SBI International Holdings AG (K) v Bore (Environment & Land Case 47 of 2013) [2020] KEELC 3984 (KLR) (3 June 2020) (Ruling)

SBI International Holdings AG (K) v Reuben Kipkorir J.T Bore [2020] eKLR

Neutral citation: [2020] KEELC 3984 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ENVIRONMENT & LAND CASE 47 OF 2013

A KANIARU, J

JUNE 3, 2020

BETWEEN

SBI INTERNATIONAL HOLDINGS AG (K) ..... PLAINTIFF

AND

REUBEN KIPKORIR JT BORE ..... DEFENDANT

RULING

1. This is a composite ruling on two applications, one, a motion on notice dated 9th September, 2019 and filed on 13th September, 2019 and, two, another motion on notice dated 11th September, 2019 and filed on 17th September, 2019. The two applications are by counsel and his client respectively, the client being the defendant in the suit. The defendant's name is Reuben Kipkorir J.T Bore. The counsel is Kiprono Siele Sigira. The respondent in both applications is SBI International Holdings. The respondent is the plaintiff in the suit. The contention is mainly about some awarded costs and some remarks made by the court in the course of awarding them.

2. The application dated 9th September, 2019 is expressed to be brought under Sections 1A, 1B, 3, 3A and 63 (e) of *Civil Procedure Act* (cap 21), Order 51 rule 1 of Civil Procedure Rules 2010, Sections 14 and 19 (1), (2) and 3 (f) of the *Environment and Land Court Act*, 2011, and Practice Direction No 1 under Gazette Notice 5178 of 28th July, 2014. It came with three (3) prayers but prayer 1 is now moot, having been meant for an earlier stage. The focus now is on prayers 2 and 3, which are as follows:

> Prayer 2: That the finding of the court on 19/6/2019 herein quote: "I am inclined to believe that counsel for the defendant is deliberately delaying this case..." (unquote) be expunged from the court record.
>
> Prayer 3: That the costs of the application be borne by the plaintiff/respondent.

3. The application dated 11th September, 2019 is stated to be brought under Sections 1A, 1B, 3, 3A, 27, and 63 (e) of The Civil Procedure Rules, 2010, Sections 14 and 19 (1), (2) and 3(f) of The *Environment and Land Court Act*, 2011, and Practice Direction number 1 under Gazette Notice Issue NO 5178 of 28th July, 2014. It is plain that the two applications are brought under the same provisions of law.

4. The background is as follows: This matter was coming for hearing on 14th February, 2019, a date taken by defendant on 7th November, 2018, but said to have been served on the plaintiff via email on 8th February, 2019. The plaintiff came and was ready to proceed but the defendant's counsel had a funeral to attend. The court adjourned the matter but ordered the defendant's side to pay costs amounting to 20,000/= mainly because the defendant's counsel could have informed the plaintiff's side not to come for hearing but did not. On that same day, the matter was fixed for hearing on 24th April, 2019.

5. On 24th April, 2019, the matter proceeded. Court records show the plaintiff's counsel insisting that the costs awarded on 14th February, 2019 be paid on that day, failing which the defendant should be denied audience by the court. The court however ordered that the costs be paid before the next hearing date, which was 19th June, 2019. That date came and costs had not been paid. Counsel for the defendant was also away in Nairobi. One Miss Ruto held brief for defendant's counsel. She asked for adjournment for reason that counsel for defendant was engaged in another matter in Nairobi.

6. Counsel for the plaintiff vehemently opposed the application for adjournment but the court nevertheless granted it but expressed its displeasure with the defendant's counsel partly in the following terms

> " I am inclined to believe that counsel for the defendant is deliberately delaying this case as his client has been attending court without fail".

It is these words that the defendant's counsel wants expunged from record. That is the main prayer in the application dated 9th September, 2019. On that day too, the defendant's side was condemned to pay yet another 20,000/= as costs. The total of unpaid costs came to 40,000/= and the court ordered these costs paid before 18th September, 2019, which was the next hearing date. Records show that the defendant side risked being denied audience if the costs were not paid. The two applications now under consideration were filed before this hearing date. By that date too, the trial judge had gone on transfer and it therefore fell on me to handle the applications.

