REPUBLIC OF KENYA

LAND AND ENVIRONMENT DIVISION

AT MALINDI

ELC NO. 106 OF 2012 (OS)

MUUNGANO WA WAKULIMA.....APPLICANT

=VERSUS=

REGISTRAR OF LAND KILIFI…….....1ST DEFENDANT

ATTORNEY GENERAL……....2ND DEFENDANT

WERU GROUP RANCH……..3RD DEFENDANT

RULING

1. I have before me an application brought under Sections 1A and 3A of the Civil Procedure Rules. The application dated and filed on 20th March 2017 is seeking for orders:-

> **…….**
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> **4. THAT (an order of) Review do issue with regard to the order of 28/11/2012 awarding costs to the respondents in any event, with regard to the preliminary objection, relative to the competence of the suit and the legal capacity of the plaintiff, on the ground that want of legal capacity to sue or be sued means that there is no party against whom an order for costs could me made; and the taxation that has taken place is a nullity and legally untenable.**
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> **5. THAT in light of the upholding of the respondent's objection, on want of legal capacity to sue against the plaintiff, no order as to costs is made on this application.**

2. The application is supported by an affidavit of one Gerald Iha Thoya sworn on 20th March 2017. The gist of the application is that the plaintiff herein Muungano wa Wakulima is a non- entity that can neither sue nor be sued. Upon filing of this suit, a preliminary objection was taken by the 3rd Defendant- Weru Group Ranch to that effect and on the said 28/11/2012, the Honourable Lady Justice Meoli sustained the objection and struck out the suit. It is however the Applicant's case that having so found that Muungano wa Wakulima had no legal personality, the Learned Judge went into error when it ordered the non-entity to bear the costs of the preliminary objection.

3. The Applicant therefore contends that the ruling and the ensuing order presents an error apparent on the face of the record in respect of which a review ought to issue to correct the record and avoid the apparent legal absurdity.

4. The 3rd defendant is opposed to the application. In a Replying Affidavit, sworn by their Advocate Mulwa Nduya on 25th April 2017, the Defendants aver that the application is misconceived and made in bad faith. The 3rd Respondents question how the applicant continues to litigate if they have no locus standi in this suit. It is their case that the Applicant is continuing to make them incur further costs and ought to bear the costs of such continued litigation.

5. In addition, the 3rd Respondents contend that this application has been brought as an afterthought five years after the orders sought to be reviewed were first issued and that there is no new and important evidence that has been raised or annexed as an exhibit before this Court to warrant the review of the orders issued by Lady Justice Meoli on 28/11/2012.

6. I have considered the application and the Reply thereto. I have also considered the submissions and authorities placed before me by the Learned Counsels for the respective Parties.

7. Section 80 of the Civil Procedure Act provides as follows:-

> "80. Any person who considers himself aggrieved:-
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> (a) *by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or*
>
> *(b) by a decree or order from which no appeal is allowed by this Act.*
>
> *May apply for a review of Judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit."*

8. Order 45 of the Civil Procedure Rules on the other hand also states thus:-

> "45. 1(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 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 raised 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 Judgement to the Court which passed the decree or made the order without unreasonable delay.*

9. It is the Applicant's case that having found that Muungano wa Wakulima had no legal personality, this Court acted in error when it ordered the said non-entity to bear the costs of the suit that was struck out. It is accordingly the Applicant's position that the ensuing order on costs presents an error apparent on the face of the record in respect of which a review order ought to issue to correct the record and avoid the apparent legal absurdity.

10. In ***Muyodi –vs- Industrial and Commercial Development Corporation & Another (2006) 1 EA 243***, the Court of Appeal described an error apparent on the face of the record as follows:-

> *" In **Nyamogo & Nyamogo –vs- Kogo(2000) EA 174**, this Court said that 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 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 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. Again, if a view adopted by the Court in the original record is a possible one, or wrong view, it cannot be an error and is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us."

11. Arising from the foregoing, it behoves this Court to consider whether the award of costs by the Honourable Meoli J was an act in error that this Court should overturn on review. Section 27 of the Civil Procedure Act provides as follows:-

"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 out of what property and to what extent such costs are to be paid, and give all the necessary directions for the purposes aforesaid; and the fact that the Court 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 shall follow the event unless the Court or Judge shall for good reason otherwise direct."

12. In ***Republic –vs- Jasbir Singh Rai & 3 Others –vs- Tarlochan Shingh Rai & Others (2014) eKLR***, ***Judicial Review Application No.6 of 2014(cited in Cecilia Karuru Ngayu –vs- Barclays Bank of Kenya & Another (2016) eKLR***, the Court held that:-

"The issue of costs is the discretion of the Court as provided under the above Section. The basic rule on attribution of costs is that costs follow the event….it is well recognized that the principle(that) costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.

13. Indeed ***Halsbury's Laws of England 4th Edition (re issue), (2010) Vol. 10***. ***Paragraph 16*** states that:-

"The Court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. 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. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice."

14. The above being the case, I am not satisfied that the award of costs to the 3rd Respondent by Meoli J on 28/11/2012 was an act of error that can be cured in the manner proposed by the Applicant. In my view, the Applicant's contention is that the Honourble Judge erred in awarding costs to a non-legal entity. That in my view is not an error as the Learned Judge had unfettered discretion to award the costs. In my considered view while it may be a ground for appeal, it certainly is not one for review in the manner proposed. The grounds as advanced suggests that the decision made by this Court on 28/11/2012 was erroneous in law. It equates an error in law simpliciter to a manifest error on the face of the record. That in my view should only constitute a ground of appeal where the intricacies as to the appropriateness of the award may be considered, but not for review.

15. To my mind in determining the issue of costs, the Court is entitled to look inter alia at (i) the conduct of the parties, (ii) the subject matter of litigation and (iii) the circumstances which led to the institution of the proceedings. In the present case, the Applicant Gerald Iha Thoya filed this case as the agent of the unincorporated association termed Mungano wa Wakulima. Five years after the suit was struck out and costs awarded to the 3rd Respondent, he has now brought the present application before the Court.

16. In ***Elijah Sikona & George Panken Narok*** on behalf of ***Trusted Society of Human Rights Alliance – vs- Mara Conservancy & 5 Others (2014) eKLR,*** Anyara Emukule J, faced with a similar situation opined as follows:-

"……currently therefore there is no lawfully existing body on whose behalf the Plaintiffs can purport to act. It would therefore be an abuse of the Court process to have a suit pending by or on behalf of a non-existent organization. It would defeat the entire overriding objective of Civil Litigation to apply both the Court's time and resources not for the proper administration of justice, but on imaginary and illusory wrongs. The law regarding costs is that costs follow the event. The Plaintiffs having put themselves into the legal arena without apparent awareness of what they were upto, they, Elijah Sikona and George Panken Narok, shall bear the costs of the suit, and the applications by the second and Third Respondents."

17. In light of the foregoing and having taken due consideration of the conduct of the Applicant and the circumstances in which this present application was filed, I hereby dismiss the same with costs to the Third Respondent. The said costs shall be borne by the Applicant Gerald Iha Thoya.

Dated, signed and delivered at Malindi this 19th day of September, 2017.

J. O. OLOLA

JUDGE