REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MISC. APPLICATION NO. 385 OF 2015

RICHARD BRIAN WEKESA……..…….....…..APPLICANT

-VERSUS-

THE BOARD OF MANAGEMENT NJIIRI SCHOOL…….....1ST RESPONDENT

KAMAU CHOMBA…….....…….....….2ND RESPONDENT

THE CABINET SECRETARY (MINISTRY OF

EDUCATION SCIENCE AND TECHNOLOGY….....3RD RESPONDENT

THE HON. ATTORNEY GENERAL....…….....4TH RESPONDENT

RULING

1. By a Motion dated 11th November, 2015, the ex parte applicant herein, **Richard Brian Wekesa,** sought orders of Certiorari and Mandamus to remove into this Court and quash the decision to suspend and/or expel the Applicant from the 1st Respondent's School (hereinafter referred to as "the School"). He also sought an order prohibiting the Respondents from disseminating certain information against the applicant herein.

2. The application was based on the fact that the decision to keep the applicant from school was arrived at without a fair hearing and without regard to the due process.

3. The application was opposed by an affidavit sworn by the 2nd Respondent, the Principal of the School herein, in which the applicant was accused of having been one of the students behind acts of indiscipline at the School and upon being summoned, gave his version and thereafter requested for transfer to another school after which the applicant's father was called to pick the applicant from school. Later on the applicant's father was informed to go to the school for disciplinary proceedings at which the applicant adopted a hostile strategy and denied the allegations which hostility led to discontinuation of the said proceedings and as a result the applicant was suspended pending further investigations.

4. It was therefore the position of the School that the applicant's rights were not breached as alleged.

5. On 28th January, 2016, the parties herein compromised these proceedings by way of a consent in which it was ordered that:

1) The applicant continues with his studies at the School and shall not be victimised.

2) The applicant to provide a counsellor's report relating to the counselling sessions undertaken by the applicant at the earliest convenient time.

3) The applicant to be punished by the School administration subject to the applicant's parents being made aware of the nature thereof and an approval of the same; the said punishment not being unreasonable; and the said punishment taking into consideration the period of absence when the applicant was under suspension.

4) The applicant and his father to give undertaking and proposal on how to partner with the School administration to ensure smooth co-existence and maintenance of high standards of discipline.

5) The School undertakes to provide remedial classes for the period when the applicant was under suspension from the School.

6) The School be at liberty to punish and take any disciplinary actions against the applicant during the period he is in the School in respect of minor offences with notification to his father of any serious offences.

7) The issue of costs and damages to be agreed upon.

6 The parties were however unable to agree on the costs hence it was directed that submissions be made thereon. It is that issue that falls to be decided in this ruling.

7. According to the applicant, he was only admitted to the school as a result of the Court order without which the violation of his rights would have continued. According to the applicant, the terms of the consent recorded herein amounted to success on his part and as costs follow the event, he is entitled to costs. The applicant relied on inter alia **Orix Oil (Kenya) Limited vs. Paul Kabeu & 2 Others [2014] eKLR**.

8. On the part of the Respondents it was submitted that each party should bear own costs. The Respondent urged the Court to take into account the need to promote reconciliation pursuant to Article 159(2)(c) of the Constitution.

9. I have considered the submissions made on behalf of the parties herein.

10. 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:***
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> ***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.***

11.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".

12. 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.

13. 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."

14. In determining the issue of costs, the Court is entitled to consider 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, whether a party has succeeded on part of his case, even if he has not been wholly successful, the extent of such success, the subject of litigation and 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. With respect to the conduct of the parties this includes the conduct before as well as during, the proceedings and in particular the extent to which the parties followed any relevant pre-action protocol and directions issued by the Court; whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; the manner in which a party has pursued or defended his case or a particular allegation or issue; and whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim. See ***Halsbury's Laws of England*** vol. 10 4th Edition of the re-issue at para 22 and **Hussein Janmohamed & Sons vs. Twentsche Overseas Trading Co. Ltd [1967] EA 287** and ***Mulla (12th Edn) P. 150.***

15. 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.

