REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 990 OF 2011

IN THE MATTER OF THE ESTATE OF WILSON ABURA LILUMA alias ABURA LILUMA (DECEASED)

RULING

1. On 21st September 2016, Sitati J delivered a judgement herein, wherein a summons for revocation of grant, dated 11th May 2015 was allowed, and costs awarded to the applicant. The said application had been brought at the behest of Dorcas Asinyilwa, who I shall refer hereafter as the applicant, seeking to have the grant held by Moses Musa Lumiti Abura, who I shall refer hereafter as the administrator, revoked. Wevarsity Sacco Society Limited, was named as interested party in those proceedings, and I shall refer to the said entity as such hereafter.

2. The interested party had bought an asset of the estate from the administrator, and the effect of the decree, in the judgement of 21st September 2016, was that the said sale transaction stood nullified, and the property reverted to the estate. The interested party was aggrieved by that outcome, and lodged an appeal at the Court of Appeal, in Kisumu CACA No. 91 of 2016. Its appeal was allowed, in a judgement rendered by the Court of Appeal, on 28th September 2017, wherein the High Court judgement of 21st September 2016 was set aside. Costs were ordered in favour of the interested party, to be borne by the applicant and the administrator.

3. Having succeeded in its appeal in Kisumu CACA No. 91 of 2016, the interested party drew and filed herein a bill of costs, dated 10th September 2018. The bill was placed before the Deputy Registrar of the High Court, Hon. Maragia, as taxing officer, who, in a short ruling, rendered on 14th May 2019, declined to tax the bill, on the ground that the costs for the High Court litigation had not been awarded, in the judgment of the High court, to the interested party, adding that the only party who could legitimately seek to tax a bill at the High Court was the applicant, in whose favour the costs had been awarded. After the Court of Appeal rendered its judgement in Kisumu CACA No. 91 of 2016, the interested party placed a copy of it before Hon. Maragia, arguing that the Court of Appeal had awarded costs in its favour. Whereupon Hon. Maragia ruled that the Court of Appeal had awarded costs to the interested party in respect of the appeal that was before it, and that what the interested party should have done was to file its bill of costs at the Court of Appeal.

4. The matter was subsequently, placed before me, presumably for me to give directions on the matter. The proper course of action should have been that counselled by Hon. Maragia, on 17th January 2020, that the interested party apply for review of her orders. A formal application ought to have been filed for a review of those orders, so that the Judge could decide on whether to review them on grounds of either an error on the face of the record, or discovery of important matter that was not available before Hon. Maragia made the orders, or any other sufficient reason. The business of simply placing matters before a Judge so that earthshaking orders are made on such issues as relate to costs, which, no any event, comprised integral parts of the judgements by this court and the Court of Appeal, should be discouraged.

5. Be that as it may, the matter was placed before me on 14th July 2020. Mr. Abok, for the interested party, addressed me. He informed me that the taxing officer had declined to tax the bill, on grounds that her ruling of 17th January 2020 had not been reviewed. He invited me to rule on the matter. He submitted that the matter had gone up to the Court of Appeal, and costs had been awarded in favour of the interested party. He asserted that the interested party was the ultimate winner of the litigation, and was entitled to its costs. Ms. Andia, for the applicant, submitted that the High Court did not award costs to the interested party. She stated that the costs awarded to the interested party were by the Court of Appeal, in respect of the appeal and not the High Court matter. She submitted that if the interested party felt strongly entitled to costs at the High Court, then it ought to apply formally for an award of the same. She further submitted that the interested party should tax its bill at the Court of Appeal, the court which had awarded it costs.

6. The last paragraph of the judgement of Sitati J. reads as follows:

> *"In a nutshell, this court finds and holds that all transaction* (sic) *made pursuant to the revoked grant cannot stand and are hereby cancelled. Accordingly, the applicant's summons for Revocation dated 11.05.2015 be and is hereby allowed in its entirety with costs to the applicant."*

7. My understanding of the ruling is that the contest was between the applicant and the administrator, on revocation of the grant held by the administrator; the applicant was the successful party, and costs were logically awarded to her.

8. The final order by the Court of Appeal in Kisumu CACA No. 91 of 2016, in the judgement of 28th September 2017, reads:

> *"35. In view of the foregoing we hereby allow this appeal and set aside the High Court judgment dated 21st September, 2016. The respondents shall bear the costs of this appeal."*

9. The order on costs by the Court of Appeal is fairly specific, that the costs awarded were in respect of the appeal. The Court of Appeal vacated the judgement of the High Court, and did not make any orders with respect to who was entitled to costs of the High Court litigation,

following the setting aside of the judgement of the High Court. That would mean that the interested party was only entitled to the costs of the appeal, and not of the litigation at the High Court. There would be no basis for it, therefore, to tax a bill at the High Court with respect to the judgement of the High Court. If the Court of Appeal had intended to award costs to the interested party, both at the High Court and the Court of Appeal, nothing would have been easier than for the Court of Appeal to say so in its judgment. The fact that it did not would mean that no costs were awarded to the interested party with respect to the litigation at the High Court.

10. I agree with Hon. Maragia, the Court of Appeal did not award costs on the High Court litigation to the interested party, and, therefore, there is no foundation for taxation of the bill of costs, dated 10th September 2018. I agree too with Ms. Andia; the interested party is better of taxing its bill at the Court of Appeal. She had submitted that the interested party, if it feels strongly that it is entitled to costs at the High Court, should it be so minded, ought to move the High Court formally for costs. I beg to differ. The interested party prosecuted an appeal against the judgement of 21st September 2016, which, apart from allowing the revocation application, had made a pronouncement on costs. When the interested party challenged that judgement on appeal, the contest should have also been around the issue of the costs at the High Court. The judgement of the High Court was litigated on appeal. The interested party ought to have canvassed the issue that it was entitled to the costs of the High Court litigation, within its appeal. If it did not raise it then then it lost a critical opportunity. If it raised it, and the same was not addressed by the Court of Appeal, then it cannot revisit the issue before the High Court.

11. I was invited to give directions on the matter. I do not think that there is anything for me to give directions on. I understand my mandate to be limited to interpreting the judgements of both the High Court and Court of Appeal on costs. I have done so in the foregoing paragraphs. I will let the matter rest at that. Any party unhappy, with the interpretation above, of the two judgments, is at liberty, if the same is permissible, to seek a second opinion on the matter from the Court of Appeal.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 8th DAY OF September, 2020

W. MUSYOKA

JUDGE