



REPUBLIC OF KENYA

IN THE HIGH COURT KENYA AT NAIVASHA

CIVIL APPEAL NO. 9 OF 2018

(Being an appeal from an order of the Chief Magistrate's Court at Naivasha Civil Case No. 1 of 2018 V. Chianda - SRM)

EVANS KAGECHE BORO.....APPLICANT

-VERSUS-

JOHN MAINA MBURU.....RESPONDENT

R U L I N G

1. The Applicant and the Respondent both consent to the withdrawal of the Applicants Notice of Motion dated 14th February, 2018 and filed of the same date. What they do not agree on is how the costs issue should be handled.
2. The Applicant was willing to forgo costs, but now insists that he should be paid costs because the Respondent also insists that the withdrawal be with costs against the Applicant withdrawing.
3. That is the only issue for determination here. I will not rehash the reason given by each party during their submissions, because they ultimately depend on the content of the lower court's ruling and whether the order, extracted were in accordance with the said ruling.
4. The Applicant says the orders extracted were fraudulent or misleading and they relied upon them. The Respondent says they relied upon the orders as certified by the court. The Respondent, at the time of extracting the same did not in the usual was, deliver the same to the Applicant for approval and correction prior to getting them certified by the court.
5. I have perused the order which was certified. It states that:

“Upon reading the application presented to this court on 8th January by the counsel for the defendant and upon reading the Ruling which was delivered to this court on 13th February, 2018 by Hon. V. Chianda (SRM) in the presence of both parties.....”

6. It then appears to lift the orders prayed for in the said application of 8th January 2018 in the lower court matter, in particular orders 2 and 4, but in different wording from the orders in the application itself.
7. I have also looked out the Ruling of the Hon. Magistrate Hon. Chianda. The handwritten ruling in the lower court's file signed by the magistrate and that typed out are similar in wording. In the said Ruling the magistrate said, inter alia regarding the said application of 8th January 2018 as follows:-

“.....the subject application herein will be allowed in terms of prayers 2 and 4 if the defendant who is hereby summoned to court (at a date to be agreed by the parties) with a Notice to Show Cause that he wilfully failed or refused to obey the subject orders.” (Underlining note)

8. Clearly, the order issued as shown above was not in tandem with the order that was extracted. That is to say, the extracted order goes a step further and commits the Defendant and his sons to jail, and requires the immediate exhumation of the boy of the deceased, **Beth Wanjiku**. This is quite beyond and contrary to what is contained in the Ruling which, as I interpret it, meant that the court was agreeable to issue the citation for contempt in terms of prayer 2 and 4 provided that Notice to Show Cause why he should not be so cited, is given to the contemnor to explain his refusal to obey the subject order.
9. The Magistrate's order was therefore to summons the alleged contemnor to show cause on a date to be agreed by the parties in terms of Order 39 – the order under which the application had been made.

10. In light of the foregoing, it is clear to me that the erroneous extraction of the Hon. Magistrate's ruling and order is what led to the institution of the application now the subject of withdrawal, and subsequent proceedings. The error was committed by the officer of the court who approved the said order and signed it for issuance as a court order.

11. In my view, the order signed and issued did not accord with the ruling of the Magistrate and caused the parties to be rushed into filing the application and response thereto.

12. At the hearing, counsel for the Respondent also admitted that he did not forward the draft order to the counsel for the Applicant for conformation of correction before it was signed and issued by the court officer. This would have been a prudent step to take particularly in light of the fact that the ruling of the Magistrate could be interpreted to suggest that the contempt application had succeeded and the orders to be issued were those numbered as 2 and 4 in the application before him. In other words, there was need for clarification of the actual orders issued by the magistrate.

13. In light of all the foregoing matters and for the reasons given herein, I do not think this is a proper case for the award of costs to any party. As I have said, the original sin was that they court officer resulting in the applications following and the concatenation of events and the subject of the application and reply thereto.

14. Judicial officers and court officers acting judicially are protected from indemnity for mistakes in any proceedings (See for example Section 6 of the Judicature Act, Article 160 (5) of the Constitution in respect of the Judiciary and Judicial Officers).

15. Having said all this I hereby determine that the appropriate order to give is that withdrawal of the application shall be without any orders to costs to any party.

16. It is so ordered.

Ruling delivered in open court and signed at Naivasha on this 6th day of April, 2018.

In the presence of:-

Mr. Onindo for the Appellant/Applicant

Mr. Wamae holding brief for Makori for the Respondent

Court Clerk - Quinter Ogutu

R. MWONGO

JUDGE