



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL APPEAL NO. 4 OF 2018**

**KENYA POWER & LIGHTING CO.LTD .....APPELLANT/RESPONDENT**

**VERSUS**

**BALOZI KENGA.....RESPONDENT/APPLICANT**

**RULING**

The applicant filed a notice of motion dated 12<sup>th</sup> July 2018 in terms of **section 1A, 1B, 3A** and **75 and 75 (1)** of the Civil Procedure Act and **order 2 Rule 15**, **order 43 Rule I** and **3** of the Civil Procedure Rules seeking the following orders;

*(a) That the appeal herein be struck out as it is frivolous, vexatious and non-starter and unmerited.*

*(b) That the costs be awarded to the appellant.*

In support of the application in an affidavit sworn by BALOZI KENGA dated 13<sup>th</sup> July 2018. In opposition to the matter a replying affidavit was sworn and filed by Priscah Obura.

The background facts on both the applicants and respondents case are as briefly set out in Miscellaneous Civil Application Number 3 of 2018 and in a ruling by Justice Korir dated 26<sup>th</sup> July 2018.

After the dismissal of the application the applicant filed the instant motion seeking striking out of the appeal already filed challenging the Malindi CMCC No.400 of 2013.

**Discussion and determination**

In Light of the above two main issues arose for consideration by this court;

*(a) Whether the memorandum of appeal filed herein should be struck out as being frivolous, vexatious and an abuse of the court process.*

*(b) Whether the applicant should be awarded costs.*

**Issue No. I**

The four grounds upon which the court may strike out any pleadings are clearly set out in **order 2 Rule 15 (1)** of the Civil Procedure Rules;

Where the court may strike out at any stage of the proceedings that;

*(a) It discloses no reasonable cause of action or defence in law.*

*(b) It is scandalous, frivolous or vexatious or*

*(c) It may prejudice, embarrass, or delay the fair trial of the action.*

*(d) It is otherwise an abuse of the process of the court.*

The guiding principles behind each of the four elements for striking out under **order 2 Rule 15 (1)** have been clearly established in various decisions of the court.

In the case of **Windward Properties Limited v William all ER** the court held on a motion filed which is an abuse of the court process and stated;

***“The court has an inherent jurisdiction to put an end summarily to proceedings which divert the court from its proper purpose and use it with some ulterior motive.”***

The elements under **order 2 Rule 15(1)** of the Civil Procedure Rules were also canvassed in the case of **Mpaka Road Development v Kana** 2004 IEA 161 where Ringera held;

***“A matter would only be scandalous, frivolous and vexatious if it would not be admissible in evidence to show the truth of any allegation in the pleadings which is sought to be impugned. A pleading is frivolous, if it is not serious or contains scandalous matter, irrelevant to the action or defence. A scandalous and or frivolous pleading is IPSO facto vexatious.”***

It is instructive in this notice of motion to recall from the submissions of both parties that there is no dispute the question of any appeal is so uncertain in view of the decision by the court dated 26th July 2018. In my respectful view any appeal is the proper upon application for leave having been determined by the judge on the application of 5<sup>th</sup> February, 2018. There are no exemptions to this rule that the present appeal does not fall within the ambit of **order 2 Rule 15(1) (b) (d)** of the civil procedures rules as an appeal to be struck out for being scandalous, frivolous and vexatious.

## **Issue No.2**

### **Determination of costs as between the appellant and respondent.**

The elaborate provisions on costs is provided for under **section 27 (1)** of the Civil Procedure Act which states 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 and incidental to all suits shall be in the discretion of 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 give all the necessary directions for the purposes aforesaid and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers, provided that the cases of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise direct.”***

These provisions are well expressed and well founded in the case of **party of Independent Candidate of Kenya v Mutula Kilonzo & 2 others** HC EP No. 6 of 2013 where the court held that;

***“It is clear that the principle undermining the award of costs is twofold.... In the first place the award of costs is a matter in which the trial judge is given discretion. But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at.***

***In the second place the general rule is that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”***

Applying the above principles in terms of the first ruling of this Court on 26<sup>th</sup> July 2018 the appeal collapsed and any determination in the notice of motion of 13<sup>th</sup> July 2018 was purely academic. The court observed that no leave was obtained for filing an appeal against the order of the Magistrate Court. The memorandum of appeal had no appropriate foundation to stand on to enable the applicant ventilate right of appeal.

In their respective affidavits and submissions both parties confirmed that the appeal offends **order 2 Rule 15** of the Civil Procedure Rules. The substance of the ruling on 26<sup>th</sup> July 2018 was that the crystallization of the cause of action as framed and the scheduling of the appeal was non-starter. There is no controversy which affects the rights of the parties capable of being entertained by this Court. I find it unjust and absence of good reason for the applicant to agitate for costs against the respondent. The proceedings in question did not involve factual or legal complexity where the factors on aware of costs would weigh in favor of the applicant.

For the above reasons the respondent is not legally obliged to pay the any legal costs to the applicant. There is no merit in the application. Each party to bear their own costs of the intended appeal.

**DATED, SIGNED AND DELIVERED IN MALINDI THIS 30<sup>TH</sup> DAY OF MAY, 2019.**

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**R. NYAKUNDI**

**JUDGE**

**Representation:**

Ms. Marubu for the Respondent

Ms. Kabore for the Applicant.