



**Mount Kenya Bottlers Limited & 3 others v Attorney General & 3 others (Petition 72 of 2011)
[2024] KEHC 7779 (KLR) (Constitutional and Human Rights) (28 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7779 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION 72 OF 2011

EC MWITA, J

JUNE 28, 2024

BETWEEN

**MOUNT KENYA BOTTLERS LIMITED 1ST PETITIONER
RIFT VALLEY BOTTLERS LIMITED 2ND PETITIONER
NAIROBI BOTTLERS LIMITED 3RD PETITIONER
KISII BOTTLERS LIMITED 4TH PETITIONER**

AND

**THE HON. ATTORNEY GENERAL 1ST RESPONDENT
THE KENYA REVENUE AUTHORITY 2ND RESPONDENT
THE COMMISSIONER-GENERAL OF THE KENYA REVENUE
AUTHORITY 3RD RESPONDENT
THE COMMISISONER OF CUSTOMS & EXCISE 4TH RESPONDENT**

RULING

Background

1. The petitioners filed a petition against the respondents in 2011. In a judgment delivered on 26th October 2012, Lenaola, J, (as he then was), dismissed the petition with costs to the respondents. The petitioners lodged an appeal in the Court of Appeal, (Civil Appeal No, 164 of 2013), challenging dismissal of their petition. In a judgment delivered on 19th July 2029, the Court of Appeal allowed the appeal with costs to the petitioners as appellants.



2. The petitioners then filed a party and party bill of costs in this court for taxation of costs in the dismissed petition. The bill of costs was dated 11th November 2021. The taxing office taxed the bill but dismissed it on 2nd June, 2022 on grounds that the Court of Appeal did not award costs in the High Court.

Reference

3. The petitioners were aggrieved and filed this reference seeking to set aside the taxing officer's decision dismissing the bill of costs.

The petitioners sought have sought to set aside the taxing officer's decision and have the bill of costs remitted back for taxation a fresh. The petitioners also asked this court to find that the amount due to the petitioners in the taxation cause is as presented in their party and party bill of costs. They prayed for costs of the reference.

4. The reference is predicted on the ground that the taxing officer failed to consider the decision rendered by the Court of Appeal which set aside this Court's judgment and awarded costs to them. The petitioners stated that the taxing officer failed to consider that the Court of Appeal allowed the appeal in its entirety, including the prayer for costs in this Court.
5. The petitioners relied on section 27 of the *Civil Procedure Act* and the case of *Party of Independent Candidates of Kenya v Mutula Kilonzo & 2 others* [2013] eKLR for the proposition that the taxing master's interpretation of the Court of Appeal Judgment as denying them costs before this Court was erroneous.
6. The petitioners asserted that as evident in the memorandum of appeal and the final orders of the Court of Appeal, they not only prayed for costs before this Court, but also those in the Court of Appeal, which were granted.
7. The petitioners further relied on *Peter M. Kariuki v Attorney General & 4 others* [2019] eKLR, that there is no ambiguity in the judgment of the Court of Appeal to warrant the interpretation proffered by the taxing officer.
8. It is the petitioners' case, that even if the Court of Appeal judgment was silent on the issue of costs in this Court, they were as a matter of legal right entitled to costs of the proceedings before this Court. They relied on *Republic v Rosemary Wairimu Munene, Ex-Parte Applicant v Ihururu Dairy Farmers Co-operative Society Ltd* [2014] eKLR and *Judicial Hints on Civil Procedure*, 2nd Edition, (Nairobi) Law Africa) 2011, (page 94) cited in *Haraf Traders Limited v Narok County Government* [2022] eKLR.
9. The petitioners further urged this Court to be persuaded by the holding in *Kenya Universities Staff Union & 7 others v Paul Odhiambo Gaya & another* [2019] eKLR and *Nation Media Group & another v Awale Transporters Limited* [2022] eKLR.
10. The petitioners posited that the taxing officer's decision was erroneous and founded on the wrong legal principles, thus should be set aside.

Response

11. The reference was opposed through a replying affidavit sworn by the Pius N. Nyaga (Mr. Pius) on behalf of the 2nd-4th respondents and written submissions. It was argued that the decision of the Court of Appeal did not award costs of proceedings in this Court, thus the taxing officer rightly dismissed the bill of costs.



12. The 2nd-4th respondents took the position that the taxing officer did not err in principle in her decision since there was no order from the Court of Appeal awarding costs to the petitioners in this petition. They relied on *First American Bank of Kenya v Gulab P. Shab and 2 others* [2002] eKLR and *Farah Awad Gullet v CMC Motors Group Limited* [2018] eKLR, and urged that the reference be dismissed with costs.

Determination

13. I have considered the reference, response and arguments by counsel for the parties. The issue for determination in this reference, is whether the Court of Appeal awarded the petitioners costs for proceedings in this Court. The petitioners argued in the affirmative while the respondents thought otherwise.
14. Determination on this issue depends on the decision of the Court of Appeal. In its judgment dated 19th July 2019, the Court of Appeal allowed the appeal stating; “We are persuaded that this appeal has merit and we consequently allow the same with costs to the appellants.
15. It is plain that the Court of Appeal did not make an express order for costs in the proceedings before this Court. The petitioners argue that they had sought costs in their memorandum of appeal filed before the Court of Appeal and since the appeal was allowed in its entirety, it must be taken that costs before this court were, thus allowed. The petitioners relied on section 27 of the *Civil Procedure Act* to support their argument.
16. Section 27(1) provides as follows:
- 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.
17. The section puts costs at the discretion of the court emphasizing, however, that costs shall follow events unless the court or judge for good reason otherwise orders. The section applies to proceedings before the High court. This court had awarded costs to the respondents when the petition was dismissed. The award of costs was not a discretion of this court but the Court of Appeal which was dealing with the appeal and not a matter for this court.
18. The judgment of the Court of Appeal was clear that the appeal was allowed with costs to the appellants. My reading of the judgment of the Court of Appeal is that the costs awarded were for the appeal. If the Court of Appeal was also minded to award costs before this court its final orders would have stated so. I also note that contrary to what the petitioners argued, the Court of Appeal did not use the word “appeal allowed in its entirety” so as to include all the prayers in the memorandum of appeal.
19. In the circumstances, I do not find fault with the decision of the taxing officer. Consequently, the reference is dismissed with costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JUNE 2024

E C MWITA



JUDGE

