

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 80 OF 2015

ROBAI KADILI AGUFA.....1ST APPELLANT

IRENE MARIA MMBOGA AGUFA.....2ND APPELLANT

VERSUS

KENYA POWER AND LIGHTING CO. LTD.....RESPONDENT

RULING

1. On 10th April 2019, I delivered a judgment herein, where I dismissed the appeal herein, and awarded costs to the respondent. The appellants have now come back, with a Motion dated 29th May 2019, seeking, principally, that I review the judgement with respect to the award of costs, and that I order that each party bear their own costs both with respect to the suit at the trial court and on appeal.

2. Their case is that, whereas they have accepted the judgment, to the extent that it held that the magistrate's court had no jurisdiction over the dispute, they felt that they should have been spared the costs. Firstly, because the appeal was not determined on merit but on a technicality. Secondly, because the appellants are not entirely to blame for seeking redress at the nearest court, for the respondent, a state funded and controlled organ, had failed in its obligation to ensure that it made its tribunal more accessible to its customers. They also plead poverty, on grounds that they are no longer in business and would be unable to meet the costs, which they believe could be considerable.

3. The application is opposed. It is argued that the application seeks to hinder the respondent from enjoying the just fruits of its judgement, by recovering the costs it incurred in defending the appeal. It is argued further that the appellants were well aware of the proper forum where they ought to have taken their litigation. The trial court had pronounced that it had no jurisdiction but the appellants, instead of heeding the ruling, chose to pursue an appeal.

4. Directions were taken on 17th September 2019, for disposal of the Motion by way of written submissions. There has been compliance as both sides have filed their respective written submissions.

5. The appellants submit that they were entitled to apply for review, and cited Order 45 rule 1 of the Civil Procedure Rules. It is also submitted that, although, under section 27 of the Civil Procedure Act, Cap 21, Laws of Kenya, costs should ordinarily follow the event, the same provision gave the court some latitude to waive costs. It is submitted that the appellants have advanced some reasons as to why the court should have exercised discretion in their favour. Firstly, because they were financially down. Secondly, they have made peace with the respondent, by settling all the outstanding bills. Thirdly, they submit that these reasons came to their mind only after the court had disposed of the appeal, and there was, therefore, no chance for them to place the arguments before the court until now. Fourthly, they argue that the circumstances did not favour grant of costs to the respondent. They accuse the respondent of not extending the tribunal, to which the appellants could have commenced their suit, to stations out of Nairobi to make it more accessible to their rural customers. They have cited decisions in *Kenya Power & Lighting Co. Ltd vs. Joseph Kiprono Kosgey* [2012] eKLR and *Prof. Daniel N. Mugendi vs. Kenyatta University and others* [2013] eKLR.

6. The respondent on the other hand submits that the appellants appeared to anchor their review application on the ground of other sufficient reason, and argue that the reasons advanced could not fall under that ground for they were not analogous to the other two grounds, discovery of new matter and error on the face of the record. It was cited *Stephen Gathua Kimani vs. Nancy Wanjira Waruingi t/a Providence Auctioneers* [2016] eKLR. It also cited *Cecilia Karuru Ngayu vs. Barclays Bank of Kenya Limited* [2016] eKLR, to make the point that, in determining whether to impose costs, the court has to consider the various steps that the parties took to appreciate the trouble taken by both sides since the suit was filed. It is submitted that the trial court dismissed the primary suit for lack of jurisdiction, at the preliminary stage, but the appellants, instead of filing their claim before the proper forum, and save costs, insisted of moving to the High Court on appeal, and thereby exposing themselves to more costs.

7. On whether the appellants are entitled to seek review of the impugned order, it would appear that there is no dispute as the respondents have acknowledged that right. The only issue is whether the grounds upon which the review is being sought fall under what is envisaged in Order 45 rule 1 of the Civil Procedure Rules. Review is really about revising a decision on the two principal grounds that there was a glaring error on the face of the record and discovery of important matter of evidence which was not available at the time the decisions was being made. The third ground is omnibus, general or ancillary, what might be called any other ground. The respondent argues that the appellants' application appears to be anchored on that ground, for it was not claimed that there was an error apparent on the face of the record, nor that the appellants had suddenly stumbled on relevant matter that they did not have at the time the order was made.

8. The traditional approach to the third ground has always been that other sufficient reason ought to be something analogous to the other two grounds. The other approach, which is fairly generous, is that the court can entertain any other excuse to review the order. I do not believe that Order 45 rule 1 gives the court a *carte blanche* to entertain all sorts of reasons for review of its orders. Review has to be considered purely with respect to evidence or matter that the parties did not have, and could not access before the order was made, or where the ruling or order or judgement or decree comes out with an error, having regard to what is on the record, that is glaring and which requires correction, or

any other reason. Any other cause or reason must be such that the parties had no opportunity to place that material before the court or something that was not before the court at the material time and could not possibly be placed before the court at all at that time. Review is about the unforeseeable.

9. The review application turns on costs that were awarded at the point the appeal was dismissed. Costs are awarded at the determination of a suit or appeal or application, and they follow the event, unless the court orders otherwise. A party prosecuting or defending a suit or appeal or application knows that at the end of it, the court will have to decide whether or not to award costs. In urging the suit or appeal or application, the parties have the opportunity to make submissions, not only on the merits or otherwise of the suit or appeal or application, but also on the matter of costs, whether the suit or appeal or application is allowed or dismissed. A party who fails to take advantage of the hearing of the matter to submit on the issue of costs, should not be entertained, when, after costs have been awarded, he approaches the court to make a case, with respect to costs, that he should have made at the hearing of the suit or appeal or application. He had the opportunity to place the issue of costs before the court, but then squandered the chance. The award of costs is a foreseeable consequence of the determination or outcome of the suit or appeal or application. It is a matter in respect of which review should not be available.

10. Having come to the conclusion that I have arrived at above, I believe the matter is at rest. However, let me still address the question of the exercise of discretion by the court to award costs. It is common ground that costs follow the event. They are awarded to the party who is deemed to have been successful in the litigation, not to punish the other party, but to have the party, who was needlessly dragged to court, recoup his costs.

11. In this case, the appeal failed, and, therefore, the respondent could be said to have had successfully resisted it. Costs followed that success. I appreciate that the respondent is a parastatal entity, but it is also a commercial entity, supplying power and incurring expenses in the process. It has overheads to meet out of the revenue it generates from the supply of power. It is not in the same footing with a pure state entity, such as a ministry, which is dependent completely on public funds for its operations. A body, such as the respondent, is entitled to costs of litigation in the circumstances. The issue of jurisdiction was addressed by the trial court. If the appellants were not aware that jurisdiction with respect to disputes such as the one they had, the decision of the trial court brought them to the light. They should have heeded that decision, guided, as it was, by the relevant statutes, and seeing that the appellants had the benefit of legal counsel all through. The appeal was ill-advised and unnecessary in view of the statutory provisions. Persons who file unnecessary suits must suffer the pain, of having to expose their adversaries to unnecessary expense, of having to meet those unnecessary expenses themselves.

12. I find no merit in the Motion dated 29th May 2019, and I hereby dismiss the same, again, with costs to the respondent.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 13TH DAY OF MARCH, 2020

W. MUSYOKA

JUDGE