



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISCELLANEOUS CIVIL APPLICATION 347 OF 2010

CIVIL

*Section 27 Cap 21

* Award of costs

KENYA MARITIME

AUTHORITY.....APPLICANT

VERSUS

PATRICK MUTUA MBITHI.....

.....RESPONDENT

RULING

The applicant’s notice of motion dated 11th November 2011 is brought under sections 27, 80, 99 and 3A of the Civil Procedure Act Cap 21 and order 45 Rule 1 of the Civil Procedure Rules 2010. The applicant seeks the setting aside and review of the order of the court of 29th September 2011. By that order the court awarded costs to the respondent. It is the award of costs to the respondent that this application is directed toward.

The background of this matter is that the respondent sued the applicant in CMCC NRB Milimani Commercial Court Case No. 4790 of 2010. The applicant is a body corporate and established under the provisions of Kenya Maritime Authority Act 2006. The applicant in filing its defence in that case indicated that its address is at White House next to MSC Plaza Moi Avenue, P. O. Box 95076 Mombasa. After filing its defence, the applicant filed this present miscellaneous application. By that application the applicant sought the transfer of the Milimani Commercial Court case to the Chief Magistrate’s court in Mombasa for determination.

This court by its ruling dated 8th September 2011 but delivered on 29th September 2011 granted the applicant its prayers by ordering the Nairobi Milimani Commercial Court Case to be transferred to the Chief Magistrate’s Court Mombasa for determination. The court by that ruling awarded the costs of the application of the transfer of that suit to the respondent. The applicant seeks the review of the order awarding the respondent costs of its application to transfer the suit from Nairobi to Mombasa. Order 45 Rule 1 (a) (b) it provides as follows:

“(1) Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new

and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

The applicant relied on the provisions of section 27 of Cap 21 and submitted that although a court is afforded discretion in awarding costs, the court should observe the principles in that section in making such an award. Section 27 (1) of Cap 21 provides:

“(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 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.”

In submissions learned counsel for the applicant submitted as follows:

“.....costs though in the discretion of the judge must normally “follow the event” unless the judge for “good reason” orders otherwise. These two prepositions, your honour, are nothing new and is the position at common law. The English Court of Appeal said in Smiths Ltd. Vs. Middleton [1986] 2 All ER (referred to in the respondent’s irregularly filed submissions) where the court said “the discretion like any other discretion, must be exercised judicially, and the judge ought not to exercise it against the successful party except for some reason connected with the case.” This Honourable Court speaking through the Honourable Mr. Justice Hayanga, in Robert Gichobi Kamundo vs. District Magistrate I Gichugu and 2 others (unreported) HC Misc. Application No. 1052 of 2000 (Applicant’s list of Authorities No. 5) cited with approval the statement by May L.J in Lipkin Gorman vs. Karnale Ltd [1989] 1 WLR 1390, which said:

“In making order for costs a court exercises a discretion, doing justice to all the circumstances of the case but bearing in mind the underlying principle that the winner whoever may be described as the winner is entitled to costs.”

Your Honour, it is my very humble submission that no reasons were given by this Honourable Court as to why costs were not granted to the successful party.”

In response to the respondent’s submissions the applicant’s learned counsel stated that the review which is sought was not premised on the ground that I should take a different view to the one of ***Justice Ibrahim (as he then was)*** when he awarded costs to the respondent. That the application is premised on the fact that the court in awarding cost gave no reasons for making that award. Further, that although the court has discretion in awarding costs, the provisions of section 27 (1) were that costs should follow the event unless for good reasons the court otherwise would state.

The respondent termed the application as frivolous, vexatious and abuse of the process. The learned counsel for the respondent submitted that the order of costs was made by a competent court with equal jurisdiction to the court now considering the present application. It was the view of the respondent therefore that the applicant in seeking review was seeking to appeal to a court of concurrent jurisdiction. The respondent was of the view that this court is now *functus officio*. That since the court which awarded costs acted within its discretion and because the applicant had not brought to the court’s attention any new issues warranting review, there was no basis to review that order. The respondent relied on the case; **SMITHS LTD AND ANOTHER V MIDDLETON (NO.2) [1986] 2 ALLER 539** where it was stated:

“Where a trial judge refused leave to appeal against an award of costs the fact that the judge had taken into account some extraneous matters in making his award did not entitle the Court of Appeal to interfere with the award unless the extraneous matters taken into account were the operative reason for the judge exercising his discretion as to costs in the manner in which he did, in the sense that the extraneous matters were the overriding or only reason for the exercise of the discretion. Accordingly, even assuming that the judge had been wrong to hold that the payment in was technically invalid, that had not been the operative reason for him refusing to order the plaintiffs to pay the defendant’s costs from the date of the payment in, because he had taken the payment in as well as other factors, including the defendant’s own conduct, into account in declining to award the defendant costs.”

As stated before, the applicant was successful in having a suit filed by the respondent in Nairobi Court transferred to Mombasa court for disposal. That was by the ruling of this court delivered on 29th September 2011 on behalf of **Justice Ibrahim**. The learned judge in making his ruling found that the respondent who had filed the case in Nairobi was a former employee of the applicant. Indeed he found that the case which the respondent filed in Nairobi related to that relationship of employer and employee. Further that before that suit was instituted, the applicant was served by the respondent with a demand letter in its Mombasa office. The summons and plaint were also served on the applicant in Mombasa. **Justice Ibrahim** in his ruling under consideration had these to say:

“From the facts I do find that the Defendants’ (applicants) principal office is in Mombasa and was where the cause of action herein arose.

Also the contract of employment herein was made, executed and performed in Mombasa.

As a result, under the provisions of the law, the suit ought to have been filed in Mombasa Courts which has appropriate territorial jurisdiction. The trial and prosecution of the case will be prejudicial to the Defendant in terms of convenience, expenses and costs.

I therefore do hereby grant the order of transfer in terms of the application – prayer 1 together with costs to the Respondent.”

Section 27 of Cap 21 as rightly stated by the applicant provides that costs shall follow the event unless the judge for good reasons shall otherwise order. No reasons were assigned in that ruling stating why the applicant who succeeded in its application was not awarded costs but the costs were awarded to the respondent who was the loser. Looking at that anomaly, I am led to state that the learned judge in awarding costs to the loser was an act in error or omission on the part of the said judge. In the case of **National Bank of Kenya Limited VsNdunguNjau Civil Appeal No. 211 of 1996 (unreported)** the court had these to say on review:

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established.”

The respondent’s main objection to the present application was that the applicant in seeking review was seeking an appeal against the award of costs. In the case **National Bank vsNdungu**(*supra*) the court of appeal had these to say as a guide to a court considering a review application:

“It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provisions of law cannot be a ground for review.”

In this matter, I find that the learned judge did not set out the reasons why he awarded costs to the respondent who had lost the application. The judge did not express himself on the reasons of that award and I would state that contrary to what was submitted before me, it was not a misdirection on the law. I am persuaded that the applicant has set out sufficient ground to lead me to find that the award of costs to

the respondent was an error or omission. I therefore find that there is merit in the application.

I grant the following orders:

1. The order of 29th September 2011 with respect to the award of costs to the respondent is hereby reviewed and set aside. It is substituted with an order of costs being awarded to the applicant in respect of the application of notice of motion dated 17th October 2010.

2. The applicant is awarded costs of the notice of motion dated 11th November 2011.

DATED and DELIVERED at MOMBASA this 5th day of July, 2012.

Mary Kasango
JUDGE