



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

MISC APPLICATION NO.7 OF 2011

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

IN THE FORM OF CERTIORARI

AND IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT NO.18 OF 1990

AND

IN THE MATTER OF THE CIVIL PROCEDURE ACT AND RULES

AND

IN THE MATTER OF LAND REFERENCE NO. NAROK CIS MARA/ILMOTIOK/21

AND

IN THE MATTER OF THE PROVINCIAL LAND DISPUTES COMMITTEE

AND

IN THE MATTER OF NAROK SENIOR PRINCIPAL MAGISTRATES MISC

LAND CASE NO. 3 OF OF 2010

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26 OF THE LAWS OF KENYA

BETWEEN

REPUBLICAPPLICANT

VERSUS

THE CHAIRMAN PROVINCIAL LAND

DISPUTES TRIBUNAL COMMITTEE.....1ST RESPONDENT

THE SENIOR MAGISTRATES COURT NAROK.....2ND RESPONDENT

EVALINE TUIYA.....3RD RESPONDENT

EX-PARTE

LEDAMA LELEI.....SUBJECT/RESPONDENT

RULING

Introduction

1. What is before me for determination is the Notice of Motion dated 27th February 2019 seeking the following orders:

- a) That pending the hearing and determination of this application inter partes, the subject by himself, his agents or any person or entity acting on his instructions be restrained from attaching, advertising for sale, selling or in any other way interfering with the 3rd Respondent's property.
- b) The Honourable court be pleased to set aside the Certificate of costs issued by this court and the subject's Bill of costs.
- c) That this honourable court be pleased to apportion the costs among all the Respondents in this suit.

2. The application is premised on the grounds stated on the Notice of Motion and the 3rd Respondent's supporting affidavit sworn on the 27th February 2019. The main grounds for the application are that the 3rd Respondent was never served with the subject's Bill of Costs and that the costs ought to be apportioned among all the Respondents.

3. In opposing the application, counsel for the subject, Mr. Erastus Menge Orina filed a Replying affidavit dated 1st April 2019 in which he depones that the 3rd Respondent's counsel was served by registered post. He has annexed the certificate of posting dated 7th April 2016. Thereafter the subject's Bill of costs was taxed on 10th May 2016 after which a Certificate of costs was issued. He further depones that in accordance with Order 24 Rule 10 of the Civil Procedure Rules, there was no need to substitute the deceased Ex-parte applicant before applying for execution.

4. The application was prosecuted by way of written submissions and both parties filed their submissions to articulate their positions.

Issues for determination:

5. Having considered the Notice of Motion, affidavits and rival submissions, the following issues arise for determination:

- i. Whether the application is valid.
- ii. Whether the Certificate of costs ought to be set aside.
- iii. Whether the costs ought to be apportioned among the Respondents

Analysis and Determination

6. Counsel for the subject raised the issue that the application served upon them was not signed by the 3rd Respondent or his advocate and that the said application is not valid. Had all the copies been filed without being signed, the application would have been struck out for being invalid. In the case of **Southern Engineering Co Limited v Heady Berge Limited & Another [2019] eKLR** the court held that:

“The requirement to have a pleading signed is a mandatory requirement and it is not a procedural technicality but is a substantive issue going to the root or pleadings. The object of the statute requiring the pleading to be signed by the pleader or his counsel is to make a party signing or filing a pleading take ownership and responsibility for the contents of the pleadings. The Kenyan position is well settled by a myriad of authorities. That a party who files an unsigned pleading has no case that is properly before the court.”

7. However, the Notice of Motion filed in court was duly signed and is therefore valid. In arriving at this finding I am guided by the case of **Atulkumar Maganlal Shah v Investments and Mortgages Bank Limited and 2 Others Civil Appeal No. 13 of 2001** consolidated with **Vipin Maganlal Shah v Investments and Mortgages Bank Limited & 2 Others Civil Appeal No. 19 of 2001 [2001] KLR 190** where the Court of Appeal held as follows:

“Where a pleading is not signed, the same would be struck out rather than being dismissed... A pleading must be signed either by the advocate or the party himself where he sues or defendant in person or by his recognized agent and this is meant to be a voucher that the case is not a mere fiction. The failure to serve the service copy of the statement of claim if the original is signed is not fatal”

8. With regard to the second issue, even though the 3rd Respondent denies that she was served, there is evidence on record to show that her advocate was served with the Bill of Costs and Notice of Taxation. The Certificate of posting dated 7th April 2016 from EMS and the Affidavit of Service dated 11th April 2016 which are annexed to the Replying Affidavit or Erastus Orina Advocate as annexure “EMO 1” both attest to this. The address indicated on the certificate of posting is the same one used by Counsel for the 3rd Respondents. Therefore, the Certificate of costs cannot be set aside on the basis that it was not served.

9. The third and last issue for determination is whether the costs ought to be apportioned among the 3 Respondents. As correctly submitted by counsel for the 3rd Respondent section 27 (1) of the Civil Procedure Act gives the court the discretion to determine which party ought to pay the costs of the suit. In her judgment dated 25th June 2014, Honourable Lady Justice Waithaka awarded the costs of the suit to the

applicant. It is clear from the record that the 1st and 2nd Respondents did not participate in the proceedings and the necessary implication is that the costs were to be paid by the 3rd Respondent as she is the only one who participated in the proceedings. In any event the 1st Respondent ceased to exist when the Land Disputes Tribunal Act was repealed in 2012.

10. In essence the 3rd Respondent is asking this court to review the order for costs which was made by the trial court more than five years ago. No explanation has been given why this application is being made so late in the day. The 3rd Respondent has not met the conditions for review which are set out in section 80 of the Civil Procedure Act and order 45 Rules 1, 2 and 3 of the Civil Procedure Rules so as to warrant a review of the said order. 45 of the of the Civil Procedure Rules provides as follows:

“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 a 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 review of judgment to the court which passed the decree or made the order without unreasonable delay”.

11. The 3rd Respondent has not cited any of the reasons given above as the reason why the review of the order for costs is necessary and I would have no basis for varying or reviewing the order by Hon. Lady Justice Waithaka.

12. In view of the foregoing, I find no merit in the application and I dismiss it with costs to the 3rd Respondent.

Dated, signed and delivered at Kericho this 3rd day of July, 2019.

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J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Nyadimo for Ms Maritim for the Applicant
2. Mr. Ngeno for Mr. Orina for the Respondent
3. Court Assistant - Rotich