



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CONSTITUTIONAL PETITION NO. 10 OF 2018

SOPHIE BRENDA WAMBUL.....1ST PETITIONER
STEPHEN TIPANKO.....2ND PETITIONER
ROSE SHAASHA.....3RD PETITIONER
AGNES SAYIA.....4TH PETITIONER
EMILY SIANTO.....5TH PETITIONER
BENSON RAKOI.....6TH PETITIONER
LYDIAH MOKIRA.....7TH PETITIONER
CLINTON KIROTE.....8TH PETITIONER
JONATHAN OIMUSHU.....9TH PETITIONER
JONATHAN KISANGA.....10TH PETITIONER
NUNU MOKIRA.....11TH PETITIONER
TIRENTE MOKIRA.....12TH PETITIONER
JOHN MBURU.....13TH PETITIONER
STEVEN OMONDI.....14TH PETITIONER

AND

LYDIAH MUTHONI KAMAU.....1ST RESPONDENT
KENYA TOWERS LIMITED.....2ND RESPONDENT
NATIONAL ENVIRONMENTAL
MANAGEMENT AUTHORITY.....3RD RESPONDENT
COMMUNICATION COMMISSION OF KENYA.....4TH RESPONDENT
EARTHCARE SERVICE LIMITED.....5TH RESPONDENT
KAJIADO COUNTY GOVERNMENT.....1ST INTERESTED PARTY

RULING

What is before Court for determination is the 3rd Respondent's Notice of Motion application dated the 21st May, 2019 brought pursuant to Order 12 Rule 7, Order 51 Rule 1, Order 45 Rule 1, Order 49 Rule 3 and 14 (15) of the Civil Procedure Rules as well as Section 1A, 1B, 3A of the Civil Procedure Act. The Applicant seeks the following orders:

1. Spent

2. That this Honourable Court be pleased to order stay of proceedings and all consequential orders currently before the Taxing Master in Kajiado High Court Miscellaneous Civil Application no. 2 of 2019 (Being Taxation of Kajiado ELC Constitutional Petition No. 10/ 2018) pending the hearing and determination of this application.

3. That this Honourable Court be pleased to set aside and/ or review its orders issued on 24th September, 2018 awarding costs to the Petitioners/ Respondents as against the 3rd Respondent/ Applicant together with all consequential orders emanating thereof.

4. That cost of this application be in the cause.

The application is premised on the grounds on the face of it and the affidavit of SIMON NGARA W who is a Senior Legal Officer with the 3rd Respondent where he deposes that the Petitioners filed the substantive suit on 1st August, 2018 and consequently an interlocutory application on 13th August, 2018 which were served upon them on 14th August, 2018. Further, that the said pleadings did not have a hearing date slated for 15th August, 2018 and the Applicant received the same under protest as it was during Court Vacation, as the Notice was too short hence they did not appear in Court on the said date. He contends that between 15th August and 24th September, 2018 the matter came up for further directions on 17th September, 2018 without the 3rd Respondents knowledge and upon which parties agreed to compromise the suit as the cause of action had been overtaken by events. He avers that at the time of filing the suit, Courts were on vacation and being the Advocate in conduct of the matter, he was attending the Law Society Annual Conference after which he proceeded for leave and resumed back on 17th September, 2018. He avers that the entire suit was compromised within a period of one month from the date of service on the 3rd Respondent and as such, it had not filed its response to the suit. He claims he was informed by the 2nd Respondent's Counsel Mr. Kuyo that the matter had been withdrawn with no orders as to costs as against the Respondents. Further, that he proceeded to mark their file as closed only to be later served with the Petitioners' Advocates Bill of Costs for the sum of Kshs. 912, 000/=. He insists the 3rd Respondent ought to have been included in recording such consent and or served with a Hearing Notice for mention slated for 24th September, 2018. He further contends that he perused the court file and noted that one Emmanuel Busu had sworn an affidavit of service alleging that he had served the 3rd Respondent with the Hearing Notice for the hearing slated for 15th August, 2018. He claims given the manner in which the matter was settled and the 3rd Respondent not being the main antagonist as against the Applicants, the awarding of costs against it is prejudicial to it. Further, the awarding of costs is left to the discretion of this Court and the same follows occurrence of certain events which in the current instance had not taken place by the time the costs were being awarded. He reiterates that if the Petitioners are allowed to proceed with the taxation of the Bill of Costs, the same will amount to unjust enrichment on their part given the high quoted figure to the detriment of the 3rd Respondent.

