



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR MISC. APPLICATION NO. 165 OF 2013

**IN THE MATTER OF AN APPLICATION BY TOM NDECHE AND PETER SHISIA
MAYEENDE FOR LEAVE TO TAKE OVER THIS MATTER FROM THE ORIGINAL
APPLICANTS**

BETWEEN

REPUBLIC.....APPLICANT

AND

THE PRINCIPAL SECRETARY, MINISTRY OF LANDS, HOUSING

AND URBAN DEVELOPMENT.....RESPONDENT

***EX PARTE:* KENYATTA PETER & 3 OTHERS**

RULING

1. These proceedings according to the ex parte applicants **Kenyatta Peter, John Keen Demesi, Ochwacho Ojango** and **Evans Emastt**, were instituted on their behalf and on behalf of more than 600 families of Kibera Soweto East Zone “A” Slums, in Kibera Nairobi who alleged that they were affected by the directive of the Respondent to evict them.
2. On 27th November, 2014, this Court after hearing the substantive Notice of Motion granted the following orders:
 1. **Certiorari removing into this Honourable court the Respondent’s directive dated 14th November, 2012 and 29th April, 2013 to evict the ex parte applicants and any other consequential orders emanating therefrom and the same are hereby quashed.**
 2. **Prohibition against the Permanent Secretary Ministry of Housing his Officers, servants, agents or assignees from implementing or executing the order of demolishing, evicting, damaging or interference with the applicants’ business, homes, structures and properties located within Kibera Soweto East Zone slums or act in any other way that will prejudice their safe, quiet enjoyment of the same pending further orders of this Court.**
 3. **Pursuant to Article 23 of the Constitution which does not limit the remedies this Court is empowered to grant in such cases, I direct that within 30 days of this Judgment, a meeting shall be convened by the Respondent with the Applicants, where a programme of eviction of the Applicants shall be designed taking into account the following factors:**
 - i. **that at the time of eviction, neutral observers should be allowed access to the suit properties to ensure compliance with international human rights principles.**
 - ii. **that there must be a mandatory presence of Governmental officials and security**

- officers.
- iii. that there must be compliance with the right to human dignity, life and security of the evictees.
 - iv. That the evictions must not take at night, in bad weather, during festivals or holidays, prior to any election, during or just prior to school exams and in fact preferably at the end of the school term or during school holidays.
 - v. that no one is subjected to indiscriminate attacks.
4. The Report of the progress shall be filed in this Court within 60 days from the date of this Judgement.
 5. Liberty to apply granted.
 6. As this was substantially a representative Cause, there will be no order as to costs.

3. On 25th March, 2015, a Notice of Motion was brought by the present applicants, **Tom Ndeche** and **Peter Shisia Mayeende** seeking that leave be granted to them to take over the conduct of the matter on behalf of the aforesaid 600 affected families from the ex parte applicants herein. They also sought an order that they be granted leave to commence contempt of court proceedings against the Respondent and the *ex parte* applicants for wilfully and deliberately disobeying the orders of the court made on 27th November, 2014.
4. On 28th May, 2015 the applicants herein by a Notice of Withdrawal of Application dated the same day, withdrew and discontinued the entire application dated 24th March, 2015. According to **Dr. Alutalala Mukhwana**, the applicant's counsel, he formed an opinion to advise the applicants to withdraw the application after perusing the response to the application filed by the ex parte applicants whose contents were hitherto unknown to him. **Mr Okemwa**, learned counsel for the ex parte applicants however insisted on costs since according to him, the application was directed at his clients and had nothing to do with the interests of the persons who stood to be affected by the respondent's action.
5. With respect to the prayer for leave to commence contempt of court, that prayer was unnecessary. The law guiding contempt of Court proceedings in this country is to be found in section 5 of the *Judicature Act* Cap 8 Laws of Kenya, which section provides:

(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.

(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.

