



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CONSTITUTIONAL PETITION NO. 70 OF 2013**

**IN THE MATTER OF: ARTICLES 2(6), 19, 22(2)(A), (3) & 25, 28, 40**

**165(30(A)(B), (D)(I), (II) OF THE CONSTITUTION OF KENYA.**

**IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 26(1), (3) 27(1), (2), 28, 29((C), (D) OF THE CONSTITUTION AND RULE 11(C) AND 12 PROTECITON OF FUNDAMENTAL RIGHTS AND PROCEDURE RULE AND ALL OTHER RELEVANT ENABLING POWER AND PROVISIONS OF THE LAWS OF KENYA.**

**AND**

**IN THE MATTER OF: ARTICLES 25 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS**

**Between**

**MAGGIE MWAUKI MTALAKI.....PETITIONER**

**VERSUS**

**THE HOUSING FINANCE COMPANY OF KENYA.....RESPONDENT**

**RULING**

1. By a Judgment delivered on 25<sup>th</sup> March, 2015, I dismissed the Petition by the Respondent/Applicant, and denied the Respondent/Applicant costs. The Respondent, Housing Finance Company of Kenya Limited is unhappy with that order, and has by a Notice of Motion dated 27<sup>th</sup> May, 2015 sought -

**(a) a review in that part of the judgment denying the Respondent costs of the dismissed Petition, dated 6<sup>th</sup> December, 2013;**

**(b) substituting the order denying the Respondent costs of the dismissed Petition and substitute therefor an order awarding the Respondent costs of the dismissed Petition.**

2. The Notice of Motion was supported by the Affidavit of Martin Wachira the Applicant's Legal Manager sworn on 27<sup>th</sup> May, 2015, and the grounds on the face of the Application.

3. The Application was however opposed, and in the “Grounds of Opposition” dated 19<sup>th</sup> June, 2015, the Petitioner’s counsel contend that the application is misconceived, bad in law and defective and should be dismissed, and the application did not satisfy the grounds for review orders, that the Judge was within his discretion not to award costs to the Respondent, but if the Respondent incurred costs, the same can be recovered as part of the price of the property during the auction and it would be unjust and unfair to burden the Petitioner with costs, when the Respondent has means of recovering the same; as it is the practice for the price of the property during auction to cover all costs incurred before and during auction, and that granting the orders south herein will greatly prejudice the Petitioner.

4. In addition to the Supporting Affidavit both Petitioner and the Respondent filed written submissions. Those of the Respondent undated, were filed on 29<sup>th</sup> July, 2013 while the Petitioner’s submissions dated 25<sup>th</sup> August, 2015 were filed on 28<sup>th</sup> August, 2015. These respective submissions were adopted by Mr. Shimaka and Mr. Ongele, respective counsel for the Petitioner/Respondent, and Respondent/Applicant on 31<sup>st</sup> August, 2015. I have perused the respective submissions together with the authorities annexed to each of them.

### **THE RESPONDENT/APPLICANT’S CASE**

5. The Respondent’s case was premised on two issues –

- (a) whether there was an error apparent on the face of the record, and
- (b) whether that error can be cured or rectified by review

6. Counsel for the Respondent’s submissions underscore the fact that this was a Constitutional Petition, not a civil suit for which the provisions of Order 45 of the Civil Procedure Rules on review on the basis of either discovery of new and important evidence which even with the exercise of due diligence, was not available to the Applicant, or there was an error on the face of the record, or again, for sufficient cause.

7. A challenge on this basis was rejected by this court (Kasango J), in **ABDISALAM HASSAN ISMAIL & 2 OTHERS VS. KENYA RAILWAYS CORPORATION & 3 OTHERS [2015] eKLR** where the learned Judge held the view that technicalities of procedure should not be entertained in matters of enforcement of constitutional rights. A similar view was upheld in **MULTIPLE HAULIERS EAST AFRICA LIMITED VS. ATTORNEY-GENERAL & 9 OTHERS [2015] eKLR** where Mumbi J said –

**“my understanding of these provisions is that even where there is no specific provision in the Rules allowing the court to review its decision, should the court find that a case has been made out for review of its decision, then it would be duty bound to review its decision.**

