



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**  
**MISC. APPLICATION NO. 30 OF 2016**  
**(CONSOLIDATED WITH JR NO. 10 OF 2016)**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**-VERSUS-**

**THE PUBLIC PRIVATE PARTNERSHIPS**

**PETITION COMMITTEE**

**(THE PETITION COMMITTEE).....1<sup>ST</sup> RESPONDENT**

**KENYA PORTS AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**AND**

**COSCO PACIFIC LIMITED WITH**

**PARAMOUNT BANK CONSORTIUM.....1<sup>ST</sup> INTERESTED PARTY**

**EX PARTE:**

**INTERNATIONAL CONTAINER TERMINAL**

**SERVICES, INC (ICTSI) AND COSCO PACIFIC LIMITED**

**RULING**

1. By a Motion dated 29<sup>th</sup> January, 2016, the ex parte applicant herein, **International Container Terminal Services, Inc (ICTSI)**, sought an order of certiorari to remove into this Court and quash the 1<sup>st</sup> Respondent’s decision made on 15<sup>th</sup> December, 2015 in Petition No. 2 of 2015 – APM Terminals BV vs. Kenya Ports Authority in relation to the tender for operating, equipping and managing Phase 1 of the Second Container Terminal Port of Mombasa being Tender No. KPA/125/2014-15/CS. In particular the order which was sought to be quashed was compelling the “review of Stage 1 (preliminary evaluation) submissions by all bidders, strictly in accordance with requirements of Cause 5.2 of the Data Sheet of the ITB with items 1-4 being minor requirements and the components included in the Envelope A remaining

mandatory”.

2. According to the ex parte applicant the 1<sup>st</sup> Respondent arrived at a decision which was procedurally and substantively ultra vires, unfair and unreasonable as it sought to compel the 2<sup>nd</sup> Respondent to adopt a criteria not envisaged in the Tender Document.

3. On 17<sup>th</sup> August, 2016, during the pendency of these proceedings, the 2<sup>nd</sup> Respondent cancelled the tender thus rendering these proceedings no longer tenable.

4. Whereas all the parties had no objection to the proceedings being marked as withdrawn, the 1<sup>st</sup> applicant insisted on being paid the costs of the proceedings. It is the issue of costs that falls for determination in this ruling.

5. Section 58(5) of the Public Private Partnership Act provides that where a tender is cancelled under the section, the bidders of the tender are not entitled to compensation for the said cancellation. That section empowers a contracting authority to cancel a tender process at any time before the execution of the contract. *Black's Law Dictionary* 9<sup>th</sup> Edn. page 322 however defines “compensation” as “payment of damages, or any other act that a court orders to be done by a person who has caused injury to another”. “Taxable costs” is however defined at page 399 thereof as “a litigation related expense that the prevailing party is entitled to as part of the court’s award”. It follows that as opposed to compensation which are damages, costs are a reimbursement of expense. Accordingly the Court is not barred from awarding costs even where a contracting authority cancels a tender. What the Court is barred from awarding are damages arising from such cancellation.

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

7. 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.*

8. 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”.

9. 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.

10. 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 1<sup>st</sup> 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.”*

11. 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 Janmohamed & Sons vs. Twentsche Overseas Trading Co. Ltd [1967] EA 287** and **Mulla (12<sup>th</sup> Edn) P. 150.**

12. 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.

13. 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.”

14. 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.”

15. In this case the proceedings were initiated by the applicants. However what provoked these proceedings was the decision of the 1<sup>st</sup> Respondent. Whether or not the 1<sup>st</sup> Respondent’s decision was right cannot be determined by this Court. It was however not the act of the 1<sup>st</sup> Respondent that rendered these proceedings untenable. Whereas the termination of these proceedings was as a result of an action on the part of the 2<sup>nd</sup> Respondent, it was not its decision that provoked these proceedings. In the premises the 1<sup>st</sup> Respondent cannot be penalised in costs. On the other hand since the decision that aggrieved the applicants was not made by the 2<sup>nd</sup> Respondent, the 2<sup>nd</sup> Respondent cannot be penalised in costs either.

16. In the premises, it is my view that this is a matter in which the costs ought to lie where they fall.

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

18. It is so ordered.

**Dated at Nairobi this 17<sup>th</sup> day of November, 2016.**

**G V ODUNGA**

**JUDGE**

*Delivered in the absence of the parties*

*CA Mwangi*