



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME JJA)

CIVIL APPEAL NO. 71 OF 2017

BETWEEN

THE AGRICULTURAL SOCIETY OF KENYA.....1ST APPELLANT

THE CHIEF EXECUTIVE OFFICE OF THE

AGRICULTURAL SOCIETY OF KENYA.....2ND APPELLANT

ANISA ABDALLA.....3RD APPELLANT

AGNES MWAGWAMBI.....4TH APPELLANT

VERSUS

MBARAK HAMID MBARAK & 21 OTHERS.....1ST RESPONDENT

(Being an appeal of the Order of the High Court at Mombasa, (Hon Ogola, J.) dated 24th July, 2017 in Mombasa H.C. Judicial Review No. 13 of 2017).

JUDGMENT OF THE COURT

[1] The twenty two respondents in this appeal were members of the Agricultural Society of Kenya (ASK), Mombasa Branch, as at the time they moved the High Court of Mombasa by way of Chamber Summons dated 10th March, 2017 in which they were seeking leave of the Court to apply for the prerogative writs of *certiorari* and *mandamus* pursuant to **Sections 8 and 9** of the Law Reforms Act and **Order 53 Rule 1 (1) and (2)** of the Civil Procedure Rules and **Sections 3 & 7** of the Fair Administrative Action Act.

[2] They were aggrieved that the appellant (ASK), had on 1st March, 2017 issued, through the 2nd appellant a Notice convening a Special Annual General Meeting (SAGM), of the Mombasa Branch which was to be held on 17th March, 2018. Their prayer before the High Court was that the said notice along with several directives issued therein be quashed. They also sought orders of mandamus to compel the appellants to call for an election of the Coastal Branch Committee Members; and also to constitute an electoral committee to vet applicants for election to the vacant offices. They asked that the leave if granted operates as a stay of the impugned notice pending the hearing and determination of the application and the substantive motion.

[3] The application was heard inter-partes before **Ogola, J.** on 16th March, 2017. The learned Judge having considered submissions by both parties through their counsel, while sympathizing with the respondents granted them leave to pursue Judicial Review remedies but declined to order the said leave to operate as a stay. The learned Judge rendered himself, in relevant part as follows:-

“...In as much as this Court sympathizes with their plight, the applicants have not demonstrated that theirs will be case with overwhelming chance (sic) of success to entitle them to a stay at this stage. It is also true that they may actually succeed in the Judicial Review cause. However, their probable success would not cause there (sic) any harm at this stage if the elections were allowed to continue schedule. (sic)

This court can only stop duly scheduled elections on sound grounds which are recorded. There is none in this case.

So, this court find that while the applicant are at liberty to pursue the Judicial Review orders pursuant to the said leave, that leave, shall not operate as stay of the elections or any proceedings to be conducted by the Respondent on 17.03.2017.(sic)

Costs of this application shall be in the Judicial Review proceedings. “

[4] The contemplated Judicial Review proceedings which, **Order 53** of the Civil Procedure Rules required to be filed within 21 days of the granting of leave was never filed. The file in question found its way before Ogola, J. on 24th July, 2017, when learned counsel Mr. Orina represented the applicant and Mr. Ochieng held brief for Mr. Milimo for the interested party. Mr. Orina informed the Court that the matter had ended at leave stage as the substantive motion was not filed. He urged the Judge to mark the matter as closed. The learned Judge made the following order:-

“The substantive motion was not filed and the costs were to be in that substantive motion. Accordingly, this matter is now finalized and file closed with no orders on costs.”

[5] It is that order that the appellants have challenged in this Court vide their memorandum of appeal dated 29th September, 2017 in which they have proffered five substantive grounds. In our view, these grounds raise two substantive issues. First, that the learned Judge erred in dealing with the matter on a mention date and making substantive orders therein; and secondly, that the appellants ought to have been given costs of the application. They have urged us to allow the appeal with costs and also award them costs before the High Court.

[6] The respondents on the other hand opposed the appeal and filed a Notice of Grounds for Affirming (*sic*) the decision. We guess what they meant to say was grounds for affirming the decision, citing three grounds. The respondents contend that in a Judicial Review matter, the Court could move itself *suo moto*; that an application for closure of a file can be made orally and allowed at the discretion of the Court; that the issue of costs could not arise as there were no proceedings filed after the granting of leave.

[7] Parties filed written submissions as directed by the Court with the appellants filing their submissions on 29th March, 2018 and the respondents filing theirs on 16th April, 2018. They also filed lists of authorities along with their respective submissions.

[8] In their submissions, the appellants reiterated their grounds of appeal and contended that they were condemned unheard on the issue of costs. From their submissions however, it is conceded that the Judicial Review file, the subject of this matter, did not appear before the learned Judge out of the blues or after he waved a magic wand. What appears to have happened is that there was another Judicial Review **Case No. 33 of 2017** which was before the learned Judge on the said date which was between the same parties in a similar matter and the two files were being mentioned together. The parties were duly represented by counsel.

[9] Although the record as to what happened on that day is sketchy, it is clear that when the Judicial Review file was called for mention to ascertain its status, Mr. Orina, who was acting for the respondents herein informed the Court that they had not filed the motion and asked the Court to mark the file as closed.

