



**IN THE HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**JUDICIAL REVIEW DIVISION**

**MISC. APPL. NO. 464 OF 2006**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....RESPONDENT**

**EX-PARTE**

**DISMAS MATE**

**MERCY KANYUA MATE**

**RULING**

**Introduction**

1. The applicants lodged judicial review proceedings to challenge a decision of the respondent. After hearing the matter and in the judgment dated 30<sup>th</sup> August 2013, I granted an order of certiorari to quash an order made by the respondent ordering the applicants to stop further use and or construction of a school. I further directed the respondent to consider an Environmental Impact Assessment Report prepared in respect of the school premises and make a decision thereon in accordance with the law. As the applicants were successful, I ordered the respondent to bear the costs of the application.

**The Application**

2. In the Notice of Motion dated 25<sup>th</sup> February 2014 now before the court, the respondent prays that, *“This Honourable Court be pleased to review its judgment of 30<sup>th</sup> August 2013 to the effect that each party should bear its costs.”* The application is made under **section 3A** and **80** of the **Civil Procedure Act** and is supported by the affidavit of Irene Kamunge sworn on 25<sup>th</sup> February 2014.
3. The grounds upon which the application is made are that the respondent is a public body, acting in the interests of the public and supported by the taxpayer’s money hence it would financially prejudicial for the respondent to pay costs to the successful applicant. It contends that payment of

costs would negatively affect its financial position. It pleads that the judgment be reviewed to the extent that each party should be ordered to pay their own costs.

### **The Response**

4. The application is opposed by the replying affidavit of Kelvin Mogeni sworn on 18<sup>th</sup> March 2014. The gist of the opposition is that the judgment subject of review was heard on merits and the applicant was represented. The *ex-parte* applicants contend that the respondent is a statutory corporation established under ***Environmental Management Coordination Act*** with capacity to sue and be sued hence it is liable to pay costs and in the event it is successful, it would also be entitled to costs. They also submitted that the applicant has not met the threshold for review under **section 80** of the ***Civil Procedure Act***.

### **Determination**

5. The scope of review is to be found in **section 80** of the ***Civil Procedure Act*** as well as **order 45 rule 1(b)** of the ***Civil Procedure Rules*** which provides as follows;

*Any person considering himself aggrieved—*

*(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*

*(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.*

6. The Court of Appeal in this case of ***National Bank of Kenya v Ndung'u Njau Civil Appeal No. 211 of 1996 [1997]eKLR*** considered the parameters of an application for review and stated that, “A review will be granted whenever the court considers it is necessary to correct an error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law.”
7. In the Notice of Motion which culminated in the judgment of 30<sup>th</sup> August 2013, the issue of the costs was very much a live issue and the parties were entitled to make submissions on it. Under **section 27(1)** of the ***Civil Procedure Act (Chapter 21 of the Laws of Kenya)***, the award of costs is a matter for the court’s discretion and as a general rule costs follow event (see ***Supremarine Handling Services Ltd v Kenya Revenue Authority MSA CA Civil Appeal No. 85 of 2006 [2010]eKLR***). There is no general rule or immunity placed in the statute or any other law that protects the respondent from payment of costs. Whether or not it should pay costs in a particular case is a matter for argument. The party resisting costs ought to put forward arguments to avoid payment of costs. In the circumstances an attempt to persuade the court to exercise its discretion once again, after a full hearing and judgment, places the matter outside the purview of a review application.
8. The application must also be refused on the ground that the respondent seeks to re-litigate the issue of costs seven months after the judgment was delivered. The delay is unexplained and is inordinate.

### **Disposition**

9. The Notice of Motion dated 25<sup>th</sup> February 2014 is therefore dismissed with costs to the *ex-parte* applicants.

**DATED and DELIVERED at NAIROBI this 14<sup>th</sup> day of April 2014.**

**D. S. MAJANJA**

**JUDGE**

**Ms Makori instructed by K. Mogeni and Company Advocates for the *ex-parte* applicants.**

**Mr Kiunga instructed by Munga Kibanga and Company Advocates for the respondent.**