REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

OF KISII

Civil Case 331 of 1996

CHARLES OTISO G. OTUNDO.....PLAINTIFF/RESPONDENT

VERSUS

KENYA COMMERCIAL BANK LIMITED.....1ST DEFENDANTAPPLICANT

RAMESH CHANDER DHINGRA.....2ND DEFENDANT/APPLICANT

RULING.

On 12th November, 2008, Kenya Commercial Bank limited, "**the applicant**" through the firm of **Messrs Hamilton Harrison** & **Mathews Advocates** filed this application by way of Notice of Motion dated 4th October, 2008. The application was expressed to be brought under sections 3A and 27 of the Civil Procedure Act and order 50 rule 1 of the civil procedure rules. The application sought two orders; against **Charles Otiso Otundo** "**the Respondent**". The orders sought as aforesaid were that the applicant do have judgment in respect of the costs of this suit and secondly, the costs of this application be the applicants' costs.

Grounds advanced in support of the application were that by a plaint, dated 22nd October, 1996, the applicant was sued by the respondent for an order directing the applicant to discharge the charge against the respondent's properties known as **Nyaribari Chache/B/B/Boburia/1448, 2780, 2995** and **3328.** Later on 23rd January, 2006, the respondent successfully applied to amend the plaint and enjoin the Ramesh Chander Dhingra to the suit. Ramesh Chander Dhingra duly entered appearance and filed a defence. He

thereafter applied to strike out the respondent's suit by an application dated 16th October, 2006. On 4th July, 2007, this court duly struck out the respondent's suit with costs which were to be taxed. On 3rd October, the applicant's Bill of Costs dated 12th February, 2008 was struck out on the basis that the order for costs was in respect of Ramesh Chander Dhingra alone and not the applicant. The applicant however maintains that having defended this suit since 1996, it was no doubt at all entitled to costs.

In support of the application, one, **George Gitonga Murugara,** an advocate swore an affidavit which merely reiterated and expounded on the grounds aforesaid. Suffice to add that when the respondent applied to strike out the applicant's defence, the applicant resisted the application by filing grounds of opposition and replying affidavit. The application was thereafter canvassed and urged before **Mbaluto.J**. (as he then was) on 5th June, 1997 and its defence was subsequently struck in a ruling delivered on 15th July, 1997. The applicant immediately preferred an appeal against the said ruling and also applied for stay of execution on 14th August, 1997. The application for stay was again argued before **Mbaluto.J.** who subsequently dismissed the same with costs. Thereafter the suit proceeded for formal proof and judgment was entered against the applicant on 2nd April, 1998. The applicant again preferred an appeal against the judgment and simultaneously applied for stay of execution of the decree. The application was successfully opposed by the respondent and stay was refused. On 12th July, 2002, the court of appeal sitting at Kisumu allowed the two appeals preferred by the applicant as aforesaid and ordered that the suit proceed to hearing. The applicant then made an application to dismiss the respondent's suit which application was opposed. The application was however subsequently withdrawn. The respondent then applied successfully to enjoin **Ramesh Chander Dhingra** as a 2nd defendant to the suit though the application had been vehemently opposed by the applicant. Having entered appearance and filed the defence, the 2nd defendant successfully filed an application to strike out the amended plaint. The application received support from the applicant and it was allowed with costs. The suit having been struck out with costs, the applicant in the fullness of time filed its bill of costs for taxation. At the taxation, the respondent raised a preliminary objection on the basis that no orders for costs were awarded in respect of the applicant. The preliminary objection was urged before the taxing master and by a ruling delivered on 3rd October, 2008, the preliminary objection was sustained and the applicant's bill of costs was struck

out. It is the case of the applicant therefore that having defended this claim since the year 1996 and incurred costs and expenses, it was only fair and just that being a successful party to these proceedings as well, it be awarded costs, hence the instant application.

