



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS CIVIL APPLICATION NO. 447 OF 2008

REPUBLICAPPLICANT

VERSUS

KENYA PORTS AUTHORITY RESPONDENT

EX PARTE

GRAIN BULK HANDLERS LIMITEDEX PARTE APPLICANT

AND

COAST SILOS LIMITED INTERESTED PARTY

RULING

INTRODUCTION

1. This is an application for costs of the suit made by the Interested Party for award of the costs of the suit that it incurred in defending the suit, which was finally withdrawn by consent of the ex parte applicant and the respondent, subject to determination on the issue of costs.
2. The history of the matter is that the respondent published a notice inviting expression of interest licensing of a second grain bulk handling facility at the Port of Mombasa in the Daily Nation Newspaper of **22nd September 2008**. The ex parte applicant, being aggrieved by this action filed the application for judicial review on **2nd October 2008**, and obtained stay of the process pending the hearing of the application.
3. Two days later, on **4th October 2008**, the respondent placed a notice in the same newspaper cancelling the first notice of **22nd September 2008**. The substantive motion dated **21st October 2008** was nevertheless filed thereafter.
4. Sometime later, on **28th November 2008**, the Interested Party sought leave and was enjoined as a party to the suit. The Interested Party applied by Notice of Motion dated **3rd March 2009** to have the leave and stay granted to the applicant to be vacated. The application was dismissed with costs to the Respondent.

5. The main motion was set down and heard before Hon. Justice Ibrahim (as he then was) on diverse dates from 4th November 2009 to 4th May 2011 when it was adjourned to a later date for the applicant to confirm whether it would withdraw its application. On 22nd March 2012, the Notice of Motion dated 21st October 2010 was withdrawn before the court, all orders granted there-under vacated, and parties consented to address the court on the issue of costs.

6. The ex parte applicant and the respondent are agreeable to each bearing their own costs. The Interested Party on the other hand seeks an award for costs.

SUBMISSIONS

7. The Interested Party's counsel, Mr. Odipo, contended that it is entitled to all costs of the suit and disbursements for taking part in the proceedings, resulting in huge legal costs. The court was urged to consider that in *Jesse Mburu Gitau & 3 Others vs. AG* (2003) eKLR, it was stated that the principle that costs follow the event was based on the justice that the successful party should not except where he is at fault be denied costs. The interested party considers itself to be the successful party in this case, since the applicant's consent to withdraw the proceedings was the Interested Party's goal.

8. For the ex parte applicant, Mr. Mogaka submitted that the Interested Party is not deserving of costs, since they invited themselves into the suit knowing full well that the respondent had by then withdrawn the notice against which review was sought, thereby destroying the substratum of the suit; that the interested party had not sought any relief against the respondent and, therefore, cannot be taken to have succeeded in the matter; and that the interested party's application for setting aside of the leave of court and stay granted to the ex parte applicant had been dismissed and, despite a notice of appeal given, no appeal had been filed against the decision.

9. Mrs Ikegu for the respondent opposed the prayer for costs contending that the Respondent was not served with the substantive motion herein and did not take part in any of the proceedings since the notice that gave rise to the judicial review proceedings had been cancelled before the respondent was served with any order for stay. It was further submitted that the Interested Party did not seek any orders against the respondent and therefore could not maintain a claim for costs against the said Respondent.

10. The full text of submissions by counsel is set out below:

"Mr. Odipo

I am ready to make oral submissions. We filed written submissions on 27.8.2013.

