REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANT-CORRUPTION AND ECONOMIC CRIMES DIVISON

CIVIL CASE NO 7 OF 2018 (MULTI-TRACK)

ETHICS AND ANTI CORRUPTION COMMISSION.....APPLICANT

VERSUS

STEPHEN SANGA BARRAWAH

T/A MEDISCOPE AGENCIES.....1ST DEFENDANT

SERAH MUSYIMI.....2ND DEFENDANT

BARRAWAH LIMITED.....3RD DEFENDANT

DAVID KISOI NDUNDA

T/A DANKIS AGENCIES.....4TH DEFENDANT

TIMOTHY MALINGI KOE.....5TH DEFENDANT

GILBERT M. S. BAYA.....6TH DEFENDANT

GABRIEL MAJIWA MKARE.....7TH DEFENDANT

ALEX KITHEKA MWONGELA.....8TH DEFENDANT

ANDREW KITHI KOMBE.....9TH DEFENDANT

SOPHIA MNYAMANYI MWANDAWIRO.....10TH DEFENDANT

RAPHAEL KIOLI MUTISO.....11TH DEFENDANT

BENJAMIN KAI CHILUMO.....12TH DEFENDANT

RIZIKI MATANO CHOGA.....13TH DEFENDANT

MWATELA MWASAMU.....14TH DEFENDANT

JUSTIN NDIRAGU NGURE.....15TH DEFENDANT

JULIUS MWAIDZA MUNGA.....16TH DEFENDANT

PAUL TEIDO MWAZO.....17TH DEFENDANT

RICHARD POLE MWASAMBU.....18TH DEFENDANT

EQUITY BANK KENYA LIMITED.....19TH DEFENDANT

BARCLAYS BANK OF KENYA.....20TH DEFENDANT

COOPERATIVE BANK OF KENYA.....21ST DEFENDANT

R U L I N G

1. By a Notice of Motion under sections 1A,1B,3, 3A, 80 and 99 of the Civil Procedure Code and Order 50 of the Rules, the plaintiff/Applicant moved the court for an Order That the Honourable Court be pleased to review its Ruling delivered and its Orders as issued on the 30th Day of September 2020 in relation to the 20th Defendant's Application dated 29th November 2019 and that the Court be pleased to review its decision to award cost to the 20th defendant

2. The application was grounded on the grounds that the issue of cost was among the issues to be addressed by the Honourable Court while determining the application by the 20th Defendant and that in its ruing the court awarded the 20th defendant cost of the suit.

3. That the plaintiff considered itself aggrieved by the said ruling as the court did not sufficiently address the matter of cost of the substantive suit and the cost of the 20th defendant's application, having failed to consider the content of the statement of grounds of opposition filed by the plaintiff, which omission or oversight may have been due to inadvertence on the part of the Court.

4. It was contended that the court may have pronounced itself without considering the views of the plaintiff thereon including Authorities in support thereof and therefore the need for the curt to correct the said error.

5. The application was supported by the affidavit sworn by **TABU C. LWANGA** in which it was deposed that, to the application by the 20th defendant to strike the plaintiffs suit with cost, the plaintiff filed grounds of opposition, replying affidavit and lists od authorities in opposition to the application.

6. That in its ruling, the court awarded the 20th defendant the cost of the suit, without sufficiently addressing the matter of costs of the substantive suit and the cost to the 20th defendant's application thereon, which omission may have been due to inadvertence on the part of the court, by not considering the views of the plaintiff and the decisions of the court of Appeal on costs.

7. In response to the application, the 20th defendant respondent filed a replying affidavit sworn by **MICHAEL MASSAWA**, it which it was deposed that the application was devoid of merit, vexatious and brought in bad faith as there was neither discovery of new facts nor apparent error on the face of the record nor sufficient reasons to warrant a review.

8. He stated that cost shall follow the event, meaning that the party who on the whole succeed gets the general costs of the action and since the Bank succeeding having the suit against it struck out for being unmeritorious, frivolous and an abuse of the court process, it was entitled to costs.

9. It was finally contended that the courts have unfettered discretion to award cost and in exercising the said discretion the court must always have regard to the fact that costs award are all about indemnification to the successful party for the expenses incurred and there was no reason to depart from the said general rule.