**It is true that the court held in the ANDERS BRUEL case, that even though there are no provisions directly providing for review of decisions in constitutional petitions, on the basis of the provisions of Article 22 and 159 (2)(d), the court is duty bound, should sufficient reasons be established, to review the decision.”**

8. I accept and endorse the principle that the court has even in Constitutional Petitions, the jurisdiction to review its orders. Having invested the court with jurisdiction to review its decisions in Constitutional Petitions, the next question which counsel for the Respondent dealt with is the principles upon which such review will be considered by the court. Counsel found and argued that one such principle was an error on the face of the record, and for definition of what an error on the face record entails, counsel relied on the decision of the Court of Appeal in **ANTHONY GACHARA AYUB VS. FRANCIS MAHINDA THINWA [2014] eKLR** where that court opined thus –

**“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 a real distinction between a mere erroneous decision and an error apparent on the face of the 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. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record.**

9. According to counsel's submissions a case was made out for an error apparent on the face of the record because there was no evidence at all on the condition of the Petitioner or the Petitioner's husband tending to show for example, terminal illness or such other deteriorating condition (paragraphs 12-17 of the submissions), and asserted at paragraph 18 that –

**“... a principal consideration in the discretion to award or deny costs is where a party presents pleadings which amount to an abuse of the court process, the courts generally guard against such abuse of the court process by telling the guilty party to meet the costs of the party who has been dragged to court to defend a lost cause.”**

10. Counsel cited the decision of the Supreme Court in **JASBIR SINGH RAI & 3 OTHERS VS. TARLOCHAN SINGH RAI & 4 OTHERS [2014] eKLR** where that court said –

**“The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivation and conduct of the parties, prior to, during, and subsequent to, the actual process of litigation.”**

11. Counsel consequently concluded that having found that the motivation and conduct of the Petitioner was an abuse of process of court, this finding could not be reconciled with a subsequent direction or that the Petitioner's condition moved the court to spare her from costs. That was an error too apparent on the face of the record, and that it accordingly calls for review and orders for costs in line with the decision in **MARGARET RWAMBA suing as legal representative of the Estate of MOFFAT KARIUKI NYANGA VS. MUGAMBI MUKETHA & ANOTHER [2014] eKLR**, where the Court of Appeal held that even where an error on the face of the record is an error of law, it may still be reviewed by the trial court, if the matter is brought to its attention. The court said –

**“We are of the considered view that failure by the trial court to grant the appellant costs of the suit is an error apparent on the face of the record. This is because pursuant to section 27(1) of the Civil Procedure Act, costs ought to have been awarded to the appellant whose claim was successful. We find that the learned Judge (.....) misdirected herself by holding that she had no power under an application for review to grant the orders sought by the appellant.”**

12. Counsel consequently urged the court to find that there was an error of law apparent on the face of the record, and should grant the application for costs.

### **THE PETITIONER/RESPONDENTS CASE**

13. I will incorporate the Petitioner/Respondent's submissions in the determination of the Respondent's Notice of Motion for review of the order against costs to the Respondents.

### **DETERMINATION**

14. The point of determination of an application arising from a determination of a Constitutional Petition is **firstly** the Constitution itself. It is the **fons et origo** of all jurisdiction. Section 3 of the Judicature Act, (Cap 8 Laws of Kenya), provides –

**“3(1) The jurisdiction of the High Court, the Court of Appeal, [the Supreme Court] and of all subordinate courts shall be exercised in conformity with:-**

- a. **the Constitution,**
- b. **subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited on Part 1 of the Schedule to this Act, modified in accordance with Part II of that Schedule**
- c. **subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12<sup>th</sup> August 1897, and the procedure and practice observed in courts of justice in England at that date but the common law, doctrines of equity and statutes of general application shall apply so far as only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.”**

15. Article 22(3) of the Constitution empowered the Chief Justice to make rules for the court proceedings which shall satisfy the criteria that –

