



REPUBLIC OF KENYA



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**Okoti & another v Attorney General & 13 others (Petition 129 of 2015)
[2019] KEHC 11125 (KLR) (Constitutional and Human Rights) (15 March 2019) (Ruling)**

Okiya Omtata Okoiti & another v Attorney General & 13 others [2019] eKLR

Neutral citation: [2019] KEHC 11125 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION 129 OF 2015

WA OKWANY, J

MARCH 15, 2019

BETWEEN

OKIYA OMTATA OKOITI 1ST PETITIONER

NYAKINA WYCLIFFE GISEBE 2ND PETITIONER

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION 2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT

DELOITTE AND TOUCHE 4TH RESPONDENT

MUMIAS SUGAR COMPANY LIMITED 5TH RESPONDENT

CAPITAL MARKETS AUTHORITY 6TH RESPONDENT

DR EVANS KIDERO (MANAGING DIRECTOR 2003-2012) 7TH RESPONDENT

**PETER KEBATI (MANAGING DIRECTOR DIRECTOR 2012-2014) 8TH
RESPONDENT**

PETER HONGO (BUSINESS DEVELOPMENT MANAGER) . 9TH RESPONDENT

CHRIS CHEPKOIT (FINANCE DIRECTOR) 10TH RESPONDENT

PAUL MURGOR (COMMERCIAL DIRECTOR) 11TH RESPONDENT

CHRISTINE CHEPROTICH (COMMERCIAL MANAGER) 12TH RESPONDENT

EMILY OTIENO (COMPANY SECRETARY) 13TH RESPONDENT



RULING

1. The original petition dated 7th of April 2015, sought to have the 7th to 14th respondents held liable for the economic crisis and imminent collapse of the 5th respondent and also to have the amount issued to the 5th respondent as a bailout surcharged directly from them and not the public. At the time of filing the petition, the 7th – 14th respondents were employees of the 5th respondent (Mumias Sugar Company Limited) and the petitioners alleged that the 9th, 11th, 12th and 13th respondents being Directors and Managers of the 5th respondent had directly contributed to the disintegration and downfall of the 5th respondent and should therefore be held liable.
2. Through an application dated 28th September 2015 the 9th, 11th, 12th and 13th respondents sought to have the petition dismissed for, among other reasons, that the petition did not disclose any reasonable cause of action against them.
3. It is alleged that when the petition came up for hearing before Lady Justice Mumbi Ngugi on 11th of November 2015, she advised the petitioners to amend the petition so remove all the unnecessary parties including 9th, 11th, 12th and 13th respondents after which the petition was amended and the court allowed the withdrawal of the petition against the 7th – 14th respondents but with a rider that the petitioners pay costs of Kshs, 20,000/= to the said respondents which order triggered the application that is the subject of this ruling.

Applicants' case

4. Aggrieved by the award for costs of kshs 20,000/- payable to each of the 7th to 14th respondents, the petitioners moved this court through a notice of motion dated 11th day of January 2016 in which they sought the following orders:
 1. That this Honourable court be pleased to review its findings and set aside its orders dated and delivered at Nairobi on the 14th day of December 2015, with regard to the awarding of costs to the then 7th-14th respondents in the original petition.
 2. That in the alternative, this Honourable court be pleased to reinstate the 7th-14th respondents in the original petition.
 3. That pursuant to the above this Honourable court be pleased to grant such other or further orders as it shall deem fit and just for the preservation of justice and the honour of the court regarding the nature and circumstances of this case.
 4. That costs be in the cause.
5. The application is supported by the 1st applicant's affidavit and is premised on the grounds that the honourable court erred in ignoring the fact that the 1st applicant never applied to amend the petition but was urged, by the court, to remove the names of the 7th - 14th respondents from the suit. The applicant states that the court acted on its own motion and in a condescending and contemptuous manner by advising the applicant to drop the names of the 7th - 14 respondents notwithstanding the fact that the applicant and filed replying affidavits to the said respondents applications in which they sought to be removed from the suit.



6. The applicant claims that the court was wrong and acted unethically by penalizing the 1st applicant for acting on its free advice, which it gave on in its own motion, to remove the names of individuals who were not institutions from the petition and adds that it was also unreasonable and malicious for the court to award costs to the 8th respondent who did not enter any appearance in the matter.
7. The applicant further states that no evidence was adduced to support the finding that the applicant was acting in a malicious manner so as to warrant his being punished by an award of costs.
8. The applicant maintains that the petition filed against the respondents was a Public Interest Litigation (PIL) geared towards enforcing the Bill of Rights and safeguarding public funds for which no citizen should be made to suffer prejudice.

7th respondent's response.

