



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTION & JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 42 OF 2013 (JR)

**IN THE MATTER OF AN APPLICATION BY BASH HAULIERS LIMITED FOR LEAVE TO
APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

AND

IN THE MATTER OF LAW REFORM ACT CHAPTER 26 LAWS OF KENYA

AND

IN THE MATTER OF THE KENYA ROADS ACT 2007

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE DIRECTOR GENERAL,

KENYA NATIONAL HIGHWAYS AUTHORITY.....1ST RESPONDENT

THE COUNTY GOVERNMENT OF MOMBASA2nd RESPONDENT

AND

BASH HAULIERS.....EX-PARTE APPLICANT

RULING OF THE COURT

Application

1. On 25th May, 2017, the ex-parte applicant herein through his counsel, Mr. Mutubia informed this Court that he wished to withdraw the proceedings dated 8th July, 2013 because the ex-parte applicant had vacated the suit property which was the subject of the main application dated 8th July 2013. Mr. Mwangi, Counsel for the 1st respondent stated that he had no objection to withdrawal of the proceedings subject to payment of costs to all the respondents. The court withdrew the proceedings and directed the parties to

file submissions on the issue of costs.

Submissions

2. The ex-parte applicant filed his written submissions on 12th June 2017 while the 1st respondent filed its written submissions on 5th June 2017. The 2nd Respondent did not file any submissions.

3. Mr. Mwangi for the 1st Respondent submitted that the substantive Motion herein was dated 8th July, 2013 in which the ex-parte applicant was seeking an **Order of Certiorari** to remove the Notice published in the Daily Nation Newspaper dated 20th June, 2013 prohibiting and/or barring all heavy goods vehicle including the Applicant's heavy goods vehicles from using the CHANGAMWE ROUND-ABOUT-MOI INTERNATIONAL AIRPORT (C110) Road and CHANGAMWE ROUND ABOUT-MAGONGO-JOMVU (A109L) Road and an **Order of Prohibition** directed to the 1st and 2nd Respondent prohibiting them from enforcing the decision contained in the Notice published in the Daily Nation Newspapers dated 20th June, 2013. Counsel submitted that the 1st Respondent filed its grounds of opposition on 22nd July 2013 and a replying affidavit sworn by Engineer Okeyo, C.D and also its submissions in 2013 in response to the application.

4. Mr. Mwangi submitted that Section 27 of the Civil Procedure Act provides that:

(1) 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, and 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 to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order”.

Counsel submitted that there is no reason for the court to invoke the exception to the general rule.

5. Mr. Mwangi submitted that compensation was made to the owner of L.R No. MN/V1.1054 in the year 2015 and subsequently the property was acquired in 2016 and the applicant moved to a different location after the action of the 1st Respondent. Counsel further submitted that the ex-parte applicant did not withdraw the application but instead took directions to put in submissions on 10th April 2017 when the ex-parte applicant was already out of the suit property.

6. Mr. Mwangi submitted that the matter herein has been mentioned in court four times and the 1st Respondent has duly complied with the courts directions on all instances including filing necessary pleadings. Counsel submitted that that the decision to institute these proceedings was ill thought hence it is only fair that the Respondent be paid costs.

7. Mr. Mutubia on the other hand submitted that the question of payment of costs is a matter of discretion as provided under Section 27(1) of the Civil Procedure Act Cap 21 and that it is trite law that the party that is deemed to have “succeeded” or “wins” in the proceedings is entitled to costs subject to the court's discretion. Counsel submitted that the proceedings in this case were never heard or determined on merit therefore there is no “winner” or “loser” and the Court can hence not make any substantive orders.

8. Mr. Mutubia submitted that the circumstances that led to the institution of these proceedings are clear as the 1st Respondent by dint of its mandate must have known before the filing of these proceedings that it intended to acquire the suit land and should have disclosed this fact rather than opposing the application while knowing that any finding or judgment in the proceeding would be bound by compulsory acquisition. Counsel further submitted that the ex-parte applicant had no ability or power to know that the

government would acquire the suit land less than two years after filing the proceedings and thus the Respondents were the cause of the continued existence of the proceedings in court and should thus bear the greatest responsibility in costs.

