



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Misc. Civ. Cause 955 of 2006

**KENYA NATIONAL FEDERATION OF
CO-OPERATIVES LIMITED.....APPLICANT**

- VERSUS -

ECONET WIRELESS KENYA LIMITED.....1ST RESPONDENT

ECONET WIRELESS INTERNATIONAL LTD.....2ND RESPONDENT

CORPORATE AFRICA LIMITED.....3RD RESPONDENT

COMMUNICATIONS COMMISSION OF KENYA....4TH RESPONDENT

R U L I N G

The applicant filed this application seeking the leave of the court to file suit against the 4th respondent without first being required to file and serve the statutory thirty (30) days formal written notice. The 4th respondent raised preliminary objection to the application. The application was heard by Kasango J. In her considered ruling delivered on 22nd September, 2006, the learned judge allowed the preliminary objection and dismissed the applicant's application with costs. The 1st, 2nd and 4th respondents were awarded costs. At page 10 of her ruling, the learned judge made the following comments:

“It is pertinent to state in this ruling that counsel for the applicant did come to court although late on 19th September, 2006 and attempted to get the attention of the court to hear him in response of the preliminary objection raised by the respondent. Since the applicant's counsel had failed to attend court at the time allocated and since the court was at that time engaged in the hearing of another matter the court declined to hear the applicant's counsel.”

The applicant was aggrieved by part of the decision of the court where the learned Judge awarded the 1st and 2nd respondents costs of the dismissed application. The applicant filed a notice of motion under the inherent jurisdiction of the court, Sections 27 (1), 3A, and 80 of the Civil Procedure Act and Order XLIV Rules 1 and 2 of the Civil Procedure Rules, seeking to review, vary or set aside the said order of the court awarding costs to the 1st and 2nd respondents.

The grounds in support of the application are on the face of the application. The applicant contends that it filed the application with a view to commencing proceedings. It argued that the application was supposed to be heard without the involvement of the 1st and 2nd respondents who were at the time putative or nominal respondents. The applicant was aggrieved that the application was heard and determined *ex parte*

without the court hearing the applicant. It was aggrieved that the court had wrongly exercised its discretion and awarded costs to parties who ought not to have been awarded costs since they would not have been affected by the orders which the applicant had sought before the court. The applicant sought directions from the court regarding whether the costs payable to the respondents should be taxed as a miscellaneous cause or as a main suit. The applicant further sought directions from the court to stay the taxation of the respondents' costs pending the hearing and determination of the main suit which was subsequently filed by the applicant.

The application is opposed. The 4th respondent filed a notice of preliminary objection to the application. It stated that the application was fatally incompetent as a formal order of the ruling to be reviewed had not been produced and annexed. The 1st and 2nd respondents objected to the application on the grounds that the orders sought by the applicant were not maintainable in law.

At the hearing of the application, I heard the rival submissions made by Mr. Kamau on behalf of the applicant, Mr. Luseno on behalf of the 4th respondent and by Mrs. Mwangi on behalf of the 1st and 2nd respondents. It was evident from the argument presented to the court that the applicant is seeking this court's order to review the ruling of Kasango J. regarding the award of costs to the 1st and 2nd respondents. It was the applicant's case that since the said respondents were nominal or putative parties to the application, their presence in court was not necessary to aid the court in determining the matter then in contention. Section 27 (1) of the Civil Procedure Act grants a court discretion to award costs to any party in a suit subject to the caveat that costs in any action or cause shall follow the event unless the court for good reason orders otherwise.

In the present application, Kasango J. made an order directing the applicant to pay costs to the 1st and 2nd respondents. The 1st and 2nd respondents participated in the proceedings although the applicant claims that it had not served them to attend court. The learned judge was exercising judicial discretion. The Court of Appeal in *Shah vs Mbogo [1968] E A 93* held that the decision made by a court when exercising judicial discretion cannot be interfered with or set aside unless the person impeaching the decision established that the court wrongly exercised its discretion and as a result of which the decision caused injustice to the aggrieved party. The applicant herein seeks this court's intervention to set aside an order made by a judge of concurrent jurisdiction when exercising her judicial discretion. I think this court lacks jurisdiction to set aside or interfere with a decision of court of concurrent jurisdiction especially when such decision is made when such a court is exercising judicial discretion.

It is doubtful whether the applicant can invoke this court's jurisdiction in the circumstances by applying to review the said decision of the court. The applicant did not satisfy this court that the learned judge made an error that was apparent on the face of the record, or that the applicant had discovered new and important matter which was not within its knowledge at the time the application was argued or that there was sufficient reasons to enable this court review the said decision (See *National Bank of Kenya Ltd. vs Ndungu Njau [1995-1998] 2 EA 231*).

I therefore hold that the applicant has failed in its attempt to persuade this court that it has a just cause to enable this court review the order issued by Kasango J. regarding the costs awarded to the 1st and the 2nd respondents. This court will not address the issue whether or not the bill of costs presented to the court by the respondents are in accordance with the Advocates Remuneration Order since this court is not in the present application dealing with a reference filed pursuant to paragraph 11 (2) of the Advocates Remuneration Order. The application dated 21st May, 2007 lacks merit and is hereby dismissed with costs to the respondents.

DATED at NAIROBI this day of 26th June, 2008.

L. KIMARU

JUDGE