10. On behalf of the Plaintiff Applicant, Mr. Mogi submitted that the case was presented by the Commission in Public interest and it was therefore not fair to award cost to the 20th Defendant /Respondent as was stated by The Court of Appeal in **Kenya Human Rights Commission and Another V the Honourable Attorney General and 6 other Civil Appeal no 147 of 2019 [2019] eKLR.**

SUBMISSIONS

11. It was submitted further that the court ought to have given an explanation on why the Respondent was awarded cost, since they had handled the funds the applicant sought to recover and when they sought to be released the applicant put in grounds of opposition and stated that it was unfair for the commission to pay cost because it was acting on behalf of public interest and the court should have distinguished the circumstances of the case.

12. On behalf of the respondent, Mr. Chege submitted that cost should follow the event and that there was no exception if it involved a public body, he submitted that they filed an appearance and defence to the suit and therefore there was no fault with the ruling on cost.

DETERMINATION.

13. This application arises out of a ruling delivered by this Court (Onyiego J) on the 30th day of September 2020 in respect to an application by the 20th defendant to struck out the suit as against it on the ground that it was a stranger to the proceedings as its relationship with the 11th defendant was that of a Bank –Client based on the normal banking services.

14. In finding in favour of the respondent, the court had this to say:

"22. ***banking institutions should not be penalized by incurring unnecessary legal fee for claims which can be litigated without their participation yet they will be bound by the orders of the court. For instance, in this case prayer (K) barring the11th defendant from transferring, disposing or dealing in any way with the amount in question in the 20th Defendant bank account is sufficient enough to secure the money without necessarily enjoining the bank and the orders should automatically be binding on the bank ……***

26. The general rule of practice is where there is a dispute involving money in a bank, the bank is served with the order to either freeze the account and not allow any transfer or withdrawal or in any manner dealing with such monies. All that the bank is served with is an order barring transactions relating with monies in question. A bank does not become an automatic litigant whenever monies held in its custody is the subject of litigation. To do so will amount to crippling down bank operations by making their personnel attend unnecessary court sessions and haring lawyers to defend frivolous suits ".

15. The only issue determination in the application herein is whether the applicant has met the threshold to enable the court review its order herein on cost?

16. The review jurisdiction of this court is governed by Section 80 of the Civil Procedure Act which provides as follows: any person who consider 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 the judgement to the court which passed the decree or made the order and the court may make such order thereon as it thinks fit.

17. Order 45 of the Civil Procedure Rules which provides:

(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. 2. To whom applications for review may be made [Order 45, rule 2.] (1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed. (2) If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.

18. In the case of **Nasibwa Wakenya Mose v University of Nairobi & Another [2019] eKLR** the court set out conditions upon which an order for review may be granted as follows: "14. Section **80** gives the power of review while Order **45** sets out the rules. The rules restrict the grounds for review. Put differently, the rules lay down the jurisdiction and scope of review. They limit it 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*.

Discussing the scope of review, the Supreme Court of India in *Ajit Kumar Rath vs State of Orisa& Others*[5] had this to say:-

"*the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" ..... means a reason sufficiently analogous to those specified in the rule"*

A similar view was held in the case of *Sadar Mohamed vs Charan Signh and Another*[6] that:-

"*Any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter)."*

In *Tokesi Mambili and others vs Simion Litsanga*[7]the Court of Appeal held:-

i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any

other sufficient reason. (Emphasis added)

ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.

It is well settled that the review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 45, Rule 1. Any other attempt, except on grounds falling within the ambit of the above rule, would amount to an abuse of the liberty given to the tribunal under the Act to review its judgement or order.

A review is permissible on the grounds of discovery by the applicant of some new and important matter or evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree or order was passed. The underlying object of this provision is neither to enable the court to write a second Judgment nor to give a second innings to the party who has lost the case because of his negligence or indifference. Therefore, a party seeking a review must show that there was no remiss on his part in adducing all possible evidence at the trial.".

19. Section 27 of the Civil Procedure Act on the issues of costs states that subject to such conditions and limitations as may be prescribed and to the provision of any law for the time being in force, the cost of and incidentals to all suits shall be at 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 cost are to be paid and to give all necessary directions for the purposes of the aforesaid , 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. In the case of **Cecilia Karuru Ngayu v. Barclays Bank of Kenya ltd and another [2016] e KLR** the court had this to say on the issue of cost: *"In my view section **27** of the Civil Procedure Act provides the general rule which ought to be followed unless for good reason to be recorded. The said section in my view does not make distinctions between determinations made by consent or on courts own determination or withdrawals. This position is well stipulated by Richard Kuloba in the above cited book where he observed that: -*