Determination

9. Having carefully considered the submissions of the parties I find that the only issue for determination is which party is to pay the costs for the proceedings herein.

10. Mr. Mwangi learned Counsel for the 1st Respondent quoted with the approval of this Court Section 27 (1) of the Civil Procedure Act which provides that:

(1) 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, and 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 to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order”.

This Section grants discretion to this Court to determine the extent of costs to be paid and by which party.

11. I have carefully perused the proceedings herein, the ex-parte applicant filed the substantive motion herein on 8rd July 2013, seeking for an Order of Certiorari and an Order of Prohibition against the Respondents. The 1st Respondent responded to the application by filing grounds of opposition dated 22nd July 2013 while the 2nd Respondent filed its grounds of opposition dated 7th August 2013. Subsequently, the 2nd Respondent filed its Replying affidavit sworn by **ENGINEER PETER MIGOSI** on 16th September 2013 in response to the application. Written Submissions were duly filed by the 1st respondent on 28th October 2013 while the 2nd Respondent filed its submissions on 12th June 2013. At the time of withdrawal of proceedings 25th May 2017, the ex-parte applicant had not filed his written submissions. It is evident that the respondents have rigorously defended this suit by filing the aforementioned documents.

12. The main motion came up for hearing on 8th August 2013 when both parties were present through their advocates and the court directed the parties to file and exchange written submissions. This matter was also mentioned three times before this court: 17/09/2013, 18/11/2014 and 4/12/2014 when both parties were present in court through their advocates. This matter has also come for hearing and highlighting of submissions on 10/04/2017 and 25/05/2017 respectively when again parties were present through their advocates.

13. It is evident that both parties were desirous of litigating this matter to its ultimate conclusion, however, it is questionable why the ex-parte applicant did not move the court in any manner from 4/12/2014 till 10/04/2017 a span of more than two years only for the ex-parte applicant to return and after agreeing to put in written submissions indicate to the court of his intention to withdraw the proceedings.

14. In the case of **Cecilia Karuru Ngayu versus Barclays Bank of Kenya & Another [2016] eKLR** the case of **Impressa Ing Fortunato Federice versus Nabwire [2001] 2 EA 383** was cited where the court stated that:

“...under Section 27(1) of the Civil Procedure Act, costs should follow the event unless the court orders otherwise. This provision gives the judge discretion in awarding costs but that discretion has to be exercised judicially...a successful party can be denied costs if it is proved that but for his conduct the action would not have been brought...”

In the case of **Cecilia Karuru Ngayu (Supra)** Justice Mativo stated that:

“In determining the issue of costs, the court is entitled to look inter alia (i) the conduct of the parties, (ii) the subject of litigation, (iii) the circumstances which led to the institution of the proceedings, (iv) the events which eventually led to their termination, (v) the stage at which the proceedings were terminated, (vi) the manner in which they were terminated, (vii) the relationship between the parties and (viii) the need to promote the reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of the Constitution”.

15. I have considered the above points coupled with the arguments raised by the ex-parte applicant and the 1st Respondent. The ex-parte initiated these proceedings and the Respondents subsequently defended the same, it is also the ex-parte who decided out of his own volition to withdraw the said proceedings. It is therefore evident that the Respondents would not have been in the position that they are in were it not for the ex-parte’s actions. I therefore find no reason to deny the Respondents costs.

16. Accordingly I make the following order:

i. THAT the Ex-parte Applicant do pay the Respondents herein the costs of this suit to be agreed or taxed by the taxing master of this Court.

Dated, Signed and Delivered in Mombasa this 31st day of July, 2017.

E. K. O. OGOLA

JUDGE

In the Presence of:

Mr. Egunza for Ex parte Applicant

No Appearance for Respondents

Mr. Kaunda Court Assistant