



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CRIMINAL MISC. APPLICATION NO. 159 OF 2006**

**REPUBLIC ..... APPLICANT**

**VERSUS**

**MAKUENI DISTRICT LAND DISPUTES TRIBUNAL ..... RESPONDENT**

**AND**

**DAVID MBALUTO**

**KIMEU**

**FILBERT NTHEKANI KIMEU ..... INTERESTED PARTIES**

**AND**

**KIIO YUMBYA MBULI ..... *EX-PARTE* APPLICANT**

**RULING**

On 30<sup>th</sup> August 2010 M/S Onesmus Makau and Associates Advocates for the *ex-parte* Applicant KIIO YUMBYA MBULI filed a party and party bill of costs for taxation. The other parties in the proceedings for judicial review are the Makueni District Land Disputes Tribunal as Respondent, and David Mbaluto Kimeu and Filbert Nthekani Kimeu as Interested Parties. The Republic was listed as a nominal party as required by law in judicial review proceedings.

On 6<sup>th</sup> July 2011, J Kamanda & Co. Advocates for the Interested Parties filed a notice of Preliminary Objection to the proposed taxation. The grounds of objection are two, as follows:-

**1.This suit was withdrawn at the instance of the Respondent in the application i.e. Makueni District Land Disputes Tribunal and therefore the Interested Party ought not to be taxed.**

**2.That the Applicant was not awarded any costs as the matter was withdrawn by consent.**

Counsel for the *ex-parte* Applicant and Interested Parties filed written submissions with respect to the Preliminary Objections raised. The *ex-parte* Applicant's submissions were filed on 9<sup>th</sup> May 2011, while the Interested Parties' submissions were filed on 6<sup>th</sup> December 2011. The Respondent did not file written submissions, or respond to the proposed taxation. Mr Kamanda for the Interested Parties relied on the submissions filed in support of the Preliminary Objections. Mr Makau for the *ex-parte* Applicant relied

on the submissions filed on behalf of his client.

The facts giving rise to the Preliminary Objection are not in dispute. The matter arose out of Makueni District Land Disputes Tribunal Case No. 63 of 2005 wherein the Interested Parties sued the *ex-parte* applicant in respect of land parcel number UKIA/UTAATI/50. The Tribunal made an award. Before the Senior Resident Magistrate Makueni could read and adopt the tribunal's award, the *ex-parte* Applicant sought leave of the High Court to file judicial review proceedings. Leave was granted and the reading and adopting of the Tribunal's award by the subordinate court was stayed. Upon receipt of the High Court order, the Tribunal withdrew the land case from the magistrate's court. Thereafter, the judicial review proceedings filed in the High Court herein were marked as finalized with costs being in the cause. The *ex-parte* applicant has now filed a party and party bill of costs in the judicial review file.

In my view, this proposed taxation on the basis of party and party costs is misconceived. The court record clearly shows that on 24<sup>th</sup> July 2008 the parties entered a consent which was in the words that: **“this matter is marked as finalized costs in the cause.”**

In my view, party and party costs can only arise where they have been awarded by the court. If they are not agreed, then they will be taxed. The court did not award costs to any party. Therefore there is no legal basis for filing a bill of costs by any party against any other party for taxation. The party and party bill of costs filed herein is therefore misconceived, mischievous and has no legal basis. I will strike it out.

Consequently, I uphold the objection and strike out the bill of costs dated 30<sup>th</sup> August 2010. The said bill of costs will therefore not be taxed. Costs of these objection proceedings are granted to the Interested Parties.

Dated and delivered at Machakos this 9<sup>th</sup> day of March 2012.

**George Dulu**

**Judge**

**In presence of:-**

Nyalo – Court clerk

Mr Kisongoa h/b for O.N. Makau for Applicant present

N/A for other parties.