



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MIGORI

ELC APPEAL NO. 10 OF 2018

TONCAP INVESTMENT.....APPELLANT

-VERSUS-

LUORE MANAGEMENT.....RESPONDENT

RULING

1. By a Notice of Motion dated 4th November 2019 brought pursuant to Section 3A of the Civil Procedure Act, Cap 21, Laws of Kenya, Order 51, rule 1, 2 and 4 of the Civil Procedure Rules (the application herein) and filed on 5th November 2019, the appellant, Toncap Investment (the applicant) through M/S Nyauke and Company Advocates, is seeking orders;

I. Spent.

II. Spent.

III. Pending the hearing and determination of this application inter parte, the court do issue an order staying the taxation of the respondent's bill of costs dated 26th September 2019.

IV. Upon hearing of this application inter-partes, the court to give clarification on what it meant by paragraph 27 (d) (ii) of the judgment delivered on 30th July, 2019.

V. The cost of this application be provided for.

2. The application rests on grounds 1 to 10 set out on its face and a 12 paragraphed supporting affidavit sworn on even date by Tom Ndege for and on behalf of the respondent. It is deposed, inter alia, that this court rendered judgement in this suit on 30th July 2019 and ordered that the sum of Ksh 300,000/= that had been deposited by the applicant was to ameliorate the respondent's costs accordingly. That the said cost was the only cost awarded to the respondent and any amount over and above it is irregular and unwarranted as revealed in the respondent's bill of costs dated 26th September 2019.

3. It is also deposed that if the bill proceeds to taxation before this application is determined, the respondent may execute against the applicant who will greatly be prejudiced thereby. That the respondent will not suffer any prejudice if the orders in the application are granted in the interest of justice.

4. The respondent, Luore Management through Kibiru and Company Advocates, opposed the application by way of a replying affidavit sworn on 8th November 2019 by Philip Okundi, the director of the respondent company. The director deposed, inter alia, that the sum of Kshs 300,000/= does not help in the offset of the respondent's costs which can duly be ascertained either by agreement between the parties or by the taxing master of this court or the Landlord and Tenant Business Premises Tribunal.

5. It was further deposed that the costs were not assessed or determined at Kshs 300,000/= in the judgement. That the additional sum of Kshs 263,365/= as quoted in the bill of costs has applied strictly in consonant with the Advocates Remuneration Order 2014. That the bill of costs dated 26th September 2019 be allowed to proceed for taxation in the interest of justice and fairness.

6. On 12th November 2019, this court did direct and order that the application be argued by written submissions; see **Order 51 Rule 16 of the Civil Procedure Rules, 2010 and Practice Direction 33 (a) and (b), of the Environment and Land Court Practice Directions, 2014.**

7. Accordingly, the applicant's counsel filed submissions dated 2nd December 2019 whereby reference was made to the orders sought in the application, three (3) issues for determination including whether the Ksh 300,000/= deposited as security for costs is a final figure as to costs and the party to bear costs in this application. Counsel relied on the provisions of Section 27 (1) of the Civil Procedure Act (Cap 21 Laws of Kenya), **Cecilia Karuru Ngayu –vs- Barclays Bank of Kenya and another (2016)eKLR** and urged this court to grant the orders sought in the application.

8. On the other hand, by submissions dated 12th December 2019 and filed in court on 16th December 2019, learned counsel for the respondent gave a brief background of the application, framed and analysed in favour of the respondent, three (3) issues: the meaning of the term "ameliorate", that the Ksh 300, 000/= deposited as security did not determine the costs payable to the respondent and that the taxing master should be at liberty to proceed with the taxation as per the bill of costs dated 26th September 2019 and filed in court on 1st October 2019. To fortify the submissions, counsel cited the Black's Law Dictionary 8th Edition, Section 27 (1)(supra), **Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 others (2014)eKLR** and **Reese –vs-Albert (1993)5ALR (3rd) 40**, among other authorities.

