REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISC CIV APP NO 19 OF 2015

Ethics and Anti-Corruption Commission…….Applicant

Versus

Nderitu Wachira……..…….....1st Respondent

M/S Ecobank Kenya Limited.....2nd Defendant

Mathew Ndonga Kabau.....3rd Respondent

RULING

On 20th May 2015 the **Ethics and Anti--Corruption Commission** (hereinafter referred to as he applicant) filed an application in this court under the provisions of Section **56 (1) & (2)** of the Anti-Corruption and Economic Crimes Act,[1] Sections **1 (2), 3 & 3A** of the Civil Procedure Act[2] and Order **51** of the Civil Procedure Rules, 2010 seeking preservatory orders against **Nderitu Wachira, Ecobank Kenya Ltd & Mathew Ndonga Kabau** (hereinafter referred to as the Respondents) prohibiting the Respondents, their servants and or agents from accessing, occupying, developing, ;easing, charging, selling, disposing, transferring, wasting, utilizing and or in any manner dealing with title number **Nyeri/ Municipality/Block 1/1105** for a period of six months and the said order was granted on 20th May 2015. Under Section 56 cited above, such an order is granted ex-parte and has effect for six months and may be extended by the court on the application of the commission.

Section **56 (4)** of the said Act provides that a person served with an order under the said section may, within **15** days from the date of being served, apply to the court to discharge or vary the order or dismiss he application.

On 27thAugust 2015, **M/S Ecobank Kenya Limited**, the Second Respondent filed an application to this court seeking to discharge the above orders arguing inter alia that the applicants in the above application failed to disclose to the court that there was in existence a judgement issued in JR. No. 244 of 2014 dated 3 March 2015 which quashed the decision to place a restriction on the land in question, hence the applicants were guilty of non disclosure of material facts.

On 6 October 2015, the parties appeared before me for hearing of the second Respondents aforesaid application, and I directed that the other Respondents be served. The matter came up again before me on 19 October 2015, and on 3 November 2015 but was adjourned because the said parties had not been served. On 7 December 2015 the matter came before me and this time service had been effected, though the said parties did not attend. Both counsels proposed to proceed by way of written submissions and a mention date was fixed for 28 January 2016 when it was adjourned to 17 February 2016 and on the said date Mr. Kalii for the second Respondent informed the court that the application filed on 27 August 2015

had been overtaken by events in that a suit had been filed in the E.L.C Court being case number 242 of 2015.

Counsel for the commission confirmed that they obtained the orders for only 6 months as provided under the law which period had already lapsed and that they acted as provided under the law and such a application is usually filed and determined ex-parte.

Mr. Kalii for the applicant in the application dated 25 August 2015 abandoned prayer one which is the substantive prayer and left the issue of costs to be determined by the court. He submitted that whereas costs is a matters of the courts discretion, the same must be exercised judicially having regard to the equity of the case, that the miscellaneous application was brought in abuse of the court process, that the applicant did not disclose to the court that there were orders of mandamus issued in J.R. 244 of 2015. Counsel insisted that they incurred costs while serving the first and second Respondents.

Mr Mogi for the commission vehemently opposed the plea for costs and insisted they also filed a replying affidavit and statement of grounds of objection and list of authorities and added that the application was not filed within the stipulated period of 14 days provided under Section 56 (4) of the Anti-Corruption and Economic Crimes Act[3]and that the judgement referred to actually dealt with a different issue.

After making the above rival submissions, counsels left it to the court to determine the issue of costs. It's important at the outset I reproduce below the provisions of section **27** of the Civil Procedure Act[4] which provides as follows:-

> ***27 (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 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 costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise direct.*

In *Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant Vs Ihururu Dairy Farmers Co-operative Society Ltd**[5]***this court held as follows:-

> *"The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.**[6]***

Thus, it is imperative to bear in mind the various steps taken by the parties in the case so as to appreciate the trouble taken by both parties since the suit was filed. Also, I find useful guidance in the following passage from the **Halsbury's Laws of England**;[7]

> *"The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice"(Emphasis added).*

Writing on the same subject *Mr. Justice (Retired) Kuloba**[8]*** stated:-

> *"Costs are {awarded at} the unfettered discretion of the court, subject to such conditions*

