



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 1 OF 2008

JAMES KIRONGO ITUMA RWITO.....PLAINTIFF

VERSUS

MARY KINGORI.....1ST DEFENDANT

NATIONAL BANK OF KENYA.....2ND DEFENDANT

INTERNET DATA SERVICES LTD.....3RD DEFENDANT

RULING

By a Notice of Motion dated 28th March 2020 and brought under *Order 45 Rule 1 CPR and Section 80 CPA*, the Applicant/3rd Defendant sought the following orders:-

(1) That the Court do review its judgment and particularly paragraph 57 (4) on the limb of costs of its judgment delivered on 10th February 2020 in respect of the 3rd defendant.

(2) Cost be in the cause.

The application is based on the following grounds:-

- (a) The aspect of payment of costs by the 3rd defendant to the plaintiff is not in tandem with the other findings in the judgment that exonerated the 3rd defendant from any blame.
- (b) The Court dismissed the plaintiff's case as against the 3rd defendant, yet it inadvertently proceeded and awarded half of the costs to the plaintiff.
- (c) There is an error apparent on record because the plaintiff cannot be awarded costs for a suit dismissed.
- (d) The application has been brought without undue delay.
- (e) The peculiar circumstances dictate that the orders be issued.

Applicant's/3rd Defendant's summary of Facts

The Applicant/3rd Defendant filed a supporting affidavit in which he made the following depositions:

- (1) That this Court delivered its judgment on 10/2/2020 inter alia dismissing the plaintiff's case against the 3rd defendant.
- (2) That the Court in the said judgment dismissed the plaintiff's claim against the 3rd defendant, but what appears to be an accidental slip ordered that the 3rd defendant pay the plaintiff half of the costs.
- (3) That there is an error apparent on the face of the record since ordinarily the Court cannot dismiss the plaintiff's claim against the

3rd defendant and on the flipside proceed to award costs against the 3rd defendant.

(4) That there are overwhelming and sufficient reasons as above described to warrant the review of the said orders.

(5) That I pray that a review of the judgment be done and particularly that at paragraph 57 and in place the Court do order that no costs are payable to the plaintiff by the 3rd defendant.

A similar application was also filed by the 2nd defendant, National Bank of Kenya dated 25th February 2020 under *Order 45 Rule 1 and Order 51 Rule 1 CPR, Sections 1A, 1B and 3A and 80 CPA Cap. 21 Laws of Kenya*. In the said application, the 2nd defendant sought the following orders:-

(1) Spent.

(2) That this Honourable Court be pleased to review and/or vary paragraph 57 (4) of its judgment made and delivered on 10th February 2020 in respect to the 2nd defendant/Applicant and particularly the order requiring the defendants to pay half costs to the plaintiff plus interest at Court rates.

(3) That this Honourable Court be pleased to award the 2nd defendant/Applicant costs of the suit as against the plaintiff for being successful in its defence of the plaintiff/Respondent claim against it.

(4) That the costs of this application be provided for.

Grounds in support of the Application

(a) That there is an error apparent and/or an accidental slip by the Court in the order made under paragraph 57(4) of its judgment on the issue of costs payable to the plaintiff/Respondent.

(b) The order made by the Court on payment of costs as per paragraph 57(4) of the judgment is inconsistent with the findings of the Court as stated in paragraph 57(1) in which the plaintiff/Respondent's suit against the 2nd and 3rd defendants was dismissed yet in paragraph 57(4) the Court ordered that the defendants pay half costs to the plaintiff/Respondent.

(c) The established legal position on payment of costs is that costs, though at the discretion of the Court, will always follow the event, unless in exceptional circumstances and for specific reasons to be stated by the Court.

(d) There is an error apparent and/or an accidental slip in the order made by the Court on the issue of costs as a party whose suit has been dismissed against a defendant in the suit cannot then be entitled to costs of the dismissed suit against the successful defendant.

(e) There is therefore need for the said order to be reviewed and/or varied so as to align and conform itself to the findings of the Court and to conform to the law in regard to costs of the suit.

(f) This application is made in utmost good faith and has been brought to Court without undue delay.

(g) The nature facts and circumstances of the case herein are in favour of granting of the prayers being sought for vide this application.

Applicant's/2nd Defendant's summary of Facts

The 2nd Respondent/Applicant filed a supporting affidavit and deposed as follows:-

(1) That this Honourable Court made and delivered its judgment herein on 10/2/2020 in which the plaintiff/Respondent's suit against the Bank (2nd Defendant/Applicant) was dismissed (see a copy of the judgment annexed hereto and marked as "SM 1").

(2) That the Court then in its said judgment made an order that the defendants pay to the plaintiff/Respondent half the costs of the suit.

(3) That there is an error apparent and/or an accidental slip by the Court in ordering the bank (2nd Defendant/Applicant) to be party to the payment of costs to the plaintiff/Respondent yet the plaintiff/Respondent suit against the 2nd defendant/Applicant was dismissed.

(4) That it is therefore desirable that the said order on costs be reviewed and/or varied to reflect and align to the findings and the actual decision and judgment in as far as the plaintiff/Respondent's claim against the Bank (2nd defendant/Applicant) is concerned.

(5) That I am advised by the 2nd Defendant/Applicant's counsel and which advise I verily believe to be correct that it is an established position of the law that costs will always follow the event and as such the plaintiff/Respondent's suit against the Bank (2nd defendant/Applicant) having been dismissed the plaintiff/Respondent is not entitled to costs as against the Bank (2nd

defendant/Applicant).

(6) That in actual fact, the position as the law provides would dictate that the bank (2nd defendant/Applicant) be awarded costs of the suit as against the plaintiff/Respondent for successfully defending the plaintiff/Respondent's suit against it.

(7) That it follows therefore that the order made by the Court on costs ought to be reviewed and/or varied to align itself with the judgment in the main suit.

(8) That this application is made in utmost good faith and the prayers being sought for are intended to correct and/or rectify the error apparent and/or accidental slip by the Court in its judgment made and delivered on 10/02/2020.

(9) That the nature facts and circumstances of this case are in favour of the orders being sought for vide this application.

The two applications are opposed by the plaintiff/Respondent through the firm of Kurauka & Co. Advocates vide Grounds of opposition dated 30th March 2020 and 31st March 2020 respectively. In the first ground of opposition, the plaintiff/Respondent averred as follows:-

(1) That the said application is incompetent, frivolous, fatally defective, superfluous, lacks merit and is an abuse of the Court process hereof.

(2) That *Section 27 of the Civil Procedure Act* provides that the Judge or Court dealing with the issue of costs in any suit, action, cause or matter has absolute discretion to determine by whom and to what extent such costs are to be paid.

(3) That the Applicant fixed the said application for hearing after the Respondent had filed and fixed the suit for taxation of the Bill of costs hereof.

(4) We persuade this Honourable Court to dismiss the Notice of Motion dated 28th March 2020 with costs to be assessed by this Honourable Court.

As regards the second grounds of opposition, the plaintiff/Respondent averred as follows:-

(1) That the said application is incompetent, frivolous, fatally defective, superfluous, lacks merit and is an abuse of the Court process hereof.

(2) That *Section 27 of the Civil Procedure Act* provides that the Judge or Court dealing with the issue of costs in any suit, action, cause or matter has **absolute** discretion to determine by whom and to what extent such costs are to be paid.

(3) That the application offends Order 45 Rule 2 of the Civil Procedure Rules which provides that ... A party who is not appealing from a decree or order may apply for a review of judgmenttherefore the Applicant is not entitled to make the application for review having filed a Notice of Appeal.

(4) The Defendants contributed to the cause of action thus the order for costs hereof.

(5) That the applicant fixed the said application for hearing after the Respondent had filed and fixed the suit for taxation of costs hereof.

(6) We persuade this Honourable Court to dismiss the Notice of Motion dated 25th February 2020 with costs to be assessed by this Honourable Court .

2nd Defendant's/Applicant's Submissions

The 2nd Defendant/Applicant through the firm of Mithega & Kariuki Advocates submitted that the guiding principles for the award of costs is Section 27 of the Civil Procedure Act which provides the Judge discretion to award costs which usually follow the event unless the Court gives reasons for the departure. The learned counsels cited the following authorities:-

(1) *Section 27 CPA Cap. 21 Laws of Kenya.*

(2) *Judicial hints in Civil Procedure. 2nd Edition, Page 99.*

(3) *Party of Independent Candidate of Kenya Vs Mutula Kilonzo & 2 Others (2013) e K.L.R.*

3RD Defendant's Submissions

The 3rd Defendant through the firm of Mbogo & Muriuki Advocates associated themselves with the submissions by the 2nd Defendant/Applicant.

Plaintiff/Respondent's written Submissions

The Plaintiff/Respondent through the firm of Kurauka & Co. Advocates submitted that this Honourable Court is functus officio and has no jurisdiction to set aside, review, vary or vacate its judgment and that the applicants having preferred appeals are barred from applying for a review by dint of Order 45 Rule 2 CPR. The learned counsel further submitted that Section 27 of the Civil Procedure Act Cap. 21 Laws of Kenya provides the Judge or Court with the absolute discretion to determine by whom and to what extent such costs are to be paid. The plaintiff/Respondent also submitted that the defendants are liable to pay costs as they contributed to the cause of action and that this application was prompted after they had filed and fixed the suit for taxation of Bill of Costs thereof. He cited the following cases:-

- (1) *Republic Vs Rosemary Wairimu Munene*
- (2) *Ex-parte Applicant Vs Ihururu Dairy Farmers Co-operative Society (2014) e K.L.R*
- (3) *J.R. Application No. 6 of 2014 and Halsbury's Laws of England 4th Edition (Re-Issue), (2010) Vol. 10*
- (4) *British Columbia (Minister of Forests) Vs Okanagan Indian Bond, (2003) - 35 C.R 371, 2003 SCC 71.*
- (5) *Zesta Engineering Ltd Vs Clontier (2002) O.J. No. 4495 (C.A)*
- (6) *Jareth Vs Kigano & Associates (2002) E.A. 92.*

Legal Analyses and Decision

I have considered the Notice of Motion, the affidavit evidence and the submissions by the parties. I have also considered the applicable law. The application for the review of an order or decree is guided by Section 80 as read with **Order 45 of the Civil Procedure Act. Order 45 CPR** reads as follows:-

“45(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, desire 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.....

The applicant in the two applications for review have presented similar reasons for review of the judgment, that is to wit; on account of some mistake or error apparent on the face of the record. A copy of the impugned judgment was annexed to the supporting affidavit of Samuel Mundia sworn on 25th February 2020 and marked “**SM 1**”.

Paragraph 57 (1) & 4 reads as follows:-

“57 (1) The plaintiff's suit as against the 2nd and 3rd defendant is dismissed.

(4) In view of the fact that plaintiff has partially succeeded in the suit, I order that the defendants shall pay half costs to the plaintiff plus interest at Court rates”.

At paragraph 57 (3) of the said judgment, the Court found that the plaintiffs claim as against the 1st defendant succeeds to the extent that the 1st defendant shall pay the plaintiff a refund of Ksh. 1,025,368 plus interest at Court rates from 28/3/98 until payment in full. I agree with the applicants in the two applications and their submissions that the order condemning defendants generally to pay half costs to the plaintiff plus interest at Court rates is an accidental slip that cannot be allowed to stand on record. The same is a mistake that should be corrected to read as follows:-

(4) “In view of the fact that the plaintiff has partially succeeded in the suit as against the 1st defendant, I order that the 1st defendant shall pay half costs to the plaintiff plus interest at Court rates”.

The upshot of my finding is that the consolidated applications is allowed and the order on half costs together with interest shall be borne by the 1st defendant. I make no order as to the costs of this application. It is so ordered.

DATED, DELIVERED VIRTUALLY AND SIGNED AT GARISSA THIS 28TH DAY OF JULY, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. Ms Masamba for the 1st and 2nd Defendant
2. Mr. Muriuki for 3rd Defendant
3. Plaintiff/Advocate; Absent
4. Fardowsa-Court Assistant.