**“(a) -**

**(b) formalities relating to proceedings, including commencement of the proceedings, are kept to a minimum, and in particular that the court shall, if necessary entertain proceedings on basis of informal documentation.**

**(c) no fee may be charged for commencing proceedings.”**

16. Rule 26 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 provides as follows –

**“26(1) the award of costs is in the discretion of the court;**

**(2) In exercising its discretion measures to ensure that every person has access to the court to determine their rights and fundamental freedoms.”**

17. Rule 26(1) above re-echoes the discretion conferred upon the court by section 27(1) of the Civil Procedure Act, (Cap 21, Laws of Kenya), which provides –

**“27(1) 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 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 Judge or court has no jurisdiction to try the suit shall be no bar to the exercise of those powers PROVIDED that costs of any action, cause or other matter or issue shall follow the event unless the court or Judge shall for good cause otherwise order.”**

18. Both rule 26(1), of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, and section 27 of the Civil Procedure Act, reiterate that the costs are at the discretion of the Court or Judge. However, such discretion cannot be exercised at the whim of the Court or Judge. It must be exercised judicially, that is to say with good reason if the Court or Judge should order that costs should not follow the event as provided in the proviso to section 27(1).

19. Considering the question of discretion in **JASBIR SINGH RAI & 3 OTHERS VS. TARLOCHAN SINGH RAI & 4 OTHERS [2014] eKLR**, the Court of Appeal reiterated the principle that costs was a matter of discretion. The court referred to the decision of Odunga J in **JOSEPH ODUOR ANODE VS. KENYA RED CROSS SOCIETY [2012] eKLR** where the learned Judge at paragraph 10 said –

**“...whereas this court has discretion when awarding costs, that discretion must, as usual, be exercised judicially. The first point of reference, with respect to the exercise of discretion is the guiding principles provided under the law. In matters of costs, the general principle as adumbrated in the aforesaid statute (the Civil Procedure Act), is that costs follow the event unless the court is satisfied otherwise. The satisfaction must, however, be patent on record. In other words, where the court decides not to follow the general principle, the court is enjoined to give reasons for not doing so. In my view it is the failure to follow the general principles without reason that would amount to arbitrary exercise of discretion....”**

20. The authors of Halsbury’s Laws of England, 4<sup>th</sup> Edition issue (2010) Vol. 10, emphasizes the discretion conferred upon the Court or Judge. At paragraph 16, the authors say –

**“...where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him and the court has an absolute and unfettered discretion to award or not to award them.”**

21. This is however different from the proviso to section 27 of the Civil Procedure Act, that costs follow the event **unless the court for good reason orders otherwise**. The reason given in my Judgment of 25<sup>th</sup> March, 2015 merely refers to the condition of the Petitioner, without clarification. By **“condition”** I meant or was referring to the fact that the Petitioner was wife to the borrower-husband. Article 22 of the Constitution gave her, as a non-borrower, a window to challenge the sale of her matrimonial home, and whether all was lost under the charge or mortgage.

22. I however dismissed her Petition. By virtue of the charge or charges, the house she had known as her matrimonial home had been turned into a **commodity for sale** as a result of her borrower-husband’s default, she was clutching at a straw under the Petition which had just been dismissed. To condemn her in costs was to rub dust and sand into her face and many others who may be minded to challenge the constitutionality of sale in an instrument she had no knowledge of. By her loss in the Petition the Respondent has received green light and liberty to sell her home, and recover all charges including charges and costs in connection with enforcement of the charge or mortgage, and secured under the said instrument.

23. It is deeply regretted that the expression “the Petitioner’s condition” was not clarified as stated above.

24. For those reasons, I am unable to review the orders denying the Respondents costs. In the circumstances, the Notice of Motion dated 27<sup>th</sup> May, 2015 is dismissed with a direction that each party bears its own costs.

25. There shall be orders accordingly.

**Dated, delivered and signed at Mombasa this 5<sup>th</sup> day of November, 2015.**

**M. J. ANYARA EMUKULE**

**JUDGE**

In presence of:

Mrs. Oballa holding brief for Mr. Shimaka for the Petitioner

No Appearance for Respondent

Mr. Silas Kaunda Court Assistant