



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NUMBER 180 OF 2019

MARY ANG'AWA.....1ST PETITIONER

JANE THIRIKALI.....2ND PETITIONER

PROF. JOSEPH KIEYAH.....3RD PETITIONER

AND

NAIROBI CLUB.....1ST RESPONDENT

JOSEPH CHACHA.....2ND RESPONDENT

CARETAKER COMMITTEE OF THE 1ST RESPONDENT.....3RD RESPONDENT

RULING

1. The petitioner through a petition dated 14th May 2018 brought pursuant to Articles 27,28,47 and 50 of the constitution sought several declarations amongst them that the expulsion of the petitioner from the 1st Respondent is unconstitutional; null and void; that an order of certiorari to call into this court and quashing the decision by the respondent vide on 15th January 2019 do issue and that court do issue an order directing the petitioner to be reinstated into full membership and accorded un hindered access to the Respondent unconditionally with costs.

2. The Respondents did not file responses to the petitioners' application and the petition. The court granted the application and the petitioners were subsequently reinstated and the issue of reinstatement compromised. The Respondents were granted 14 days to circulate the reinstatement to all members of the club and parties were given time to agree on the issue of costs.

3. The petitioners and the respondents did not agree on costs, consequently the court directed that parties do file their respective submissions on costs. The petitioners filed submissions on costs dated 2nd December 2019 on the even date whereas the respondents filed theirs on 13th December 2019.

4. The petitioners aver that there is no doubt that their complaint against the respondents is that they had been unlawfully and un procedurally been expelled from the 1st respondent club and after being heard the court made interim orders in their favour directing the respondents to reinstate them to the club temporarily to enable them participate in the forthcoming election which were scheduled for 24th May 2019. The respondents wholly complied with the order.

5. It is further stated that following the election of new leadership at the club at the General meeting (**AGM**) held on 24th May 2019, the club's new leadership wholly reinstated the petitioners and apologized to them in regard to the manner, in which they had been expelled. This position was confirmed by the advocates on 18th September 2019 and the club also circulated a notice to all its members and affiliated clubs to this effect.

6. It is confirmed by the Respondents that the respondents on 26/11/2019 that they conceded that in the light of the orders of the court granted on 22/5/2019 and the club's compliance to the said orders, the instant application and petition herein had been overtaken by events, the prayers sought therein were spent and the issues in contention disposed of.

7. The Respondents contend that there was no admission of liability and/or culpability by the club at the **AGM** or the club's Advocates on record at the said mention of 18th November 2019 or at any other part in time.

8. I have perused the petitioners' application, petition, affidavit in support, the court's orders and the petitioners' as well as the Respondents submissions and the only issue arising for determination is one thus; who is entitled to costs in this matter?

9. It is trite law under the provisions of section 27 of the Civil Procedure Act, that cost of a cause follow the event and are granted at the discretion of the court. In support of this proposition the parties relied in the decision of **Peter Muriuki Ngure vs Equity Bank (K) Ltd (2018) eKLR** where it was held:-

“I have considered the submissions in this ruling. I find it is trite law that costs follow the event and are granted at the discretion of the court.”

In **Jasbir Singh Rai & others vs Tarlochan Singh Rai & others (2014) eKLR**, the court stated:-

“(18) It emerges that the award of costs would normally be guided by the principle that costs follow the event, the effect being that the party who calls forth the event by instituting suit, will bear costs if the suit fails, but if this party shows legitimate occasion by successful suit, then the Defendant or Respondent will bear the costs.....”

10. In determining who should be condemned to meet costs the court is required to exercise its judicial discretion on costs. This issue was considered in **Republic vs. Independent Electoral and Boundaries Commission ex-parte Mohamed Ibrahim Abdi & others (2017) eKLR** where it was stated thus:-

“17. In determining the issue of costs, the court is entitled to look at inter alia the conduct of the parties, the subject of litigation, the circumstances which led to the institution of the legal proceedings were terminated, the manner in which they were terminated, the relationship between the parties and the need to promote reconciliation amongst the disputing parties pursuant to Article 159(2) (c) of the Constitution. In other words the court may not only consider the conduct of the party in the actual litigation, but the matters which led up to litigation, the eventual termination thereof and the likely consequences of the order for cost.”

11. In the instant petition the petitioners pray for costs whereas the Respondents urge that each party should bear its own costs.

12. In determining this issue as regards the issue of costs, this court is called upon to exercise its discretion and look at the circumstances under which the suit was instituted and terminated. It is further required to look into the general conduct of the parties since and before institution of the suit. There is no dispute that where a party refuses to purge its ground until a suit has been filed and orders issued, that party should be held liable for costs of the suit. In support of this proposition the petitioners rely on the case of **Peter Muriuki Nguru vs. Equity Bank (k) Ltd (2018) eKLR**, where the defendant refused to release the plaintiff's title deed and only agreed to do so after it had been sued. The court awarded the cost of the suit to the plaintiff.

13. There are however circumstances under which a successful plaintiff may be denied costs. In the case of **Devram Manji Daltani vs. Danda [1949] 16 EACA 35** it was held that a successful litigant can only be deprived of his costs where his conduct has led to litigation, which might have been averted.

14. Maphalala J. referred to the holding of Murray C J in the case of **Levben Products VS Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227**, who stated as follows:

“It is clear from authorities that the fundamental principle underlying the award of costs is twofold. In the first place the award of costs is matter in which the trial Judge is given discretion (Fripp vs Gibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at...In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

15. In the instant petition, the petitioners instituted this suit following constitutional violation of their Bill of rights. The petitioners had given notice before action which the Respondents did accede to; that upon service of the notice of motion and petition the Respondents did not file any response and court proceeded to grant interim orders pending filing of the response by the Respondents, which was not filed but Respondents complied with the court's orders and subsequently reinstated the petitioner's. It is evidently clear that the Respondents conceded that their conduct of procedurally expelling the petitioners was unlawful and apologized after this suit was instituted and interim orders issued. There is no doubt that the petitioners incurred costs in bringing up this suit. The petitioners were successful and it is not due to their conduct that led to this litigation, which might have been averted. The Respondents have not demonstrated good grounds for this court to depart from the established general rule that costs always follow the event. I find that it is only fair and just for the petitioners to be indemnified for the costs the petitioners have been forced to incur in filing the petition seeking the orders as set out in the petition.

16. The upshot is that the petitioners' application for costs of the application and petition succeeds. The petitioners are awarded costs of the application and the petition.

Dated at Nairobi this 26th day of March, 2020.

Delivered on 29th day of April 2020.

.....

J .A. MAKAU

JUDGE