The Petitioners opposed the application and filed a replying affidavit sworn by EMMANUEL BUSU MWAKA the Advocate from the firm of messrs Yano & Company Advocates where he explains that they filed a Petition on 1st August, 2018 that was duly served upon the Respondents on 15th August, 2018. He contends that even though the Notice was served during August Vacation, there was a duty court sitting in Machakos and Counsel ought to have exercised due diligence and have had a Counsel hold his brief. He explains that the matter has been dispensed with in the Kajiado High Court Misc No. 2 of 2019 by the Deputy Registrar who delivered his ruling and they intend to file an application to amend their Bill of Costs from Advocate/ Client to Party and Party Bill of Costs. He insists he duly served the Respondents with a Mention Notice and they have never appeared in Court and in any event costs were awarded as per the discretion of the Court.

The other Respondents and Interested Parties did not file any response to the instant application.

The 3rd Respondent filed written submissions to canvass the instant application but the Petitioners failed to do so.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 21st May, 2019 including the parties affidavits and submissions, the only issue for determination is whether the Court should set aside and/ or review its orders issued on 24th September, 2018 awarding costs to the Petitioners/ Respondents as against the 3rd Respondent/ Applicant together with all consequential orders emanating thereof.

I note this matter was concluded vide an order dated the 24th September, 2018 when the Petitioners and the 2nd, 4th and 5th Respondents representatives were present. The 3rd Respondent and the Interested Parties were not present. The 3rd Respondent submits that the matter was terminated by consent at the behest of the 2nd Respondent. Further, that the Petitioners cannot be deemed to be a successful party as against the 3rd Respondent. He insists the events prior and during the suit does not entitle the Petitioners to costs. Further, the subject matter of the suit was overtaken by events when the 2nd Respondent decided not to proceed with the suit project leading to the same being compromised prematurely. It referred to the cases of **Rufus Njuguna Miringu & Another V Martha Murithi & 2 others (2012) eKLR, Republic V Kenya Ports Authority Ex parte Grain Bulk Handlers Limited V Coast Silos Limited (2015) eKLR and Republic V Senior Principal Magistrate Mombasa & Other, Ex parte Nicholas Katumo Peter** to buttress its arguments.

Section 80 of the Civil Procedure Act provides: -“Any person who considers himself aggrieved— (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

Further, Order 45, rule 1 (1) of the Civil Procedure Rules provides as follows: ‘ Any person considering himself aggrieved— (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.’

While Section 27 of the Civil Procedure Act provides that;

“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.”

In the current scenario, this suit was terminated by the Petitioners including the 1st, 2nd, 4th and 5th Respondents as the cause of action had been overtaken by events. From a perusal of the Court file, I note the 3rd Respondent was indeed not served with a Mention Notice for 17th August, 2018 and 24th September, 2018 respectively. The Petitioners have further not denied that the 3rd Respondent was not involved in the entry of consent which culminated in the settlement of the suit. In the case of **Republic V Kenya Ports Authority Ex parte Grain Bulk Handlers Limited V Coast Silos Limited (2015) eKLR** the Court held that: ‘ the parties to the consent just withdrew the dispute from the determination of the court before it was heard and determined on the merits and after the withdrawal of the notice which prompted the suit. There was accordingly, no successful party on the merits of the case and therefore no basis for an award of the full costs to any party.

Further in the case of Nyamogo & Nyamogo -vs- Kogo (2001) EA 174 it was held that:’ an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out.’

I note the matter herein was in court three times before the withdrawal of the same by consent when the Petitioners sought for costs. Further, the 3rd Respondent has confirmed lack of service and the matter having not been set down for hearing. I concur with the submissions of the 3rd Respondent that indeed there was no successful party to be awarded costs. Further, that consent cannot be interpreted to mean that one or the other party succeeded in a suit. Based on the facts before me, the legal provisions quoted above and in associating myself with the two cited authorities, I will proceed to review the order of costs granted on 24th September, 2019 and direct that each party do bear their own costs.

It is against the foregoing that I find the Notice of Motion application dated the 21st May, 2019 merited and will allow it. I will proceed to make the following final orders:

- a) The orders issued on 24th September, 2018 awarding costs to the Petitioners as against the 3rd Respondent together with all consequential orders emanating therefrom be and are hereby reviewed as well as set aside.
- b) Each party herein is directed to bear their own costs.

Dated signed and delivered via email this 13th May, 2020.

CHRISTINE OCHIENG

JUDGE