



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. JR. CASE NO. 43 OF 2017

REPUBLIC.....APPLICANT

=VERSUS=

NATIONAL LAND COMMISSION.....1 ST RESPONDENT

CHIEF LAND REGISTRAR.....2 ND RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY.....3 RD RESPONDENT

=AND=

VIPINGO BEACH RESORT LIMITED.....EX-PARTE APPLICANT

=AND =

CLIFFORD NIXON ODUOR.....1ST INTERESTED PARTY

SAMUEL KAMAU NGANGA.....2ND INTERESTED PARTY

FLORENCE WANJA WANYOIKE.....3RD INTERESTED PARTY

JOEL KIPLAGAT BUSIENI4TH INTERESTED PARTY

HILLARY KIPKURUI KOECH.5TH INTERESTED PARTY

JOSEPH GOGO OCHOK.....6TH INTERESTED PARTY

JANET KATHAMBI KIUNGA.....7TH INTERESTED PARTY

ISAAC MBEYA OYOSI.....8TH INTERESTED PARTY

SAMUEL NGUYAI NJOROGE.9TH INTERESTED PARTY

JUDGMENT

Background

1. The ex-parte applicant moved this court on 24/8/2017 seeking leave to commence judicial review proceedings for judicial review orders, including an order of *certiorari*, quashing Gazette Notice Number 6862 published by the 1st respondent on 17/7/2017. The said Gazette Notice contained a determination under Article 68 of the Constitution and Section 14 of the National Land Commission Act, recommending revocation of the *ex-parte* applicant's title to Land Reference Number 209/14437. The application was served upon all the parties for *inter partes* hearing the subsequent day. The respondents failed to attend court at the *inter partes* hearing and leave to commence judicial review proceedings against the respondents was granted. The ex-parte applicant subsequently lodged a substantive motion dated 1/9/2017 and served it on all the parties. About seventeen months later, the 1st respondent published Gazette Notice Number 1547 on 15/2/2019, revoking the impugned Gazette Notice. The reason given for the subsequent Gazette Notice was that the 1st respondent wished to uphold the judgment rendered on 20/2/2015 by the Environment and Land Court (Gitumbi J) in Nairobi ELC Case No 963 of 2012.

2. The impugned Gazette Notice having been revoked, the substantive motion became an academic exercise because there was nothing to

quash. The parties were however not able to agree on the issue of costs. Consequently, on 25/7/2019. At the request of the *ex-parte* applicant the substantive notice of motion was marked as withdrawn but the parties were unable to reach a settlement on the issue of costs of the suit. Consequently, the parties were directed to file and exchange written submissions to enable the court make a determination on the issue of costs.

3. It is apparent from the evidential materials on record that after Judgment was delivered on 20/2/2015 in Nairobi ELC Case No 963 of 2012, the 1st respondent, on behalf of the 3rd respondent, expressed its intention to acquire the suit property through Gazette Notice Number 4760 dated 24/6/2016. A notice of inquiry was subsequently issued vide Gazette Notice Number 2434 published on 17/3/2017. The *ex-parte* applicant and the interested parties appeared before the Valuation Committee of the 1st respondent on 3/4/2017 where they were informed that the 1st respondent had opted to wait for the determination of the review that was scheduled for 27/3/2017. Subsequent to that the 1st respondent published the impugned Gazette Notice on 17/7/2017. As soon as the impugned Gazette Notice was published, *ex-parte* applicant notified the 1st respondent through a letter dated 2/8/2017 of the error in the Gazette Notice published on 17/7/2017 because there was an existing judgment relating to the matter.

Submissions

4. The *ex-parte* applicant and the 5th to 9th interested parties filed written submissions on 26/9/2019. It was submitted that costs should be borne by the 1st respondent and/or the 3rd respondent on whose account the 1st respondent sought to acquire the suit property. It was further submitted that the 1st and 3rd respondents should bear costs of this suit because they occasioned the present litigation. It was further argued that where a suit fails, the party that instituted the suit should bear the costs of the suit, but where the suit is successful, the defendant or respondent will bear the costs. Reliance was placed on **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR**. Lastly, it was submitted that where a plaintiff comes to enforce a legal right and there was no misconduct or negligence on his part the court has no discretion and cannot take away the plaintiff's right to costs of the suit.

5. The 1st respondent submitted that the *ex-parte* applicant did not fall under the definition of a successful party as defined in the case of **Loft v Nat 2014 BCCA 108 (CANLII)** hence it was not entitled to costs. It was contended that a successful party is a plaintiff who establishes liability under a cause of action and obtains a remedy or a defendant who obtains a dismissal of the plaintiff's case. It was argued that the *ex-parte* applicant instituted the present proceedings against all the parties but the proceedings did not culminate in a judgment in favour of the *ex-parte* applicant as expected. It was further submitted that since the parties had consented to the withdrawal of the motion, the *ex-parte* applicant was not entitled to costs. Reliance was placed on **Rufus Njuguna Miringu & Another v Martha Muriithi & 2 others (2012) eKLR** where the court held that where parties consent and withdraw a matter, it cannot be interpreted that one or the other party has succeeded in the suit. It was submitted that under Section 27 (1) of the Civil Procedure Act the judge has discretion to award or decline to award costs according to.

