



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS APPLICATION NO.595 OF 2014

URBAN PROPERTIES CONSULTANTS AND

DEVELOPERS LTD..PLAINTIFF

-VERSUS-

HENKAM LTD.....DEFENDANT

AND

G.T. MATHU.....1ST INTERESTED PARTY

WAQAMBO QAMBO.....2ND INTERESTED PARTY

SAMUEL KINYANJUI.....3RD INTERESTED PARTY

PAUL MACHARIA NJOGU.....4TH INTERESTED PARTY

STEPHEN NDIRANGU WAIGWA.....5TH INTERESTED PARTY

ELIJAH NGUGI MACHARIA.....6TH INTERESTED PARTY/RESPONDENT

RULING

1. This ruling is in respect to the application dated 7th December 2018 wherein the defendant/applicant seeks the following orders:-

1. That the Order No. 3 of Judge Farah S. M. Amin made on the 18th August, 2015 to the extent it affects the defendant, be set aside absolutely.

2. That the costs of this application be specifically provided for.

2. The application is brought under Sections 1A, 1B, 3A, and 63 of the Civil Procedure Act and is premised on the grounds that;

a) The plaintiff/applicant in this Miscellaneous Application did serve all the parties involved herein.

b) The defendant Henkam Ltd did not participate in this Miscellaneous Application.

c) The defendant could not in law be condemned to pay costs in the circumstances.

d) There exist reasonable cause to warrant the setting aside of the order complained of.

e) Whatever the circumstances the applicant in this Miscellaneous Application could not have this matter transferred to the

High Court without the Miscellaneous Application.

3. The application is supported by the affidavit of the defendant's advocate **Mr. Moses Siagi** who avers that the subject Miscellaneous Application made by the plaintiff in CMCC 6364 of 2014 (Nairobi) that gave rise to the impugned orders was specifically for the transfer of the said suit. He states that since the defendant did not participate in the said application, the defendant should not have been condemned in respect to costs.

4. The plaintiff/respondent opposed the application through the Grounds of Opposition dated 4th March 2019 wherein it lists the following grounds:-

1. The defendant was dissolved on 16th May 2016 Vide Kenya Gazette Notice No. 4077 hence it is legally incapable of making such an application. (attached is a copy of the Kenya Gazette Notice).

2. That counsel for the defendant ought first to substitute the defendant in view of the dissolution aforesaid.

3. That the defendant having been dissolved on 16th May 2016, the Law Firm of Siagi & Co. Advocates legally represents no one in the suit currently.

4. That consequent to (3) above the Law Firm of Siagi & Company advocates lacks locus standi to file or bring up the application in issue of the same is purported brought for the defendant which is legally dissolved.

5. That the application dated 7th December 2018 should therefore be dismissed immediately with costs to the plaintiff.

5. The plaintiff Director **Mr. Ernest Stephen Kamau** swore a replying affidavit dated 29th April 2019 in response to the application. He avers that the orders sought in the said application are ambiguous and incapable of being granted as the impugned order was not attached to the application so as to enable this court decipher exactly which order the defendant seeks to set aside.

6. On 25th July 2019 the defendant/applicant filed a further affidavit of **Ms Christine Kalugu** in response to the plaintiff's replying affidavit wherein she avers that through an order made by Nzioka J. on 24th April 2019, the court restored the defendant to the Register of Companies. A copy of the said order was attached to the further affidavit as annexure "CK2".

7. She further attached a copy of the impugned order of Farah J as annexure "CK3". She stated that it was unjust and prejudicial for the court to condemn the defendant to bear the costs in the circumstances of the case.

8. She contends that as a consequence of impugned order party and party costs have been taxed at Kshs 5,066,831, which taxation is immoral, in excess and exorbitant as the court ought to have taken into account the fact that the defendant was dragged to court and should not be made to bear the costs of the application.

9. Parties agreed to canvass the application by way of written submissions. When the matter came up for hearing on 22nd January 2020 both counsel informed this court that they had filed written submissions which they sought to rely on entirely. The court then listed the case for Ruling on 23rd April 2020.

10. A perusal of the court file however shows that contrary to the claim that they had filed submissions none of the parties submissions is in the court file. This court takes a great exception to the casual and flippant manner in which the counsel for the parties herein have dealt with the issues of filing written submission as it is clear that they misled the court on the said issue.

11. Be that as it may and in the interest of expediting the conclusion of this matter, this court will go ahead to determine the merits of the application dated 7th December 2018 based on the pleadings filed the parties.

12. The main issue for determination is whether the applicant/defendant has made out a case for the setting aside of order No. 3 of the ruling made by Farah J. on 18th August 2015.

13. The full text of the impugned order(s) was as follows:-

1. Application for transfer granted.

2. Preliminary Objection dated 16th December 2014 dismissed with costs.

3. Costs to be paid by the defendant and sixth interested party on an Indemnity basis.

4. Application for interim order adjourned to a hearing of the application.

5. Leave to the parties formerly joined b the court below to renew their applications.

Order accordingly.

14. Looking at the above order in its totality, it is clear that the defendant/applicant is aggrieved by the order No. 3 thereof condemning it and the 6th interested party to pay costs and now seeks the intervention of this court, to set aside the said order.

15. The question which then arises is whether this court can set aside an order on costs issued by another court of concurrent jurisdiction.

16. In the present case, it is clear that the Learned Judge, Farah J., upon determining the application to transfer suit, exercised her discretion in awarding the costs to the plaintiff. The general rule as to costs is provided for in section 27 of the **Civil Procedure Act** which provides as follows:

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.

17. In the case of **Supermarine Handling Services Ltd v Kenya Revenue Authority Civil Appeal** No. 85 of 2006 the Court of Appeal expressed itself thus:

“Costs of any action or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts. If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance...Thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where the reasons are given if it considers that those reasons do not constitute “good reason” within the meaning of the rule...In the instant case the learned Judge gave no reasons whatsoever for his decision to deprive the successful plaintiff of its costs and yet it was not shown that the defendant had been guilty of some misconduct which led to litigation. In the court’s view the learned Judge’s order was wrong and for the foregoing reasons, the plaintiff’s appeal succeeds as to the award of interest and costs on the principal sum awarded”.

18. In **Devram Manji Daltani v Danda** [1949] 16 EACA 35 it was held that a successful litigant can only be deprived of his costs where his conduct has led to litigation, which might have been averted.

19. Guided by the dictum in the above case cited cases, I find that it is not within the purview of this court and indeed even the Court of Appeal, for that matter, to interfere with the learned judge’s exercise of discretion in awarding costs.

20. A perusal of the applicant’s further affidavit shows that the applicant is dissatisfied with the amount of costs awarded by the Taxing Master which it stated is exorbitant and in excess. My take is that the challenge on the amount awarded for costs is a matter that belongs to a different forum, where the applicant could have filed a reference in objection to the taxation.

21. In a nutshell and having regard to the above finding and observations, I find that the instant application is not merited and I therefore dismiss it with no orders as to costs.

Dated, signed and delivered via skype at Nairobi this 29th day of April 2020. in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Miss Wangui for Kimandu Gichohi for the applicant

Mr Mwaniki for Kimathi for defendant

C/A

&

DR

–

Hon.

Tanui