the cause.

iv. The Responses by the 2nd, 3rd and 5th Respondents.

6. On 18th November, 2022, the 2nd, 3rd and 5th Respondents filed and served a 12 Paragraphed Replying Affidavit sworn by Winnie Namahya – Waswa a Senior Litigation Counsel at the Officer of the Honorable Attorney General Chambers Mombasa and in conduct of this matter hence competent to swear this Affidavit.
7. The Learned Counsel averred that she was in court on 16th November, 2022 whereby the Advocates for the Plaintiff made an oral application seeking to bar the 1st, 2nd and 3rd Defendants from participating in the proceedings of this case for failure to comply with the court order dated 26th May, 2016 requiring



- them to pay costs of a sum of Kenya Shillings One Hundred and Eighty-Four Thousand (Kshs. 184,000/=). The costs claim arose from the request by the Defendants to be given more time to comply.
8. She deposed that from a clear perusal of that day's proceedings – 18th May, 2016 – would prove that the adjournment was also contributed by the Plaintiff having called in their witness – the Registrar of Companies without the knowledge of the offices of the Attorney General and therefore they could not authenticate his testimony and the documents he was to produce. They raised the objection and the issue to the court which then stood the witness to enable him officially submit documents through their offices.
 9. She stated that the Land Registrar had initially supplied them with the lists of documents which they failed to supply the Physical documents so that they had to request for more time to enable them file the documents in court.
 10. The Learned Counsel held that nevertheless the court adjournment the matter but on condition that together with the 1st and 2nd Defendants they pay costs of a sum of Kenya Shillings One Hundred and Eighty Four Thousand (Kshs. 184,000/=) to the Plaintiffs before the next hearing date though this information had been relayed to then client but the client had not remitted the said amount as yet. Furthermore, she added that from that dated to date this matter has come up for various mention and directions but at no time the Plaintiff stopped the proceedings because of the payment of costs. She was of the view that the Plaintiff would not be prejudiced in anyway of the costs were in the cause and the same would be paid eventually at the conclusion of the matter and taking that the 3rd, 4th and 5th Defendants were still parties to this suit.
 11. The Learned Counsels argued that the mode of payment of claims against the Government was procedural and took time.

V. Analysis and Determination

12. I have had an opportunity to critically assess and consider the issues raised from the oral application by the two Learned Counsels for the Plaintiff herein on 16th November, 2022 and 16th February, 2023 and the objections by the Learned Counsels, for the 1st, 2nd, 3rd, 4th and 5th Defendants the appropriate and relevant provisions of *the constitution* of Kenya 2010 and the statutes. For the court to attain an informed, just and fair decision on this matter, it has framed 2 issues for determination.
 - a. Whether the oral application by the Learned Counsels for the Plaintiffs made on 16th November, 2022 and 16th February, 2022 has any merit
 - b. Whether the parties are entitled to the reliefs sought and
 - c. What are the court's directions going forward?

Issue No. (a) Whether the oral application by the Learned Counsels for the Plaintiffs made on 16th November, 2022 and 16th February, 2022 has any merit

13. From the proceedings, there is no doubt that when this matter was fixed for hearing of the Plaintiff's case on 18th May, 2016, the Registrar of Companies was present having been summoned by the Plaintiff to testify on their behalf. Ideally, this witness ought to have been the 3rd Defendant's witness taking that he was attached under the Company Registry – or as it's called Business Registration Bureau – was a defendant under the 3rd Defendant. Nonetheless, to avoid digressing as this was not the issue before me, according to M/s. Waswa Advocate taking that the witness appeared in Court without their knowledge they could not authenticate his testimony and the documents he was to produce. As a result, they



raised objection which led to him being stood down to enable him submit documents through the 3rd Defendant's offices. Additionally, they also sought adjournment failure to access documents from the Land Registry despite a request they had made. Resultantly the court though allowed the adjournment but felt it needful for the costs of day be paid by the 1st, 2nd and 3rd Defendants jointly and severally within the stipulated period of 60 days from that date.

14. It is now well established that the issue of costs is at the discretion of the Court. Costs means the award that is granted to a party at the conclusion of any legal action, proceedings and process. The proviso of the Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow the event. By event it means the results of the said legal action, process and proceedings. This legal position was supported in the case of "*Reid, Hewett & Co. – Versus – Joseph*, AIR 1918 CAL, *Myres – Versus – Defries* (1880) 5 Ex D 180 and *Morgan Air cargo Limited – Versus – Everest Enterprises Limited* (2014) eKLR," and also in the Court of Appeal case of "*Republic – Versus – Rosemary Wairimu Munene, Ex-Parte Applicant – Versus – Ibururu Dairy Farmers Co-operative Society Limited* Judicial Review application no 6 of 2014 and the Supreme Court case of "*Jasbir Rai Singh – Versus – Tarchalan Singh*" (2014) eKLR where the Court held as follows: -

"The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case."