> *and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise…"*

To my mind there appears to be no clear or prescribed definition of what constitutes *"good reasons"* that will justify the courts departure, in awarding costs, from the general rule that *'costs follow the event."* Discussing the same point, the supreme court of Kenya in the case of *Jasbir Singh Rai & Others vs Tarlochan Rai & Others*[9] observed that:

> *"in the classic common law style, the courts have to proceed on a case by case basis, to identify "good reasons" for such a departure. An examination of evolving practices on this question shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs……"*

The reason for the above reasoning is that in public litigation, a litigant is usually advancing public interest as opposed to personal gain.

In the above cited case,[10] this court cited the decision in the *Party of Independent Candidate of Kenya vs Mutula Kilonzo & 2 others*,[11]where the court citing two leading decisions on the subject held *inter alia* that:-

> *"It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. 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 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."***

In my view section **27** of the Civil Procedure Act provides the general rule which ought to be followed *unless for good reason to be recorded*. The said section in my view does not make distinctions between determinations made by consent or on courts own determination or withdrawals. This position is well stipulated by *Richard Kuloba* in the above cited book where he observed that:-

> *"the fact that the unsuccessful party did not contest the case is not in itself a ground for refusal of costs but it is a factor that can be take into account if other good reason exists"(Emphasis added).*

However, the only consideration is the *"event"* as was held in the supreme court of Uganda in *Impressa Ing Fortunato Federice vs Nabwire*[12] where the court stated:-

> *"The effect of section* ***27*** *of the Civil Procedure Act is that the Judge or court dealing with the issue of costs in any suit, action, cause or matter has absolute discretion to determine by whom and to what extent such costs are to be paid; of course like all judicial discretions, the discretion on costs must be exercised judiciously and how a court or judge exercises such discretion depends on the facts of each case. If there were mathematical formula, it would no longer be discretion… while it is true that ordinarily, costs should follow the event unless for some good reason the court orders otherwise, the principles to be applied are-* ***(i)*** *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****. (ii),*** *A successful party can be denied costs if it is proved that but for his conduct the action would not have been brought… It is trite law that where judgement is given on the basis of consent of parties, a court may not inquire into what motivated the parties to consent or to admit liability……..…"*

Also of useful guidance is the decision in the Ugandan case of *Re Ebuneiri Waisswa Kafuko*[13] 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."*

To my mind, in determining the issue of costs, the court is entitled to look at *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 reconciliation amongst the disputing parties pursuant to Article **159 (2) (c)** of the Constitution.[14] In other wards the court may not only consider the conduct of the party in the actual litigation, but the matters which led to the litigation, the eventual termination thereof and the likely consequences of the order for costs.[15]

Justice (Retired) Richard Kuloba[16] in the earlier cited book states as follows:-

> *"The words "the event" mean the result of all the proceedings to the litigation. The event is the result of the entire litigation. It is clear however, that the word "event" is to be regarded as a collective noun and is to be read distinctively so that in fact it may mean the "events" of separate issues in an action. Thus the expression "the costs shall follow the event" means that the party who on the whole succeeds in the action gets the general costs of the action, but that, where the action involves separate issues, whether arising under different causes of action or under one cause of action, the costs of any particular issue go to the party who succeeds upon it. An issue in this sense need not go to the whole cause of action, but includes any issue which has a direct and definite event in defeating the claim to judgement in the whole or in part"*

At page **101** of the same book, Kuloba authoritatively states as follows:-

> *"The law of costs as it is understood by courts in Kenya, is this, that where a plaintiff comes to enforce a legal right and there has been no misconduct on his part-no omission or neglect, and no vexatious or oppressive conduct is attributed to him, which would induce the court to deprive him of his costs-the court has no discretion and cannot take away the plaintiffs right to costs. If the defendant, however innocently, has infringed a legal right of the plaintiff, the plaintiff is entitled to enforce his legal right and in the absence of any reason such as misconduct, is entitled to the costs of the suit as a matter of course"*

In my view, the above paragraph applies equally where a defendant has been wrongfully sued. To my mind, the second Respondents application was not filed in court with 15 days as provided under section 56 (4) cited above. No explanation has been offered for the delay. In fact, no attempt was made to explain the delay or seek an extension of time. On this ground alone I find that the said application is incompetent and improperly before the court.

