



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. 328 OF 2013

REPUBLIC.....APPLICANT

VERSUS

THE CO-OPERATIVE TRIBUNAL.....RESPONDENT

AND

FRANCIS NDIRANGU & OTHERS.....1ST INTERESTED PARTY

UFUNDI SACCO LIMITED.....2ND INTERESTED PARTY

TITUS E OBARA & 199 OTHERS.....3RD INTERESTED PARTY

ALEX G. MARATE & 19 OTHERS.....4TH INTERESTED PARTY

EX PARTE: K-REP BANK LIMITED

RULING

1. On 31st January, 2014, **Miss Mburu**, learned counsel for the Applicant informed the Court that there had been a takeover of the loan facility given by the applicant to the 2nd Interested Party which was the subject of this application. Accordingly, the applicant did not wish to pursue the Motion. She however, proposed that each party bears own costs.
2. While not opposing the withdrawal of the application **Mr Muruiki**, learned counsel for the 2nd and 4th interested parties insisted on costs. Similar position was taken by **Mr Ngari** who held brief for **Mr Mahiga** for the 1st interested party. Accordingly the Court marked the application as withdrawn but directed that the issue of the costs be determined by the Court unless otherwise agreed by the parties.
3. When the matter came up on 19th March, 2014, **Miss Mburu**, learned counsel for the Applicant informed the Court that she did not wish to proceed with this matter as the Motion had been overtaken by events as the loan the subject matter of the application had been taken over by another Bank. She however informed the Court that the parties were unable to agree on the costs as the costs proposed by the interested party were in excess of Kshs 1 million per party. She therefore applied that in the absence of any such agreement, each party be ordered to bear own costs otherwise the matter proceeds and be determined on merits since they were challenging the jurisdiction of the Tribunal to hear the matter by the 2nd interested party when the facility taken over by another bank.
4. Since the parties were unable to agree on the issue of costs I directed that written submissions on

- the issue be filed.
5. The Applicant's case is that it advanced financial facilities to the 2nd interested party on the security of LR No. 209/2571. However, the 1st interested party instituted legal proceedings before the Respondent claiming ownership of the same property. When the applicant attempted to be joined in the said proceedings, its application was declined on the ground that it was neither a Co-operative Society nor a member thereof. It was that decision that provoked the applicant into instituting these proceedings.
 6. However while these proceedings were pending, the 2nd interested party approached another financial institution to take over the said facility from the Applicant which process was completed in January, 2014. The effect of the said take over was that the Applicant's interest in the said property was thereby compromised hence rendering these proceedings unnecessary. While relying on section 27 of the *Civil Procedure Act*, the Applicant contended that there was no victory for either the applicant or the Respondents as the facts underlying the Motion were no longer the same. It was submitted based on Republic vs. Minister of Agriculture & Another ex parte Equatorial Nuts Processors Limited and 3 Others [2013] eKLR, that the said events rendered the Motion superfluous and hence the Court would not have granted the same even if the orders sought were merited. The Applicant also relied on the Supreme Court decision of Jasbir Singh Ra & 3 Others vs. Tarlochan Singh Rai & 4 Others [2014] eKLR on the principles guiding the award of costs and that where the events subsequent to the institution of the legal proceedings render the suit no longer viable costs ought not to be awarded.
 7. On behalf of the 1st interested parties, it was submitted that the 1st interested party stood to suffer most if the applicant's application was allowed. Therefore he instructed an advocate who duly took the steps in opposing the application. Taking into account the serious issues raised in the suit, the complexity and repercussions thereof, the 1st interested parties' advocates had to burn midnight oil in preparation for trial, researched into statute and case law in readiness for trial. As the 1st interested parties were not privy to the contract between the applicant and the 2nd interested party and as costs follow event, it was submitted that the 1st interested parties were unnecessarily dragged into these proceedings hence they deserve to be compensated with an order of costs.
 8. On the part of the 3rd interested party it was submitted that the applicant advanced the respondent Kshs 100,000,000.00 on security of the aforesaid property and this year the 2nd interested party sought accommodation with other banks which took over the facility from the 1st applicant agitating the applicant to file this judicial review. According to the 3rd interested party, the ex parte applicant's application was an abuse of the court process as their loan was safely and adequately secured.
 9. It was submitted that the reasons advanced by the ex parte applicant for dragging in innocent parties to the judicial review is irrelevant and cannot stand the test of time and the effect of this is for the ex parte applicant to bear the brunt of ill-advised decision of filing these misconceived proceedings. The court was therefore urged to hold that the third interested party is entitled to costs. The 3rd interested party relied on section 27(1)(2) of the *Civil Procedure Act*. However the Court noted that the provision cited was a totally different provision of the *Cooperatives Societies Act* instead. The 3rd interested further relied on Joseph Oduor vs. Kenya Red Cross Society HCCC No. 69 of 2009 and prayed that the Court awards him the costs.
 10. The 2nd and 4th interested parties on the other hand contended that the reasons advanced by the ex parte applicant are immaterial and not relevant to the case as there was no justification in making an application to the Respondent hence the ex parte applicant ought to bear the brunt of the ill-advised decision of filing these proceedings. In support of this position the said interested parties relied on Party of Independent Candidate of Kenya & Another vs. Hon. Mutula Kilonzo & 2 Others Election Petition No. 6 of 2013 and Joseph Oduor vs. Kenya Red Cross Society (supra).
 11. The general rule as to costs is provided for in section 27 of the *Civil Procedure Act* which provides as follows:

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.

12. This provision has been the subject of several judicial pronouncements. In the case of Supermarine Handling Services Ltd vs. Kenya Revenue Authority Civil Appeal No. 85 of 2006 the Court of Appeal expressed itself thus:

“Costs of any action or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts. If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance... Thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where the reasons are given if it considers that those reasons do not constitute “good reason” within the meaning of the rule... In the instant case the learned Judge gave no reasons whatsoever for his decision to deprive the successful plaintiff of its costs and yet it was not shown that the defendant had been guilty of some misconduct which led to litigation. In the court’s view the learned Judge’s order was wrong and for the foregoing reasons, the plaintiff’s appeal succeeds as to the award of interest and costs on the principal sum awarded”.

13. In **Devram Manji Daltani vs. Danda [1949] 16 EACA 35** it was held that a successful litigant can only be deprived of his costs where his conduct has led to litigation, which might have been averted.
14. The issue of the 2nd interested party’s costs to me looks rather straightforward. It is contended, which contention is not denied that the decision to withdraw the application was occasioned by the 2nd interested party’s move to secure the transfer of its liability from the applicant to another financial institution. In other words it was its action which led to the disappearance of the substratum of the application. As was held in **West Kenya Sugar Company Limited vs. Kenya Sugar Board Nairobi (Milimani) HCCC No. 206 of 2010**, it should not benefit from its own wrong doing. Accordingly, I would award no costs to the 2nd interested party.
15. With respect to the 1st, 3rd and 4th interested parties, no allegation has been made that their conduct led to the institution of this proceedings which would otherwise have been avoided. A perusal of the documents filed in opposition to the applicant reveal issues which were the subject of the application and which the Court would have been called upon to determine. Accordingly, I do not have any reason why they should be deprived of the costs.
16. On the part of the Respondent by the time of the withdrawal of the application, it had not filed any submissions contrary to the directions given on 19th March, 2014. Accordingly, in the exercise of the court’s discretion, there will be no costs of the Respondent.

Dated at Nairobi this 26th day of June 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Mburu for the Applicant

Mr Gachugi for Mr Mwaniki for the 2nd interested party

Mr Ngare for Mr Mahinda for the 1st interested party and Mr Morara for the 3rd interested party

Cc Kevin