



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

MISC. APPLICATION NO. 43 OF 2010

FLORENCE

NABALAYOAPPLICANT

VERSUS

WILBERFORCE WAMALWA RESPONDENT

R U L I N G

The Ex parte applicant filed a Notice of Motion dated 13.4.2010 seeking to remove into this court for quashing, an award by the Kimilili Land Dispute Tribunal (as adopted by the Kimilili Senior Resident Magistrate’s court,) on the ground that the Tribunal had no jurisdiction to entertain the matter and give the award. The interested party who was served with the award as adopted , conceded to the application but thought, in the circumstances, that no order to pay costs should be made against him. The issue was accordingly placed before this court to resolve it.

The position with regard to costs is provided under section 27 of the Civil Procedure Act which states:-

“(i) 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 incident 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 or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order.”

A proper reading and understanding of Section 27 aforesaid is that the order for costs is at the power and/or discretion of the court or Judge. This means that the court or Judge decides when costs are due, by whom and to whom, in any matter before the court.

The power and/or discretion is however, according to the proviso, to be exercised with the understanding that costs should generally follow the event. That is to say that costs should be paid by the party who loses the suit except where for good reasons, the court orders otherwise. This means that the court's or Judge's order for costs which does not follow the event, must be based on good reasons which must be transparent and recorded before the order is made. In short, the exercise of power to order costs where it does not follow the event, must be on just cause, recorded and transparent.

In this case the interested party filed his case before the Land Disputes Tribunal which had no power or jurisdiction to entertain the substantive beneficial interest in land. He ought to have known better before filing the suit before the said Tribunal instead of filing it in the ordinary court of law. He realised his folly only when the Ex parte applicant filed this Notice of Motion for an order of certiorari to quash the Tribunal's award. He rightly and timely conceded to his mistake. That way he lost the case. In the circumstances and in accordance with the proviso to Section 27 of the Civil Procedure Act, he is required to pay the costs.

He however argues that he should not pay the costs. He needed to give good reasons why the court should agree with him to modify or vary the basic principle of payment of costs above stated. He provided no such reasons. In the circumstances this court will not be justified to change the basic rule for paying costs.

The upshot is that the Interested Party should pay costs.

ORDERS:-

1. By consent of both parties the order of Certiorari shall issue to remove to this court the Kimilili Land Dispute's Tribunal's award as adopted by the Senior Resident Magistrate's court, to be quashed forthwith.
2. The interested party shall pay costs here and below.

DATED AND DELIVERED AT BUNGOMA THIS 21st DAY OF JULY 2011

D. A. ONYACHA

JUDGE