



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 69 OF 2014

**IN THE MATTER OF AN APPLICATION BY WATER RESOURCES
MANAGEMENT AUTHORITY FOR LEAVE TO APPLY FOR JUDICIAL
REVIEW ORDERS OF PROHIBITION AND CERTIORARI AGAINST
THE COMMISSIONER FOR CO-OPERATIVE DEVELOPMENT**

and

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010, THE
WATER ACT, 2002 AND THE CO-OPERATIVE SOCIETIES
ACT CHAPTER 490 OF THE LAWS OF KENYA**

and

**IN THE MATTER OF THE RIGHT TO FAIR ADMINISTRATIVE
ACTION UNDER THE CONSTITUTION OF KENYA 2010.**

**IN THE MATTER OF UNLAWFUL AND IRREGULAR ISSUANCE OF
AGENCY NOTICES FREEZING OF ALL THE APPLICANT'S**

BANK ACCOUNTS BY THE COMMISSIONER

FOR CO-OPEARTIVE DEVELOPMENT

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

COMMISSIONER FOR

CO-OPERATIVE DEVELOPMENT.....RESPONDENT

UKULIMA CO-OPERATIVE SAVINGS &

CREDIT SOCIETY LTD.....INTERESTED PARTY

EX PARTE: WATER RESOURCES MANAGEMENT AUTHORITY

RULING

1. These proceedings were provoked by the Respondent's decision on 11th February, 2014 by which the Respondent issued an Agency Notice to one of the applicant's bankers, Kenya Commercial Bank Limited, requiring the Bank to freeze all the Applicant's Bank Accounts held with the Bank until the recovery of some alleged Kshs. 28, 470, 807.45 allegedly owed to the Interested Party by the Applicant. The said Agency Notice equally required the Bank to remit any money in any of the Applicant's account to the Interested Party in an alleged attempt to settle the said debt of Kshs. 28, 470, 807.45.
2. According to the applicant, the said decision was neither communicated to the Applicant by the Respondent nor a copy of the said Agency Notice issued to it for its information. However, the applicant's case was that it learnt that the Respondent had in fact maliciously issued the said Agency Notices to all the Applicant's Bankers with the effect that all the Applicant's Bank Accounts are frozen and the Applicant's operations were completely crippled.
3. It was the applicant's case that it did not owe the Interested Party the said Kshs. 28, 470, 807.45 as the Applicant had since paid the Interested Party a sum of Kshs. 11,708,448.80 on the 11th day of February 2014. The applicant contended that it had been acting in good faith in carrying out the Check-off Sacco dues deductions through pay-roll for the Interested Party without any agreement and/or payment from the Interested Party hence it was unfair and improper for the Respondent to victimize the Applicant and paralyze its operations on the basis of delayed remittance which the Interested Party was fully aware would be remitted by 31st March 2014. It was therefore alleged that the Respondent's above actions were grossly malicious and in bad faith.
4. In the applicant's view, the Respondent's Office is an office in the public service created under section 3 of the **Co-operative Act**, Chapter 490 of the Laws of Kenya. In carrying out his duties, the Respondent is mandatorily required by law to comply with the rules of natural justice and act fairly as provided for under Article 47 of the Constitution. However in issuing the said Agency Notices to all the Applicant's Bankers and freezing all the Applicants Bank Accounts without any notice and/or affording the Applicant a hearing on the same, the Respondent denied the Applicant the right to be heard on an issue which had fundamental impact on the Applicant's operations and as such violently breached the rules of natural justice.
5. The applicant contended that the above actions by the Respondent were plainly unreasonable and it was against public policy and the Constitution that public officers like the Respondent herein should be allowed to act in such unfair and unreasonable manner without any regard to the Constitution and the rule of law. It was further averred that the above actions by the Respondent were *ultra vires* and irregular and had the effect of destabilizing the Applicant's operations and rendering it impossible for the Applicant to carry out its statutory duties.
6. On 6th November, 2017, a consent was recorded herein in which the matter was marked as settled as between the Applicant and the Respondent. While the interested party had no objection to the matter being terminated the interested party insisted on costs. It is therefore the issue of costs that falls for determination.
7. In these proceedings, the interested party contended that the ex parte Applicant has employees who are the members of the interested party and who instructed the applicant to effect deductions from their monthly emoluments and remit to the interested party which amounted to Kshs.5 million every month, an obligation the ex parte applicant was bound to perform by virtue of section 35(1) of the **Co-operative Societies Act**.
8. However the ex parte applicant as it admitted did not remit the deductions within the period stipulated but held them to the detriment of the interested party and its members. It was therefore contended that the ex parte applicant had no ground to seek the orders sought as it had no respect for the law.
9. Granting the reliefs sought, it was contended would be allowing the ex parte applicant to continue holding the deductions illegally yet the interested party's members' contributions are the lifeline of the Sacco and to hold the same is to cripple our activities particularly services to members hence our result to the respondent as law provides.
10. The interested party's case was therefore that granting the prayers sought was contrary to justice and legalizing breach of the law by the ex parte Applicant hence the application had no merit and ought to be dismissed with costs.

Determinations

11. I have considered the foregoing including the submissions filed on behalf of the parties herein and the authorities relied upon.
12. The general rule as to costs is provided for in **section 27** of the **Civil Procedure Act** which provides as follows:

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 to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

13. This provision has been the subject of several judicial pronouncements. In the case of Supermarine Handling Services Ltd vs. Kenya Revenue Authority Civil Appeal No. 85 of 2006 the Court of Appeal expressed itself thus:

“Costs of any action or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts. If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance...Thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where the reasons are given if it considers that those reasons do not constitute “good reason” within the meaning of the rule...In the instant case the learned Judge gave no reasons whatsoever for his decision to deprive the successful plaintiff of its costs and yet it was not shown that the defendant had been guilty of some misconduct which led to litigation. In the court’s view the learned Judge’s order was wrong and for the foregoing reasons, the plaintiff’s appeal succeeds as to the award of interest and costs on the principal sum awarded”.

