



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JR.CASE NO. 264 OF 2010

REPUBLICAPPLICANT

VERSUS

THE CONSTITUENCY DEVELOPMENT FUND BOARD.....RESPONDENT

AND

KENYA ANTI-CORRUPTION COMMISSION.....INTERESTED PARTY

EXPARTE

**THOMAS MONGARE MOINDI & 3 OTHERS (AS OFFICIALS OF THE MILLENIUM FORUM
FOR UNITY AND DEVELOPMENT)**

RULING

Introduction

1. By a Notice of Motion dated 22nd September, 2016, the applicant herein, **The Constituency Development Fund Board**, seeks the following orders:

1. That this application be certified urgent and be heard ex parte in the first instance;
2. That there is a stay of execution of the decree issued on 31st March, 2016 pending the inter-parties hearing and determination of this application.
3. That the exparte decree on costs by this Honourable court dated 31st March, 2016 be set aside.
4. That the firm of Morara Apiemi & Nyangito Advocates be ordered to file and serve a proper bill of costs and the Respondent be allowed time to respond accordingly.
5. That costs of this application be provided for.

Respondent/Applicant's Case

2. According to the said applicant (hereinafter referred to as “the Board”), the Advocates for the ex parte applicant filed an application under a Notice of Motion on the 26th day of June, 2014 seeking to convert a certificate of taxation dated 19th May, 2014 into a decree and judgment against the Respondent/Applicant for the sum of Kshs 521,779/=. To that application, the Board responded by way of an affidavit in which the latter contended that the said application and certificate of costs were a nullity as the advocates who filed the said documents were not properly on record at the time of filing the bill of costs and the subsequent application and that it was never served with any taxation notice for the proceedings of 22nd April, 2014.
3. According to the Board based on its submissions this Court on 29th September, 2015 observed inter alia that “having found that the Applicant firm of advocates is not properly on record, I need not determine the question as to whether the taxation proceedings were legitimate. Consequently, the notice of motion dated 26th June, 2014 filed by Morara Apiemi & Nyangito Advocates (hereinafter referred to as “the firm”) is dismissed with costs to the Respondent (The Constituency Development Fund Board)”.
4. It was averred by the Board that on or about the 13th day of May, 2016 the firm served it with a consent between them and the firm for the former to come on record for the applicant and subsequently on or about the 18th day of May 2016 the Board was served with a copy of a decree for the payment of costs amounting to Kshs.521,779/= for settlement by the Board.
5. It was averred that on or about the 23rd day of May, 2016 the Board wrote to the firm requesting them to forward to it the court order on change of advocates and a proper bill of costs filed by themselves to enable them respond accordingly which letter never elicited a response from the firm.
6. In the Board’s view, the bill of costs and subsequent certificate of taxation were a nullity since the said firm of advocates was not properly on record as stated on the of 29th September, 2016. Accordingly, the firm cannot purport to enforce an illegality. According to the Board, the said firm ought to file a proper bill of costs and serve the same upon the Respondent’s advocates on record to allow them to respond to the same.
7. It was the Board’s case that allowing the said decree to be executed as it is will be prejudicial as the Board did not have an opportunity to challenge the bill of costs hence the said decree should be set aside as prayed.
8. Since the application was not opposed, the factual averments remain uncontroverted.
9. I have perused the record of these proceedings. By his ruling dated 29th September, 2015, **Korir, J** found that the application dated 26th June, 2014 was filed by a firm of advocates (Morara Apiemi & Nyangito Advocates) which was not on record. From the record, the bill of costs dated 24th October, 2013 was similarly filed by the same firm.
10. In my view although the Court did not expressly deal with the Bill of Costs, what is important is the finding that the said firm was not properly on record. It would follow that any action taken in these proceedings before regularising its position must of necessity fall by the wayside. As was held in **Macfoy vs. United Africa Co. Ltd [1961] 2 All ER 1169 at 1172** where an act is a nullity it is trite that it is void and if an act is void, then it is in law a nullity as it is not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. Where the Court finds this to be so the actions taken in pursuance thereof must therefore break down once the superstructure upon which it is based is removed; since you cannot put something on nothing and expect it to stay there as it will collapse.
11. It follows that the Bill of costs dated 24th October, 2013, based on nothing as it were must also have collapsed with the finding that the said firm was not properly on record. Pursuant to the said ruling, therefore the ex parte applicant herein had no option but to go back to the drawing board and commence

the taxation process *de novo*. By simply filing an application and recording a consent on a Bill which to all intents and purposes was non-existent, the ex parte applicant, just like in the earlier proceedings was taking a short cut.

12. Parties and their legal advisers ought to take seriously the advice of the Court of Appeal in **James Njoro Kibutiri vs. Eliud Njau Kibutiri 1 KAR 60 [1983] KLR 62; [1976-1985] EA 220** that the ingenious lawyers are advised that short cuts are fine, as long as you are absolutely sure they won't land you in a ditch. Similarly, in **Macharia vs. Wanyoike [1981] KLR 45**, the Court was of the view that, a pleading by way of the proposed short-cut method may or may not be an out of place is perhaps a worthwhile proposition for the rules making body on grounds of expedience or as a time-saving device; but experience has repeatedly shown that short-cuts invariably result in being more expensive and time-absorbing in the end and that it may be specifically argued that in relation to the precaution against delay, a short-cut may be accepted or applied to expedite but not to delay; but a short-cut in breach of a fundamental rule creating or occasioning remedial action cannot escape the stigma of 'delay'. Similarly, it was held in **Lehmann's (East Africa) Ltd vs. R Lehmann & Co. Ltd [1973] EA 167** that short-cuts in procedure almost always confuse and obscure the true issues and almost always result in prolonged litigation and unsatisfactory decision.

13. In the foregoing premises I find merit in the Motion dated 22nd September, 2016 which I hereby grant and set aside the decree on costs dated 31st March, 2016. For avoidance of doubt, the Bill of costs dated 24th October, 2013 is struck out and the consequential orders set aside on the ground of nullity.

14. In the premises it is not my duty to direct the ex parte applicant on the appropriate steps to take in the mater.

15. The costs of this application are awarded to the Respondent, the Board.

16. It is so ordered.

Dated at Nairobi this 1st day of March, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Magero for the applicant

CA Mwangi