



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 1137 OF 2006

PATRIOTIC GUARDS LTDPLAINTIFF

VERSUS

KENYA ELECTRICITY GENERATING CO. LTD.....DEFENDANT

RULING

1. The application dated 27th August, 2019 seeks orders that:

(a) That, this honourable court be pleased to order for Review of the court ruling delivered on 16th day of October, 2018 on the omission of costs of the main suit.

(b) That subsequent to prayer (a); above this honourable court be pleased to order the Plaintiff/Respondent to bear costs of the suit.

(c) That costs be in the cause.

2. It is stated in the grounds and the affidavit in support of the application that the ruling the subject matter of the application omitted to determine who was to bear the costs of the suit. It is further averred that the Defendant incurred the costs of defending the suit herein which now stands dismissed in terms of the said ruling.

3. The application is opposed as per the grounds of objection herein dated 22nd November, 2019 and the replying affidavit sworn by Titus Kigen, the Plaintiff's Managing Director on 22nd November, 2019. The replying affidavit does not address itself to the matters at hand. The grounds of objection are as follows:

1. The application is incompetent for failure to adhere to paragraph 11 (4) of the Advocates Remuneration Order as they did not object to the decision of the Taxing Officer within 14 days as the Applicants costs of their application dated 23rd May, 2017 was duly awarded.

2. Under 4th Edition (Re-issue 2010) Vol 10 paragraph 16. This court should not be bulldozed to award costs.

“The court has discretion as to whether costs are payable by one party to another the amount of those costs and when they are to be paid where costs are in the discretion of the court a party has no right to costs unless and until the court awards them to him AND THE COURT HAS AN ABSOLUTE AND UNFETTERED DISCRETION TO AWARD OR NOT TO AWARD THEM THIS DISCRETION MUST BE EXERCISED IN ACCORDANCE WITH REASON AND JUSTICE.

4. I have considered the application, the response to the same and submissions filed by the respective counsel for the parties.

5. Section 27 (1) Civil Procedure Act 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 an 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...”

6. The ruling dated 16th October, 2018 gave the Plaintiff 120 days to fix the suit for hearing. In default the suit stood dismissed. Costs follow the event. However, the court has discretion to determine the question of facts. In the case at hand, there was an omission by the court to determine the question of costs. The suit ought to have stood dismissed with costs.

7. The application has merits and is allowed.

Date, signed and delivered at Nairobi this 18th day of June, 2020

B. THURANIRA JADEN

JUDGE