



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Suit 178 of 2004

1. **K. KIMANI**
2. **DR. J.M. CHAMIA**
3. **P. KIBUNJA MBUGUA**
4. **J. KAGURU**
5. **AGGREY MWAPULO MARAMI**
6. **N. GODHIL**
7. **MOSES M. MUKIRA**
8. **T.M. LUBERA**
9. **DR. KAREGA**
10. **DR. ERICK MAINA**
11. **EVANSON MWAKIO**
12. **DR. C. KAMANDE.....PLAINTIFFS**

-VERSUS-

1. **NYALI MASJID TRUST**
(REGISTERED TRUSTEE)
2. **ABDULHAMID ALI MOHAMED ABDULRAHIM**
3. **AHMED ALI TAIB**
4. **YUSUFALI ISMAILJI & HUZEFA ESMAILJI**
5. **ABDULKADI ABDULAHI FARAH**
6. **JAMA ABDINUR**
7. **NYALI TRUSTEE (REGISTERED TRUSTEE) DEFENDANTS**

RULING

What is before the Court is an application by the 2nd plaintiff, Chamber Summons dated **14th May, 2009** and brought under Order XXI, rule 22 (1) of the Civil Procedure Rules, and ss. 3A, 27 and 34 of the Civil Procedure Act (Cap. 21, Laws of Kenya).

The 2nd plaintiff seeks that the execution of the decree/order on costs be set aside. The 2nd plaintiff seeks, in the alternative, that this Court should exercise its discretion and determine and order that the costs of this suit be paid by plaintiffs 1, 2, 3, 6, 7, 8, 9 and 12 equally, each of those plaintiffs who pays his proportionate share being discharged accordingly.

The grounds supporting 2nd plaintiff's application are set out as follows:

- (i) the plaintiffs were ordered to pay costs of the suit to the defendants;
- (ii) the costs have been taxed twice and that is unlawful;
- (iii) 1st defendant has applied for execution of the costs wholly by attachment, and sale of 2nd plaintiff's goods only – and the same is unlawful;
- (iv) The application and warrants of attachment and sale include interest on costs, when there was no order for the same under s. 27 of the Civil Procedure Act;
- (v) There is another application for execution of the same costs by the same 1st defendant filed on **26th April, 2007** which is still pending and there cannot be two applications for execution by different modes;
- (vi) There has been no order granting leave to execute for costs;
- (vii) That in any event, and in the alternative, the costs should be severed and paid by the plaintiffs equally – otherwise it is unfair, unjust and inequitable for 2nd plaintiff to pay solely, while any benefit could have accrued to all the plaintiffs equally;
- (viii) That the defendants have now issued execution and 2nd plaintiff stands to suffer substantial and irreparable loss.

Dr. J.M. Chamia, the second plaintiff swore a supporting affidavit on 14th May, 2009 deponing as follows:

- (a) the Court had made orders that the costs be paid by 1st, 2nd, 3rd, 6th, 7th, 8th, 9th and 12th plaintiffs;
- (b) M/s. Khatib & Co. Advocates for 1st and 7th defendants subsequently applied for execution of the costs: and warrants of attachment and sale

were issued accordingly;

- (c) earlier on, 1st and 7th defendants had applied for execution by Notice to Show Cause for arrest and committal to civil jail – and this application is still pending;
- (d) costs were assessed separately for 2nd defendant through M/s. A.B. Patel & Patel, Advocates;
- (e) M/s. Khatib & Co. advocates for 1st and 7th defendants have included interest in the sum of Kshs.95,831/00 on the application and warrants, though there were no orders for the same at all.

M/s. A.B. Patel & Patel, Advocates for 2nd defendant, filed grounds of opposition to the instant application, on 27th May, 2009. These grounds are as follows:

- (i) the application is misconceived;
- (ii) the suit had been filed jointly and severally by each of the plaintiffs;
- (iii) the question of contribution and/or indemnity for costs between the plaintiffs *inter se* is a matter that cannot be visited upon the defendants;
- (iv) there is no requirement for filing of a separate suit for costs, as there is a decree in the instant suit for costs, on a party-and-party basis, capable of execution.