9. I have anxiously considered the application in its entirety, the replying affidavit and rival submissions with issues for determination and all the authorities cited therein. In that regard, it is the considered view of this court that the issues for determination are twofold;

a) Whether the sum of Kshs 300,000 deposited as security for costs on 20th November 2018 is the final figure as to costs as per the judgement of this court rendered on 30th July 2019.

b) The appropriate orders to be made in this application.

10. In respect of the first issue, it is pretty clear from the record that a sum of Ksh 300,000/= being security for costs was deposited in this court on 20th November 2018 further to the order of 26th September 2018. At paragraph 27 (d)(ii) of the judgment, the court directed that the deposit shall be applied to ameliorate the respondent's costs in this appeal.

11. The Black's Law Dictionary 10th Edition at page 98 defines the term "ameliorate" thus :-

"To make better."

12. The appellant asserted that the sum of Ksh 300,000/= deposited as security for costs in the final as to costs in this matter. That therefore the sum of Ksh 263, 365/= quoted in the bill of costs amounting to 563, 365 is premature, excessive, misplaced and unjust in the circumstances.

13. On the part of the respondent, it was contended that the sum deposited as security for costs was not mutually exclusive to taxation of costs. That the same goes to make better the costs as assessed by the court hence the bill of costs should proceed for taxation by the taxing master accordingly.

14. It is worthy to note that in Munya case(supra), the Court of Appeal cited the decision of Majanja J, in **Patrick Ngeta Kimanzi v Marcus Mutuamulvi and 2 others High Court Election Petition No. 8 of 2018** where it was held;

"Security of costs ensures that the respondent is not left without recompense for any costs or charges payable to him. The duty of the court is therefore to create a level ground for all the parties involved, in this case, the proportionality of the right of the petitioner to access to justice vis-à-vis the respondent's right to have security for any costs that may be owed to him and not to have vexatious proceedings against him."

15. The Court of Appeal further remarked, inter alia;

"It is clear from the trial court judgement that the court did not assess the costs payable to the applicant..."

16. In the present matter orders d (i) and (ii) at paragraph 27 of this court's judgement are cumulative in nature. Quite plainly, this court did not determine the costs payable to the respondent. The sum of Ksh 300,000/= is to be applied to make better the costs awardable to the respondent after taxation of the respondent's bill of costs herein.

17. As regards the second issue, I subscribe to the decision in **Rai and others –vs- Rai and others (2014)eKLR** that the basic rule that costs follow the event is not an invariable rule. That, indeed, the ultimate factor on award or non-award of costs is the judicial discretion.

18. Similarly, the Halsbury's Laws of England 4th Edition volume 10 regarding costs states that;

"The court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially."

19. To that end, it is the funding of this court that by the judgment, rendered on 30th July 2019 herein the sum of Ksh 300,000/= deposited as security for costs, is to be applied to ameliorate or make better the costs payable to the respondent. Thus, the respondent's bill of costs have to be taxed as prescribed by the law; see also **Reese case (supra)**.

20. Wherefore, the application dated 4th November 2019 and filed in court on 5th November 2019 is hereby determined as follows;

a) Paragraph (d)(ii) of the judgement delivered on 30th July 2019 means that the court did not assess the costs payable to the respondent but only directed and ordered that the sum of Ksh 300,000/= being security for costs deposited in court on 20th November 2018 pursuant to order of 20th September 2018 shall be applied to make better (ameliorate) the respondent's costs taxable by the taxing master.

b) The respondent's bill of costs dated 26th September 2019 and filed in court on 1st October 2019, be and hereby allowed to proceed for taxation by the taxing master accordingly.

c) Costs of this application shall be borne by the applicant.

Delivered, Signed and Dated at Migori through email pursuant to, inter alia, Articles 7 (3) (b), 159 (2) (b) and (d) of the Constitution of Kenya, 2010, Section 3A of Civil Procedure Act chapter 21 Laws of Kenya and Sections 3 and 19 of the Environment and Land Court Act, 2015 (2011) due to the Corona Virus pandemic challenge this 11th day of JUNE , 2020.

G.M.A. ONGONDO

JUDGE