



**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

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

**MISCELLANEOUS APPLICATION NO. 68 OF 2019**

**IN THE MATTER OF AN APPLICATION FOR DECLARATIONS AND ORDER OF CERTIORARI**

**IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION**

**IN THE MATTER OF SECTION 4, 6, 7, 8 AND 9 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**KENYATTA UNIVERSITY.....RESPONDENT**

**LOSEM NAOMI CHEPKEMOI.....EX-PARTE**

**RULING**

1. This ruling determines the question whether the Ex-Parte Applicant herein, Losem Naomi Chepkemoi, should be awarded cost of the application dated **4.5.2021** which was compromised by the respondents' compliance with the orders of court of **20.5.2020**.
2. The parties appeared before court on the **28.7.2021** whereupon Mr. Gacheru for the applicant informed the court that their application dated **11.5.2021** should be marked settled with costs to the applicant following the respondents' compliance with the orders of court of **20.5.2020**. Mr. Mwathe opposed an award of costs stating that the school was always ready to comply. These rival positions held by the parties necessitated this ruling.
3. In his brief submission, Mr. Gacheru stated that despite the applicants' threat to institute contempt of court proceedings against the respondent, the respondent did not comply with the orders of court. This necessitated the filing of the subject application dated **11.5.2021**. It is Counsel's take that it is the non-compliance on the part of the respondent that gave rise to the application and the applicant is thus entitled to costs.
4. On his part Mr. Mwathe for the respondent submitted that when their application for leave to appeal out of time was dismissed, the applicant's Counsel wrote to them in April. The current application was filed in May after the Counsel for the respondent had written to Counsel for the applicant asking them to hold their hands on the matter as Counsel for the respondent awaited instructions. Despite the letter, Counsel still filed the application. On **23.6.2021**, the applicant was invited to go back to college. Counsel concluded that costs on the application were unnecessary as they had written to the applicant's Counsel.
5. In rejoinder, Mr. Gacheru stated that he was shocked that there was a letter dated **7.5.2021**. He added that they had delivered their letter to the respondent Counsel on **27.4.2021** and given an ultimatum of 48 hours response.
6. 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'**

7. In **Republic vs. Rosemary Wairimu Munene, Ex-parte Applicant vs. Kururu Dairy Farmers Co-operative Society Ltd** the court held on 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 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”**

8. 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.

9. Useful guidance on the subject is found in Mr. Justice (Rtd) 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”**

10. 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 [2016J 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)**

11. In our instant suit, it is common ground that the court issued orders dated **20.5.2020** against the respondent. Efforts to challenge the orders vide a stay of execution application and leave to appeal out of time came a cropper.

12. The applicant on **27.4.2021** wrote to the respondents Counsel giving an ultimatum of 48 hours for compliance in default of which enforcement of the orders would be pursued. It is not until **7.5.2021** that the purported letter seeking indulgence by Counsel for the applicant was written by the respondents Counsel. Mr. Gacheru denies receipt of such a letter and I note that no sufficient evidence of the existence of this later was availed. In any event, the same would be entirely beyond the 48 hours ultimatum given by the applicant.

13. Having considered the chronology of events in these proceedings and the lapse of time since the issuance of the subject orders of court, it is quite obvious that at the time of taking out the contempt application, the applicant was truly entitled so to do. The compliance by the respondent was after the relevant application was filed.

14. I need to comment on the respondents alleged letter written on **7.5.2021** seeking that Counsel for the applicant hold their hands on the matter. I take judicial notice that this is a normal occurrence in the practice of Law in our jurisdiction and such communication must be encouraged to avoid clogging our courts with unnecessary applications or litigation when the parties are in a position to take a little more time to resolve the issue at hand.

15. However, the making of such a request in a letter must not be constructed to constitute a stay of execution and in determining whether a party ought to have acceded to the request, the court will have to look at the reasonableness of the same with each case being evaluated on its circumstances.

16. In our case given the lapse of time since the orders of court were issued and noting the less than prompt response to the applicant's letter dated **27.4.2021** by the respondents, the balance tilts in favour of the applicant in taking the steps they did to enforce the orders. The move was reasonable in the circumstances.

17. In the end, I must find and hold that following the statutory provision on costs set out under Section 27 of the Civil Procedure Act and the principles developed therefrom in Case Law, I am satisfied that the Ex-parte applicant in this matter is entitled to the costs in the compromised application dated **11.5.2021**.

18. With the result that the application dated **11.5.2021** is marked as settled with costs to the Ex-parte applicant.

**Dated, Signed and Delivered at Nairobi this 28th Day of October, 2021.**

**A.K. NDUNG’U**

**JUDGE**

In the Presence of:

Gacheru for Ex-parte Applicant

Mwathe for Respondent

Court clerk — David Ooko