7. According to the defendant's counsel, it is the plaintiff's side that has been causing delay. Stated the counsel, "...It is the respondent who has failed to prosecute its suit for the last seven (7) years". Counsel further observed that the remarks made by the court reflect negatively on him as a practicing advocate. In his own words, "the finding of the court can potentially have a negative impact on my practice as an advocate".

8. And as regards costs, the defendant alleged that the plaintiff is using the issue of costs to gag or muzzle his right of being heard. The defendant's position is that the plaintiff's counsel misled the court into believing that delay was caused by him while records show the contrary. The defendant explained the circumstances in which the defendant was condemned to pay costs and sought to persuade that the prevailing circumstances did not justify the orders made. To the defendant, the orders on costs were "punitive and inconsiderate". He therefore wishes that the orders are varied and costs ordered to be in the cause.

9. The plaintiff responded vide a 27 – paragraph replying affidavit dated 7th October, 2019. According to the plaintiff, the applications contain falsehoods, misrepresentations, and malice, and are therefore frivolous and vexatious. They are meant to serve the purpose of "further delaying the matter which

the applicants have severally been reprimanded over" To the plaintiff, the defendant is seeking a review without expressly stating so.

10. The plaintiff averred that its side was ready to proceed with hearing on 14th February, 2019 despite being served late. But the defendant's counsel insisted he wanted to attend a funeral. He asked for adjournments, which was granted subject to payment of costs. Another hearing date, 24th April, 2019, was given and on that date, the case proceeded and the defendant was ordered to pay the costs – 20,000/= - earlier awarded. The costs were to be paid before 19th June, 2019, which was the next hearing date given.

11. On 19th June, 2019, the defendant's counsel was in Nairobi but the plaintiff had come to court ready to proceed. The matter was adjourned but the defendant was ordered to pay costs amounting to yet another 20,000/=. The plaintiff averred that the costs were actually incurred, the expenses being for travelling and subsistence. The defendant, plaintiff averred, was ordered to pay costs largely for lacking courtesy, or presence of mind, to communicate his intention to adjourn in advance. The plaintiff expressed the view that the court was perfectly right to assess costs and order them paid as it did. The court was asked to strike out the two applications and order compliance with the orders made on 19th June, 2019.

12. There was no oral hearing of the applications; submissions were filed instead. The defendant's side submissions were filed on 29th April, 2020. The submissions give a snapshot of the two applications. The averments of the plaintiff are rebutted, and there is highlight of the law thought to be applicable. Overall the submissions contain re-statements and extrapolations of the substances of the two applications, the negation of the plaintiff's response, and some nuggets of applicable law. The point made is that the discretion afforded by law on the issue of costs was not exercised "judicially" and that the contentious remarks by the court concerning defendant's counsel were without sound basis. The applicant asked that the two applications be allowed with costs.

13. The plaintiff's submissions were filed on 4th February, 2020. The salient aspects of the case background was given while the introductory part made reference to the prayers in the two applications. According to the plaintiff, the issues for determination are two, one being whether the defendant can compel the court to vary the amount of costs with a view to settling them aside, while the other is whether counsel for the defendant can compel the court to expunge findings from record yet he is allegedly a stranger to the suit.

14. According to the plaintiff, the court has a wide discretion donated to it by Section 27 of *Civil Procedure Act* (cap 21) regarding award of costs. Several decided cases - Farah Awad Gullet Vcmc Motors Group Limited (2018) eKLR, Robric Limited & Another Vs Kobil Petroleum Limited & Another (2018) eKLR And James Koskei Chirchir Vs Chairman Board of Governors Eldoret Polytechnic (2011) eKLR - were cited to drive home the point that costs are awarded at the discretion of the court seized of the matter, with the only qualification being that such discretion should be exercised judiciously.

