



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**(CORAM: A.K. NDUNG'U J.)**

**MISCELLANEOUS APPLICATION NO. E130 OF 2021**

**IN THE MATTER OF**

**APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF**

**CONTRAVENTION OF ARTICLES 10, 73, 75, 232 AND 248 OF**

**THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF**

**SECTION 19, 22,22A, 23 & 26, 29, 34,35, 36, 39, 40 AND 43 OF**

**THE UNIVERSITIES ACT**

**AND**

**IN THE MATTER OF**

**SECTION 4, 5, 7, 9, 11 & 12 OF THE FAIR ADMINISTRATIVE ACTION ACT**

**AND**

**IN THE MATTER OF**

**THE UNIVERSITY OF NAIROBI CHARTER, 2013**

**AND IN THE MATTER OF PROPOSED GOVERNANCE REFORMS**

**DATED JULY, 2021**

**ALOIS ONYANGO AERO ..... EX-PARTE APPLICANT**

**VERSUS**

**UNIVERSITY OF NAIROBI .....RESPONDENT**

**RULING**

1. The subject of this ruling is the question whether costs are payable to the Respondent upon the withdrawal by the Exparte Applicant of their application by way of notice of motion dated 9.9.2021.
2. Mr. Ogembo for the Ex-parte Applicant submitted that the applicant intended to withdraw the application out of a technicality. He sought that the same be withdrawn without costs. He urged that at the time of withdrawal no responses had been filed.
3. Mr. Omondi for the Respondent indicated that the respondent had substantively responded to the motion. Counsel stated that they had reached out to the Counsel for the Applicant expressing concerns on the propriety of the entire application and had suggested a withdrawal. He sought modest costs at Sh.200, 000.
4. Mr. Kariuki for the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Party indicated that he had not filed a response and he had no objection to the withdrawal of the application without costs.
5. I have had the advantage of perusing the record herein. I note that there is no response on record to the application herein.
6. The question for determination is whether upon the withdrawal of the notice of motion, the respondents should be awarded costs.
7. 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"*

8. In **Republic vs. Rosemary Wairimu Munene, Ex-parte Applicant vs. Kururu Dairy Farmers Co-operative Society Ltd** 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"**

9. 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.

10. 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"**

11. To buttress the applicable legal principle on award of costs, I cannot agree more with Mr. Justice J.M. 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)

12. In our instant suit, I note the notice of motion dated 9.9.2021 was filed and served on the respondent. To date, there is no response on record. The absence of a response is not sufficient to deny the respondent costs. Having been served with the application and having instructed Counsel, the respondent certainly took steps and are entitled to compensation for the trouble taken in initiating the process to defend the case. Indeed, the appointed Counsel has even made appearances in court.

13. I have, however, considered the nature of the suit herein. The applicant did not stand to gain personally and exclusively from the outcome of the suit. By its very nature, this is a public interest litigation and the applicant was advancing public interest as opposed to personal gain.

14. The Supreme Court in the case of **Jashir Singh Rai & Others vs. Tarlochan Rai & Others** observed that;

**"In the classic common law style, the courts have to proceed on a case by case basis, to identify "good reasons" for such a departure. An examination of evolving practices on this question shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs..."**

15. Bearing in mind that the suit is being withdrawn before a response has been filed or any step as to hearing having not taken place, and in view of the suit being one of the nature of a public interest litigation, I am satisfied that good reasons abound to deny the respondent costs.

16. Consequently, it is ordered that each party is to bear its own costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF OCTOBER, 2021**

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**A.K. NDUNG’U**

**JUDGE**

**In the Presence of:**

Court Assistant – David Ooko

Ogembo for Applicant

Omondi for Respondent