The 1st defendant/respondent for his part, filed a notice of preliminary objection to the plaintiff's Chamber Summons of 14th May, 2009: and the objection is that "the application is *res judicata* [on] the issues raised therein, being similar to the issues raised in the application dated 21st August, 2006".

Learned counsel **Mr. Mutisya**, for 2nd plaintiff/applicant, submitted that the instant application had been served on 1st, 3rd, 6th, 8th, 9th and 10th plaintiffs through M/s. J.A. Abuodha & Co. Advocates; and on 7th plaintiff through M/s. Musinga Munyithya & Co. Advocates – but none of them made an appearance, nor filed any papers to oppose the application. Those plaintiffs who need not have been involved, because there were Court orders absolving them of liability for costs, were 4th, 5th, 10th and 11th plaintiffs. Counsel

noted that other defendants who filed no papers to oppose the 2nd plaintiff's application were: 3rd, 4th, 5th, 6th and 7th defendants. "Only the 1st and 2nd defendants/respondents filed a notice of preliminary objection, and grounds [of opposition]". As no replying affidavit was filed, in relation to 2nd plaintiff's application, *Mr. Mutisya* urged that "the facts of the application remain unchallenged".

Counsel urged that execution of the decree/order on costs should be set aside –

- (a) because costs were taxed twice for 1st and 2nd defendants/respondents; and this was irregular and unlawful;
- (b) because costs once taxed, "should be spread upon all the defendants/respondents".
- (c) because the application for attachment and sale and the warrants include interest on the costs (Kshs.95,831/75); and this is wrong and unlawful unless there is a specific order of the Court to charge interest on the costs under ss. 26 and 27 of the Civil Procedure Act, and there is none in this case – and so the entire execution process is bad in law and should be set aside;
- (d) that there are two separate executions – one by Notice to Show Cause filed on 26th April, 2007, and the other by attachment and sale of goods filed on 3rd March, 2009 – both against 2nd plaintiff; it is contended that there cannot be two modes of execution at the same time – otherwise the first one should have been withdrawn and returned to the Court, with an endorsement as to the results (but this was not done, and it renders the subsequent application incompetent and bad in law);
- (e) that the execution for costs is incompetent and bad in law, because there was no order for leave to execute for the same.

Counsel urged that an order be made severing the costs falling on the plaintiffs, to provide for equal sharing between all the remaining **eight** plaintiffs, and that once any plaintiff pays their share, they are discharged. Counsel gave a rationale as follows;

“When the plaintiffs filed suit, they would have enjoyed its benefits equally, hence the same should follow the costs. Since the other plaintiffs are not objecting to this order, and it doesn't

concern the defendants, it should be allowed, it being the most lawful, reasonable, equitable and conscionable”

Mr. Mutisya submitted that under s. 27 of the Civil Procedure Rules, the Court “has full power to determine by whom and to what [extent] costs are to be paid. The defendants have no business [objecting] to this, since all they want is to be paid”. Counsel submitted that “although the plaintiffs filed the suit together, each would have derived a separate and individual benefit, and similarly each should bear liability on the costs proportionately”.

Mr. Fayaz instructed by M/s. A.B. Patel & Patel Advocates, for 2nd defendant/respondent, submitted that whereas the plaintiffs’ case was jointly instituted through one advocate, the defendants were, for a substantial part, separately represented in the suit. The 2nd defendant alone had, by an application of **11th April, 2005** sought to have the suit struck out – and it was dismissed with costs as against 2nd defendant (on 29th July, 2005); and after the decree was issued, 2nd defendant’s bill of costs was taxed at Kshs.292,575/00 – and a certificate of taxation was issued therefor by the Deputy Registrar on 7th September, 2006. Counsel submitted that 2nd defendant’s attempts to recover the said sum of Kshs.292,575/00 has been frustrated by the plaintiffs who have been filing a plurality of applications. In a ruling of 27th February, 2009 **Sergon, J.** ordered the plaintiffs (with the exception of 4th, 5th, 10th and 11th plaintiffs) to bear the costs of the suit.