15. The plaintiff then submitted that the court considered various factors including absence of the defendant and/or request for adjournment by the same party and it addressed itself to the prevailing circumstances before awarding the plaintiff costs amount to Kshs. 40,000/= in the aggregate. The defendant then submitted thus: "It is clear that the judge exercised his (sic) discretion judiciously and without any allegation to the contrary his (sic) decision should not be interfered with as this would amount to interfering with his (sic) decisional independence".

16. And as to whether the court can expunge certain findings from record, the plaintiff submitted that the application is brought by a stranger, who simply filed the application without even seeking to be made

party to the proceedings. According to the plaintiff, the court needs to be convinced that a party is necessary before allowing joinder. And it is only after joinder that a party can participate in proceedings. Several cases including Sammy M. Makove, Commissioner of Insurance & Others Vs Kiragu Holdings Limited (2013) eKLR, and Robert Njoka Muthara & Anothers Vs Barclays Bank of Kenya Limited & another (2014) eKLR were cited to make the point. The defendant's counsel was then said to be a stranger as he is not a party to the suit and has no discernible interest in the matter. He was also faulted for not making the necessary application to be enjoined as a party.

17. I have considered the two applications, the response made, rival submissions, and the record of the proceedings generally. And as regards proceedings, I have focused my attention more on the records that contains what the two applications are about.

18. I will begin with the application dated 9th September, 2019. The plaintiff has alleged that counsel for the defendant should be treated as a stranger to the proceedings. According to the plaintiff the counsel should have applied to be joined as a party. If allowed to so join, he should then have made the application. The plaintiff even cited decided case to reinforce his argument. I don't agree with the plaintiff. The case cited are about individual persons wanting to be enjoined in the case. They are not about counsel with a client/counsel relationship. They are about people with no prior role in the case. In this matter there is already a clear relationship between counsel and defendant herein and it is clear that proceedings expressly referred to counsel in the manner he stated, with the counsel consequently feeling impelled to clear his name. One would ask: If proceedings expressly mention an advocate in circumstances such as these, would the advocate be required to seek to be enjoined in the suit yet he has no other interests in the case except that of playing his professional role as counsel?

19. In my view, it would the wrong approach in law to require such counsel to file separate proceedings to ventilate grievances or to require him to be enjoined in the suit as a substantive party. The principles of overriding objectives under which defendant's counsel filed his application entitle him in my view to approach the court the way he did. It is an approach that makes it possible to avoid multiplicity of proceedings and at the same time save costs and precious judicial time.

20. Having found, as I do, that the application is properly on record, is the application merited? It bears repeating the words counsel has complained of. They are as follows:

> " I am inclined to believe that counsel for the defendant is deliberately delaying this case..."

I am persuaded here that the learned judge was not unequivocally asserting that the counsel was delaying the case. She was merely expressing an opinion, or belief, if you like. It would be wrong in my view to call this a finding; it is an opinion or a view. To incline, according to concise Oxford English Dictionary, twelfth Edition, at page 719, is to "be favourably disposed towards or willing to do". It is also to" have a specified tendency, disposition or talent". There is really nothing conclusive about what the learned judge said. She merely expressed an opinion and if one looks at the records and then consider the remarks she made before expressing her opinion, one would appreciate that it was not based on caprice or whims. In other words, the judge was not making a wild surmise; she had reason for her opinion.

21. Counsel for the defendant has invited the court to have a look at the entire record and decide for itself who has caused more delay. It is the plaintiff, counsel avers. But the learned judge was not engaged in the exercise of comparative analysis regarding who may have caused more delay. She was simply appreciating recent events, which clearly showed the defendant's side causing adjournments, while the court itself and the plaintiff's side were ready for hearing. She then opined or suggested that counsel

for the defendant was responsible for the delay. In my view, she was entitled to her opinion, given that the record clearly shows the basis of her position.

22. Further, it is necessary to bear in mind that the remarks by the judge were not made in a formal ruling or judgement. They were made in the course of management and control of proceedings, which was her exclusive domain. As a judge of equal and/or concurrent jurisdiction, I should be reluctant to engage in the drastic action of expunging a record that shows a considered appreciation of what transferred before her. I consider that I was not there myself and I cannot therefore justifiably make a better claim of understanding the same situation.

