



**Murang'a County Government v Batiment Engineering & Associates Limited (Civil Appeal E019 of 2023) [2024] KEHC 14190 (KLR) (13 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14190 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
CIVIL APPEAL E019 OF 2023  
CW GITHUA, J  
NOVEMBER 13, 2024**

**BETWEEN**

**MURANG'A COUNTY GOVERNMENT ..... APPELLANT**

**AND**

**BATIMENT ENGINEERING & ASSOCIATES LIMITED ..... RESPONDENT**

*(An Appeal from the judgement of Hon. S. Mwangi (S.R.M) delivered on 15th November, 2023 in Murang'a Senior Principal Magistrate's Court Civil Case No. 326 of 2018)*

**RULING**

1. This ruling is in respect of the applicant's Notice of Motion dated 17<sup>th</sup> April 2023. The application contained six prayers but when it came up for hearing on 4<sup>th</sup> March 2024, learned counsel for the applicant, Mr. Kimwere conceded that four of the prayers had been overtaken by events including the prayer that sought stay of proceedings in the suit filed in the trial court. He further conceded that only prayers (d) and (f) remained for this court's determination.

The aforesaid two prayers sought the following orders:

- (d) That the plaintiff be ordered to refund Kshs 25,000 paid as part of throw away cost.
  - (f) Cost of the application.
2. In order to understand the context in which the application was filed, it is important to give a brief background to the appeal herein and the application. The record shows that the respondent was the Plaintiff in the lower court while the appellant was the defendant.
  3. In a plaint dated 29<sup>th</sup> August 2018, the respondent sued the appellant for breach of contract claiming payment of Kshs 6,152,763.3. The appellant failed to file and serve a statement of defence within the stipulated time and interlocutory judgement was entered in favour of the respondent against the appellant on 23<sup>rd</sup> April 2019.



4. The applicant subsequently filed an application seeking to set aside the interlocutory judgement and all consequential orders and that leave be granted to allow it to defend the suit.
5. The application was fully heard and in a ruling delivered on 10<sup>th</sup> January 2023, the learned trial magistrate (Hon.S.N. Mwangi SRM) found that the applicant had not given satisfactory reasons for the delay of four years in moving the court to set aside the ex-parte judgement entered against it. The trial court however, in the exercise of its discretion, allowed the application on condition that the applicant pays the respondent throw away costs of Kshs 50,000 which was to be paid before 5<sup>th</sup> April 2023 which was the date the suit was fixed for hearing. In default of compliance, hearing would proceed without participation by the applicant.
6. On 5<sup>th</sup> April 2023, the applicant sought an adjournment on grounds that it had made part payment of the throw away costs in the sum of Kshs 25,000 and sought an adjournment to pay the entire amount. The application was refused and hearing proceeded. This is what triggered filing of the current appeal and the instant application.
7. In support of the application, Mr Kimwere swore a supporting affidavit on 17<sup>th</sup> April 2023 in which he deposed that the applicant was unable to pay the throw away costs within the time limited by the court due to change in the organization of its Government; that to demonstrate willingness to comply, he had paid the respondent's counsel Kshs 25,000 from his own pocket and that since the applicant still was shut out from defending the suit despite the payment, it was just that the part payment be refunded.
8. The application was contested through a replying affidavit sworn by the respondent learned counsel, Ms Wangui Ndirangu on 10<sup>th</sup> January 2024.  
  
In the affidavit, Ms Ndirangu averred in a nutshell that the applicant had come to court with unclean hands and the application amounted to an abuse of the court process; that the application was meant to further delay conclusion of the dispute between the parties and ought to be dismissed with costs.
9. The application was canvassed by way of written submissions. Those of the applicant were filed on 8<sup>th</sup> April 2024 while the respondent filed their submissions in response on 7<sup>th</sup> May 2024.
10. In its submissions, the appellant conceded that the part payment of throw away costs was made pursuant to a court order and that only a court order can compel the respondent to refund the amount paid. The applicant also conceded that the order for throw away costs was made as a pre-condition to setting aside the ex-parte judgement entered in favour of the respondent but that since the judgement was not eventually set aside, it was entitled to a refund of the monies paid.
11. On the other hand, the respondent in its submissions urged the court to dismiss the application with costs noting that it was filed in bad faith. It was the respondent's case that there was no basis for ordering a refund of the monies sought since the payment was made in compliance with a court order.
12. Having considered the application and the parties rival submissions as well as the record of the trial court, I find that the only issue arising for my determination is whether the part payment made to the respondent's counsel in the sum of Kshs 25,000 ought to be refunded to the applicant.
13. The law governing the award of costs in civil suits is set out in Section 27 (1) of the *Civil Procedure Act* (CPA) which provides as follows:

“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.”

14. From the above provision, it is clear that the award of costs including throw away costs is discretionary. The practice of courts of awarding throw away costs is informed by the need to compensate a party for time and effort as well as resources used in obtaining an exparte Judgment which had been set aside at the instance of the party against whom the judgment was issued. I agree with Nyakundi J when he expounded on the purpose served by throw away costs in County Government of Tana River & Gafi Hiribae V Hussein Fumo Hiribae [2021] KEHC 5909(KLR) when he stated as follows:

“In my view the award of costs either in the classification defined in section 27 as those that follow the event or throwaway costs as it’s in the case herein, the uniting factor is closely linked to adjudicative procedures before courts by a litigating party. These procedures can consume time, energy and money. This award of costs may be one route to improve due diligence and efficiency in our legal system as whole.....In my strong view the respondent being awarded throwaway costs are to cater for substantial indemnity costs to reflect time that was wasted and would be duplicated when the trial is rescheduled.”

15. In this case, it is not disputed that the trial court ordered the applicant to pay to the respondent throw away costs in the sum of Kshs 50,000 as a pre-condition to setting aside of the exparte judgment entered against it for failure to file and serve its defence within the time prescribed by the law.

Instead of complying with that order, the applicant paid to the respondent advocates only half of the costs awarded by the court.

16. It is important to note that at the time the part payment of Kshs 25,000 was made, the orders made by the trial court were still in force as the same had not been varied or set aside. And although the current appeal was filed contesting inter alia the orders made by the trial court which touch on the current application, the filing of an appeal does not amount to an automatic stay of the orders appealed against. The appellants must move the court to have the orders stayed which the applicant in this case failed to do. In the premises, the orders requiring payment of throw away costs are still in force to date.

17. It is trite that court orders must be obeyed in full unless and until they were varied or set aside however aggrieved the party against whom they are issued is. Court orders have the force of law and a party against whom they are issued has no choice but to comply as long as they remain in force.

18. In this case, the applicant was ordered by a court of competent jurisdiction to pay the respondent throw away costs in the sum of Kshs 50,000 within a certain time line but instead of complying with the order, the applicant decided to pay half of the amount ordered by the court.

It is difficult to understand how the applicant expected to have the default judgement set aside before it had fully complied with the condition precedent set by the court.

19. Given the foregoing, it is clear that the part payment whose refund was being sought in this application was made pursuant to a court order and was therefore lawfully made. In the premises, I find no legal basis upon which I can order its refund.

20. For all the above reasons, I am satisfied that this application is devoid of merit and it is hereby dismissed with costs to the respondent.

It is so ordered.



**DATED, SIGNED AND DELIVERED AT MURANG'A THIS 13<sup>TH</sup> DAY OF NOVEMBER 2024.**

**HON. C.W GITHUA**

**JUDGE**

In the presence of:

Mr. Kimwere for the Applicant

Mr. Wanda for the respondent

Ms. Susan Waiganjo, Court Assistant