Counsel submitted that, insofar as the defendants were separately represented, each defendant is entitled to have its costs taxed and paid by the plaintiffs, in accordance with the Court’s order of 27th February, 2009. The contention that the costs once taxed ought to be divided on a **pro-rata** basis among the defendants, counsel submitted, was misconceived, because each defendant was awarded costs separately.

Counsel submitted that since the Court had already made its orders in respect of costs, it is an abuse of process for 2nd plaintiff to seek that the same be set aside, or varied, so as to allow him to pay by certain proportions; “the only manner of varying a judgment is either by review or on appeal”.

Counsel cited the High Court’s authority in **Mohamed & Muigai, Advocates v. Samuel Kamau Macharia & Another** Nairobi Milimani H.C.C.C. No. 1158 of 2002 in which the following passage appears in the ruling of **Kasango, J:**

“the parties agree that the judgment obtained against the defendants is joint and several. I accept the plaintiff’s interpretation of joint and several as correct. The decree-holder can choose to follow one or all of the defendants

“The plaintiffs are entitled at their option to follow any of the defendants”

Mr. Fayaz submitted that “a party in whose favour a joint-and-several order is made is entitled, at his option, to pursue the creditors either jointly or separately – in which case the onus would be on the debtor to seek an indemnity or contribution from his co-guarantors”.

Counsel further submitted that since the recovery of costs in this matter is on a party-and-party basis, the decree which has been issued can be executed in the same suit, without the necessity to file a fares suit.

Learned counsel **Mr. Kiarie Kariuki**, for 4th and 5th defendants, submitted that the 2nd plaintiff had no basis for seeking a setting aside of the High court’s decree: the plaintiffs had sued the defendants in a matter in which the cause of action was joint, and not severable; hence the costs are recoverable from any of the plaintiffs.

The same point is made by learned counsel **Mr. Khatib**, for 1st and 7th defendants: the possibility of sharing costs is an issue among the plaintiffs themselves; the plaintiffs had sought orders jointly; and their liability is joint and several.

The outcome in this matter is, in my opinion, straightforward. The costs question had been determined by **Sergon, J.** on 27th February, 2009, and the applicant herein does not deny that he, along with quite some of his co-plaintiffs, were landed with the responsibility to pay costs. It is not disputed that the said costs must come on the basis of bills of costs presented **by the several advocates** who acted for the defendants. It is equally clear that the liability of the plaintiffs, had the trial run full course and then they were found liable, would have been **joint and several** – and so the costs payable by the plaintiffs too are joint and several. In law, in such a condition, the defendants entitled to costs may claim from any or all the plaintiffs, and there is no duty to apportion the demands over the individual plaintiffs. It will be the obligation of the plaintiffs alone, by their own arrangements, to formulate and agree on any scheme of contribution to their costs fund.

It has also correctly emerged from the submissions of counsel for the defendants, that

2nd plaintiff's application is irregular as a basis for seeking to change this Court's decree and orders on costs: in the absence of a *review* or *an appeal*, the obligation to pay the decreed costs has already crystallized upon the plaintiffs, and this cannot be averted by an application such as the instant one.

I dismiss 2nd plaintiff's Chamber summons application of 14th May, 20-09 with costs to the defendants.

Orders accordingly.

DATED and ***DELIVERD*** at ***MOMBASA*** this 14th day of December, 2009.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Ibrahim

For 2nd Plaintiff/Applicant: Mr. Mutisya

For 2nd Defendant: Mr. Fayaz

For 4th & 5th Defendants: Mr. Kiarrie Kariuki

For 1st & 7th Defendants: Mr. Khatib