



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT EMBU**

**CRIMINAL MISC. NO. 11 OF 2019**

**SILAS MURITHI MBUI.....APPLICANT**

**VERSUS**

**EVANSON MEANGI KIHUMBA.....1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF IMMIGRATION SERVICES.....2<sup>ND</sup> RESPONDENT**

**CABINET SECRETARY**

**MINISTRY OF INTERIOR & COORDINATION**

**OF NATIONAL GOVERNMENT.....3<sup>RD</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS.....4<sup>TH</sup> RESPONDENT**

**RULING**

**A. Introduction**

1. This ruling is for the application dated 12<sup>th</sup> September 2019 in which the applicant seeks to have the orders awarding costs to the 1<sup>st</sup> respondent, issued by the Deputy Registrar on the 15/08/2019 set aside.
2. It is the applicant's case that he applied to withdraw the entire Miscellaneous Application No. 11 of 2019 and the 1<sup>st</sup> respondent did not oppose the withdrawal but the deputy registrar proceeded to award costs despite there being no provision for such orders of costs to be made.
3. The applicant further states that the Deputy Registrar ought to have forwarded the matter to the judge for the parties to canvass the issue of contested costs. The applicant further stated that the deputy registrar had no jurisdiction to award costs in the criminal application as she purported to do.
4. In rejoinder, the 1<sup>st</sup> respondent filed grounds of opposition in which he stated that the application was an abuse of the court process as it was an affront to the provisions of **Sections 20(2), 21(1) (d), 21 (2) and 22 (1) of the High Court (Organization and Administration) Act No 27 of 2015** as he ought to have sought review of the deputy registrar's decision rather than the present application.
5. The 1<sup>st</sup> respondent further stated that the applicant had not demonstrated how the deputy registrar was wrong in awarding costs or any provisions of the law that the registrar had offended in awarding the costs.
6. The 1<sup>st</sup> respondent further stated that it was trite that costs follow the event and since the previous application had been defended and attended the deputy registrar was right in awarding costs to the 1<sup>st</sup> respondent.
7. The applicant was to file submissions to dispose of the matter but did not file any. On his part, the 1<sup>st</sup> respondent's advocate relied on his grounds of opposition.

**B. Analysis & Determination**

8. I have considered the instant application, the response by the 1<sup>st</sup> respondent and it is my considered view that the only issue for determination is whether the payment of costs following the withdrawal of the suit as ordered by the Deputy Registrar on the 15<sup>th</sup> August 2019 was merited.

9. It is imperative to note that costs are not awarded as a matter of right but are at the discretion of the court. The discretion must be exercised judiciously upon defined legal principles. Therefore, the law in designing the legal phrase that “**Cost follow the event**” recognized the fact that there could be no “one-size-fit-all” prescription on different matters. That is why **Section 27(1) of the Civil Procedure Act** is couched the way it appears in the statute. **Section 27 (1)** provides;

***“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.”***

10. Accordingly, as the matter was before the Deputy Registrar when the applicant sought to have it withdrawn, it is my considered view that the Deputy Registrar was vested with jurisdiction to determine the matter of costs which had arisen.

11. The circumstances of this case are that; the applicant herein instituted suit against the respondents herein vide a notice of motion dated 27<sup>th</sup> May 2019 and later amended on the 8<sup>th</sup> July 2019 that sought review orders made by the trial court in Embu Chief Magistrates Criminal Court No. 498 of 2016. The respondents herein filed their respective responses in the form of grounds of opposition for all the respondents and in addition a preliminary objection filed by the 1<sup>st</sup> respondent on the 13<sup>th</sup> August 2019.

12. On the 15<sup>th</sup> August 2019 when the matter came up before the Honourable Deputy Registrar, the applicant’s advocate sought to have the matter withdrawn with no costs. This was not opposed by the advocate on record for the 2<sup>nd</sup> to 5<sup>th</sup> respondent however the 1<sup>st</sup> respondent’s advocate insisted on costs as he had filed a defence to the withdrawn application. The applicant’s advocate then moved court to determine the issue of costs and the deputy registrar proceeded to have the suit withdrawn with costs to the 1<sup>st</sup> respondent.