9. The 7th respondent opposed the application through grounds of opposition dated 11th February 2017 in which it listed the following grounds:
 1. That an award of costs is an exercise of discretion of the High Court (Ngugi J) vested in it under Rule 26 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which cannot be set aside or reviewed by the same Honourable Court.
 2. That the application is incompetent as the applicants have not brought themselves within the narrow limits of review but have instead couched an appeal as a review which this Honourable Court lacks jurisdiction to hear and determine or grant any of the orders sought therein.
 3. That even assuming that this Honourable court has jurisdiction to review the order of this Honourable Court issued on 14th December, 2015 the applicants have not placed any material before this Honourable Court to show that the Honourable Court (Mumbi Ngugi J) wrongly exercised her discretion in awarding minimal costs of Kshs 20,000/- to the 7th respondent upon the withdrawal of the petition against him.
 4. That in any event it is the petitioners who voluntarily applied to amend their petition to withdraw their suit against the 7th respondent herein which suit now remains withdrawn. They cannot now purport to argue that the court misled them into withdrawing their petition against the 7th respondent.
 5. That costs as a matter of principle follows the events and having dragged the 7th respondent into this Honourable Court without any cause of action against him and subsequently withdrawing their case against him, the 7th respondent is entitled to costs.
 6. That the petitioners have not laid any basis or shown that the 7th respondent is guilty of some misconduct in these proceedings disentitling him to an award of costs of the withdrawn petition.
 7. That the application herein is frivolous, without iota of merit and is an abuse of the court process.
 8. That there is no law or rule prohibiting the grant of costs even in purportedly public interest claims and/or issues where such claims are frivolous and an abuse of the court process as the instant petition.



9. That on the basis of foregoing, the Notice of Motion application herein is filed in gross abuse of the process of Honourable court and ought to be dismissed with costs.

10th and 14th respondents' grounds of opposition

10. The 10th and 14th respondents similarly opposed the application through grounds of opposition dated 4th March 2016 and raised the following grounds:
 1. That the petitioner's application is devoid of any merit and a flagrant abuse of the court process.
 2. That though the application is guised as an application for review, it fails to meet the basic threshold for such review and constitutes a collateral attack and/or appeal against the order by the Honourable Lady Justice Mumbi Ngugi issued on the 14th December 2015.
 3. That the award of costs is at the discretion of the court under the provisions of Rule 26 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and procedure Rules, 2013 and the petitioner has failed and continues to fail to demonstrate that such discretion was not exercised judiciously.
 4. That the notice of motion application dated 11th January 2016 constitutes a flagrant abuse of the court process and only liable for dismissal in limine.

Applicant's submissions

11. At the hearing of the application, the 1st petitioner, who appeared in person, submitted that since they dropped the 8 respondents (7th-14th respondents) at the instance and upon the advise of Lady Justice Ngugi, who was at the time handling the case, then the case should proceed without the said respondents or they be brought back to the case so that costs can await the outcome of the case.
12. The 1st petitioner relied on the decision in the case of B. D Naidu v Shamsheer Juny Bahadur Rana on 8th August 1956: AIR 1957 Kant 21 wherein the Karnataka High Court held:

“The next contention urged on the side of the petitioner is that the order of the learned magistrate awarding costs of Rs 200/- to the respondent -1st party is without jurisdiction and irregular. Under Section 148, cri. p.c, a magistrate has got jurisdiction to award costs to a successful party. But the contention of the learned counsel for the petitioner is that the award of Rs -200/- as costs is not based on any materials and that this fixation is quite arbitrary. There appears to be some substance in this connection.”

The order awarding costs is a judicial order and must be based on proper materials. In the present case, there is no evidence to show costs actually incurred by the respondent – 1st party. The magistrate has not given any valid or convincing reasons for fixing costs at Rs.200/-. It has been held by this court in the case reported in 3 Mys LJ 184(D) that an order assessing costs payable to a successful party without any evidence to show the costs actually incurred is one without jurisdiction. A similar view has been taken by the Patna High Court, in the case reported in Manglu Sahu v Ramdhani Tamboli, AIR 1929 Pat 93(E). No doubt, it cannot be said that the parties in this case have not incurred any costs, but in the absence of evidence to show the amount of expenses actually incurred, it is not possible to fix any definite sum as costs due to the respondent -1st party. Under these circumstances, the order of the learned magistrate as to costs has to be set aside.”



13. The 1st petitioner submitted that if matters filed under Articles 22 and 258 of *the Constitution* are subjected to costs then Article 48 would become superfluous. He added that the learned judge erred in imposing costs on the petitioners as the petition raises weighty matters of privatization of public funds through the writing off of debts of public companies.