15. From the instant case I seem to hear that there is no contention as to whether to pay the costs awarded by court or not. Likewise, there is a very thin membrane as to whether it is a case of disobedience of court order or not. None of the parties here have denied or refused to honor the Court order. I have stated herein on times without numbers that there should be no debate on the efficacy of Court orders. They are not a formality nor cosmetic. They ought to be obeyed at all event. Should anyone feel aggrieved by the Court order, the only available option is to seek for the said orders to be reviewed, set aside or varied.
16. Essentially, as far as I am concerned, the issue at hand herein are all on a matter to do with the timings. By this I mean the order reads "(c) that the costs will be paidwithin 60 days of the date hereof". Through quick mathematical computation, the costs ought to have been paid by 18th July, 2016. This never happened. Interestingly, for one reason or the other all the parties went silent including the Plaintiff until 16th November, 2022 – which is close to six (6) years when they decided to revive the issue. Certainly, although the Plaintiff was within its right to have done so, but surely that duration was such long one to have gone to slumber and then waken- up one morning and brought it out as a sword of Damocles as a bar to prevent the parties from participating in a proceedings. In my view, and based on the Legal Maxim "Justice delayed is Justice Denied" I say that is unreasonable, inordinate and unfair for the following reasons: -

Firstly, the Plaintiff ought to have taken action immediately but they opted until the last minute upon the closure of the Plaintiff's case. Perhaps they became apprehensive that they may never have any other opportunity to raise the issue. This is a misconception as the 1st, 2nd, 3rd and 4th Defendants are still parties in the matter and at the conclusion of the case they shall be raising – Bill of Costs for taxation before the Taxation Master.

Secondly, all the parties have agreed and the orders are clear, express and plain and that the 5th Defendant is not affected. Assuming that the Court was to allow this application, it would mean the case proceeds on with the presence of the 1st, 2nd, 3rd, and 4th Defendants in it. It goes without saying that the absence of



these parties would definitely affect the case in one way or the other. In the interest of justice, the case of the 5th Defendant would somehow be adversely affected. They would be disadvantaged. Furthermore, the orders of the Court would not bar the 1st, 2nd, 3rd, and 4th Defendants from moving this Court under the provision of Article 159 (1) & (2) and Order 12 Rule 7 of the Civil Procedure Rules, 2010 among numerous the statutory provisions to seek setting aside the said orders and proceedings as a subsequent measure.

Thirdly, the 3rd and 4th Defendants are Government agents/organ. It well known that all proceedings against the Government including issues of costs are governed by the Government Proceedings Act Cap 40 of the Laws of Kenya and the Provisions of Order 29 of the Civil Procedure Rules, 2010. The Provisions of Section 17 of the Act Governs issues of costs of and incidents to government proceedings are awarded in the same manner and principles as in other cases and the court or arbitration has power to make an order for costs by or to the Government provided that:-

- a. “in the case of proceedings to which by reason of any written law or otherwise the Attorney General government department or a Government officer as such is authorized to be made a party, the court or arbitrator shall have regard to the nature of the proceedings and the character and the circumstances in which the Attorney General, the department or officer appears and may exercise discretion to order any other party to the proceedings to pay costs to the Attorney General, department or officer whatsoever the result of the proceedings, and
- b. Nothing in this section affects the power of the court or arbitrator to order or any written law provided for the payment of costs out of a particular fund or property or any written law express by relieving any government department or government officer of the liability to pay costs.”

Therefore, from the above legal position, it is clear payment of costs by Government it’s a herculean task marred with a string of bureaucracies and red tapism for the interest of justice Equity and conscience to commence engaging in that proceedings at this stage will definitely spare the smooth flow of the case.

17. In the given circumstances, therefore, I discern that the best option available herein, is to let the costs awarded by this court on 18th May, 2016 be in the cause. Although the application will be allowed but it should not be a bar against the parties – 1st, 2nd, 3rd & 4th Defendants herein to participate in the proceedings going forward and in the fullness of time.

vi. Conclusion & Findings: -

18. The upshot of all this the Honorable Court on the preponderous of probability, makes the following directions:
 - a. That the oral application made by the Learned Counsel for the Plaintiffs on 16th November, 2022 and 14th February, 2023 are meritorious and hence allowed under the terms and conditions stipulated herein.
 - b. That the 1st, 2nd, 3rd & 4th Defendants be and are hereby directed to comply with the court order of 18th May, 2016 upon conclusion of this case in the cause or if earlier the better.
 - c. That there be further hearing of this matter on priority basis on 5th October, 2023.

It is so ordered accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DELIVERED AT MOMBASA THIS 14th DAY OF JUNE 2023



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**HON. JUSTICE MR. L.L NAIKUNI (JUDGE)
OF THE ENVIRONMENT AND LAND COURT AT
MOMBASA**

Ruling delivered in the presence of:-

- a. M/s. Yumnah, the Court Assistant.
- b. M/s. Onesmus Advocate for the Plaintiff.
- c. Mr. Ngure Advocate for the 1st & 2nd Defendants.
- d. M/s. Waswa Advocate for the 3rd & 4th Defendants.
- e. No appearance for the 5th & 6th Defendants.