6. The 3rd respondent submitted that it should not be condemned to pay costs because it was not the author of Gazette Notice Number 6862. It was also submitted that the *ex-parte* applicant did not issue a demand notice as required under Section 67(a) of the Kenya Roads Act, Cap 408 Laws of Kenya. It was argued that the 1st respondent should bear the 3rd respondent's costs because it occasioned the costs incurred by the 3rd respondent. It was added that the dispute in this suit was solely between the *ex-parte* applicant and the 1st respondent, hence, the 3rd respondent should not be condemned to pay any costs. Reliance was placed on **Peter Muriuki Ngure v Equity Bank (K) Ltd [2018]eKLR**. Lastly, it was submitted that the jurisdiction to award costs is a discretionary one and the purpose of costs is to indemnify fully or partly the successful party.

7. The second interested party submitted that the principle that costs follow the event was trite law and should be invoke. Counsel for the 2nd interested party urged the court to award the 2nd interested party costs.

Analysis and Determination

8. The single issue falling for determination in this judgment relates to the question as to whether or not there should be an award of costs. I have considered the evidential materials on record and the parties' respective submissions. I have also considered the relevant legal framework and jurisprudence on the issue of costs.

9. The relevant legal framework on the subject of costs in a civil suit is contained in Section 27 of the Civil Procedure Act which provides as follows:

27 Costs

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.

2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

10. My interpretation of the above legal framework is that unless it is prescribed otherwise, jurisdiction to award costs relating to a suit is discretionary. Our courts have developed clear principles which guide the exercises of this discretionary jurisdiction. In **Supermarine Handling Services Ltd v Kenya Revenue Authority, [2010] eKLR** the Court of Appeal emphasized that the discretion is a judicial one; its exercise must be based on facts, and the judge exercising the discretion has an obligation to give reasons for the discretionary decision taken.

11. The Supreme Court of Kenya in **Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 others (2014) eKLR** set out the following jurisprudential guidelines on the exercise of this discretionary jurisdiction:

It emerges that the award of costs would normally be guided by the principle that costs follow the event; the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously exercised discretion of the court, accommodation of the special circumstances of the case, while being guided by the ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior to, during, and subsequent to the actual process of litigation

12. In the case under consideration, the *ex-parte* applicant was aggrieved by the 1st respondent's decision to recommend revocation of its title. The recommendation was conveyed to the 2nd respondent through the impugned Gazette Notice. It is not contested that the impugned Gazette Notice was published subsequent to a number of statutory steps which the 1st respondent had taken, geared towards compulsory acquisition of the land subject matter under the doctrine of eminent domain. Indeed, at the time of publishing the impugned Gazette Notice, two Gazette Notices had been published in tandem with the requirements of the Constitution and the National Land Commission Act, as part of the process of compulsory acquisition.

13. Secondly, before initiating the present judicial review proceedings, the *ex-parte* applicant wrote to the 1st respondent and placed before the 1st respondent relevant materials, including the judgment which the *ex-parte* applicant subsequently invoked while revoking the impugned Gazette Notice. The 1st respondent did not heed the *ex-parte* applicant's plea at that point, constraining the *ex-parte* applicant to initiate the suit herein.

14. Thirdly, this suit was initiated in August 2017 and the respondents and interested parties were promptly served with court papers. Responses and submissions were duly filed. It took the 1st respondent seventeen (17) months to revoke the impugned Gazette Notice. During that period, parties to this suit expended resources to deal with the suit, including retainer costs of advocates.

15. Because of the above circumstances, I am persuaded that there is evidence that the proceedings herein were occasioned by the 1st respondent. There is also evidence that the substantive motion herein was rendered academic when the 1st respondent revoked the impugned Gazette Notice. The revocation is what culminated in the withdrawal of the substantive notice of motion.

16. In light of the above facts and evidence, it is my finding that the 1st respondent caused the suit herein to be initiated. It similarly caused the suit to be terminated. It should therefore bear costs of the suit. However, the parties entitled to the costs are only those parties who had responded to the substantive motion by way of filing responses and or submissions to the motion as at 25/7/2019 when the motion was withdrawn. Parties who had not responded to the motion as at 25/7/2019 are not entitled to costs.

17. In summary, I order that the 1st respondent shall bear costs of the suit in relation to: ***(i) the ex-parte applicant together with the 5th - 9th interested parties, all represented by the firm of Njoroge Regeru & Co Advocates; (ii) the 3rd respondent; (iii) the 1st interested party; (iv) the 2nd interested party; (v) the 3rd interested party; and (vi) the 4th interested party***

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF NOVEMBER 2019.

B M EBOSO

JUDGE

In the presence of:-

1. Ms Otiende for the 2nd Interested Party and holding brief for Mrs Okima for the 4th Interested Party and Mr Odhiambo for the 3rd Respondent
2. Ms Ngonde for the *ex-parte* applicant and the 5th – 9th Interested Parties
3. Mr Kivindyo holding brief for Mr Ouma for the 1st Interested Party
4. Court Clerk - Mr Waweru