



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

PETITION NO.3 OF 2016

THANGARI LOISE MUKUHL.....PETITIONER

VERSUS

KARATINA UNIVERSITY.....RESPONDENT

RULING

INTRODUCTION

1. The Petitioner who was an undergraduate student at the respondent university filed the instant Petition challenging her expulsion which she alleged was unfair as it violated her right to fair and expeditious administrative action as envisaged in the Constitution 2010; she sought the following declaratory orders'

- i. That her right to education has been unlawfully, irregularly and unfairly curtailed by the respondent through unfair administrative actions of expulsion;
- ii. That the respondent's decision to expel the petitioner was unfair, unlawful and illegal;
- iii. The petitioner was entitled to be re-admitted by the respondent and an order compelling readmission forthwith;

2. The respondent filed a detailed response in reply to the Petition setting out the reasons for the delay which it attributed to students unrest leading to the closure of the university; and that the irregularity was discovered when the university operations resumed;

3. The court gave directions on the way the matter was to be prosecuted which was by the filing and exchanging of written submissions; and each party was given 30 days to comply; several mention dates were taken to confirm compliance and on the 5th February, 2019 counsel for the petitioner made an oral application to withdraw the Petition and the reasons given were that she had since been admitted to another institution and moved on with her life;

4. The application was not opposed by the respondent but sought for an order that costs be provided for; the parties were given time to agree on costs or the same be subjected to taxation;

5. On the 26/02/2019 the Petition was marked as "WITHDRAWN"; as the parties were unable to agree on the issue of costs this was left to the court to determine;

ISSUES FOR DETERMINATION

6. It is reiterated that the parties were unable to agree on costs and that this was left to the court to make a determination; therefore the only issue that is for determination is whether to award costs to the respondent;

ANALYSIS

7. The respondent argues that as provided by Section 27 of the Civil Procedure Act it was entitled to costs in accordance with the section; upon perusal of the section the question that arises is whether at this stage the respondent herein can be described as a successful party and therefore the onus would be upon the petitioner to adduce good reasons as to why the respondent should be deprived of its costs;

8. Going back to the proceedings, on the 30/05/2017 this court directed the parties to file and exchange written submissions within 30 days

and a mention date was given to confirm compliance; on the 28/02/2018 the matter came up for mention and as both parties had not complied another date was given to confirm compliance; on the 16/04/2018 the position remained the same and time to file was enlarged by seven (7) days; on the following numerous mention dates that is the 18/06/2018, 9/09/2018, 23/10/2018, 04/12/2018, 5/02/2019 there was still non-compliance with the direction;

9. These mentions culminated with the withdrawal of the Petition on the 26/02/2019; following the application for the withdrawal of the Petition made by the Petitioner the respondent argued that it was entitled to costs at this stage;

10. The applicable law is also found at Rule 26 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provides as follows;

“26(1) The award of cost is at the discretion of the court;

(2) 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.”

11. The basic principles to be considered are two-fold; one, would be, in order to justify an order refusing the respondent costs it must be shown that the respondent’s conduct was such that it induced or encouraged the petitioner to believe that she had a good case; the second test would be whether the petition was wholly frivolous, an abuse of the constitutional process or that the petition did not raise purely constitutional issues;

12. In considering these two principles the petition would pass the test; in that the respondent’s conduct was such that it induced or encouraged the petitioner to believe that she had a good case; and the petition was not wholly frivolous, an abuse of the constitutional process nor was it found lacking in purely constitutional issues;

13. In this instance the respondent cannot be described as a successful party; and it is also this court’s considered view that an order as such would work a great injustice to the petitioner as she was led to believe through the respondent’s delay, which it admitted, that she was justified in bringing the action;

14. After stating the above this court is satisfied that there are sufficient considerations to justify a refusal for costs to the respondent; this court also makes reference to the case of **Consumers Federation of Kenya (COFEK) vs Nakumatt Holdings Limited & 4 others [2018] eKLR** it was held;

“Courts have held the view that an order for costs would hinder the promotion of constitutional justice as parties who are not well-endowed financially would be shy to approach the seat of justice for fear of being condemned in costs should they be unsuccessful in their cases thus preventing a matter of public importance from being heard.”

15. For the reasons stated above this court is satisfied that the petitioner was justified in filing her Petition which is found to have substantial constitutional issues and she was entitled to also withdraw it; and student like her who are presumably not being financially well endowed should not be made to shy away from coming to court when they felt that their rights had been violated;

16. All in all the common sense underlying the issue of costs is aptly quoted by **Mativo Judge in Constitutional Petition No.86 of 2017** which this court is persuaded by and fully concurs with; the observation made therein was;

“An award of costs may have a chilling effect on the people who may wish to vindicate their constitutional rights.”

FINDINGS AND DETERMINATION

17. This court finds that this is not a suitable case for the issuance costs to the respondent and directs that each party shall bear her/its own costs;

It is so ordered.

Dated, Signed and Delivered at Nyeri this 30th day of May, 2019.

HON. A. MSHILA

JUDGE