[10] Mr. Ochieng who was holding brief for Mr. Milimo for the appellant only said he had no instructions on the matter. This was a simple matter where he could have raised the issue of costs if indeed they thought they were entitled to costs. He does not appear to have sought an adjournment either to allow him seek instructions of the matter. The appellants cannot say they were not given an opportunity to be heard. They were definitely accorded an opportunity to be heard.

[11] The learned Judge noted that the substantive motion had not been filed and consequently the matter had lapsed upon expiration of the 21 days, and did the only logical thing in the circumstances, that is order the file closed as there was nothing pending in the matter. Could the issue of costs which had been pegged to the life of the said motion survive? We shall advert to that issue later.

[12] The appellants accuse the learned Judge of ‘bias’ for the sole reason that they were not awarded costs. With respect to counsel ‘bias’ is not just a four-letter word you hurl at a judicial officer. It is a serious matter that must be founded/grounded on serious evidence before it is raised as it is tantamount to be besmirching a Judge’s integrity. Needless to say, integrity is one of the fundamentals of a judicial officer’s character and a challenge on the same cannot be taken lightly.

[13] On their part, the respondents through their written submissions maintained that there was no denial of the right to be heard. According to learned counsel, the matter in question was actually in the cause list for 24th July, 2017 and so when it was called out, counsel applied that the file be closed as there was nothing pending. Mr. Ochieng, counsel holding brief for Mr. Milimo for the appellant was given an opportunity to address the Court but he said he had no instructions. He was therefore given opportunity to address the Court on the issue but he chose not to say anything. There was therefore no violation of the appellants’ right to be heard.

[14] To buttress that point, learned counsel called in aid this Court’s decision in **Union Insurance Company of Kenya vs Ramzan Abdul Danji, Civil Application No. NAI 79 of 1998** where the Court held: -

“...The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilized, then the only point on which the party not utilizing the opportunity can be heard is why he did not utilize it.”

[15] On the second prong of the appeal, learned counsel submitted that costs are at the discretion of the Court pursuant to **Section 27(1)** of the Civil Procedure Act; and further that costs follow the event, and the learned Judge had not departed from those provisions when he failed to award costs to the appellants. He urged us not to interfere with the learned Judge’s discretion. He concluded by positing that this appeal is vexatious, malicious, devoid of merit and the same should be dismissed with costs to the respondents.

[16] When this matter came up for plenary hearing, due to the nature of this appeal the Court engaged counsel with a view of encouraging them to consider settling the matter without incurring more costs in pursuing this appeal; particularly because this appeal is against a Judge's exercise of his unfettered discretion on the issue of costs. That intervention bore no fruits and so the appeal had to be deferred for judgment.

[17] We have considered the record of appeal, the submissions by counsel and the law. As stated earlier, this appeal is basically on the issue of costs. Were the appellants entitled to costs of the Judicial Review proceedings before the High Court? The learned Judge's order was that the costs be in the Notice of Motion that was to be filed within 21 days. The application for leave was an interlocutory application and the Judge was therefore in order to direct that costs of the application be in the Notice of Motion. This was the same as saying that costs of the application were to be in the cause. It is important to note that at that point neither party was awarded costs of the application.

[18] When such an order is made, it means that costs of the interlocutory application will abide the results of the main suit, in this case the results of the Notice of Motion. An award of costs of an interlocutory proceeding to a named party in the cause means that only if the party in whose favour the order is made is later awarded the costs of the action will that party be entitled to the costs of the interlocutory proceeding in question. The Notice of Motion was not filed, the appellant was never awarded costs and so the issue of costs was left to the learned Judge's discretion to determine whether in the circumstances of the case the appellant deserved to be awarded the costs.

[19] The respondents had partially succeeded in the application for leave but failed in the second limb of the application to have the leave act as a stay of the orders sought to be quashed. In this case, either party could have claimed half costs. This in the end would have amounted to each party bearing its own costs, or not awarding costs to either party which is what the learned Judge ordered. The learned Judge may have failed to give express reasons for this order but in our view, it is because the circumstances were clear.

[20] The circumstances under which this Court will interfere with the exercise of discretion by the trial court are circumscribed as what **Madan J.A.**, (as he then was), stated in **United India Insurance Co. Ltd. -vs- East African Underwriters (Kenya) Ltd., [1985] E.A. 898**, where the learned Judge rendered himself as follows:

“The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: First, that the Judge misdirected himself in law; secondly, that he misapprehended the facts, thirdly, that he took account of considerations of which he should not have taken account of; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

(See also **Mrao Ltd. -vs- First American Bank of Kenya Ltd. & 2 Others [2003] KLR 125**.)

In our view, none of the above principles have been satisfied in this matter and the invitation by the appellant for us to interfere with that discretion must be turned down. As stated earlier, the appellant had an opportunity to address the Court on the issue of costs before the said file was closed and their right to be heard was not therefore violated.

[21] We have said enough to demonstrate that this appeal is devoid of merit. The same is hereby dismissed with costs to the respondents.

Dated and delivered at Mombasa this 7th day of June, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR