



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISCELLANEOUS CIVIL APPLICATION NO. 169 OF 2004**

**REPUBLIC ..... APPLICANT**

**VERSUS**

**NATIONAL ENVIRONMENT AUTHORITY..... 1<sup>ST</sup> RESPONDENT**

**PUBLIC COMPLAINT COMMITTEE.....2<sup>ND</sup> RESPONDENT**

**CITY COUNCIL OF NAIROBI.....3<sup>RD</sup> RESPONDENT**

- EX-PARTE:**
- 1. GREENHILLS INVESTMENTS LIMITED**
  - 2. MARKET MASTERS LIMITED.**
  - 3. SUGAR CANDY LIMITED.**

**RULING**

1. By a Notice of Motion dated 24<sup>th</sup> February, 2004, the ex parte applicant herein sought the following orders:

- 1. An order of prohibition prohibiting the Respondents, their officers, agents, servants and any other person or authority from interfering with the suit property or business of the Applicants in any way.**
- 2. An order of prohibition prohibiting the Respondents, their officers, agents, servants and any other person or authority from harassing, intimidating and or effecting any adverse act against the Applicants.**
- 3. An order of prohibition prohibiting the Respondents, their officers, agents, servants and any other person or authority from demolishing or interfering with any of the Applicants' interests or property.**
- 4. An order of prohibition prohibiting the Respondents, their officers, agents, and servants and any others person or authority from proceeding with any unlawful illegal and unconstitutional actions against the Applicants.**
- 5. An order of prohibition prohibiting the Respondent's their officers, agents, servants or any other person or authority from closing the Applicants' business and or interfering with any property of the Applicants without the authority of this honourable court.**

6. An order of prohibition prohibiting 1<sup>st</sup> and 2<sup>nd</sup> Respondents their officers, servants or agents from acting arbitrary unlawfully, illegally and unconstitutional by questioning, interfering and or purporting to sit on appeal against the legal and lawful decisions and approvals made by the City Council of Nairobi and the Government

7. An order of prohibition the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, their officers, agents, servants or any other person or authority from interfering with the Kenya Government's lawful, legal and constitutional acts decisions and approvals made or undertaken before the said Respondents came into being.

8. An order of Certiorari removing to the High Court for the purposes of being quashed:

(i) The unlawful, illegal, adverse and unconstitutional Report and Recommendations by the Public Complainants Committee dated the 22<sup>nd</sup> January, 2004.

(ii) The unlawful, illegal adverse and unconstitutional order dated 5<sup>th</sup> February, 2004 by the National Environment Management Authority Board.

(iii) The unlawful, illegal, adverse and unconstitutional decisions and orders made by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents affecting the operations of the Applicants business.

9. An order of Mandamus compelling the Respondents to perform and to carry out their statutory duty of constructing and or providing a sewage system along the Applicants' property.

10. An order of Mandamus compelling the Respondents to carry out their statutory duty to give guidelines, advice and technical support needed to the Applicants.

11. An order of Mandamus compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondent from acting illegally and unconstitutionally by applying double standards or discriminatory practices against the Applicants.

12. A declaration that the Respondents acts are arbitrary *malafides* unlawful, unconstitutional and contrary to the Rules and Natural Justice.

13. A declaration that the Respondents acts are *Ultra Vires* their powers.

14. A declaration that the Respondents acts are *Ultra Vires* the provisions of the Local Government Act Cap 265, Physical Planning Act Cap 286 and the Environmental Management Co-ordination Act, 1999.

15. An order that the Respondents bear the costs occasioned by this application.

2. The Motion was based on the following grounds:

(a) The acts by the Respondents are arbitrary and *ultra vires* the Local Government Act, Town Planning Act and Environmental Management Co-ordination Act.

(b) The acts of the Respondents are illegal, unconstitutional, arbitrary and oppressive.

(c) The acts of the Respondent are contrary to the law and public policy.

(d) The Respondents acts are actuated by malice and irrelevant considerations.

(e) The Respondents acts are in breach of the Rules of Natural Justice.