5th respondent's submissions

14. Dr. Khaminwa SC, learned counsel for the 5th respondent supported the application and submitted that in suits filed under Article 22 of *the Constitution*, it should be assumed that each party be responsible for his its own costs as these are Public Interest Litigation matters for which it would be unjust to condemn the petitioners to pay costs.
15. Counsel submitted that it was therefore an error, on the face of the record, for the learned judge to award costs as *the constitution* gives power to the people to enforce public interest and that the petitioner had volunteered their services to the public.
16. Counsel argued that through Public Interest Litigation, the 1st petitioner has done a commendable job in assisting the court to develop jurisprudence and for putting issues into the correct perspective for which he should be appreciated.

7th respondent's submissions

17. Mr. Ouma, learned counsel for the 7th respondent submitted that since the petitioners moved the court, on their own motion, to amend the petition so as to drop the names of the 7th-14th respondents, the court's order allowing the proposed amendment, subject to costs, was justified. Counsel submitted that the application does not meet the threshold/conditions for the grant of orders of review and that the applicants should have appealed against the court order granting the said costs.
18. Counsel argued that Rule 26 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and procedure Rules, 2013 (the Mutunga Rules) which is the same as Section 27 of the *Civil Procedure Act* vests the court with the discretion to make orders for costs and that the court has the option to assess costs or assign a Deputy Registrar to do the assessment. Counsel maintained that allowing the instant application will be tantamount to this court sitting on appeal in the decision of another judge of equal jurisdiction. For this argument counsel relied on the decision in the case of *Morgan Air Cargo Ltd v Evrest Enterprise Limited* [2014] eKLR wherein Gikonyo J. held that an award of costs is at the discretion of the court. Counsel also cited the Supreme Court's decision in *Jasbir Singh Rai& Others v Tarlochan Rai & Others* [2014] eKLR wherein the discretion of the court to award costs upon the withdrawal of a case was discussed.

11th – 14th Respondents' Submissions

19. Mr. Oriri, learned counsel for the 11th – 14th respondents submitted that the application does not meet the threshold for the grant of the orders for review or setting aside and added that PIL should not be abused in order to achieve an ulterior motive. Counsel argued that it was not within the province of this court to interfere with the unfettered discretion of another court to make an award for costs. On the reinstatement of the case against the 7th – 14th respondents, counsel submitted that no reasonable cause of action had been shown against the said respondents so as to warrant their inclusion in the case.



Petitioner's Rejoinder

20. In a rejoinder to the respondents' submissions, the 1st petitioner submitted that an order for costs should be distinguished from the assessment of costs and that in making a specific order in respect to the amount of costs payable, the learned judge acted in an arbitrary manner since the parties had not quantified their costs. The petitioner maintained that he only acquiesced to the suggestion by the judge to withdraw the cases against the 7th – 14th respondent and that he should not have been penalized to pay costs.

Analysis and Determination

21. I have considered the application dated 11th January 2016, the respondents' response and the parties' respective submissions together with the authorities that they cited. The main issue for determination is whether the applicant has made out a case to warrant the issuance of the orders sought in the application.
22. It was not disputed that the petition was amended so as to exclude the names of the 7th – 14th respondents and that following the said amendment, this court (differently constituted) ordered the petitioners to pay the said respondents the sum of Kshs. 20,000/= each as costs. The main bone of contention is whether this court can review the orders issued on 14th December 2015.

Under Order 45 of the Civil Procedure Rules, a court has powers to review its own orders. The said order provide as follows:

- “(45) Any person considering himself aggrieved-
- (1) 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 review of judgment to the court which passed the decree or made the order without unreasonable delay.”

23. The above legal position flows from Section 80 of the *Civil Procedure Act* which gives a Court power to review its own order where an appeal has not been preferred against its order or for sufficient cause. In *National Bank of Kenya Limited v Ndungu Njau* (Civil Appeal No. 211 of 1996 (unreported)) it was held:

“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 ground for review.”



“... the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same Court which had adjudicated upon it.”

24. In *Francis Origo & another v Jacob Kumali Mungala* (C.A. Civil Appeal No.149 of 2001 (unreported)), the High Court dismissed an application for review because the applicants did not show that they had made discovery of new and important matter or evidence as the witness they intended to call was all along known to them and in any case, the applicants had filed appeal which was struck out before the filing of the application for review. The court stated:-

“our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end. As for this appeal, we are satisfied that the learned Commissioner was right when he found that there was absolutely no basis for the appellant’s application for review. We have therefore no option but to dismiss this appeal with costs to the respondent.”

25. In the instant case, the applicant’s case is that the learned judge ought not to have awarded costs to the respondents following the withdrawal of the petition against them because firstly; the said withdrawal was done at the instance of the court, secondly; that the matter before the court was a public interest litigation for which no costs should have been awarded and lastly; that the 8th respondent was not entitled to any costs as he did not enter any appearance in the matter before the same was withdrawn.

