



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 12 OF 2012

IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF: AN APPLICATION BY RAJEN HARILAL MALDE,

NILESH PANACHAND GUDKA, MRS. KANCHAN HARILAL SHAH,

KANTILAL GOVINDJI SHAH AND MRS. DEEPA RAJEN MALDE

AND

IN THE MATTER OF: CIVIL SUIT NO. 5517 OF 2003 OF THE

PRINCIPAL MAGISTRATE'S COURT, MOMBASA (CHRISTUS

MWASHO VS. ELEGANT CARS LIMITED AND

RAJEN HARILAL MALDE & 4 OTHERS)

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE PRINCIPAL MAGISTRATE.....RESPONDENT

AND

CHRISTUS MWASHO.....INTERESTED PARTY

EX PARTE APPLICANTS:

- 1. RAJEN MALDE**
- 2. NILESH PANACHAND GUDKA**
- 3. MRS. KANCHAN HARILAL SHAH**
- 4. KANTILAL GOVINDHI SHAH**
- 5. MRS. DEEPA RAJEN MALDE**

RULING

The Application

1. The Notice of Motion application before the court dated 20th November, 2017 seeks the orders:
 - (a) That the court be pleased to amend and/or rectify the Ruling dated 13th May, 2016 and award costs to the Interested Party.
 - (b) That the court be pleased to order that costs are payable to the Interested Party.
 - (c) That costs of the application be provided for.
2. The application is premised on grounds set out therein and is supported by affidavit of Christus Mwasho, the Interested Party, who is the applicant herein.
3. The Applicants' case is that there is an error apparent on the face of the Ruling. There was apparent oversight in the Ruling in awarding costs to the Respondent yet the Interested Party is the only one who opposed the application. The Applicant's case is that the awarding of costs to the Respondent was an error made by this court. It is trite law that costs follow the events and a successful party is entitled to costs in this case the Interested Party. The Applicant's case is that he filed a Bill of Costs before the Taxing Officer who has had difficulties in assessing costs because the Interested Party was never awarded costs in the Ruling. The Applicant's case is that it is therefore imperative to amend and/or rectify the Ruling dated and delivered on 13th May, 2016 to provide costs to the Interested Party who opposed the application.

The Response

4. The application is opposed by the Respondent vide grounds of opposition filed on 18th December, 2017. The Respondent's case is that the matter offends the provisions of Order 53 of the Civil Procedure Rules 2010 and Sections 8 and 9 of the Law Reform Act Cap 26 Laws of Kenya which are the only provisions that apply to Judicial Review. The provisions of Section 1A, 2A, 99 and 100 of the Civil Procedure Act invoked on the face of the application do not confer this court with the pre-requisite jurisdiction to grant the orders sought by the Interested Party, and neither do they apply to Judicial Review matters. In the circumstances, the Respondent's case is that the application cannot be said to be within the purview of a Judicial Review court neither does it meet the basic tenets of Judicial Review application as it seeks to substantively review, vary, amend or rectify this court's Judgment which is not possible within these proceedings. The Respondent's case is that this court does not have the power to review its decisions in a Judicial Review application under Order 53 of the Civil Procedure Rules 2010.

Determination

5. I have considered the motion before the court. I have also looked at the Ruling of the court dated 13th May, 2016 where the learned Judge stated at paragraph 22 thereof as follows:

“For those reasons, the ex parte Applicants' Notice of Motion dated 27th February, 2012 fails and is dismissed with costs to the Respondents.”

6. The Interested Party herein, believing that the costs of the motion was given to him started the process of taxation. However, the Taxing Officer stopped the proceedings because the Presiding Judge did not give costs to the Interested Party. The Taxing Master advised the Interested Party to seek interpretation of the issue of costs from the High Court hence this application.

7. The Applicant in support of his motion has cited provisions of Civil Procedure Act and Rules. Specifically the Applicant cited Section 99 of the Civil Procedure Act which allows this court to correct clerical or arithmetic mistakes in Judgments, decrees and orders.

8. On the other hand the Respondent submitted that this matter being a Judicial Review matter, Civil Procedure Rules and Act do not apply. In support of this ascerion the Respondent cited JR Misc. Application No. 126 of 2013 **Republic vs. Cabinet Secretary for Labour and Others** where Justice Odunga stated that apart from Order 53 of the Civil Procedure Rules the provisions of the Civil Procedure Act do not apply to Judicial Review Proceedings. The Respondent submitted that these proceedings are a nullity *abinitio*.

9. In my view the submission of the Respondent is correct. It is not envisaged that Civil Procedure Act and Rules would apply in Judicial Review proceedings. Once the Judge has rendered himself in Judicial Review matters he becomes exhausted and cannot go back to that matter.

10. However, the point of departure in my view is simple. I have looked at the said Ruling and the comments which the Judge made on costs. The Judge gave costs to the Respondents. In my view the Respondents whom the Judge gave the costs were the Respondents to the motion dated 27th February, 2012. The Judge was simply referring to the parties who opposed or responded to the said application, and not the parties as referred to in the title of the suit. This, I believe, is true also because the Judge used the plural term “*Respondents*” when he awarded costs. In the title of the suit there is only a single Respondent.

11. Further, the proceedings before the court also show that only the Interested Party opposed the said application. He filed a Replying Affidavit sworn by himself on 16th March, 2015. He also filed submissions on the application on 24th February, 2016. In all this he appointed an advocate. In fact it is only the Interested Party who opposed and responded to the said motion. The learned Judge was

therefore right and correct in giving costs to the Respondents, and by the word Respondent the Judge merely meant the Respondent to the motion dated 27th February, 2012.

12. Accordingly in my view, there is no mistake on the Ruling to be corrected or to be reviewed. The Judge gave costs to the Respondents of the motion before the court and that Respondent was the Interested Party. Therefore, all the submissions by parties before the court are irrelevant and not necessary. It is the finding of the court that the Judge was clear in his Ruling and he awarded costs to the Respondent in the motion before him, and that Respondent was the Interested Party herein.

13. Parties shall bear own costs of this application.

Dated, Signed and Delivered at Mombasa this 17th day of April, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

None of the parties

Mr. Kaunda Court Assistant