



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL CASE NO. 188 OF 2012**

**MWANZO KAPTEMBWA SELF HELP GROUP**

Suing through officials

**FLORENCE WANGUI NGARI.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**PETER WARUI WAMAI.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**-VERSUS-**

**FLORENCE WAITHERA MUNGAI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**PETER KURIA IKUA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. By an application dated **15<sup>th</sup> May 2018**, the court is urged to review its earlier orders dated the **9<sup>th</sup> May 2018** pursuant to the 1<sup>st</sup> Defendants application dated 4<sup>th</sup> August 2014 where the 1<sup>st</sup> defendant was removed from the suit but did not specify which party was to pay the costs to the 1<sup>st</sup> defendant and whether the costs were for the application or for the suit. None of the other parties to the suit opposed the application as it was clear to them that its presence in the suit was not necessary.

2. I have considered the parties arguments and list of authorities and in particular **Major RTD Godfrey Masaba -vs- IEBC & 2 Others (2013) e KLR and Cecilia Karuru Ngayu -vs- BBK & Another, (2016) e KLR** to the effect that a decision whether or not to vary set aside or review earlier orders is a judicial discretion and the court could only do so if the review would serve useful purpose and justice to the parties.

3. In the circumstances of the case whose proceedings I have looked at, the 1<sup>st</sup> Defendant was not a necessary party and was dragged into court for no good cause by the plaintiffs. However the plaintiffs by their grounds of opposition dated 16<sup>th</sup> October 2014 thought otherwise, but changed their minds when on the 9<sup>th</sup> May 2018 they told the court by their advocate Mr. Ooga that they did not wish to oppose the application but sought an order of no costs. Likewise the 2<sup>nd</sup> Respondent did not oppose the application but sought costs as the 1<sup>st</sup> defendant had filed a defence.

4. An award of costs by the court is discretionary but circumstances dictate exercise of that discretion – **Section 27 Civil Procedure Act**. Costs also would follow the event unless the circumstances dictate otherwise.

So that when the 1<sup>st</sup> defendant's suit was withdrawn by the party who dragged him to court, necessitating him to seek legal counsel to file a defence on his behalf, then it goes without a doubt that his costs ought be paid unless all parties are in agreement that no costs ought to be awarded.

5. The court in its ruling dated 9<sup>th</sup> May 2018 in exercise of its discretion awarded costs of the **withdrawn suit** to the 1<sup>st</sup> defendant but did not state which party would pay such costs.

This was an oversight and error that ought to be corrected pursuant **Order 45 CPR** – by an application for review to clarify which party ought to pay the costs.

6. I therefore allow the application dated 15<sup>th</sup> May 2018 in the following terms that the court orders dated 9<sup>th</sup> May 2018 are reviewed in suitable terms **that the 1<sup>st</sup> Defendant's costs following the withdrawal of the suit against him shall be paid by the plaintiffs jointly and severally as may be agreed or taxed.**

**Dated, signed and delivered this 24<sup>th</sup> Day of January 2019.**

**J.N. MULWA**

**JUDGE**