



**H. Young & Co. (E.A) Limited v Kenya Electricity Generating Company (Kengen)
& another; Fichtner GMBH & Co. KG & MTL NZ Ltd (Interested Party) (Application
E024 of 2023) [2024] KEHC 8820 (KLR) (Judicial Review) (19 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8820 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
APPLICATION E024 OF 2023**

**J NGAAH, J
JULY 19, 2024**

BETWEEN

H. YOUNG & CO. (E.A) LIMITED APPLICANT

AND

**KENYA ELECTRICITY GENERATING COMPANY (Kengen) 1ST
RESPONDENT**

DISPUTE BOARD 2ND RESPONDENT

AND

FICHTNER GMBH & CO. KG & MTL NZ LTD INTERESTED PARTY

RULING

1. On 24 March 2023, the applicant in this matter obtained leave to file a substantive motion for judicial review reliefs; however, by a letter of consent subsequently executed by the applicant and the 1st respondent, the suit was marked as withdrawn. The parties to the consent were to bear their respective costs but it was also agreed between them that they would share costs payable to the 2nd respondent.
2. The letter of consent was brought to my attention on 11 December 2023 when parties' representatives appeared in court. Upon the application of the parties to the consent, the consent was eventually adopted as the order of the court.
3. As at the time of adoption of the consent, there were two pending applications on record in which the applicants sought to be admitted to the suit as interested parties. Notwithstanding the fact that the applicants in those pending applications were yet to be admitted to the suit, they sought for costs of the suit after its withdrawal. This quest for costs prompted me to invite the parties in the suit and the



applicants in the applications for joinder to file submissions on the question whether persons who are not parties in a suit would be entitled to costs upon the determination of the suit; irrespective of how the suit is determined or terminated.

Only the applicant and the 2nd proposed interested party complied with the directions and filed submissions.

4. According to the applicant, the judicial review proceedings before court had nothing to do with the proposed interested parties in their private capacities and, in any event, their applications to be joined to the proceedings were never heard and determined.
5. The applicant relied on *Musa Ogaro Osoro v Wakenya Pamoja Sacco Ltd & Another* (2016) eKLR for the argument that orders cannot legally issue to a party who is a stranger to a suit because issuance of an order against such a party would be irregular, untenable and an exercise in futility.

The applicant also relied on *Republic v Director of Public Prosecutions & Another, ex parte; Patrick Onyango Ogola* (2016) eKLR in which the case of *Commercial Bank of Africa Limited v Isaac Kamau Ndirangu* (Civil Appeal No. 157 of 1995 (1990 – 1994) EA 69 was cited with approval for the argument that that a person who is not a party to legal proceedings cannot reap the benefits thereof.

6. On the 2nd proposed interested party's behalf, Section 27(1) of the *Civil Procedure Act*, cap. 21 was invoked for the argument that costs follow the event and that costs are awarded at the discretion of the judge. The case of *Nubian Rights Forum & 2 others v Attorney General & 6 others*; (2020) eKLR was cited as one of those cases where this provision of the law has been applied.
7. The 2nd proposed interested party also relied on *DGM v ENG* (2021) eKLR where *Morgan Air Cargo Limited v Everest Enterprises Limited* (2014) eKLR was cited with approval. In the latter decision, factors to be considered in awarding costs were outlined as follows:
 - a. The conduct of the parties;
 - b. The subject of litigation;
 - c. The circumstances which led to the institution of the proceedings;
 - d. The events which eventually led to their termination;
 - e. The stage at which proceedings were terminated;
 - f. The manner in which they were terminated;
 - g. The relationship between the parties, and;
 - h. The need to promote reconciliation amongst the disputing parties amount to Article 159(2) (c) of the *Constitution*.
8. It has been urged on behalf of the 2nd proposed interested party that the applicant “dragged” him in court and, apparently, has been engaged in the court proceedings for a nearly a year because he is a member of the 2nd respondent and, for this reason, the 2nd proposed interested party ought to be awarded costs.

As earlier noted, the 3rd and 4th proposed interested parties did not file submissions. They filed what they described as “a preliminary objection”. I will revert to this objection in due course.

9. Having considered the submissions both for the applicant and the 2nd proposed interested party, it is not in dispute, and indeed it is common ground, that the “2nd proposed interested party” is not a



party to the proceedings. The 2nd proposed interested party's description of himself as a "proposed" interested, in itself, goes to show that that he is not a party to the suit either in the capacity in which he seeks to join the suit or at all. What's more; that he has a pending application to join the suit ipso facto rules him out as a party to the suit.