The second important issue is to appreciate the nature and purpose of proceedings under Section 56 of the Act. The section aims at preserving properties acquired as a result of corrupt conduct. At paragraph 16 of the judgement delivered in Misc No. 244 of 2014, the learned Judge stated as folows:-

"Therefore, in this application the court is not concerned with the determination of how the suit property came to be registered in the name of the borrower. To determine that issue would necessarily require the parties to call witnesses whose evidence would be subjected to cross-examination before the court would be in a position to resolve the parties rivalling contentions some of which may touch on fraud and illegality..."

The learned judge proceeded at paragraph 17 to state as follows:-

"Judicial Review applications do not deal with merits of the case but only with the processes. In other words judicial review applications do not determine ownership of a disputed property but only determines whether the decision makers had jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters"

Also relevant is paragraph 18 of the judgement which clears states:-

*"Therefore in this case the court is only concerned with the determination of the issue whether the process of registration of the restriction on the suit parcel was illegal in the sense that the 2nd Respondent committed an error of law in the process of the said registration or acted without jurisdiction or **ultra vires**, or contrary to the provisions of a law or its principles; whether in so doing he was irrational in the sense that his action amounted to such gross unreasonableness that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision....."*

The above quoted paragraphs and indeed the entire judgement clearly demonstrate that the issues before the court in Misc No. 244 of 2014 had nothing to do in the manner in which the title was obtained because that was outside the purview of Judicial Review proceeding as aby observed by the learned judge. It is therefore improper for the second applicant to insist tha counsel for the commission withheld crucial information at the time of obtaining the ex parte orders. In fact in my view, even if the disclosure was made, it would not have changed the position.

In this connection, I am guided by the decision in the case of *Orix (K) Limited vs Paul Kabeu & 2 others*[17] where it was held *inter alia:-*

"……..the court should have been guided by the law that costs follow the event, and the plaintiff being the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied costs or the successful issue was not attracting costs. None of the deviant factors are present in this case and the court would still have awarded costs to the plaintiff, which I do."

Considering the entire chain of events from filing the applications in these proceedings, and having found that the second applicants application was filed out of time hence improperly before court, and having established that the judgement the applicant based his reasoning did not determine the issue of how the title was acquired, I find no reason to award the second Respondent costs, nor do I find any reason to deny the applicant costs and in exercise of my discretion, and guided by the law and relevant authorities, I hereby make the following orders:-

i. **That** the second Respondent do pay to the Applicant, namely Ethics and Anti-Corruption Commission the costs of the Notice of motion filed on 27 August 2015 to be agreed or taxed by the taxing master of this court.

ii. **That** the said costs shall be paid within 30 days from the date of being agreed upon or from the date of taxation.

Orders accordingly

Right of appeal 30 days

Dated at Nyeri this **14th** day of **March** 2016

John M. Mativo

Judge

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[1] Chapter 65, Laws of Kenya

[2] Cap 21, Laws of Kenya

[3] Supra

[4] Cap 21, Laws of Kenya

[5] Judicial Review application no 6 of 2014

[6] Jasbir Singh Rai & 3 others vs Tarlochan Signh Rai & others {2014} eKLR

[7] 4th Edition (Re-issue), {2010}, Vol.10. para 16

[8] Judicial Hints on Civil Procedure, 2nd Edition, (Nairobi) Law Africa) 2011, page 94

[9] Supra note 4

[10] Supra note 2

[11] HC EP No. 6 of 2013

[12] {2001} 2 EA 383

[13] Kampala HCMA No. 81 of 1993 cited by Odunga J in Pet No 466 of 2014 cited above, see note 11

[14] See Odunga J in JR No. 466 of 2014 between Republic vs Kenya National Highway Authority & Others , Ex parte Kanyingi Wahome

[15] See Hussein Janmohamed & Sons vs Twentsche Overseas Trading Co. Ltd {1967} EA 287 and Mulla 12th Edition AT Psage 150

[16] Richard Kuloba, Judicial Hints on Civil Procedure, 2nd Edition, page 99

[17] {2014}eKLR