13. It is the applicant’s case that the deputy registrar awarded costs despite there being no provision for such orders of costs to be made whereas the deputy registrar ought to have forwarded the matter to the judge for the parties to canvass the issue of contested costs. The applicant further asserts that the deputy registrar lacks jurisdiction to award costs however he does acknowledge that the 1<sup>st</sup> respondent did file a response to the application he sought to withdraw.

14. In rejoinder, the 1<sup>st</sup> respondent argues that the Deputy Registrar has jurisdiction to award costs by virtue of the provisions of Sections 20(2), 21(1) (d), 21 (2) and 22 (1) of the High Court (Organization and Administration) Act No 27 of 2015 and further stated that the applicant had not demonstrated how the Deputy Registrar was wrong in awarding costs or any provisions of the law that the registrar had offended in awarding the costs.

15. Section 21 of the High Court (Organization and Administration) Act No 27 of 2015 provides for the functions of the deputy registrar. **Section 22 (1)** provides as follows;

***“22. (1) Any person aggrieved by a decision of the Registrar or Deputy Registrar on matters relating to judicial functions of the Court may apply for review by a Judge of the Court in accordance with the Rules.”***

16. The applicant’s instant suit seeks to review the Deputy Registrar’s decision on awarding costs to the 1<sup>st</sup> respondent and is brought under *Article 159 (2) (e) of the Constitution as well as all other the Civil enabling provisions of the law*. Based on Section 22(1) of the Act, this application is therefore properly before the court since it falls under the supervisory jurisdiction of this court.

17. The 1<sup>st</sup> respondent argued that he had put a response to the application and had a right to be awarded costs. On the other hand, the applicant argues that the Deputy Registrar had no jurisdiction to award costs and ought to have referred the matter to the High Court for hearing on costs.

18. Order 49 of the Civil Procedure Rules provides for the special powers of the Deputy Registrar which include recording consent orders, giving directions under Order 42 Rule 12 and Order 51 Rule 8 of the Civil Procedure Rules, execution of decrees and hearing applications under selected orders. The decision to award or not award costs in applications within the judge’s jurisdiction is not within the powers of the Deputy Registrar.

19. It was therefore a misdirection on part of the Deputy Registrar to award costs to the 1<sup>st</sup> respondent. The withdrawal of the application was not opposed but the 1<sup>st</sup> respondent asked for costs. The Deputy Registrar even assuming that she was possessed of the requisite jurisdiction ought to have heard the applicant and the 1<sup>st</sup> respondent on the issue of costs and make a ruling to that effect. Perusal of the proceedings show that the parties were not heard.

20. Having found that the Deputy Registrar had no jurisdiction to award costs to the respondent, I hereby set aside the orders made on 15/08/2019 awarding costs to the 1<sup>st</sup> Respondent.

21. However, I am in agreement with the 1<sup>st</sup> respondent that having filed a response to the application which was later withdrawn, he was

entitled to costs. This was an application of civil nature although it bears a sub-heading of “Miscellaneous Criminal Application”. The orders sought in the application were of civil nature although the issues giving rise to the application arose from Embu Chief Magistrate Criminal Case No. 498 of 2016.

22. In the interests of justice and to save the precious time of the court, I proceed to determine the issue of costs in favour of the 1<sup>st</sup> respondent.

23. The 1<sup>st</sup> respondent had instructed the firm of Guantai & Associates in the said application who filed a replying affidavit. The matter did not go to hearing since it was withdrawn and as such, costs must be in the lower scale.

24. I hereby assess the costs to the 1<sup>st</sup> respondent in Miscellaneous Application No. 11 of 2019 to Kshs. 20,000/= being capped costs which I hereby award.

25. As for the application before me I am of the considered view that each party will meet their own costs.

26. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 16<sup>TH</sup> DAY OF DECEMBER, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Lokorio for State/Respondent**

**Mr. Okwaro for Guantai for 1<sup>st</sup> Respondent**

**Mr. Momanyi for Andande for Applicant**

**Applicant present**