



Republic v Public Procurement Regulatory Authority; Kenya Bureau of Standards & 2 others (Interested Parties); EAA Company Limited (Exparte Applicant) (Judicial Review Application 88 of 2020) [2023] KEHC 232 (KLR) (Judicial Review) (26 January 2023) (Ruling)

Neutral citation: [2023] KEHC 232 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION 88 OF 2020
AK NDUNG’U, J
JANUARY 26, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

PUBLIC PROCUREMENT REGULATORY AUTHORITY RESPONDENT

AND

KENYA BUREAU OF STANDARDS INTERESTED PARTY

NIAVANA AGENCIES LIMITED INTERESTED PARTY

POTTERMARK ENTERPRISES INTERESTED PARTY

AND

EAA COMPANY LIMITED EXPARTE APPLICANT

RULING

1. The *ex-parte* applicant withdrew the instant judicial review proceedings, through a notice of withdrawal dated July 15, 2021. Consequently, the issue of cost arose, and to which now forms the subject of this ruling.
2. The *ex-parte* applicant submitted in opposition to award of cost against it. It was conceded that the award of costs on a party is a discretionary power, which it ought to be exercised judicially. That in this instant matter, cost ought to be awarded in favour of the applicants since: this court had granted leave to institute the judicial review proceedings, this court granted interim orders suspending the respondent’s impugned report, and that it was the respondent’s actions that necessitated these



judicial review proceedings. Additionally, that the 1st interested party was a necessary party in these proceedings as it was the procuring entity in the subject tender which was being investigated by the respondent. Notably, that the 2nd and 3rd interested parties were joined to these proceedings by their own fiat/applications, and not by the *ex-parte* applicant herein. Also that judgment was disrupted, prolonged, and eventually determined on account of the investigations that was prompted by the interested parties.

3. The 1st interested party, in seeking award of cost, averred that by virtue of section 27 of the [Civil Procedure Act](#), it is trite law that the issue of costs is a discretionary award that is awarded to a successful party. Reliance was placed on the cases of [Party of Independent Candidate of Kenya & another v Mutula Kilonzo & 2 others](#) [2013] eKLR.
4. It was the 1st interested party submissions that its trite law that costs must follow the event, unless the court for some good reasons, orders otherwise; and that certain factors should be taken into consideration when determining the costs of suit. Also, that the costs sought in this case are not in a bid to punish the applicant, but rather for compensating the 1st interested party for the trouble suffered in defending the suit, and prosecuting its case. [Reid, Hewitt & Co v Joseph](#), Air 1918 Cal 717 and [Myres v Defries](#) [1880] 5 Ex D 180; [Morgan Air Cargo Limited v Everest Enterprises Limited](#) [2014] eKLR; and [Republic v Rosemary Wairimu Munene \(Ex Parte Applicant\) v Ihururu Dairy Farmers Co-Operative Society Ltd](#) Judicial Review Application No 6 of 2004 cases were relied upon.
5. The 1st interested party contended that by the *ex-parte* applicant successfully withdrawing the suit, it conceded defeat; and that the 1st interested party was rendered the successful party in that suit in terms of the provisions of section 27 of the [Civil Procedure Act](#). Reliance was on the case of [DGM vs EWG](#) (2021) eKLR.
6. The 2nd interested party submitted that the effect of a notice of withdrawal is to terminate the suit of course subject to costs to the opposite party. That section 27 of the [Civil Procedure Act](#) is instructive that costs follow the event. The cases of [PIL Kenya Limited v Joseph Oppong](#) (2009) eKLR; [Farah Awad Gullet v CMC Motors Group Limited](#) [2018] eKLR were relied on.
7. It was the 2nd interested party averments that the *ex-parte* applicant misconduct was that: (a) The application was withdrawn by the *ex-parte* applicant after the 4th interested party unearthed (through the replying affidavit sworn by Chief Inspector Chief Maithya on February 4, 2021) a pattern of forgery and uttering of false documents by the *ex parte* applicant; (b) The *ex-parte* applicant filed multiple suits including Nairobi High Court Petition No 180 of 2020 and Nairobi High Court Petition No 357 of 2020 in which similar conduct was displayed. (c) The *ex-parte* applicant has engaged in clear abuse of court process.
8. From the record, I note that there are no submissions filed by the respondents, and the 3rd interested party, on the issue of cost.
9. The question for determination is whether upon the withdrawal of the judicial review suit, cost ought to be awarded.
10. The law governing the issue of costs in suits is set out under section 27 of the [Civil Procedure Act](#). The section provides;

“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"

11. In *Republic v Rosemary Wairimu Munene, Ex-parte Applicant v Ihururu Dairy Farmers Co-operative Society Ltd*, Judicial Review Application No 6 of 2004, the court held;

"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 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"

12. Flowing from the decision of the court in the above case, the steps taken by a party in a case become key indicators of the efforts and resources employed by a party since the filing of a suit. Such indicators would ultimately have a bearing on the court's exercise of discretion to award costs and the amount. Thus for a party to be denied costs good reason (s) must exist.

13. Useful guidance on the subject is found in Mr Justice Richard Kuloba's book "[*Judicial Hints on Civil Procedure*](#)" where at page 94 he wrote;

"Costs are {awarded at} the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise"

14. To buttress the applicable legal principle on award of costs, I cannot agree more with Mr Justice JM Mativo's sentiment in [*Cecilia Karuru Ngayu vs Barclays Bank of Kenya*](#) [2016] eKLR where at page 3 he states;

"In my view section 27 of the Civil Procedure Act provides the general rule which ought to be followed unless for good reason to be recorded. The said section in my view does not make distinctions between determinations made by consent or on courts own determination or withdrawals. This position is well stipulated by Richard Kuloba in the above cited book where he observed that;

"The fact that the unsuccessful party did not contest the case is not in itself a ground for refusal of costs but it is a factor that can be taken into account if other good reason exists" (Emphasis added)

15. In the instant matter, I observe that the *ex-parte* applicants filed the judicial review proceedings; while the respondents, and the interested parties took steps to defend the suit. The suit had progressed to an advanced stage. To my mind, it is immaterial that the it was the interested parties who made an application to be enjoin in the suit.

16. To that end, the respondents and the interested parties are entitled to compensation for the trouble taken to defend the case. On further consideration of the nature of this instant judicial review case, the *ex-parte* applicants stood to gain personally, and exclusively from the outcome of the suit. By its very nature, this is a not a public interest litigation and the *ex-parte* applicant was advancing personal gain as opposed to public interest.

17. In the premises, I am satisfied that no good reasons abound to deny the respondent and interested parties costs. Consequently, in exercise of this courts discretion, it is ordered that the *ex-parte* applicant to bear the cost of the suit.



DATED SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JANUARY 2023

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A. K. NDUNG’U

JUDGE

