



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

JUDICIAL REVIEW CASE NO. 100 OF 2009

ISAIAH MIRITI.....EX-PARTE APPLICANT

VERSUS

IGEME DISTRICT LAND ADJUDICATION

AND SETTLEMENT OFFICER.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

AND

JOSEPH MWENDA MALEBE.....1ST INTERESTED PARTY

JOSEPH NTUMBURI.....2ND INTERESTED PARTY

STEPHEN MWITI.....3RD INTERESTED PARTY

JUSTUS MURERWA.....4TH INTERESTED PARTY

RULING

1. **Isaiah Miriti** (*the ex-parte applicant*) herein instituted these proceedings through ex-parte chamber summons dated 21/12/2009 and filed on 8.2.2010, which application was allowed vide a consent ruling on 16.2.2016. The substantive motion was filed on 8/3/2016 seeking Orders of prohibition and Certiorari to bring into this court the decision of the 1st Respondent made in Objection No. 829/97 A.B.C and E over land parcels No. 3436, 3455, 3719 and 3707 for the purpose of quashing the same.

2. The 4th interested party filed a notice of appointment by Gatari Ringera Advocates on 18.2.2010, and a Replying Affidavit was subsequently filed on 14.4.2010. The 1st and 2nd interested parties filed a notice of appointment and their Replying affidavits on 27.5.2010 through C.B. Mwangela Advocates. On 16.7.2016, the 3rd and 4th Interested Parties filed their Notice of appointment of advocates whereby Mbogo and Muriuki were to act alongside Gatari and Ringera Advocates.

3. The 4th Respondent filed his **Notice of Preliminary Objection on 28/10/2016** which culminated in the ruling delivered on 8.2.2018 dismissing the suit. Therein, the court stated that the application for leave to apply for an order of certiorari to quash the 1st Respondent's decision/award made on 29/4/1998 was done outside the six months statutory period and it was therefore not open for the applicant to seek to have the Respondents prohibited from implementing the impugned decision. In that decision, costs were awarded to the 4th respondent.

4. The 1st and 2nd Interested parties have since filed an application dated 8th May 2019 seeking to be awarded costs of the dismissed judicial review matter. The application was supported by the sworn affidavit of **Charles Benedict Mwangela** an advocate practising under the name and style of C.B. Mwangela & Co. Advocates who averred that he represented the 1st and 2nd interested parties and to this end, he filed a notice of appointment and Replying affidavit dated 26/5/2010. It was contended by the 1st and 2nd interested parties that costs follow the event, hence they should get costs.

5. The ex-parte applicant opposed the application through his Replying affidavit dated 24/09/2019, where he avers that the application is not tenable in law since an award of costs is not couched in mandatory terms. That the award of costs is discretionary and which award this Court ruled on conclusively on 04/4/2019. That in any event, the Preliminary Objection dismissing the application was raised by the 4th interested party who was rightly awarded the costs and therefore the applicants are not entitled to costs.

6. On 25/9/2019 this Court directed the parties to canvass the application by way of written submissions. Both Parties have since filed their written submissions. On his part the ex-parte applicant has submitted that the award of costs was well within the discretion of the Court and is not a matter of right. That a trial court awards costs having considered all the circumstances of the case including any omissions in procedure as well as conduct of the parties. The main aim of awarding costs is to reimburse the successful party for amounts expended in the case. The applicants (1st and 2nd interested parties) did not take part in the prosecution of the preliminary objection that eventually led to the dismissal of the suit of the exparte applicant. In support of his arguments, the exparte applicant relied on the cited cases of; **Ethics and Anti-Corruption Commission v. Nderitu Wachira & 2 Others (2016) eKLR** and **Cecilia Karuru Ngayu v Barclays Bank of Kenya & Anor [2016] eKLR**.