Having been served with the application, the respondent reacted by filing a statement of grounds of opposition to the application through **Messrs Oguttu-Mboya** & **Co. Advocates**. He claimed that the application was mischievous, misconceived and otherwise bad in law. That the court had made a conscious and deliberate decision not to award costs to the applicant. Consequently, the said decision cannot be impeached without an appeal. That this court lacked and or is devoid of jurisdiction to entertain and adjudicate on the instant application, either as sought or at all. The application amounted to and or constituted an appeal through the back door against the decision of this court made on 4th July, 2007. The remedy available to the applicant lies in an appeal and or Review. Accordingly, the application as filed is scandalous, frivolous, vexatious and amounts to an abuse of the due process of the court. Finally, it was the contention of the respondent that the application had in any event been made with inordinate and unreasonable delay which delay had not been explained. Consequently, the applicant was guilty of laches.

The application was then placed before me for hearing interpartes on 19th April, 2010. On that occasion **Mr. Odhiambo**, **Mr. Otiso** and **Mr. K'Opere** learned counsel appeared for the applicant, respondent and 2nd defendant respectively. **Mr. K'Opere** indicated to the court that since the application pitted the applicant against the respondent and did not touch on his client, he wished to be excused from participating further in the proceedings. The other parties not opposing, his plea was granted. I was further informed by **Mr. Otiso** that **Muchelule.J.** had previously handled the application and made an order that parties file and exchange written submissions and thereafter come for a date for the ruling. That position was confirmed by **Mr. Odhiambo** who was then holding brief for **Mr. Murugara**, learned counsel for the applicant. Pursuant to the alleged order, the two parties had already filed and exchanged written submissions. They were therefore before me so that I could give them a date for the ruling.

However, before I could accede to their request, I required of them to make an election as to whether I should hear the application de novo or proceed from where **Muchelule.J.** had allegedly left before he was transferred from the station. They all agreed that I should take up the matter from where

Muchelule.J had left. An appropriate order to that effect was duly made.

However, as I sat down to craft this ruling it transpired that infact **Muchelule.J** had not at all dealt with this application nor had he made any order to the effect that the application be canvassed by way of written submissions. **Muchelule.J** only dealt with the application dated 27th April, 2009 in which the advocates then acting for the respondent, **Messrs Oguttu-Mboya** & **Co. Advocates** sought and were granted leave to cease acting for the respondent. When however this application came before him for hearing interpartes on 3rd November, 2009, it did not proceed according to the record. I do not know therefore where counsel for the applicant and respondent respectively got the impression that **Muchelule.J** had actually dealt with the application and made the order aforesaid.

Be that as it may and since respective written submissions are on record, I do not think that any party will suffer any prejudice if proceeded to act on them in coining this ruling.

This application has been brought pursuant to the provisions of sections 3A and 27 of the civil procedure act as well as order 50 rule 1 of the civil procedure rules. It is common knowledge that Section 3A of the civil procedure act donates to this court the inherent power to make such orders as may be necessary to meet the ends of justice. The section merely restates that there is a power in this court to make such orders as may be necessary to meet the ends of justice. To the applicant there is nothing to prevent this court from invoking that inherent power so as to make an order awarding it costs having been denied the same by the court in a ruling delivered on 4th July, 2007 that struck out the respondent's amended plaint and dismissed the entire suit.

On the other hand Section 27 of the Civil Procedure Act provides interlia ***"…..(1) 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..".

The purport of this provision is that costs are within the discretion of the court and the court has power to determine to whom and to what extent an order of costs should be made; with a rider however that costs should normally follow the event. The case for the applicant as I understand it is that having succeeded in its prayer as sought in its defence that the suit be dismissed and having sought a prayer for costs consequent upon the dismissal of the suit, it was entitled to costs as a matter of ofcourse when the suit was struck out, the court having not found it guilty of misconduct either before or after the institution of these proceedings as would deny it an order in costs. These are perhaps the only grounds upon which a successful litigant may be denied costs. It is the submission of the applicant that it carried itself with impeccable conduct during the proceedings and was therefore entitled to cost as a matter of course.

With regard to order 50 rule 1 of the civil procedure rules, that merely deals with procedure of moving the court on this kind of application. Accordingly nothing turns on this. The applicant has afterall properly moved this court by way of notice of Motion as required.