16. 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 nolonger 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."**

17. 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."**

18. In this case it is clear that whereas the applicant was permitted to continue with his studies, there was proviso that the applicant be subjected to disciplinary measures. By appreciating that some element of discipline was warranted, it was in my view a clear recognition that to some extent, the applicant could have been culpable. To what extent this is so cannot be determined from the material placed before me. In other words based on the material placed before me it is not possible to make a definite finding that it is the applicant who was the successful party in these proceedings considering that these proceedings were, according to the Respondents instituted before a final decision was made on the applicant's fate. It is in this context that I understand the learned work of **David Foskett, QC** of Gray's Inn at page 77 of his book, ***In the Law and Practice of Compromise*** when states that:

> **"An unimpeached compromise represents the end of the dispute or disputes from which it arose. Such issues of fact or law as may have formed the subject matter of the original disputation are buried beneath the surface of the compromise. The courts will not permit them to be raised afresh in the context of the new action."**

19. In other words unless it comes out clearly in the compromise that a particular party was the successful party, the parties cannot in their submissions on costs, reopen the compromised issues with a view to persuading the Court to find that had the matter gone to full hearing a particular party might have been the successful party. Whereas the recording of a consent is not an automatic disentitlement to costs, the "event" must come out clearly from the compromise in order to enable the Court determine who the successful party is otherwise the Court's determination on costs would be based on speculation and

conjecture yet the Court is required to determine with certainty who is the successful party in the proceedings.

20. Apart from that the effect of the consent order recorded herein is that the parties herein will continue partnering in a student/teacher relationship. In my view the applicant needs the services of the School for the sake of his future. That kind of a relationship should be natured by promoting reconciliation between the parties rather than antagonising them. The effect of awarding costs in these proceedings would be to expose the school to execution proceedings by the applicant and in my view such proceedings would be inimical to the letter and spirit of Article 159(2)(c) of the Constitution.

21. It is in this context that I associate myself with the object of awarding costs as restated in **Vinod Seth vs. Davinder Bajaj Civil Appeal No. 4891 of 2010** where it was held that:

> **"We must remember that whatever the origin of costs might have been, they are now awarded, not as a punishment of the defeated party but as a recompense to the successful party for the expenses to which he has been subjected, or, as Lord Coke puts it, for whatever appears to the Court to be the legal expenses incurred by the party in prosecuting his suit or his defence…The theory on which the costs are now awarded to a plaintiff is that default of the defendant made it necessary to sue him, and to a defendant is that the plaintiff sued him without cause; costs are thus in the nature of incidental damages allowed to indemnify a party against the expense of successfully vindicating his rights in court and consequently the party to blame pays costs to the party without fault. These principles apply, not merely in the award of costs, but also in the award of extra allowance or special costs. Courts are authorised to allow such special allowances, not to inflict penalty on the unsuccessful party, but to indemnify the successful litigant for actual expenses necessarily or reasonably incurred in what are designated as important cases or difficult and extraordinary cases."**

22. Apart from the foregoing it is clear that these proceedings were not properly intituled. In the Notice of Motion filed herein the person who appears as the applicant is not the Republic but **Richard Brian Wekesa**. In judicial review applications, the applicant is always the Republic rather than the person aggrieved by the decision sought to be impugned. See **Farmers Bus Service & Others vs. Transport Licensing Appeal Tribunal [1959] EA 779.**

23. The rationale for this was given in **Mohamed Ahmed vs. R [1957] EA 523** where it was held:

> **"This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioners' offices and in some registries of the High Court. The appellant's advocate appears to have failed entirely to realise that prerogative orders, like the old prerogative writs, are issued in the name of the crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be intituled and served accordingly. The Crown cannot be both applicant and respondent in the same matter".**

24. In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486 Ringera, J** (as he then was) expressed himself as follows:

> **"Prerogative orders are issued in the name of the crown and applications for such orders must be correctly intituled and accordingly, the orders of *Certiorari, Mandamus* or Prohibition are issued in the name of the Republic and applications therefore are made in the name of the Republic at the instance of the person affected by the action or omission in issue and the proper format of the substantive motion for *Mandamus* is:-**
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> **"REPUBLIC……..…….....APPLICANT**

THE ELECTORAL COMMISSIONOF KENYA……RESPONDENT.

EX PARTE

JOTHAM MULATI WELAMONDI"

25. However in **Republic Ex Parte the Minister For Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005** the Court of Appeal stated:

> **"Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court".**

26. This Court has however held on numerous occasions that it is entitled to take the improper intitutling of judicial review applications in making a decision with respect to award of costs.

27. Accordingly, the order which commends itself to me and which I hereby grant is that there shall be no order as to costs.

28. It is so ordered.

Dated at Nairobi this 27th day of September, 2016.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mrs Kinyanjui for the Applicant

Miss Maina for the Respondents

CA Mwangi/Gitonga