7. The 1st and 2nd interested parties too submitted that the court has discretion in awarding costs taking into account the conduct of the parties. They contended that the courts discretion should be exercised in their favour in order to meet the ends of justice as they incurred costs in defending the suit. The 1st and 2nd interested parties relied on the following cases to support their claim on costs; **Party of Independent Candidate of Kenya vs Mutula Kilonzo & 2 Others, HC EP No. 6 of 2013, Jasbir Singh Rai & Others vs Tarlochan Rai & Others [2002] eKLR**, **Little Kenya Africa Ltd versus Andrew Mwiti Jackson [2014] eKLR**, **Republic vs. Rosemary Wairimu Munene, Exparte Applicant vs. Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review Application no.6 of 2014, Cecilia Karuru Ngayu v Barclays Bank of Kenya & Anor [2016] eKLR**.

Analysis and Determination

8. I have dully considered the averments made by the parties and their submissions. The only issue for determination is **Whether or not the 1st and 2nd interested parties should be awarded costs of the suit**. It is clear that these parties initially participated in the proceedings as is noted from the filing of the replying affidavits. This court however awarded costs only to the 4th interested party who lodged and prosecuted a preliminary objection that subsequently led to the dismissal of the Judicial Review.

9. **Section 27 of the Civil Procedure Act** 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”.

10. In **Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] eKLR**, the Court Outlined the conditions a court should adhere to in determining an award of Costs when it held as follows;

“To my mind, in determining the issue of costs, the court is entitled to look at inter alia (i) the conduct of the parties, (ii) the subject of litigation, (iii) the circumstances which led to the institution of the proceedings, (iv) the events which eventually led to their termination, (v) the stage at which the proceedings were terminated, (vi) the manner in which they were terminated, (vii) the relationship between the parties and (viii) the need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of the Constitution. In other wards the court may not only consider the conduct of the party in the actual litigation, but the matters which led to the litigation, the eventual termination thereof and the likely consequences of the order for costs.”

11. In this case parties consented to the application seeking leave to file substantive application for judicial review. I do note that even in the instance where a consent has been filed, a party can still pursue an award of costs. This was so held by **Gikonyo J** In **Little Africa Kenya Limited v Andrew Mwiti Jason [2014] eKLR** where he stated that;

“Whereas a compromise to a suit by way of consent supresses all the issues which were in contention, it does not necessarily mean that, where the parties have entered into consent to settle a proceedings no, costs should be awarded....”

12. In **Ethics and Anti-Corruption Commission v Nderitu Wachira & 2 others [2016] eKLR** the Court cited the Ugandan Case of **Impressa Ing Fortunato Federice vs Nabwire** where it was held as follows;

“The effect of section 27 of the Civil Procedure Act is that the Judge or court dealing with the issue of costs in any suit, action, cause or matter has absolute discretion to determine by whom and to what extent such costs are to be paid; of course like all judicial discretion, the discretion on costs must be exercised judiciously and how a court or judge exercises such discretion depends on the facts of each case. If there were mathematical formula, it would no longer be discretion... while it is true that ordinarily, costs should follow the event unless for some good reason the court orders otherwise, the principles to be applied are- (i) under section 27 (1) of the Civil Procedure Act, costs should follow the event unless the court orders otherwise. This provision gives the judge discretion in awarding costs but that discretion has to be exercised judiciously. (ii), A successful party can be denied costs if it is proved that but for his conduct the action would not have been brought... It is trite law that where judgement is given on the basis of consent of parties, a court may not inquire into what motivated the parties to consent or to admit liability.....”

13. This court has taken into account the tumultuous journey of this dispute. The dispute had been tabled before the land adjudication bodies and it then spilled over to the magistrate’s court as from 1997. The application seeking leave to file the judicial review proceedings was instituted in the year 2009 and a consent was arrived at 7 years later in the year 2016. It is apparent that the odyssey of the litigation herein was brought to an end through the institution of the Preliminary Objection filed by the 4th interested party. Nothing much had transpired before the filing of the preliminary Objection. I have also taken into account that even taxation of costs proceedings before the Deputy

Registrar came to an end on 4.4.2019. Against this back ground, I am not inclined to disturb the ruling delivered on 8.2.2018 by Judge Cheron. I therefore proceed to dismiss the application dated 8.5.2019 with each party bearing their own costs of the application.

DATED, SIGNED AND DELIVERED AT MERU THIS 20TH DAY OF MAY, 2020 .

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this ruling was given to the parties at the conclusion of the hearing and by a fresh notice by the Deputy Registrar. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE