



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 117 OF 2019

IN THE MATTER OF ARTICLES 2(6), 10, 19, 20(1), (2), (3) & (4),

21(1), 22(1), (2), (3), (a), (b), (c), & (e), 25(a), 27 (2) (5), 28, 29 (f), 31, 35(2)

AND

IN THE MATTER OF ALELGE CONTRAVENTION FO TH BILL OF

RIGHTS UNDER ARTICLES 10, 22, 23(3), 40(1), 27 AND (3), 42

AND 47 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

KO HOLDINGS LIMITED.....PETITIONER

VERSUS

COUNTY GOVERNMENT OF KIAMBU.....RESPONDENT

AND

RED HILL KENTMERE RESIDENTS ASSOCIATION.....INTERESTED PARTY

RULING

APPLICANT’S CASE

1. The Petitioner / Applicant through Notice of Motion brought pursuant to Section 1A and 80 of the Civil Procedure Act; Order 45 Rule 1 of the Civil Procedure Rules 2010 seek the following orders:-

a) That Notice of this application upon the Respondent and Interested Party be dispensed with and the application be heard ex-parte in the first instance by reasons of the urgency and the same be heard inter-parte in the first instance by reasons of the urgency and the same be heard inter-partes on such date as this Honourable Court may direct.

b) That pending the hearing inter parties of this application the Honourable court be pleased to grant a temporary order of stay of the Bill of Costs filed by the Interested Party and/or taxation proceedings.

c) That the Honourable Court be pleased to review and /or set aside its judgment delivered on 19th December 2019 with respect to costs to the Interested Party.

d) That the costs of this Application be provided for.

2. The application is premised on the ground on the face of the application being thus:-

- a) That judgment was delivered on 19th December 2019 where the court dismissed the petition with costs to the Respondent and Interested Party
- b) That the Court's decision to award costs to the Interested Party was made by mistake or error apparent on the face of the record given that the Petitioner had no claim against the Interested Party.
- c) That the Interested Party joined these proceedings well after the Petitioner had filed and exchanged its pleadings with the Respondent.
- d) That the Petitioner had no claim at all against the Interested Party.
- e) That in view of paragraph 2, 3 and 4 (above), the Interested Party's decision to tax its bill is uncalled for.
- f) That it is fair and just that the orders sought by the Petitioner be granted.

INTERESTED PARTY'S RESPONSE

3. The Interested Party is opposed to the Petitioner's application dated 24th February 2020 and in doing so filed ground of opposition dated 2nd March 2020 urging that the application is frivolous; vexatious and an abuse of the Court process. It is further averred that the Application offends the provisions of Section 81 of Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules.

4. It is urged the Application is a mere afterthought as the Applicant is merely seeking to invite this Court to sit as an Appellate Court over its own decision on the question of costs and as such it is urged the application is contrary to the provisions of **Rule 26 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) practice and procedure Rules 2013 (otherwise commonly known as the Mutunga Rules)** and **Section 27 of the Civil Procedure Act**.

5. The Interested Party further contend that the application is devoid of merit; That it is merely speculative and prejudicial to the Interested Party.

ANALYSIS AND DETERMINATION

6. I have very carefully considered the Petitioner's / Applicant's application, grounds in support and affidavit in support, the Interested Party's grounds of opposition; parties rival submissions and from the above the issue arising for determination is one being as follows:-

a) Whether the Petitioner/Applicant has met the threshold for granting of orders of Review in terms of Section 80 of the Civil Procedure Act and Order 45 Rule (1) of the Civil Procedure Rules?

7. This Court through its Judgment delivered on 19th December 2019 upon hearing the counsel and considering parties respective pleadings it upheld the Respondent's and Interested Party's objections to the competence and jurisdiction of the Honourable Court hearing and determination of the instant Petition. The Court upheld the preliminary objections and dismissed the instant petition with costs as the Respondent and Interested Party. The Petitioner / Applicant therefore being aggrieved by Court's said orders seeks to have the Court review and /or set aside the same as regards only costs awarded to the Interested Party.

8. The Petitioner/Applicant in seeking review orders relies on **Section 80 of the Civil Procedure Act** which provides: -

"80. Any person who considers 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 judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

9. The Petitioner/Applicant's application is further premised on **Order 45(1) of the Civil Procedure Rules** which provides :-

"[Order 45, rule 1.] Application for review of decree or order.