**(f) The Respondents have illegally acted as judges in their own cause.**

**(g)The remedies prayed for will stop the Respondents from abusing their powers.**

**(h)The Applicants shall suffer grave irreparable business loss and loss of income if the business premises are closed down.**

**(i) The said loss cannot be compensated for and or adequately compensated by way of damages.**

3. After several court appearances the parties eventually agreed to mark the matter as settled. The only outstanding issue was the issue of costs as between the ex parte applicant and the 3<sup>rd</sup> Respondent. In order to determine that issue the Court directed the said parties to submit on the same.

4. I have considered the submissions made on behalf of the parties and it is clear that each of the said parties have submitted on the basis that the other parties' case was unmerited hence they deserved the award of costs.

5. However as can clearly be seen from the motion, some of the prayers being sought by the applicant were declaratory in nature. However, it is trite that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the **Civil Procedure Act** does not apply. It is governed by sections 8 and 9 of the **Law Reform Act** being the substantive law and Order 53 of the **Civil Procedure Rules** being the procedural law. Section 8 of the **Law Reform Act** specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, certiorari and prohibition. A declaration, therefore does not fall under the purview of judicial review for the simple reason that in most cases the court would require *viva voce* evidence to be adduced for the determination of the case on the merits before declaring the rights of the parties unless what is sought is merely a declaration of the legal position in which case the parties are better of seeking Constitutional or civil remedies rather than judicial review remedies. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in the application. See **Commissioner of Lands vs. Hotel Kunste Ltd Civil Appeal No. 234 of 1995 and Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354.**

6. It is therefore clear that even if the application had been otherwise merited, this Court would not have granted the application as prayed.

7. 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.***

8.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”.

9. 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.

10. Since the Motion was never heard, this Court cannot in deciding the issue of costs dissect the parties’ submissions with a view to making a determination as to whether or not the issues raised in the application were justiciable. To do that would amount to making a determination without affording the parties an opportunity of being heard on the main cause of action.

11. In **Party of Independent Candidate of Kenya & Another vs. Mutula Kilonzo & 2 Others HCEP No. 6 of 2013**, it was held:

**“The main reason why this Petition should be withdrawn is due to the demise of the 1<sup>st</sup> Respondent. This would call upon the Court considering ordering each party to bear their own costs. In the case of *Nedbank Swaziland Ltd verses Sandile Dlamini No.(144/2010) [2013] SZHC30 (2013)* Maphalala J. referred to the holding of *Murray C J in the case of Levben Products VS Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227*, who stated as follows:**

**“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (*Fripp vs Gibbon & Co., 1913 AD D 354*). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have 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.”**

12. In determining the issue of costs, the Court is entitled to look at the conduct of the parties, the subject of litigation and the circumstances which led to the institution of the legal proceedings and the events which eventually led to their termination. In other words the court may not only consider the conduct of the party in the actual litigation, but the matters which led up to litigation. See **Hussein Janmohamed & Sons vs. Twentsche Overseas Trading Co. Ltd [1967] EA 287** and **Mulla (12<sup>th</sup> Edn) P. 150**.

13. In this case, the determination did not come from the Court. The parties themselves after negotiating informed the Court that the matter had been settled. In **David Njuguna Karanja vs. Housing Finance Company Limited Nairobi HCCS (Commercial and Admiralty Division) No. 733 of 2008**, this Court observed that whereas this Court has discretion when awarding costs, that discretion must, as usual, be exercised judicially and in that case the circumstances under which the dispute therein was compromised were unknown to the court. However, since the parties did not move the Court to mark the matter as settled until an application for dismissal of the suit for want of prosecution of the case was made and the terms of the settlement were never disclosed, the Court having allowed the application for dismissal of the suit awarded costs to the Defendant.

14. In this case, however, the parties did record the consent settling the suit. However the terms of the said settlement were never disclosed. In the premises there are no materials upon which this Court can make a determination as to which party is the successful party. In that event costs must fall where they lie and since they lie on a suit which has been compromised, it is my view and I so hold that each party ought to and will bear own costs.

Dated at Nairobi this 24<sup>th</sup> day of November, 2014

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Issa for Mr Odera for the Applicant**

**Mr Odhiambo for the 3<sup>rd</sup> Respondent**

**Cc Richard**