



REPUBLIC OF KENYA



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**LWK v GMM (Miscellaneous Cause 3 of 2014)
[2023] KEHC 2307 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2307 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
MISCELLANEOUS CAUSE 3 OF 2014
RM MWONGO, J
MARCH 23, 2023**

BETWEEN

LWK PLAINTIFF

AND

GMM RESPONDENT

RULING

Background

1. The substantive dispute concerns division of matrimonial properties between the parties. After certain determinations by the court and a consent between them the plaintiff filed a party and party Bill of Costs (BOC) in this matter on May 13, 2021. The BOC is titled as a BOC:

“On decree[s] given on September 28, 2018 and Ruling delivered on March 28, 2019”.

The BOC is under Schedule 6 of the *Advocates Remuneration Order*.

2. On September 23, 2021, the respondent filed a preliminary objection dated September 17, 2021 raising the following objections:
 1. That the Bill of Costs is incompetent and bad in law by virtue of the order given on November 3, 2020 and issued on November 12, 2020 whereby each party was ordered to meet its own costs.
 2. That the bill of costs is an abuse of the court process.

The Hearing

3. By consent the preliminary objection was heard orally on January 23, 2023. The parties made brief submissions thereon.



4. Counsel for the plaintiff submitted that the preliminary objection was addressing a consent order issued on July 21, 2020. Thus, the Preliminary Objection is misplaced as far as party and party costs is concerned. The bill of costs concerns the decree made by court on September 28, 2018 and a ruling delivered on March 28, 2019. Counsel is challenging bill of costs in respect of a subsequent order. Costs had been granted by the court way before and no appeal had been filed.
5. Counsel for the respondent/defendant submitted that the Bill of Costs was drawn after the court had ordered in a judgement dated September 28, 2018. Parties entered into a consent settlement on July 21, 2020 which agreed that each party bears its own costs. On November 3, 2020 the court adopted the consent as an order of the court.
6. There had been no application filed indicating that the consent was entered into by mistake or duress. As such, the notice of motion dated February 22, 2021 was withdrawn on April 23, 2021. Accordingly, the Bill of Costs is bad in law and should be dismissed.

Issues for Determination

7. The only issue for determination is:
Whether the bill of costs should be struck off with costs.

Analysis and Determination

8. A preliminary objection is described in the *locus classicus* case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696 where the court stated what constitutes a preliminary objection as follows:

“...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop...”
9. I think the objection filed by the applicant is strictly a preliminary objection. It is one because it depends entirely on a proper appreciation of the facts in this case, which are not disputed. The question being one of interpretation as to whether the consent agreement between the parties wholly took into account all or only some of the parties’ costs.
10. The facts are as earlier stated, undisputed and are as follows regarding costs. I would say there are three facets to consider therein.
11. First, the suit was commenced by originating summons dated October 25, 2014 (wrongly indicated in the judgment as October 25, 2014), seeking, *inter alia*, declarations on land sub-division of, over twelve properties in dispute between the couple. That application was heard by this court, and a judgment on the merits delivered. The court awarded costs of that application to the applicant, LWK.
12. Second, the respondent, GMM, applied for stay of execution of the said judgment vide an application dated October 30, 2018. A ruling was issued by this court after hearing the parties on that application on June 6, 2019, declining the application. Costs of that application were awarded to the respondent thereto, LWK.



13. Third, there is the consent entered into between the parties, dated July 21, 2020. It was adopted as an order of the court on 2/2/2021. The Consent is entitled:

“Consent towards the Applications dated August 14, 2019 and October 26, 2018 respectively”

I understand this title to refer to the agreed subject matter of the consent. Were there such applications as are mentioned in the consent?

14. There is an application dated August 14, 2019 filed by the applicant, GMM on August 15, 2019. It sought, *inter alia*, review and setting aside of the court’s judgment to the extent that it shared out LR Inoi/xxx/xxx. It also sought three other prayers. This application was the subject of the consent.
15. There is also an application dated October 26, 2018 filed by the plaintiff/applicant seeking that the Executive Officer do sign various statutory transfer documents, and dispense with attendance to Land Control Board by the respondent. The proceedings of November 22, 2019 show that the parties sought to compromise that application and time was given for negotiations thereon by the court. This application was also the subject of the consent.

Conclusions

16. In light of the foregoing, and having carefully perused the file and listened to the parties’ representations it is clear to me beyond any doubt, what the parties intended. They intended that the Consent Orders be treated as a settlement for, and as applicable to, the two applications dated August 14, 2019 and October 26, 2018, respectively.
17. Similarly, it is clear that separately from the consent, this court awarded costs to LWK for the applications covered in the Judgment and the Ruling as stated herein. Clearly, those costs were not included in the consent orders adopted by the court.
18. Ultimately, therefore, the objection herein cannot stand and is dismissed. The Bill of Costs will be taxed in the normal manner.
19. No order as to costs is made in respect of this application.
20. Orders accordingly.

DATED AND DELIVERED AT KERUGOYA THIS 23RD DAY OF MARCH 2023

R. MWONGO

JUDGE

In the presence of:

Ms. Nanjala holding brief for Ombongi for the Applicant

Hamba for the Respondent

Mr. Murage, Court Assistant

