REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

PETITION NO. 149 OF 2012

IN THE MATTER OF ARTICLES 22, 23 AND 70 OF THE CONSTITUTION

AND

IN THE MATTER OF AN ALLEGED CONTRAVENTION OF FUNDAMENTAL

RIGHTS UNDER ARTICLE 42 OF THE CONSTITUTION

OASIS PARK SELF HELP GROUP petitioning through

1. JOHN MUTINDA

2. MONICA KILONZO

3. HARRIET NGARUTHI.....PETITIONERS/RESPONDENTS

VERSUS

JOINVEN INVESTMENTS LIMITED.....1ST RESPONDENT

MUNICIPAL COUNCIL OF MAVOKO.....2ND RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....3RD RESPONDENT

RULING

Judgment was entered herein on 26th May 2015 in favour of the Petitioners, and the Respondents were ordered to pay the costs of the Petition. The said costs were subsequently taxed by the taxing master of this Court and a certificate of costs issued of Kshs 513,172/-, payable by the Respondents as Party and Party costs. The 3rd Respondent has now filed an application by way of a Notice of Motion dated 19th May 2016, seeking a stay of execution of the certificate of taxation and the warrants of attachment and sale issued against it, as the Court issues directions or an order as to the mode of apportionment or payment of the party and party costs of Kshs 523,172/= by the 3rd Respondent.

The grounds for the application are that a question has arisen between the Petitioner and the Respondents relating to the execution, discharge or satisfaction of the decree of this court, as the 1st and 3rd Respondents have each paid their 1/3 share of the taxed costs due to the Petitioner, who now seeks to recover by way of attachment and public auction, the balance of 1/3 from the said Respondents without

making any effort to recover the said balance from the 2nd Respondent. Further, that the judgment and decree of this Court was not specific as to whether the costs were to be borne by the 3 respondents jointly, severally or jointly and severally.

Erastus K. Gitonga, the principal legal officer of the 3rd Respondent attached the certificate of costs to a supporting affidavit he swore on 19th May 2016, as well as copies of the payment cheques and voucher by the 3rd Respondent, and a letter from the Petitioner's advocates dated 10th May 2016 acknowledging receipt of Kshs 171,057/35 each from the 1st Respondent and 3rd Respondent. He also stated that the Petitioner has instructed M/S Upstate Kenya Auctioneers to recover the entire taxed costs together with a disputed assessment of auctioneers fees from the 3rd Respondent, and he attached proclamation by the said auctioneers and letters requesting for warrants of attachment and sale. The 3rd Respondent did not file any submissions, and relied wholly on their application and supporting affidavit.

The Advocate for the 1st Respondent, Emily M. Mulinya also filed a supporting affidavit she swore on 19th July 2016, wherein she reiterated the averments made by the 3rd Respondent, and in addition stated that the 1st Respondent paid the Petitioner the decretal sum of Kshs 300,000/= as well as the auctioneers fees of Kshs 70,000/= and ½ of the 2nd Respondents costs of Kshs 90,000/=. Therefore, that the 1st Respondent had fully discharged the decree as well as the certificate of costs as ordered by the Court. She attached copies of the various payment cheques.

Kagwe Kamau & Karanja dvocates for the 1st Respondent filed submissions in Court dated 19th July 2016 wherein it was contended that the Government Proceedings Act (Chapter 40 of the Laws of Kenya) has clear provisions on how orders issued against the Government are satisfied in sections 21 (1), (2) and (3) thereof, and that the Petitioner ought to have extracted a certificate of order against the 2nd Respondent and served the Attorney General with the same for the debt of the 2nd Respondent to be made good. Further, that in the event the 2nd Respondent failed to pay, the Petitioner ought to have applied to Court for an order of mandamus to enforce it.

According to the 1st Respondent, the Petitioner, having slept on its rights to get costs from the 2nd Respondent, is now seeking to carry out illegal proclamation and execution as against the 1st and 3rd Respondents. The 1st Respondent relied on the decisions in **R. vs Ministry of Internal Security and Another ex. Parte Nasir Mwandihi, (2014) eKLR** and **R. vs Attorney General & Another ex parte James Alfred Koroso (2014) eKLR** for this argument.