14. In 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.

15. In Party of Independent Candidate of Kenya & Another vs. Mutula Kilonzo & 2 Others HCEP No. 6 of 2013, it was held:

“The main reason why this Petition should be withdrawn is due to the demise of the 1st Respondent. This would call upon the Court considering ordering each party to bear their own costs. In the case of *Nedbank Swaziland Ltd verses Sandile Dlamini No.(144/2010) [2013] SZHC30 (2013) 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 two-fold. 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.”

16. 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, the events which eventually led to their termination, the stage at which the 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 costs. See Hussein Jannohamed & Sons vs. Twentsche Overseas Trading Co. Ltd [1967] EA 287 and Mulla (12th Edn) P. 150.

17. In my view section 27 of the *Civil Procedure Act* provides for the general rule which ought to be followed unless for good reasons to be recorded.

18. When all things are equal, however, the only consideration is the “event”. As was held by the Supreme Court of Uganda in Impressa Ing Fortunato Federice vs. Nabwire [2001] 2 EA 383:

“The effect of section 27 of the Civil Procedure Act is that the Judge or court dealing with the issue of costs in any suit, action, cause or matter has absolute discretion to determine by whom and to what extent such costs are to be paid; of course like all judicial discretions, the discretion on costs must be exercised judiciously and how a court or a judge exercises such discretion depends on the facts of each case. If there were mathematical formula, it would no longer be discretion... While it is true that ordinarily, costs should follow the event unless for some good reason the court orders otherwise, the principles to be applied are: - (i). Under section 27(1) of the Civil Procedure Act (Chapter 65), costs should follow the event unless the court orders otherwise. This provision gives the judge discretion in awarding costs but that discretion has to be exercised judicially. (ii). A successful party can be denied costs if it is proved that but for his conduct the action would not have been brought. The costs should follow the event even when the party succeeds only in the main purpose of the suit...It is trite law that where judgement is given on the basis of consent of parties, a court may not inquire into what motivated the parties to consent or to admit liability since admission of liability implied acceptance of the particulars of injuries enumerated in the plaint and the evidence in favour of the Respondent, including loss of hearing and speech.”

19. I associate myself with the decision of Kampala High Court in Re Ebuneiri Waisswa Kafuko (Deceased) Kampala HCMA No. 81 of 1993 in which it was held that:

“The Judge in his discretion may say expressly that he makes no order as to costs and in that case each party must pay his own costs. If he does not make an order as to costs, the general rule is that he shall order that the costs follow the event except where it appears to him in the circumstances of the case some other order should be made as to the whole or any part of the costs. But he must not apply this or any other general rule in such a way as to exclude the exercise of the discretion entrusted to him and the material must exist upon which the discretion can be exercised. This discretion, like any other discretion, must be exercised judicially and the judge ought not to exercise it against the successful party except for some

reason connected with the case. It is not judicial exercise of the judge's discretion to order a party who has been completely successful and against whom no misconduct is even alleged to pay costs."

20. In this case the proceedings were initiated by the applicant. Before the proceedings could be determined in the normal manner, the applicant withdrew the same. In the normal course of events a withdrawal of proceedings amounts to a determination thereof in favour of the respondents thereto and pursuant to the provisions of section 27 aforesaid the respondents would be entitled to costs. See **Joseph Oduor Anode vs. Kenya Red Cross Society [2012] eKLR.**

21. This was the position adopted by **Sergon, J** in **Stephen Chege Waweru vs. Ephantus Mwangi & Others Nyeri HCCC No. 173 of 2008** where he expressed himself as follows:

"There is no dispute that the Plaintiffs filed this suit. The plaint and the summons were served upon the defendants. A defence and counterclaim was filed to resist the plaintiff's suit. In fact the plaintiffs filed an answer to the defence to the counterclaim. There is no denial that the plaintiffs unilaterally filed a notice of withdrawal of the suit and by the time of filing the notice of withdrawal, the defendant had incurred money in hiring an advocate to defend the suit. The proviso to section 27 of the Civil Procedure Act clearly states that costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order. The plaintiffs are the ones who filed this suit thus prompting the Defendants to engage the services of an advocate to defend themselves. It is clear from the prayers in the Plaint that the plaintiffs had asked for costs at the end of the suit. On their part, the defendants asked for the suit to be dismissed with costs. There is no peculiar reason which should make the court deny the defendants costs. The court is convinced costs should follow the event."

22. A perusal of the pleadings filed herein shows that the issuance of the Agency notices as substantially occasioned by the failure by the applicant to adhere to its statutory obligations. Whereas the applicant may well have succeeded in its contention that the Respondent violated the applicant's right to hearing, as the matter did not progress to hearing, that matter remains moot. However, the interested party cannot be faulted for the termination of these proceedings, the effect of which is that these proceedings have been terminated in favour of the interested party which is now the successful party.

23. In the result I do not see any justification for the denying the ex parte applicant costs. However, under section 27 of the ***Civil Procedure Act***, this Court has the discretion to determine *inter alia* to what extent such costs are to be paid taking into account the stage at which the proceedings were terminated and the manner in which they were terminated.

24. Since Article 159(2)(c) requires this Court to promote alternative dispute resolution mechanisms which in my view encompass reconciliation, I hereby award the interested party half the costs of these proceedings to be borne by the ex parte applicant.

25. It is so ordered.

Dated at Nairobi this 16th day of February, 2018

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

CA Ooko: