



**Bandari Investment Company Limited v National Police Service & Others
(Constitutional Petition 15 of 2017) [2022] KEELC 3510 (KLR) (5 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3510 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CONSTITUTIONAL PETITION 15 OF 2017**

M SILA, J

MAY 5, 2022

BETWEEN

BANDARI INVESTMENT COMPANY LIMITED PETITIONER

AND

NATIONAL POLICE SERVICE & OTHERS RESPONDENT

RULING

(Application for review of an order for costs; petition dismissed with no orders as to costs; some respondents in the petition now seeking that they be awarded costs of the petition; costs in discretion of court; court assessed all circumstances though they were not particularly spelt out; court not persuaded to review its orders on costs but proceeds to give elaborate reasons for not making the order on costs in favour of the respondents)

1. In my judgment delivered on January 28, 2021, I dismissed this petition but made no order as to costs. Now, through an application dated February 9, 2021, the 6th, 12th, 20th, 21st, and 23rd respondents seek that this court reviews that order on costs, so that costs are awarded to them. The application is based on the following grounds
 - (i) Ordinarily, costs follow the results of the case, albeit the court has unfettered discretion to pronounce itself on costs in every case.
 - (ii) The court in exercise of its unfettered discretion did not make any orders as to costs on this petition, despite sustaining all the objections to the petition taken by the named 6th, 12th, 20th, 21st, and 23rd respondents.
 - (iii) On an appeal taken by the respondents abovementioned from an order made on the dismissed petition, the petitioner was awarded costs on dismissal of the appeal.



- (iv) The matter involved serious legal issues, which polarised on the one hand counsel for the petitioner and all the Government departments vis-à-vis the said respondents on the other, and the successful parties ought to be compensated by an award of costs.
 - (v) Had all these facts been brought to the court's attention before the making of the order on costs, this court would most probably have arrived at and exercised its discretion differently.
 - (vi) Regrettably, the court inadvertently did not invite the parties to address it on costs before making and pronouncing its decision.
2. The application is opposed.
 3. Briefly, by way of background, this suit was commenced as a constitutional petition through which the petitioner, the registered proprietor of the land parcel Subdivision No.817 (Original Number 324/2) Section II/MN, claimed that the respondents have violated various of its constitutional rights touching on the suit property. The petition was against the National Police Service (1st respondent), the Regional Coordinator Coast Province (2nd respondent), the Attorney General (3rd respondent), Oriole Investment Limited (a construction company as 5th respondent) with the rest, the 6th to 23rd respondents, being individuals who were said to be squatting on the land. These individuals include the applicants herein. In a nutshell the complaint of the petitioner was that the Government agencies did nothing to stop the 6th – 23rd respondents from invading her land, despite the petitioner making a report thereof. It contended that the 6th – 23rd respondents are criminals who have invaded her land and are not squatters. They averred that these criminal acts violated her right to own property which right is provided in article 40 of *the Constitution*. Inter alia, they sought orders of mandamus to compel the 1st – 4th respondents to demolish the structures of the 6th – 23rd respondents and a permanent injunction against the 6th – 23rd respondents to restrain them from the land.
 4. In my judgment, I held the position that the complaint of the petitioner was not constitutional in nature so as to be addressed through a constitutional petition. I held the view that the petitioners ought to have filed an ordinary civil suit since the substratum of the petition was that it wanted the 6th – 23rd respondents out of her land and on mainly that basis, proceeded to dismiss the petition. On the issue of costs, I actually addressed myself on the same for I stated as follows :-

“I have found the petition unmerited but considering all the surrounding circumstances of this matter, I make no orders as to costs.”
 5. It is that order which the applicants now seek to have reviewed so that costs can be awarded to them.
 6. The petitioner filed grounds of opposition to oppose the motion. She contends that the remedy of the applicant lies in filing an appeal and not review. It is also raised that the application offends the provisions of order 51 rule 4 of the *Civil Procedure Rules*.
 7. In his submissions, Mr. Kimani, learned counsel for the applicants, submitted that it is not known what considerations went into play as no reasons were attributed to the statement of court disallowing the respondents costs. Counsel referred me to the Court of Appeal decision in the case of *Farah Awad Gullet vs CMC Motors Group Limited* (2018)Eklr and to other decisions cited therein. He submitted that reasons must be assigned to a decision denying a successful party costs of the suit. Mr. Muniyithya, learned counsel for the petitioner, similarly referred me to the case of *Farah Awad Gullet* (supra) and the case of *Supermarine Handling Services Limited vs Kenya Revenue Authority* (2010) Eklr. I have considered these submissions before arriving at my decision.



8. The subject application does not say under which provisions of the law it is brought. Neither does it have a supporting affidavit. That is probably why order 51 rule 4 has been raised in opposing the motion. Order 51 rule 4 states as follows :-

Every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served.

9. I have considered the above provision which addresses the issue of a supporting affidavit to an application. I do not think that order 51 rule 4 prescribes that all applications must be supported by an affidavit. What I interpret this rule as prescribing is the manner in which evidence in support of a motion needs to be brought, that is, through an affidavit. In other words, if a motion is to be grounded on evidence, then this needs to be presented in the form of an affidavit. It does not say that an application must be supported by evidence, and indeed, I think there are instances where it may not be necessary to support an application with any evidence, especially where only an issue of law arises from the record.