The Response

The Petitioner filed a replying affidavit sworn on 3rd June 2016 by its Advocate, Fredrick Guandaru Thuita. It was averred therein that the general rule where liability is found against two or more defendants is that they are jointly and severally liable for the award, and that the winning party may collect the costs from any one or all of the defendants. Further, that the Court held that the Respondents shall pay the costs of the Petition, and if it had wanted to deviate from the general rule it would have expressly stated the proportions of the costs to be paid by each Respondent.

The Petitioner also stated that the Respondent ought to have argued the point of apportionment of costs before judgment, and that the issue of costs is now *res judicata*. Further, that if dissatisfied with the judgment and decree on costs, the 3rd Respondent should have filed an appeal or an application for review, and the Court cannot therefore set aside or purport to vary the decree.

The Advocate for the Petitioner filed submissions dated 19th July 2016 wherein reliance was placed on the decision in **John Gachanja Mundia vs Rancis Muriira alias Francis Muthika & Another, (2016) e KLR** for the position that where liability is joint and/or several, the plaintiff has the option of directing his claim against any one of the tortfeasors, and the defendants are entitled to reimbursement from the co-defendants in the event that the plaintiff only opts to recover from one of them.

It was also argued that the applicant has not used the appropriate procedure or applicable law as regards review or appeal in bringing this application, and that the doctrine of *res judicata* espoused by section 7 of the Civil Procedure Act bars this Court from re-opening the issue of costs, and that the Court is *functus officio* in this regard. Reliance was placed on the decision in **Dhanji Jadra Ramji vs Commissioner of Prisons & Another (2014) e KLR.**

The Issues and Determination

I have read and carefully considered the pleadings filed. The preliminary issue has been raised as to whether the present application is *res judicata* and whether this Court is *functus officio*. It is not contested that this Court did in its judgment delivered by Mutende J. on 26th May 2015 hold that costs of the Petition herein would be paid by the Respondents. The 3rd Respondent in its application is seeking directions on how the said costs are to be paid amongst the three Respondents, and is not seeking to change or overturn that decision, or the amount of costs awarded. It is thus my view that there is no review or appeal sought from the said decision but a clarification of how it is to be effected.

This Court has jurisdiction to grant such consequential orders after a judgment has been delivered pursuant to section 99 of the Civil Procedure Act which provides as follows:

> "**Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties."**

The slip or omission that is alleged by the 3rd Respondent in the present application is that the judgment required the costs to be paid severally. The Petitioner disputes this interpretation and states that if the judgment is silent as to how costs are to be apportioned between several defendants, then the costs are to be paid jointly and severally.

I find that I have to agree with the Petitioner, and that the ordinary and natural meaning once judgment for costs is awarded against several defendants in a single cause, is that they are jointly and severally responsible for the costs ,unless the Court specifically apportions the costs as between the several defendants. **In the case of Kenya Airways Limited vs. Mwaniki Gichohi High Court (Milimani Commercial Courts) Civil Case No. 423 of 2002, Ringera, J (as he then was) stated as follows in this regard:**

> **'The concept of joint and several liability comprehends one judgement and decree against two or more persons who are liable collectively and individually to the full extent of such decree; however double compensation is not allowed and accordingly whatever portion of the decree is recovered against one of such defendant cannot be recovered from the other defendant(s).'**

I also find that the omission by the Court to state the proportion of costs to be paid by the Respondents cannot therefore be said to be an accidental slip or omission, and this is not one of the cases where the Court can amend a judgment in this respect. The Respondents liability to the Petitioner is therefore joint and several in the amount of the decree, and the issue of apportionment can only be as between the Respondents themselves.

Lastly, arguments by the 1st and 3rd Respondents as regards the amounts already paid in satisfaction of the decretal sum and award of costs should be raised in the execution proceedings, when the determination as to whether the warrants of attachment and sale should issue is being made.

The Notice of Motion dated 19th May 2016 by the 3rd Respondent is therefore dispensed with in the terms of this ruling, and the stay orders granted by this Court on 24th May 2016 are accordingly discharged. Each party shall bear its costs of the said application.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 24th day of October, 2016.

P. NYAMWEYA

JUDGE