10. The question that then follows is whether he, or any other proposed interested party or parties, for that matter, would be entitled to costs of the suit if the suit is determined or terminated, as it has been in this case, before they are joined to the suit.
11. Neither section 27 of the *Civil Procedure Act* nor any of the decisions cited by the 2nd proposed party says that costs may be awarded to a stranger to the proceedings otherwise described as a "proposed interested party". Section 27 of the *Civil Procedure Act* reads 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.
 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.
12. Thus, costs, including incidental costs of the suit are awarded at the discretion of the judge but subject to the proviso that, everything else being equal, costs follow the event. No doubt, the "event" here would be the outcome of the suit. So that if the suit succeeds, the "event" of success would ordinarily entitle a claimant to costs. On the flipside, if the suit fails, the "event" of failure of the suit would entitle the defendant or respondent to costs.
13. Be that as it may, irrespective of the outcome of the suit, whoever is entitled to costs must, in the first place, be a party to the suit in which costs are awarded. The court will not award costs to a person who is not a party to a suit in any capacity and neither will it order such a party to pay costs.
14. I have noted before that in none of the decisions cited by the 2nd proposed interested party have costs been awarded to a "proposed interested party" or, to put it more candidly, to a stranger to the suit. Neither has it been suggested in those cases that it is possible that the court, in exercise of its discretion under section 27 of the *Civil Procedure Act*, can make such an order.
15. The Nubian Rights Forum case (supra) simply affirmed the legal position as stated in Section 21 of the *Civil Procedure Act*. *DMG v ENG* (supra) set out the factors to be considered in exercise of the discretion to award costs; one way or the other. It is important to note that, among these factors, are the conduct of the parties and their relationship. But the factors would apply to parties to the suit and not strangers. This position is reiterated in *Republic v KPA ex parte Grain Bulk Handlers Limited* ⁶



Coast Silos Limited (2015) eKLR in which the court explained, among other things, a party to a suit that would ordinarily be entitled to costs. The court noted as follows:

“In my view, with respect, it does not matter how a party joins the suit – whether by original joinder by the applicant as a defendant a respondent, or by leave of court subsequently. What matters is that the court found that the party had an interest or is a necessary party in the matter justifying his joinder in the suit. If a such party turns out to be successful party, he should be entitled to costs on the basis of the principle that costs follow the event.”

16. This decision would be of little help to the 2nd proposed interested party because, first, he has not joined the suit in any capacity. Secondly, the court has not found that he has an interest in the suit or he is a necessary party. And, finally, he has not turned out to be a successful party in this suit. His bid to join the suit was nipped in the bud, so to speak, when the suit he sought to join was withdrawn before a determination could be made on his application.

The common thread in the rest of the decisions cited by the proposed 2nd interested party is the the position that costs would be awarded to persons who are already parties to particular suits, in whatever capacity.

17. In Canyon Properties Limited & 3 others v Eliud Kipchirchir Bett & 2 others (2017) eKLR, for example, the appellants who succeeded in convincing the Court of Appeal that they were entitled to costs in a withdrawn suit were parties to the suit in question. In Douglas Wabwire Wabidonge v John Ochiemo Wanjala & 3 others, Cooperative Bank of Kenya (interested party) (2019) eKLR and Pradipkumar Harjivandas Paunrama v Muriu Thoiti & George Waweru (2021) eKLR costs were awarded to interested parties who were parties in the respective suits in those capacities. Certainly, they were not proposed interested parties.
18. Finally, the allegation by the 2nd proposed interested party that he was dragged in this suit by the applicant is factually incorrect. Contrary to the 2nd proposed interested party’s allegations, the record shows that it is the applicant who applied to join the suit. It follows that the 2nd proposed interested party cannot employ his own application for joinder and the proceedings thereto to demand costs when the suit to which he seeks to be joined was terminated before the hearing and determination of the application for joinder.

For the foregoing reasons, I hold that the 2nd proposed interested party is not entitled to costs of the suit.

19. The 3rd and 4th proposed interested parties would, for the same reasons, not be entitled to costs. Their purported preliminary objection is a nullity as it was filed in a non-existent suit; having been filed after the suit had been withdrawn. In any event, a preliminary objection cannot be raised against an order of the court. A party dissatisfied with such an order would apply for its review or setting aside. He may also appeal against it, as the case may be.

DATED, AND DELIVERED AT NAIROBI ON 19TH JULY 2024.

NGAAH JAIRUS

JUDGE