> *"the fact that the unsuccessful party did not contest the case is not in itself a ground for refusal of costs but it is a factor that can be take into account if other good reason exists" (Emphasis added).*
>
> *However, the only consideration is the "event" as was held in the supreme court of Uganda in Impressa Ing Fortunato Federice vs Nabwire[9] where the court stated:-*
>
> *"The effect of section **27** of the Civil Procedure Act is that the Judge or court dealing with the issue of costs in any suit, action, cause or matter has absolute discretion to determine by whom and to what extent such costs are to be paid; of course like all judicial discretions, the discretion on costs must be exercised judiciously and how a court or judge exercises such discretion depends on the facts of each case. If there were mathematical formula, it would no longer be discretion… while it is true that ordinarily, costs should follow the event unless for some good reason the court orders otherwise, the principles to be applied are- **(i)** under section **27 (1)** of the Civil Procedure Act, costs should **follow the event unless the court orders otherwise**. This provision gives the judge discretion in awarding costs but that discretion has to be exercised judicially**. (ii),** A successful party can be denied costs if it is proved that but for his conduct the action would not have been brought… It is trite law that where judgement is given on the basis of consent of parties, a court may not inquire into what motivated the parties to consent or to admit liability……."*

Also of useful guidance is the decision in the Ugandan case of Re Ebuneiri Waisswa Kafuko[10] where the court held as hereunder:-

> *"The judge in his discretion may say expressly that he makes no order as to costs and in that case each party must pay his own costs. If he does not make an order as to costs, the general rule is that he shall order that he costs follow the event except where it appears to him in the circumstances of the case some other order should be made as to the whole or any part of the costs. But he must not apply this or any other general rule in such a way as to exclude the exercise of the discretion entrusted to him and the material must exist upon which the discretion can be exercised. The discretion, like any other must be exercised judicially and the judge ought not to exercise it against the successful party except for some reason connected with the case. It is not judicial exercise of the judge's discretion to order a party who was completely successful and against whom no misconduct is even alleged to pay costs."*
>
> *To my mind, in determining the issue of costs, the court is entitled to look at inter alia **(i)** the conduct of the parties, **(ii)** the subject of litigation, **(iii)** the circumstances which led to the institution of the proceedings, **(iv)** the events which eventually led to their termination,**(v)** the stage at which the proceedings were terminated, **(vi)** the manner in which they were terminated, **(vii)** the relationship between the parties and **(viii)** the need to promote reconciliation amongst the disputing parties pursuant to Article **159 (2) (c)** of the Constitution.[11] In other wards the court may not only consider the conduct of the party in the actual litigation, but the matters which led to the litigation, the eventual termination thereof and the likely consequences of the order for costs.[12].*

21. The general rule is that the unsuccessful party will be ordered to pay cost to the successful party but court may make a different order. A judge must have regard to all the circumstances of the case including the conduct of the parties and whether a party has succeeded on part of the case even if it has not been wholly successful.

22. In this matter I have been persuaded by the Applicant that on the authority **of Kenya Human Right Commission and another v The Honourable Attorney General and 6 others** (supra) the Honourable Court should not have awarded cost to the respondent on account of the suit having been brought in public interest and that public interest litigation is for the benefit of the public and not the person or entities that institute the proceedings, which authority they submitted to the court

23. The question therefore for determination, is whether in awarding the respondent cost, the court did not exercise its discretion properly and whether the matter herein is public interest litigation within the context of the Kenya Human Right's case as submitted by the Applicant.

24. Whereas the Applicant is a Public body with Constitutional mandate to enforce the Anti-Corruption laws, the matter herein cannot be called a public right interest litigation purse within the meaning of the Kenya Human Right Commission case and therefore the submissions by the Applicant herein is misplaced.

25. In awarding the Respondent cost, the trial court was very clear that it should not have been sued by the Applicant in the first place and on that basis awarded her cost. There are no new matters raised by the applicant which were not placed before the court and a look at the ruling by the judge does not indicate that there was any error on the face of the record which would entitle the Applicant to review.

26. I have however noted that the Respondent's name was struck out at the application stage and is of the considered opinion that the same was only entitled to the cost of the Application and not of the main suit which has not been determined on its merit

27. I take the view that the Respondent only succeeded on the application and would therefore award the same only the cost of the application and not of the suit. I therefore review the order made on 30th September 2020, set aside the order in respect of the cost of the suit to the respondent and substitute the same with cost of the application.

28. And it is ordered

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF JUNE, 2021

.....

J. WAKIAGA

JUDGE

In the Presence of:

Mr. Mare for Respondent

Mr. Mukele for 12th Respondent

Mr. Mugi for the Plaintiff/Applicant

Hope, Court Assistant