1. (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.”

10. Under **45 (1) of the Civil Procedure Rules** an application for review of Judgment to the Court which passed the decree or made the order is supposed to be brought to the Court without unreasonable delay.

11. The Interested Party contention is that the Petitioner/Applicant is guilty of unreasonable delay and had deliberately waited until the statutory timelines for filing an appeal to lapse and has not explained the reasons for the delay. It is Interested Party; contention that the impugned order herein was made on 19th December, 2019 and Applicant waited for over two (2) months to file the instant application.

12. The Applicant on the other hand contend the application has been made timeously and without unreasonable delay. It is urged that the Judgment was rendered on 19th December 2019, a day before the three-week Christmas vacation. That **Order 50 Rule 4 of the Civil Procedure Rules** provides that the computation of time for purpose of proceedings brought under Rules exclude the 21st day of December in any year and the 13th day of January in the year next following (both days included).

13. In the instant application there is no dispute that judgment was delivered on a Thursday on 19th December 2019. The following day the 20th December 2019 was on a Friday and a working day. The vacation ended 13th January 2020 and from 13th to the date of filing of the application on 24th February 2020 is 31 clear working days. The Applicant has not explained why he delayed to file the application after the end of the High Court Vacation.

14. I find that the application filed on 24th February 2020 after delivery of Judgment on 19th December 2019 has been filed was out of time and after unreasonable delay. The filing of the application after more than 30 working days in my view offends the provisions of **Order 45 Rule 1 of the Civil Procedure Rules** which demands an application for review of the Court's Judgment or an order be filed without unreasonable delay. I find that in absence of any explanation for the delay this is not a suitable case for the court to exercise its discretion in favour of the Applicant.

15. The Applicant contend that the Courts have held time and again that pursuant to **Order 45 of the Civil Procedure Rules**, an error apparent on the face of the record constitutes a valid ground for review of a court decision. It is urged by the Applicant that such an error, must be such an error, which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions.

16. The Applicant avers that the subject of this application suffers such an error on the face of the record for the reason that the court in making its decision failed to take into account the fact that the interested party had not been sued by the Petitioner but willingly invited itself in these proceedings at its own costs and expense with a view to advancing its course. That the Petitioner had no claim against the Interested Party in the first place; even after inviting itself in the proceedings. It is asserted the petitioner did not seek any claim from the Interested Party.

17. The Applicant contend that these issues are factual and can be picked out on the face of the record.

18. What constitutes error on face of the record is well settled. It is clear that the error must be evident on the face of the record and should not require an elaborate argument to be established. In the case of **National Bank of Kenya Limited vs. Ndungu Njau [1997] eKLR** the Court stated that :-

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review”

19. The Interested Party urge that the contention is that the Court erred by awarding costs to the Interested Party. It is submitted by the Interested Party an award of costs to a party cannot be said to be an apparent error on the face of the record and/or a mistake. The award of costs in Civil matters in my view do not constitute to an error apparent on the face of record nor can it be termed as a mistake since the same is a statutory and discretionary exercise of power by a court pursuant to **Section 27 of Civil Procedure Act and Rule 26 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Protected Procedure Rules 2013**.

(Mutunga Rules) in which it is provided under Rule 26 as follows:-

“26. (1) The award of costs is at the discretion of the Court.

(2) In exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms.”

20. Under Section 27 of the Civil Procedure Act it is clearly provided that costs always follow the event.

21. I find that the question of costs is a substantive question of law and the exercise of discretionary power by Court, and considering the present application, I find the court is being asked to sit as an appellate court over its own decision. That even if the court reached an erroneous conclusion on costs, this is question of Law or misconstruing a statute or provision of law which cannot in my view be a ground for review of this Court's decision.

22. From the above I find that the Petitioner/Applicant has not met the threshold as set out under **Order 45(1) of the Civil Procedure Rules** to warrant granting the application seeking review of this Court's decision on issue of awarding costs to the Interested Party. The Petitioner/Applicant has not demonstrated that there is mistake or error apparent on the face of the record or any sufficient reason to warrant review. Furthermore the application for review herein was not made without unreasonable delay.

23. The upshot is that the Petitioner's / Applicant's application dated 24th February 2020 is without merit and is dismissed with costs.

Dated, Signed and Delivered at Nairobi on this 28th day of May, 2020.

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J. A. MAKAU

JUDGE