



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 225 OF 2014

IN THE MATTER OF ARTICLE 22, 23 (1), 47 OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF THREATENED AND ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 47 OF THE CONSTITUTION**

BETWEEN

**CONSTANTINE MWIKAMBA MGHENYI.....
.....PETITIONER/RESPONDENT**

VERSUS

**THE INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF KENYA.....
RESPONDENT/APPLICANT**

RULING

On 21st October 2015, Onguto J rendered a ruling ordering that the petitioner herein takes such steps as may be necessary to prosecute this petition within three months, in default, the petition stands dismissed. In making the said order, which to me would once effective operate as a final determination of this case, the learned judge did not provide for costs. No action was taken within the stipulated period, hence, this petition stood dismissed after the expiry of the three months. No application was made to vary, set aside or review the said order nor was an application preferred, hence the said order still remains in force and for all purposes this suit remains dismissed.

By an application dated 3rd November 2016 the subject of this ruling, the Respondent/ Applicant seeks leave for the firm of Ogembo & Co advocates to come on record in place of Okoth & Kiplangat Advocates and a further order that this court awards costs of this Petition to the Respondent/Applicant.

Leave to come on record is not contested. What is contested is the issue of costs. I have considered the affidavit in support of the application, the Replying affidavit and the applicants supplementary affidavit and having taken into account the rival arguments advanced by the parties as outlined above, and taking into account the history of this case as enumerated above, it's important at the outset to reproduce below the provisions of Rule 26 (1) of *The Constitution of Kenya (Protection of Rights and Fundamental*

Freedoms) Practice and Procedure Rules, 2013^[1] which provides that:-

26. (1) *The award of costs 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.*

The issue of costs is the discretion of the court as provided under the above Rule. 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 prosecuting or defending the case.^[2] I find useful guidance in the following passage from the *Halsbury's Laws of England*;^[3]

“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice”(Emphasis added).

Writing on the same subject *Mr. Justice (Retired) Kuloba*^[4] stated:-

“Costs are {awarded at} the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise...”

To my mind there appears to be no clear or prescribed definition of what constitutes “good reasons” that will justify the courts departure, in awarding costs, from the general rule that ‘costs follow the event.’ Discussing the same point, the supreme court of Kenya in the case of *Jasbir Singh Rai & Others vs Tarlochan Rai & Others*^[5] observed that:-

“in the classic common law style, the courts have to proceed on a case by case basis, to identify “good reasons” for such a departure. An examination of evolving practices on this question shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs.....”

The reason for the above reasoning is that in public litigation, a litigant is usually advancing public interest as opposed to personal gain. In *Party of Independent Candidate of Kenya vs Mutula Kilonzo & 2 others*,^[6] citing two leading decisions of the subject the court held *inter alia* that:-

*“It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is a matter in which the trial Judge is given discretion.But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could 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.**”*

In my view section 26 cited above provides the general rule which ought to be followed. The said Rule in my view does not make distinctions between determinations made by consent or on courts own determination, withdrawals or after a full hearing. This position is well enumerated by **Richard Kuloba** in the earlier cited book where he observed that:-

“the fact that the unsuccessful party did not contest the case is not in itself a ground for refusal of costs but it is a factor that can be take into account if other good reason exists”(Emphasis added).

However, the only consideration is the “event” as was held in the supreme court of Uganda in *Impressa Ing Fortunato Federice vs Nabwire*^[7] where the court discussing the provisions of the Civil Procedure Act stated:-

*“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 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) 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... 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.....”*

Also of useful guidance is the decision in the Ugandan case of *Re Ebuneiri Waisswa Kafuko*^[8] where the court held as hereunder:-

“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 he 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. The discretion, like any other 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 was completely successful and against whom no misconduct is even alleged to pay costs.”

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.^[9] 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.^[10]

I have considered the rival arguments advanced by the parties. It is my considered opinion that while making the determination in question, the learned judge did not at his discretion provide for costs. The order this court is being invited to make amounts to asking this court to vary or review the learned judge’s decision. This can only be done by way of an application for review or by way of appeal.

To the extent the orders sought seek to vary the orders made by the learned judge, a court of coordinate jurisdiction, in my view, it will amount to inviting this court to sit as an appellate court on a decision of a High court judge, which I cannot do. In the circumstances the applicants application fails. The upshot is that the application dated 3rd November 2016 is dismissed with costs to the Applicant/Respondent.

Orders accordingly

Right of appeal.

Signed, Dated and Delivered at **Nairobi** this **19th** day of **May** 2017

John M. Mativo

Judge

[1] Legal Notice No. 117 of 28 June 2013

[2] Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai & others {2014} eKLR

[3] 4th Edition (Re-issue), {2010}, Vol.10. para 16

[4] Judicial Hints on Civil Procedure, 2nd Edition, (Nairobi) Law Africa) 2011, page 94

[5] Supra note 4

[6] HC EP No. 6 of 2013

[7] {2001} 2 EA 383

[8] Kampala HCMA No. 81 of 1993 cited by Odunga J in Pet No 466 of 2014 cited above, see note 11

[9] See Odunga J in JR No. 466 of 2014 between Republic vs Kenya National Highway Authority & Others , Ex parte Kanyingi Wahome

[10] See Hussein Janmohamed & Sons vs Twentsche Overseas Trading Co. Ltd {1967} EA 287 and Mulla 12th Edition AT Psage 150