23. Additionally, I must say that I don't understand well why the defendant's counsel should be unduly worried by harmless ex-cathedra remarks by a judge that are not contained in a formal ruling or judgement. Allegations of delay caused by party, counsel, or even the court itself, are everyday fare in our courts. If one were to take offence at every such allegation, one would be bitter or angry all the time. I have stayed in the station for some time now. I have had the experience of the practice of the counsel before me. He comes across as a well endowed professional, has a better than average mastery of both procedural and substantive law, and always exhibits an admirable comeliness of deportment. It should be possible for him to find the judge's remarks tolerable. The remarks are innocuous and refer to a specific situation. They do not in any way berate his general or professional reputation.

24. It is for all these reasons that I find the application umerited and dismiss it. I make no order as to costs.

25. I now turn to the other application. This one is about costs. There is an obvious interface between this application and the one I have just decided. But this one is about the client while the other was about counsel. The two however have the same contextual setting.

26. As pointed out by the plaintiff, costs are always awarded at the discretion of the court. The discretion is wide and unfettered save that it should be exercised judiciously. It is the position of the defendant's counsel that the exercise of discretion in this case was not judicious. According to defendant's counsel, the plaintiff's counsel misled the court into believing that the defendant's side was causing delay.

27. The court records show that on 14th February, 2019 costs were awarded because the defendant's counsel had not informed the plaintiff's counsel beforehand that he would be seeking adjournment. The plaintiff's counsel had travelled with witnesses and was ready to proceed. The court was alive to all this. It assessed costs to be paid by the defendant and granted adjournment. The crucial consideration here was lack of communication by counsel, not delay. Then on 24th April, 2019, counsel for the plaintiff insisted on payment of costs that were awarded on 14th February, 2019. Counsel for the defendant was present. The record does not show him saying what he is now saying in the application. He said something different. And based on what was said by both learned counsel, the court made an order that the costs be paid before the next hearing date. Question is: why didn't the counsel put forth before the court at that time what he has now put in the grounds on which the application is anchored and in the supporting affidavit? It seems to me clear that what the counsel is now alleging is an afterthought.

28. Then there was the date of 19th June, 2019. On this date, costs were again awarded to the plaintiff because defendant's counsel had not communicated in time to the plaintiff's counsel about his un-availability for hearing of the matter. Counsel for the plaintiff happened to have travelled and was ready for hearing. Counsel for the defendant was away in Nairobi. I see the defendant's counsel saying that he had called the plaintiff's counsel several times earlier but the counsel was not picking the calls. Question is: why not text? If a text had been sent to counsel early enough before the date of hearing, I think it would have been injudicious exercise of discretion to award costs if the same counsel happened to travel. Text messages are effective and efficient. They always show time and date of texting. And it would have

been impossible for plaintiff's counsel to avoid or run away from them. The defendant's counsel failed to do something cheap and simple that would have obviated the burden of costs on the defendant.

29. It seems to me clear that costs were not so much awarded because of any alleged delay but because of failure by the defendant's counsel to communicate to plaintiff's counsel early enough about intended requests for adjournments. And because of that failure, counsel for plaintiff travelled from Nairobi ready for hearing of the case. Costs were incurred. Costs were ordered to be paid. Time for payment was also specified. Nothing injudicious in all this in my view. Counsel for the defendant would have us believe that this is punitive to defendant. It is very normal to make such orders. They are normally a wake-up call to the party being ordered to pay to be ready to move the matter forward. Such orders are normally meant for those whose conduct in relation to hearing a given matter is found wanting. And this is precisely the situation that obtains here.

30. Given what I have said heretofore, it is very clear that I am not persuaded that I should interfere with the orders of costs as made earlier in this case. It is my considered view that discretion to award them was exercised judiciously. I therefore find the application unmeritorious and dismiss it with costs.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 3RD DAY OF JUNE, 2020.

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A. K. KANIARU

JUDGE