



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.143 OF 2019

SARAFINA WAMBUGU (Suing for herself and

on behalf of 195 OTHERS.....PETITIONERS

VERSUS

UNITED STATES INTERNATIONAL

UNIVERSITY – AFRICA - (USIU)..... RESPONDENT

RULING

PETITIONERS CASE

1. The Petitioners through a Petition dated 15th April 2019 sued the United States International University seeking a number of reliefs being as follows:-

- a) *A declaration be issued that the Respondent actions violate the Petitioners Rights under Articles 27(1) & (2), 28, 47(1) & (2), 50 and 55 of the Constitution.*
- b) *A declaration be issued that the Respondent have breached the provisions of the Universities Act and specifically the Charter for the United States International University specifically Sections 4 and 5 of the Charter.*
- c) *An order of prohibition, be issued prohibiting the Respondent from carrying out any academic activities which includes, offering and administering any exams, marking and releasing results for exams sat by the Petitioners and offering any classes for the Petitioners until prayer d below is adhered to.*
- d) *An order of mandamus be issued directing the Respondent at its cost to ensure within the remaining academic year of the Petitioners: (1) that all academic grievances of ensuring the Degree courses of the Respondent are up to par with the required minimum standards, (2) the grading system used on the petitioners courses by the Respondent is the new grading system effected in the Spring (January – April 2019) semester, (3) that the petitioners attend all required attachments at medical facilities and hospitals, prior to their graduation with a bachelor's Degree in Pharmacy.*
- e) *Compensation by damages to be assessed by the court for the violation of the Bill of Rights and the Constitution.*
- f) *Costs of the Petition be awarded.*

RESPONDENT'S RESPONSE

2. The Respondent filed Replying Affidavit sworn by Professor Paul Tiyambe Zeleza sworn on 17th June 2019 denying the Petitioners' claims set out in their Petition and Notice of Motion. It is Respondent's contention that the Petition as filed is frivolous and amounts to an abuse of the Court process for failing to establish any cause of action against the Respondent.

3. The Respondent urge that its substantive response has a strong case against the Petition and that the Respondent's case is likely to succeed.

BRIEF FACTS

4. On 20th November 2019, parties attended Court with a view to indicate the way forward as regards the hearing of the Petition, when the Petitioners withdrew the Petition and parties given time to agree on the issue of costs. The parties herein did not reach agreement on costs and court directed the parties to file submission on the issue of costs. The Petitioners as per Court's order of 17th May 2020, were directed to file and serve submission on issue of costs within 14 days, failing whereof the Respondent would proceed to file submissions within 14 days upon lapse of the time granted to the Petitioners. The Petitioners have failed to comply with the Court's order, hence what is before this Court is the Respondent's submissions on the issue of costs.

ANALYSIS AND DETERMINATION

5. I have considered the Petition, the Respondent's Response and submissions by the Respondent and from the same there arises only one single issue for determination thus:-

a) Whether the Respondent is entitled to costs?

6. The Respondent filed and served Replying Affidavit to the Petitioners' Petition. The same was duly served upon the Petitioners. The Respondent attended Court on Account of the matter, on various dates including but not limited to 11th April 2019; 6th July 2019; 20th November 2011 and 27th May 2020. The Respondent contend that it incurred and continues to incur costs on the matter including, legal fees and charges on account of disbursements.

7. The basic statutory law governing the issue of costs is well set out under **Section 27(1) of the Civil Procedure Act**. It is clear that the Court has the discretion to award costs of and incidental to the suit subject only to such condition as to limitations as may be described and to the provision of any law for the time being in force. The Court further has power to determine by whom and the extent to which such costs are to be paid. It should also be noted the general rule, under the proviso to **Section 27(1) of the Civil Procedure Act**, is that costs follow the event unless the court, for good reason, otherwise orders.

8. **Rule 26(1) & (2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** provides:-

“the award of costs is at the discretion of the Court”

“In exercising its discretion to award costs the Court shall take appropriate measures to ensure that every person has access to the court to determine their rights and fundamental freedoms”

9. The Respondents in seeking for costs rely on the case in the **High Court of Kenya at Nairobi Commercial and Admiralty Division Civil Case No. 421 of 2010 Pacis Insurance Company Ltd vs. Francis Njeru Njoka**, where the learned Judge held as follows:-

“...No doubt the Defendant had incurred expenses by the time the suit was withdrawn and should have bene notified of intention to withdraw and invited to appear before the registrar for issue of costs to the addressed.

A party having been caused by the other to participate in a suit, is entitled to costs incurred in the event the party instituting the suit decide to withdraw it unless parties agree otherwise or Court on exercising its discretion decides otherwise after giving the parties opportunity to submit on costs.

In the instant case, the suit was withdrawn after hearing date was set. The Defendant had engaged an advocate to defend the suit. The Defendant is therefore expected to have incurred expenses and is entitled to costs expended...”

10. The Respondent further rely on the case of in the **High Court of Kenya at Nyeri Civil Case No. 17 of 2014 Cecilia Karuru Ngayu vs- Barclays Bank of Kenya and Credit Reference Bureau Africa Ltd**, where the learned Judge cited the following case and held as follows:-

“...In Republic vs. Rosemary Wairimu Munene, Ex-Parte Applicant vs. Ihururu Dairy Farmers Co-operative Society Ltd this Court held as follows:-

“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 prosecution or defending the case...”

Considering the entire chain of events from filing this suit up to the time the parties left the issue tot eh court to determine, the numerous Court attendances cited above I find no reason to deny the second Defendant costs...”

11. The Petitioners herein initiated these proceedings by filing the current Petition herein. They are the ones who have caused the Respondent to respond to their Petition and caused it to incur costs and which they continue to incur. The suit was withdrawn after the Respondent had filed response and made about three court attendances. The withdrawal of the Petition was not prompt but after Respondent had given full instructions to their advocate and after they had prepared to defend the Petition. The Petitioners have not filed any submissions as regards the issue of costs. There is now no denial that the Respondent has incurred costs. I find that the Respondent as submitted has incurred costs to which there is not rebuttal from the Petitioners. Further on considering the Petition as drawn and filed it is clear this Petition is not a public interest matter but a private Petition for the benefit of the Petitioners. In Petitions for personal or individual benefits nothing would preclude the court from awarding costs to a successful party.

12. Having considered the facts of the Petition and based on the totality of the above facts and the applicable law, it would not be proper to encourage parties to bring frivolous claims against others and get away without being condemned to meet costs in such a situation. The Petitioners have opted not to participate in the issue of costs and as such, I find no reason advanced by the Petitioners to enable this honourable Court to deny the Respondent costs of this Petition. The Respondent has demonstrated that it is entitled to costs of this Petition. However as the Petition was not determined on merits but was withdrawn before hearing I find that the Respondent should not be granted full costs but fifty (50%) percent of the Costs that would be taxed by Taxing Master.

13. The upshot is that the Respondent is awarded costs of the Petition. ***The Respondent shall get fifty (50%) of the full taxed costs by the Taxing Master as the Petition was not decided on merits nor heard.***

Dated, signed and delivered at Nairobi this 19th day of November 2020.

.....

J .A. MAKAU

JUDGE