26. In my humble view, save for the ground that the 8th respondent was not entitled to any costs as he had not entered appearance in the suit, the rest of the reasons advanced by the applicant do not fall within the purview of the grounds for review of orders as envisaged under Order 45 aforesaid as it has not been shown that there is any discovery of a new matter or mistake on the face of the record or sufficient reason so as to warrant the issuance of an order for review. I however find that it was an error on the face of the record to award costs to a party, in this case the 8th respondent, since he had not entered appearance in the case.

27. Moreover, it is trite law that an award of costs is at the discretion of the trial court making such an award for which an order for review is not available as to make such an order would be tantamount to sitting on appeal on the decision of a court with equal jurisdiction. I am guided by the decision in the Ugandan case of *Re Ebuneiri Waisswa Kafuko* [2001] 2 EA 383 where the court held as hereunder:-

“The judge in his discretion may say expressly that he makes no order as to costs and in that case each party must pay his own costs. If he does not make an order as to costs, the general rule is that he shall order that he costs follow the event except where it appears to him in the circumstances of the case some other order should be made as to the whole or any part of the costs. But he must not apply this or any other general rule in such a way as to exclude the exercise of the discretion entrusted to him and the material must exist upon which the discretion can be exercised. The discretion, like any other must be exercised judicially and the judge ought not to exercise it against the successful party except for some reason connected with the case. It is not judicial exercise of the judge’s discretion to order a party who was completely successful and against whom no misconduct is even alleged to pay costs.”



28. Going by the dictum in the above cited authority, I find that it is not open for this court to interfere with the discretionary order of a court of equal jurisdiction and that if the applicant was aggrieved with this court's findings on costs or the amount thereof, then the proper forum to lodge his grievance would have been before the same judge who issued the impugned order or before the Court of Appeal. In this regard, I note that the late Justice Onguto J. when confronted with a similar application for review in the same matter on 8th March 2016 declined to allow the application and stated as follows:
- “I am not in a position to review the order of my fellow judge unless otherwise directed by her.”
29. I am further guided by the decision in the case of *Abasi Belinda v Frederick Kangwamu and another* [1963] E.A. 557 where it was held that:
- “a point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal”
30. On the same point, the authors, Chittaley & Rao in the *Code of Civil Procedure* (4thEdn) Vol.3, pg. 3227 in explaining the distinction between a review and an appeal had this to say:
- “A point which may be a good ground of appeal may not be a ground for an application for review. Thus, an erroneous view of evidence or of law is no ground for a review though it may be a good ground for an appeal.”
31. The applicant argued that the court should not have condemned him to pay costs upon withdrawal of the suit against some of the respondents in view of the fact that the matter was a constitutional petition filed in the interest of the public. My finding is that even though courts have been reluctant to award costs in constitutional Petitions seeking to enforce constitutional rights in cognizance of the fact that costs may be a barrier to potential litigants in Public Interest Litigation, this is not to say that courts do not award costs in constitutional all petitions as there are instances where courts have held that an award of costs would be justified such as where the litigation is frivolous or vexatious or where the conduct of the litigant attracts censure by the court. (See *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC). In the instant case, I have already found that it is not in the place of this court to determine whether or not Ngugi Mumbi J. was justified to assess and award costs as that is a matter that can only be a good ground for appeal. My take is that allowing the application for review, in the circumstances of this case would create a dangerous precedent where court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are *functus officio* and have no appellate jurisdiction.
32. On the prayer to set aside the impugned orders, the applicant argued that he withdrew the case against the 7th – 14th respondent at the instance of the court and that in view of the fact that he had been condemned to pay costs following the said withdrawal, he should be allowed to reinstate the said respondents to the suit. I have perused the record of the proceedings conducted by Mumbi J. at the time the case against the said respondents was withdrawn and I note that nowhere in the said proceedings is it indicated that the court prevailed upon the applicant to withdraw the case against the respondents. Be that as it may, I find that even if the court made such a suggestion, the applicant was still at liberty to resist the same and proceed with the suit against all the respondents. I am therefore not satisfied that the prayer for the setting aside of the impugned orders is merited.



33. Having regard to the findings and observations made in this ruling, I allow the application, albeit partly, and make an order to set aside the award of costs to the 8th respondent only. I decline to grant a setting aside in respect to the 7th, 9th – 14th respondents and make the following final orders:
- a) The order issued on 14th December 2015 awarding cost to the 8th respondent in the original petition is hereby set aside.
 - b) I make no orders as to the costs of this application.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 15TH DAY OF MARCH 2019.

W. A. OKWANY

JUDGE

In the presence of:

Non appearance of parties

Court Assistant - Ali