10. Secondly, although it has not been raised, failure to state the law upon which an application is based is also not fatal. This is pursuant to order 51 rule 10 (1) which provides as follows :-

10(1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.

11. Thus, in as much as it is desirable, and it is indeed good practice, to state the provision of the law upon which an application is based, failure to do so, by itself does not necessarily make the application fatal.

12. In our case, I can see for myself that this is an application for review, and even the petitioner acknowledges in her grounds of opposition that this is an application for review. I therefore see no prejudice to the petitioner if we proceed on the understanding that what is before court is an application for review on the order of costs.

13. Review orders are well addressed in order 45 rule 1, of the *Civil Procedure Rules*, and I think that provision can properly be imported even to suits based on a constitutional petition. It provides as follows :-

1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

From the above, I can flesh out the following three issues :-



- (i) That a review application needs to be made without unreasonable delay.
- (ii) That one needs to base his application on new evidence which could not be procured when the order was made, or on an error apparent on the face or record, or for other sufficient reason.
- (iii) That one can still file an application for review even where there is an appeal pending which has been filed by the other party unless the ground of appeal is common to the applicant and appellant or he can present the same case upon which he applies for review.

14. On delay, this application was filed on 8 February 2021. I had delivered judgment on January 28, 2021 and I do not think that it can be argued that the application has been filed after unreasonable delay.
15. In his submissions, Mr. Munyiya raised issue that his client has filed a Notice of Appeal and is in the process of filing an appeal. He submitted that whatever grievances are being raised here can be raised before the Court of Appeal. I would have agreed with Mr. Munyiya if I was certain that there is actually an appeal filed before the Court of Appeal. No evidence of any appeal filed was given to me, save that the petitioner filed a Notice of Appeal. I note that it is now more than one year since I delivered judgment, and without there being filed an appeal, then it cannot be ascertained that indeed the petitioner will follow up her notice of appeal with an actual appeal. I think in those circumstances, the application can be entertained, for it has not been demonstrated that there is an actual appeal pending, where the applicants can raise the same grievance that they are raising here.
16. The last element lists the substantive grounds upon which an application for review can be based, which are mistake apparent on the record, or new evidence, or other sufficient reasons. This is not a case where new evidence is being claimed not to have been presented. It could be that the applicant thinks that there is an error apparent on the face of record, though this is not coming out very clearly in the application, or it could be that the applicants are simply basing their application on the assertion that there is “sufficient reason” to warrant a review of the order on costs. I first commend the applicants for appreciating the discretion granted to a court to make orders that it deems fit when it comes to costs. What I hear them saying is that no reasons were given to depart from the general rule that costs should follow the event, and they actually press the point that since the petition was dismissed, then they should have been awarded costs.
17. It is true that the general rule on costs is that costs follow the event, and this is laid down in section 27 of the *Civil Procedure Act*, cap 21, which states as follows :-

27. Costs

- (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.



It can be seen from the above that the law on costs is that the costs are in the discretion of the court, provided that costs will follow the event, unless the court for good reason otherwise orders.

18. I was actually very much alive to the above law when I made the order on costs. I was also very much in step with the reasoning of the court in the case of *Farah Awad Gullet vs CMC Motors* (supra). Indeed, when I declined to make an award of costs, that was a very deliberate and well thought out order. It is not because I did not address my mind to it, for I certainly did. As mentioned in the judgment, I declined to award costs after taking into account all the surrounding circumstances of this case. Probably what I may have failed to do is to make elaborate those surrounding circumstances, so that the applicants can understand the mind of the court, and that is all I will do, for I am not persuaded through this application to review the order for costs.
19. First, it was within my mind that the legal registered owner of the disputed land was the petitioner. Secondly, I considered that the 6th – 23rd respondents did not claim to have any registered title to the same land, i.e, this was not a case of two parallel titles at play. I appreciated that the land of the petitioner has been occupied by other persons, and I could see why the petitioner would feel frustrated because of what it perceived to be inaction by the police to remove the occupants of the land. I also thought that the petition, though misplaced in my opinion, was raising an important issue on the obligation of the police to act, in removal of squatters, upon a report being made. At the end of the day, I did not find merit in the petition, but I never considered the petition as being frivolous. Sometimes you need to be slow in awarding costs especially in matters that attempt to bring out fine points of law in constitutional interpretation. In those circumstances I did not consider it proper to make an award of costs against the petitioner. Those were the surrounding circumstances that I took into account. Whether I was wrong in those reasons, may be grounds for appeal, but I am not persuaded that I made a mistake, or that there is any sufficient basis presented here, which would warrant me to review that order.
20. It is for these reasons that this application is hereby dismissed. But what about costs of this dismissed application ? Now that I have dismissed it, should costs follow the event so that I award costs to the petitioner ? I have thought about it. I decide not to make any order as to costs. Reason : in as much as the application is dismissed, I am unable to find fault in the respondents attempting to seek a review of the order of dismissal with no orders as to costs, because I had not elegantly set out the elaborate reasons for making such order.
21. Orders accordingly.

DATED AND DELIVERED THIS 5 DAY OF MAY 2022

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA

