



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

MISC. APPLICATION NO. 1 OF 2020

STEPHEN NJIRU NGURE.....APPLICANT

VERSUS

ELIDAH NJAMBI MAINA.....1ST RESPONDENT

STEPHEN MURIITHI.....2ND RESPONDENT

RULING

1. By a Notice of Motion application dated 3rd February 2021 and supported by an affidavit of even date, the Applicant herein approached the court seeking the following orders:

(i) That the Honourable Court be pleased to amend/correct its orders on costs made on 13th November 2020;

(ii) That the costs of the Notice of Motion dated 6th January 2020 be awarded to the 2nd Respondent instead of the 1st Respondent;

(iii) That the costs of this application be awarded to the Applicant in any event.

2. The Applicant's prayers are grounded on the premises set out in the supporting affidavit of Okero Gilbert Ombachi:

a) That the Notice of Motion herein dated 6th January, 2020 was filed in court on 10th January 2020;

b) The Notice of Motion was seeking for transfer of Kerugoya CMC ELC No. 152 of 2012 to this Honourable Court for hearing and final disposal;

c) The Applicant opposed the Notice of Motion by filing grounds of opposition and submissions in opposition thereto;

d) The application dated 6th January 2020 was dismissed by this Honourable Court on 13th November 2020, however the costs were awarded to the 2nd Respondent instead of the Applicant;

e) There is an error as to who was to be awarded the costs since the 2nd Respondent never opposed nor participated in the proceedings;

f) The correction or the error or mistake will not prejudice any party.

3. The Applicant's application is opposed. The 1st Respondent filed her grounds of opposition on 12th February 2021. She opposed the Applicant's opposition for being bad in law, for having been brought after inordinate delay and for being *res judicata*. The 2nd Respondent filed his replying affidavit on 20th April 2021. He averred that following the ruling on 13th November 2020, the 1st Respondent settled the costs awarded to him. That the Applicant's application cannot be granted since the costs awarded were already settled.

4. By consent, the parties canvassed the application vide written submissions. The 1st Respondent filed her submissions on 06th April 2021. She submitted that **Sections 99 and 100 of the Civil Procedure Act, Cap 21** on amendment of judgements and decrees is inapplicable in the present case owing to the fact that costs are awarded at the discretion of the Court. She relied on the following decisions: **Central Bank of Kenya v Giro Commercial Bank Limited & 3 Others (2021) e KLR; Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others (2014) e KLR; Morgan Air Cargo Limited v Errest Enterprises Limited (2014) e KLR**. She further submitted that since the

issue of costs had already been determined in the ruling delivered on 13th November 2020, it had become *res judicata*. She relied on the decision in **ELC No Misc E3 of 2020 Monica Wambui & Another v George Maina Mugo (2021)**.

Neither the Applicant nor the 2nd Respondent filed their submissions.

5. The court has considered the notice of motion application, rival affidavits and the 1st Respondent's submissions. Indeed, the 1st Respondent (then, Applicant) filed a notice of motion application on 6th January 2020 for orders against the 2nd Respondent (then, 1st Respondent and the Applicant (then, 2nd Respondent), which application was dismissed. In the ruling delivered by this court on 13th November 2020, costs were awarded to the 1st Respondent (now, 2nd Respondent). The court considered the 2nd Respondent's (now, Applicant's) ground of application in its final determination. Although the record indicates that both the 1st and 2nd respondent's filed their defence, the ruling analyzed the 2nd Respondent's (now, Applicant's) grounds of opposition. The Court agrees with the 1st Respondent herein that although an award for costs is at the discretion of the court, costs usually follow the event. See

Party of Independent Candidate of Kenya vs Mutula Kilonzo & 2 others HC EP No. 6 of 2013:

"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."

Again in **Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant Vs Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review Application No. 6 of 2014** the court held as follows:-

"The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case."

It thus does appear that the Court made an error in its award of costs. **Section 99 of the Civil Procedure Act, Cap 21** allows for the amendment of errors.

'99. Amendment of judgments, decrees or orders Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.'

[Order 45, rule 1.] Application for review of decree or order.

1. (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.(Underline, mine)

While the Applicant has a right to seek the courts intervention, that intervention cannot be sought after undue delay. The court delivered its ruling on 13th November 2020 while the Applicant filed his notice of motion application on 3rd February 2021, more than two months after the ruling. By this time, the 1st Respondent had already paid the relevant costs to the 2nd Respondent. In my opinion, the orders sought therefore cannot be granted. It is my view that the application ought to be dismissed which I hereby do.

RULING READ, SIGNED AND DELIVERED PHYSICALLY AT KERUGOYA THIS 23RD DAY OF JULY, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of :-

1. Ms Wangechi Munene holding brief for Muriuki Muriithi

2. Mr. Asimwe holding brief for Ombachi

3. 1st Respondent – absent

4. Kabuta, Court clerk – present