



**Erdermann Property Limited v Export Processing Zones Authority & 2 others;
London Distillers (K) Limited & 3 others (Interested Parties) (Environment and Land
Judicial Review Case 2 of 2020) [2023] KEELC 15842 (KLR) (1 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 15842 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 2 OF 2020
CA OCHIENG, J
MARCH 1, 2023**

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL
REVIEW ORDERS OF CERTIORARI, MANDUMS AND PROHIBITION**

AND

**IN THE MATTER OF: AN APPLICATION UNDER SECTIONS 3 AND 31 OF THE
ENVIRONMENTAL MANAGEMENT AND COORDINATION ACT, 1999, ORDER
53 OF THE CIVIL PROCEDURE RULES 2010, SECTIONS 8 AND 9 OF THE LAW
REFORM ACT, SECTIONS 2(I), 7(1)(B), (2)(A)(I) & (II), 7(2)(D) 7(2) (F), 7(2) (I) (II),
7(2) (J), 7(2)(N) AND 9(2) FAIR ADMINISTRATIVE ACTION ACT NO.4 OF 2015;
ARTICLES,10, 20, 21, 22, 42, 69, 70 AND 159 (2) OF THE CONSTITUTION OF KENYA,
2010; REGULATION 10, 11, 12, 13, 14, 15 AND 16 OF THE ENVIRONMENTAL
MANAGEMENT AND CO-ORDINATION (WATER QUALITY) REGULATIONS, 2006;**

AND ALL OTHER ENABLING PROVISIONS AND PROCEDURE OF THE LAW

BETWEEN

ERDERMANN PROPERTY LIMITED APPLICANT

AND

EXPORT PROCESSING ZONES AUTHORITY 1ST RESPONDENT

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 2ND
RESPONDENT**

WATER RESOURCES AUTHORITY 3RD RESPONDENT

AND

LONDON DISTILLERS (K) LIMITED INTERESTED PARTY

MAVOKO WATER & SEWERAGE CO INTERESTED PARTY



**COUNTY GOVERNMENT OF MACHAKOS, DEPARTMENT OF
ENVIRONMENT & NATURAL RESOURCES INTERESTED PARTY
DENVIC PROPERTY MANAGERS LTD INTERESTED PARTY**

RULING

1. What is before Court for determination is an issue of costs after the Ex parte Applicant had filed a Notice of Withdrawal dated the 8th July, 2020. The Ex parte Applicant sought to withdraw the Chamber Summons Application dated 24th January, 2020 wherein it had sought for leave to institute Judicial Review proceedings and for the said leave to operate as stay. The Notice of Withdrawal of Suit was struck out with Costs to the 1st Interested Party, vide Justice Angote's Ruling dated the 25th September, 2020. On 13th June, 2022, the Ex parte Applicant's Counsel sought for Judicial Review to be marked as withdrawn with no order as to costs. The parties were then directed to file submissions on the issue of costs.
2. The 1st Respondent filed their submissions dated the 26th October, 2022. None of the other parties filed their submissions.

Analysis and Determination

3. Upon consideration of the Pleadings including proceedings herein and the 1st Respondent's submissions, the only issue for determination is whether the 1st Respondent as well as the 1st Interested Party are entitled to costs.
4. On the issue of costs, Section 27 of the *Civil Procedure Act* stipulates thus:
 - “ 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.
 - (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.”
5. In the case of *Party of Independent Candidate of Kenya & another v Mutula Kilonzo & 2 others* [2013] eKLR it was held as follows;

“It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is a matter in which the trial Judge is given discretion. ...But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule



that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.

6. While in the case of *Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another* [2016] eKLR, Mativo J (as he then was), emphasized the position as to costs as outlined in Halsbury's Laws of England where it stated thus:

“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice” (Emphasis added).

See also the decision in *Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] eKLR.

7. In this instance, from a perusal of the Court proceedings, I note it is only the 1st Respondent and 1st Interested Party that sought for costs. It is trite that costs must follow the events. I note in the current scenario, the Ex parte Applicant filed a Notice of Withdrawal of the Chamber Summons Application dated the 24th January, 2020 seeking leave to institute proceedings on Judicial Review since it had been overtaken by events. From the proceedings, the Respondents including the 1st Interested Party had actually participated in the Application for Review and made several court appearances. I note there were other Applications where the parties participated including the 1st Interested Party's application dated the 12th February, 2020 which was heard and determined. It is my considered view that since the 1st Respondent including the 1st Interested Party entered appearances and participated in other interlocutory applications, they indeed made attempts to defend themselves. I opine that the costs in this instance is hence awardable but should be commensurate to the pleadings filed herein including court attendances made.
8. Based on the facts as presented while relying on the legal provision I have quoted as well as associating myself with the decisions cited, I find that since the other Respondents were not opposed to the Notice of Withdrawal of Suit without orders as to costs but only the 1st Respondent including the 1st Interested Party sought for the same, they hence qualify to be awarded the costs of this suit and I will proceed to do so.
9. I however direct that the quantum of costs payable to the 1st Respondent and 1st Interested Party is subjected to the discretion of the Taxing Master.
10. I so order.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 1ST DAY OF MARCH, 2023

CHRISTINE OCHIENG

JUDGE