The respondent's take on all these was that the ruling was pursuant to an application by the 2nd defendant. Thus the ruling only affected the 2nd defendant. The applicant did not participate in the said application as it did not file papers in the same vein as the 2nd defendant, nor did it file a replying affidavit or indeed any other affidavit in support of the 2nd defendant's application. As far as the respondent was concerned, the order of 4th July, 2008 striking out the amended plaint did not strike out the suit against the applicant. That suit is still alive. The application too was strange as section27 of the civil procedure Act does not have provisions for the entry of judgment as costs. In the same vein, that section confers discretion to the judge to award costs. That discretion was properly exercised by **Gacheche.J** on 4th July, 2007. If the applicant felt aggrieved by the court's order, it should have preferred an appeal or sought for its review.

To some extent I am in agreement with the submissions of the Respondent. I have looked at the ruling delivered by **Gacheche.J** on 4th July, 2007. With regard to costs these were her words **"….In view of the above, I form the opinion that to allow the amended plaint to remain on the record would be**

to encourage abuse of the process of the court and I do in the circumstances allow this application with costs…". Simply put the judge allowed the application with costs. However, the court did not specify whether the costs were payable by the respondent to the applicant as well as the 2nd defendant or the 2nd defendant only. I have also looked at the decree that was extracted pursuant to the aforesaid ruling. With regard to costs it is stated therein **"…..Costs of this application and the main suit be taxed and certified and same be born by the plaintiff…"** I have my own doubts whether that as aspect of the decree was in consonant with the ruling over the issue. Be that as it may, that part of the decree again did not specify whether the costs were payable to only the 2nd defendant or to both applicant and 2nd defendant. At the end of the day therefore the issue as to who should get the costs turned on the interpretation of the aforesaid ruling as well the decree.

Convinced that it was entitled to costs pursuant to the ruling and decree aforesaid, the applicant duly filed its bill of costs for taxation. However when the taxation came up and pursuant to an objection raised by the respondent that the applicant was not entitled to costs as it was not party to the application, the subject of the ruling and subsequent decree, the taxing master duly upheld the objection. In upholding the objection, the learned taxing master delivered himself thus **"…I thus agree with Mr. Oguttu that the application not only was made by the 2nd defendant and not the first defendant but even from the prayers stated on the face of the application the 2nd defendant asked for costs only for himself which the learned judge allowed even using the prayers on the application to interprete the judge's ruling does not help the cause of the 1st defendant. I am afraid that in the absence of a clear and express order as to costs in favour of the 1st defendant, I do not see any basis for taxation by the 1st defendant. The authorities presented by the 1stdefendant do not in my view challenge this position. The plaintiff's objection is sustained…."**

From the foregoing, it is apparent that the decision of the learned taxing master turned on the interpretation of the application filed by the 2nd defendant to strike out the suit and the ruling thereof by the learned Judge on the issue of costs. It is possible that the learned taxing master could have been wrong. It is also possible that he was right. The decision of the taxing master is appealable. The applicant

too could have sought the setting aside of the same. In other words, that decision can be tested and or impeached either on appeal or by an order of review. In my view, it was open to the applicant to challenge that decision on appeal or on review instead of the instant application. As long as the ruling by the taxing master has not been set aside on appeal or on review, it remains an order of court. Supposing I was to allow this application, what would happen to the said ruling? It will mean that there will be two contradictory orders issued by two courts of competent jurisdiction. It is an absurdity that this court will rather do without.

Infact to allow this application will be tantamount to and or constituting an appeal through the back door against the decision of the Honourable taxing master. If the applicant is truly aggrieved by the ruling, the doors are wide open to it to prefer an appeal and or pursue an application for review. The instant application has no basis at all in law.

It is in view of the foregoing that I find the application unmerited and accordingly dismiss it with costs to the respondent.

JUDGMENT DATED, SIGNED and DELIVERED at **KISII** this 14h May, 2010.

M.A. MAKHANDIA.

JUDGE.