6. Therefore substantially the law that governs contempt of court proceedings is the English law applicable in England at the time the contempt was committed. The procedure in the High Court of Justice in England was considered in detail by the Court of Appeal in **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others [2014] eKLR** in which the Court of Appeal recognised the position stated hereinabove that the only statutory basis for contempt of court law in so far as the Court of Appeal and the High Court are concerned is section 5 of the *Judicature Act*.
7. In that case, the Court expounded on the stat of law in England on the said issue. It was recalled that the High Court of Justice in England comprises three (3) divisions – the Chancery, the Queens Bench and the Family Divisions. Following the implementation of **Lord Woolf's "Access to Justice Report, 1996"**, the **Rules of the Supreme Court** of England are being replaced with the **Civil Procedure Rules, 1999** and pursuant thereto the Court of Appeal in the above decision recognised that on 1st October, 2012 the **Civil Procedure (Amendment No. 2) Rules, 2012**, came into force and Part 81 thereof effectively replaced Order 52 of the **Rules of the Supreme Court** which was the Order dealing with the procedure for seeking contempt of Court orders in the High Court of Justice in England, in its entirety. Under Rule 81.4 which deals with breach of judgement, order or undertaking, referred to as "application notice", the application is made in the

proceedings in which the judgement or order was made or undertaking given and the application is required to set out fully the grounds on which the committal application is made, identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon. The said application and affidavit(s) must be served personally on the respondent unless the Court dispenses with the same if it considers it just to do so or authorises an alternative mode of service. The Court of Appeal held that leave or permission is no longer required in such proceedings (relating to a breach of a judgement, order or undertaking) as opposed to committal for interference with the due administration of justice or in committal for making a false statement of Truth or disclosure statement.

8. Since the said prayer was gratuitous, nothing turns on its withdrawal.
9. The other prayer was as already stated hereinabove, seeking in effect to substitute the ex parte applicants with the present applicants so as to enable the present applicants prosecute the matter on behalf of the persons affected. The applicants have deposed that they were part of the said 600 families who were affected by the respondent's decision. This contention is however denied by the ex parte applicants who averred that the applicants are not persons by the project.
10. The general rule as to costs is provided for in **section 27** of the *Civil Procedure Act* which 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.

11. This provision has been the subject of several judicial pronouncements. In the case of Supermarine Handling Services Ltd vs. Kenya Revenue Authority Civil Appeal No. 85 of 2006 the Court of Appeal expressed itself thus:

“Costs of any action or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts. If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance... Thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where the reasons are given if it considers that those reasons do not constitute “good reason” within the meaning of the rule... In the instant case the learned Judge gave no reasons whatsoever for his decision to deprive the successful plaintiff of its costs and yet it was not shown that the defendant had been guilty of some misconduct which led to litigation. In the court's view the learned Judge's order was wrong and for the foregoing reasons, the plaintiff's appeal succeeds as to the award of interest and costs on the principal sum awarded”.

12. In **Devram Manji Daltani vs. Danda [1949] 16 EACA 35** it was held that a successful litigant can only be deprived of his costs where his conduct has led to litigation, which might have been averted.
13. In **Party of Independent Candidate of Kenya & Another vs. Mutula Kilonzo & 2 Others HCEP No. 6 of 2013**, it was held:

“The main reason why this Petition should be withdrawn is due to the demise of the 1st Respondent. This would call upon the Court considering ordering each party to bear their own costs. In the case of *Nedbank Swaziland Ltd verses Sandile Dlamini No.(144/2010) [2013] SZHC30 (2013) Maphalala J.* referred to the holding of *Murray C J in the case of Levben Products VS Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227*, who stated as follows:

“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (*Fripp vs Gibbon & Co., 1913 AD D 354*). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at...In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

14. In determining the issue of costs, the Court is entitled to look at the conduct of the parties, the subject of litigation and the circumstances which led to the institution of the legal proceedings and the events which eventually led to their termination. In other words the court may not only consider the conduct of the party in the actual litigation, but the matters which led up to litigation. See **Hussein Janmohamed & Sons vs. Twentsche Overseas Trading Co. Ltd [1967] EA 287** and **Mulla (12th Edn) P. 150.**
15. As stated hereinabove, costs follow the event. Where an application is withdrawn, the general rule would be that the applicant would bear the costs thereof since the event would be the determination albeit by withdrawal of the application in favour of the respondents. However, being a discretionary power the Court is perfectly entitled to consider all other relevant factors.
16. In this case, as already held, the prayer for leave to commence contempt of Court proceedings was unnecessary. It is also worth considering that the application was not heard on merit. However, the withdrawal of the application was clearly informed by the documents filed by the ex parte applicants.
17. Taking into account all the foregoing, it is my view and I hereby hold that the ex parte applicants ought to be paid half the costs by the applicants in the instant application.
18. It is so ordered.

Dated at Nairobi this day 2nd day of June, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Dr Alutalala for the Applicants

Mr Okemwa for the ex parte applicants

Mr Munene for Ms Chimau for the Respondent

Cc Patricia