



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 433 OF 2015

JUDICIARY OF KENYA.....APPELLANT/APPLICANT

-VERSUS-

THREE STAR CONTRACTORS LTD.....RESPONDENT

RULING

1) **Three Star Contractors Ltd**, the applicant herein, took out the motion dated 2nd November 2020 whereof it sought for inter alia that this court vary, review and or set aside the judgement and decree issued on 31st March 2017 by deleting the award of costs. The motion is supported by the affidavit deponed by Ashioya Biko.

2) In response to the motion, **The Judiciary of Kenya**, the respondent herein filed grounds of opposition to resist the motion.

3) When the motion came up for interpartes hearing, learned counsels were invited to make oral submissions.

4) I have considered the grounds stated on the face of the motion and the facts deponed in the supporting affidavit plus the grounds of opposition. I have further considered the rival oral submissions. It is the submission of M/s Nasimiyu learned advocate who held brief for Mr. Ashioya for the applicant that there is a manifest error and mistake on the face of the court's record and on the court's judgement delivered on 31st March 2017.

5) It is pointed out that the court awarded the respondent costs which is prohibited by law under Section 175(7) of the **Public procurement and Asset Disposal Act** no. 33 of 2015. It is argued that the court had no jurisdiction to award costs.

6) Mr. Ochieng, learned advocate for respondent, opposed the motion arguing that the same was filed after an undue delay of 3 years from the date of delivery of judgment. The learned advocate further argued that there is no apparent error or mistake made by this court because the applicable law was the Public Procurement and Disposal Act of 2005 (now repealed) and the Public Procurement and Disposal Act of Assets no. 33 of 2015.

7) Mr. Ochieng argued that the new Act could not be applied retrospectively. According to the respondents' advocate the court had jurisdiction to award costs pursuant to Section 27 of the Civil Procedure Act in which costs follow the event.

8) The respondent also argued that the application violates the doctrine of finality of this court's orders hence contrary to public interest. It is further argued that the application does not meet the requirements necessary in an application for review. It is said the application is basically challenging the correctness of the decision which means it is a matter for the Court of Appeal to determine.

9) In response to the respondent's submissions, the applicant stated that it has explained the delay in the current motion. It is deponed in the supporting affidavit of Mr. Ashioya Biko, that the applicant wrote several letters to the Deputy Registrar of this court seeking for audience with the judge to clarify the award on costs with no avail. It is also stated that the applicant filed a preliminary objection to the Bill of Costs and in the process a lot of time was lost.

10) After considering the rival submissions and the material placed before this court, it is now apparent that the following issues have arisen for the determination

First, whether there was inordinate delay in bringing in filing the application for review.

Second, whether the application should be regarded as an application for review or an appeal.

Thirdly is which is the applicable law.

11) On the first issue, it is the submission of the Respondent/ Applicant that it explained the cause of the delay in filing the application for review. It is stated on the certificate of urgency that the application for review was filed without unreasonable delay. The appellant/respondent is of the submission that there is no explanation the delay in filing the application. The provisions of Order 45 rule 1(1) (b) of the Civil Procedure Rules expressly states in part that

“..... Any person considering himself aggrieved by a decree or ordermay apply for review of the judgment to the court which passed the decree or made the order without unreasonable delay.”

12) The moment the Appellant/Respondent stated that there was no explanation for the unreasonable delay before filing the application it became incumbent upon the Respondent/ Applicant to offer an explanation for the delay. It is not in dispute that this court delivered its judgment on 31st March 2017 whereof it awarded the appellant/respondent costs.

13) The instant motion was filed on 2nd November 2020. In other words the Respondent/Applicant took about 3 years and 8 months from the date of judgment to file the instant motion. I have carefully perused the supporting affidavit sworn by Mr. Ashoya Biko and it is clear that there is no single paragraph the deponent offered to explain why it took the Respondent/ Applicant more than three years to file an application for review. The record shows the advocates from both sides were present when this court delivered its judgment on 31st March 2017.

14) In the absence of any explanation for the delay for 3 years 8 months, I am convinced that the instant motion was filed after unreasonable delay hence it should not be entertained.

15) The second issue is whether the application deserves to be regarded as an application for review. The respondent/applicant has expressly stated that it is seeking to review the order awarding the appellant costs on account that there is an apparent mistake or error on the face of record.

16) It is further argued that this court made an error by awarding costs without jurisdiction. The appellant/respondent is of the submission that the application should not be regarded as an application for review since it is more of an appeal. It is also argued that the applicant has not established any mistake or error apparent on the face of record as envisaged in Order 45 of the Civil Procedure Rules.

17) The character of an application for review is clearly defined under Order 45 rule 1(1) (b) of the Civil procedure as follows:

“Any person considering himself aggrieved by the 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 within his knowledge or could not be produced by him at the time when the decree was passed or order made or on account of some mistake or error apparent on the face of record or for any other sufficient reason, desires to obtain a review of the decree or order may apply for review of the judgment to the court which passed the decree or made the order without unreasonable delay.

18) I have already outlined the sort of orders the Respondent/ Applicant seeks. It has expressly stated that there is an error on the face of record in that this court awarded the Appellant/ Respondent costs contrary to the provisions of Section 175(7) of the Public Procurement and Disposal of Assets Act, 2015. In my view, I think the Respondent/Applicant’s application perfectly qualifies to be regarded as an application for review on the basis that there is an apparent error on record.

19) The final issue is the question as to which is the applicable law. I have already set out the arguments put forward by both sides over this issue. The decision of the Public Procurement Administrative Review Board (PPARB) was delivered on 11th August 2015. The appellant/respondent filed this appeal to challenge the decision of PPARB on 4th September 2015.

20) The provisions of Section 175(7) of the Public Procurement and Disposal of Assets Act, 2015 provides that where the decision of the Review Board has been quashed, the High Court shall not impose costs on either side. However, the provisions of Section 123 of the Public Procurement and Disposal Act 2005, provides that a party to a review may appeal from the decision of the Review Board to the High Court within 14 days after the decision is made. The 2005 Act is silent when it comes to costs which the 2015 Act expressly prohibits the award of costs.

21) It should be noted that the commencement date for the **Public Procurement and Disposal of Assets Act, 2015**, is stated to be **7th January 2016**. The applicable law to these proceedings therefore is the Public Procurement and Disposal Act, 2005.

22) The learned advocate for the Respondent/Applicant therefore misapprehended the point when he submitted that this court made an error to award costs contrary to **Section 175(7) of the Public Procurement and Disposal Act, 2015** because the Act could not operate retrospectively. The act did not have a clause stating that the 2015 Act would operate retrospectively.

23) Since the 2005 Act is silent when it comes to costs, the **Civil Procedure Act comes into play**. Under Section 27 of the Civil Procedure Act costs follow the event. Consequently, this court made no error as alleged by the Respondent/Applicant. In sum, the court acted with jurisdiction in awarding costs.

24) In the end, the Respondent/Applicant’s motion dated 2/11/2020 is found to be without merit and to have been filed with unreasonable delay. The same is dismissed with costs to the Appellant/ Respondent.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 17th day of December, 2020.

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J. K. SERGON

JUDGE

In the presence of:

.....for the Appellants

.....for the Respondents