



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 280 OF 2016

JAOKO ALEXANDER.....PETITIONER

-VERSUS-

NAIROBI CITY WATER & SEWERAGE COMPANY LTD.....RESPONDENT

RULING

1. Through the petition dated 30th June, 2016 the Petitioner, Jaoko Alexander, sought several reliefs following the disconnection of his water supply by the Respondent, Nairobi City Water and Sewerage Company Limited, over an unpaid water bill.
2. On 17th July, 2019 the Petitioner withdrew the petition with the consent of the Respondent. However, the parties could not reach a consent on the issue of costs and they agreed to file submissions on the same so that this Court can make a determination on the issue.
3. Through submissions dated 19th June, 2020 counsel for the Respondent urged this Court to award costs to the Respondent. Counsel submitted that the Petitioner is the one who filed the petition contesting the accuracy of the water bill. He, however, eventually agreed to pay the contested bill in full. According to the Respondent's counsel, at the time the Petitioner agreed to settle the water bill, the matter was only awaiting the determination of the Court as the hearing had proceeded to conclusion.
4. Counsel for the Respondent discloses that the Petitioner had interim orders in place which guaranteed that there would be no interference with his water supply pending the hearing and determination of the petition. It is urged that the Petitioner's decision to settle the bill was made of his own free will.
5. Counsel for the Respondent points out that prior to the withdrawal of the case, the advocates for the parties had attended Court multiple times and the Respondent had therefore incurred a huge sum of money in defending the claim.
6. According to counsel, the Respondent being an entity providing a crucial service to the residents of Nairobi City County, it is imperative that its revenue be protected at all costs to enable it to continue providing this very crucial service to its customers.
7. It is the assertion of the counsel for the Respondent, that based on Section 27(1) of the Civil Procedure Act, Cap. 21, the well-established position that costs follow the event is applicable in this matter and costs should be awarded to the Respondent.
8. It is urged that the Petitioner's voluntary settlement of the water bill and withdrawal of the claim amounts to an admission that he had wrongly filed this cause against the Respondent. The Respondent asserts that having successfully defended the Petitioner's claim, it is entitled to the costs.
9. Counsel for the Respondent cited the decision in **Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] eKLR** as outlining the factors to be taken into account in determining whether or not to award costs. It is therefore urged that it is only just and fair that the Respondent be awarded costs against the Petitioner.
10. On his part, the Petitioner through his submissions dated 31st October, 2019 asserted that it is the corrupt and inhuman conduct of the Respondent which necessitated the filing of this petition and it is actually the Respondent who should be paying costs to him.
11. The Petitioner submits that it is the Court that directed the parties to reach an out of court settlement. He points out that after he filed this petition the faulty water meter was replaced and since then his water bill had not risen beyond Kshs.600/= per month. Further, that when the Respondent invited the Petitioner for negotiations on 27th November, 2018, the pending water bill was Kshs.16, 847.39 but he was instead directed to pay Kshs.3, 848/= after the Respondent realised that the bill was indeed falsified.

12. The Petitioner submits that the Court should exercise discretion in determining the issue of costs. The discretion, he submits, must not be exercised arbitrarily but in accordance with reason and justice.

13. The Petitioner further submits that the fact that the matter was settled through consent means that there is no successful party. The decision in the case of **Rufus Njuguna Mirirngu & another v Martha Muriithi & 2 others [2012] eKLR** is cited as confirming this statement.

14. Finally, the Petitioner urges that the principle that costs should follow the event can be departed from for good reason as held in the cases of **Joseph Oduor Anode v Kenya Red Cross Society [2012] eKLR** and **Supermarine Handling Services Ltd v Kenya Revenue Authority, Civil Appeal No. 85 of 2006**.

15. I have carefully considered the submissions of the parties on the issue of costs. The applicable principle when determining the question of costs is that costs shall follow the event unless the court or judge shall for good reason otherwise direct.

16. In the case of **Cecilia Karuru Ngayu v Barclays Bank of Kenya and another [2016] eKLR**, the factors to be considered in determining the question of costs were enumerated as follows:

“To my mind, in determining the issue of costs, the court is entitled to look at *inter alia* (i) the conduct of the parties, (ii) the subject of litigation, (iii) the circumstances which led to the institution of the proceedings, (iv) the events which eventually led to their termination, (v) the stage at which the proceedings were terminated, (vi) the manner in which they were terminated, (vii) the relationship between the parties and (viii) 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 to the litigation, the eventual termination thereof and the likely consequences of the order for costs.”

17. In the case before this Court, the petition was withdrawn by the Petitioner. The Petitioner submits he paid the water bill after it was corrected and the faulty meter replaced. I see no fault in the Petitioner’s actions. He came to Court after he was aggrieved by what he believed was an unreasonable water bill. He was vindicated when his monthly water bills stabilised at no more than Kshs.600/= after the water meter was replaced. That alone means that his petition was not frivolous.

18. It is also noted that the parties entered a consent on 20th March, 2017 that the water should not be disconnected pending the hearing and determination of the petition. This confirms that the Petitioner had an arguable case.

19. The fact that the Petitioner decided to withdraw the petition cannot be held against him. In **Rufus Njuguna Miringu & another v. Martha Muriithi & 2 others [2012] eKLR** it was held that:

“I agree with the Counsel for the 1st and 2nd Defendants that the interpretation of the proviso to the cited section is that the material event referred to is the result of the proceedings, and it is the successful party in this result who is normally awarded costs. The result in this suit is the settlement of the dispute between the parties following the written consent by the parties dated 13th May 2011 and adopted by this Court, save for the issue of costs. I also agree with the 1st and 2nd Defendants’ Counsel that consent cannot be interpreted to mean that one or the other party has succeeded in a suit. Even if in the present case such settlement has worked out in the Defendants’ favour, the successful determination of the dispute is still attributable to both the Plaintiffs and the 1st and 2nd Defendants.”

20. Considering what I have stated above, I find that in the circumstances of this case it is in the interests of justice that each party be directed to bear own costs of the proceedings. That is my order.

Dated, signed and delivered virtually at Nairobi this 29th day of October, 2020.

W. Korir

Judge of the High Court