*The applicant filed Judicial Review against Kenya Ports Authority which was withdrawn. We came with the proceedings because brokers were going to affect us. I rely on **Jesse Mburu Gikau vs Attorney General** (2003) eKLR. Costs to follow the event. We filed the proceedings by a successful application of 28.11.2008. he parties later withdrew the suit but we are not a party to the withdrawal. I believe we had a good case. We pray for costs. If we had not filed the case orders would have been negative and affected us adversely. the applicant and the respondent should both pay our costs. The applicant should be liable for the costs incurred by the Interested Party. I will apply the decision in **Jesse Mburu**.*

Mrs. Ikegu for the Respondent

Submissions dated 12.9.2012. Chronology of events for the court to appreciate the matter. The suit arose from a notice published on a daily of 22.9.2008. The applicant filed suit on 2.10.2008, obtaining leave for Judicial Review and leave operating as stay. On 4.10.2008, the Respondent cancelled the notice of 22.9.2008. The applicant did not serve any Notice of Motion pursuant to leave. The Interested Party filed an application to be joined a month after the cancellation of the notice. The two parties, the application

and the Interested Party kept fighting. We made it clear that there was no dispute and therefore nothing to fight about. The substratum of the dispute no longer existed after the cancellation of the notice on 22.9.2008. We also were never served with notice of motion and we did not take any active part in the proceedings and we did not understand why the parties were in court over two years when there was no dispute. We urge that each party pay its own costs. On 18.3.2011 the matter was mentioned before Ibrahim J. and the applicant indicated intention to withdraw with no orders as to costs. There is a consent order of 22.3.2012 before Kasango, J before the applicant withdrew the application. We pray that each party meets its costs.

Mr. Mogaka for the applicant

I agree that each party should bear its own costs. The court was satisfied that parties were served with the notice of motion. On one occasion, Mr. Kyandhi indicated that KPA shall not be participating in the proceedings.

The question before the court. The application filed on 2.10.2008 challenging a decision of 22.9.2008. On realising that stay had been granted, KPA published a cancellation of the notice of 4.10.2008. They did not come to court to challenge the stay. I refer to the Cooperative case; they should have come to court to challenge the stay. They never said anything to the court. That is not the way to litigate by withdrawing the offending notice and not coming to court to challenge the proceedings.

The interested party was challenging the stay. The formal application for leave of 22.11.2008. they challenged the stay. Even after the stay they did not achieve anything. The court dismissed the application discharged the leave and stay. The application also sought the dismissal of the notice of motion. The application is dated 16.2.2009. the efforts of the Interested party failed.

At p.19 of the notice of motion, the interested party knew the KPA had withdrawn the suit and subtraction has been destroyed. Why participate in the proceedings? After withdrawal of 4.10.2008, the interested party came to court after 1 month after event. What orders were going to affect them. KPA had invited tenders and later terminated the invitation for tender. It is not the ex parte applicant who terminated the tender KPA says that they were never served with the order until the 7.4.2008. The KPA submissions shows that it is not the order which made them cancel the notice. It is not the ex parte applicant that withdrew the tender.

The interested party are not seeking KPA to reinstate the tender. The interested party just seek to veto the termination of proceedings without costs for no reason. The interested party have not filed any suit against KPA.

Decision of Nyamu J. the orders were not likely to affect them. Although they had tendered KPA had withdrawn the invitation before the order of the court was served. Grain Bulk did not terminate the subtraction of the suit. It is KPA that destroyed the substructure. The interested party came into the proceedings after the termination of the invitation. A party cannot participate in an illegality and then seek to benefit from the participation.

The ruling of 24.7.2009. They actually filed a notice of appeal but did not pursue but instead continued to participate. The court had on 24.7.2009, the court was aware that substratum had been destroyed. It is not true that interested party pointed out the page about the substratum had been destroyed. Pp. 144 – 145 the Judge raised the issue of substratum of the proceedings. The interested party is as guilty as all the parties. They are not the ones who pushed the court to take the view that the substratum of the suit had been destroyed. The interested party had no good case.

Even after termination of the suit the interested party wanted the KPA to proceed with the invitation. At p. 23 of their application, they say that the cancellation of the notice was politically motivated. The ex parte applicant should therefore not be punished by costs. In these proceedings the interested party was not seeking any relief in the proceedings. They only relief they sought was dismissed with costs to the ex parte applicants. I rely on the written submissions. I pray for the order that seek party to ber its costs.

Mr. Odipo

The **Trusted Society for HR v. Mumo Matemo** does not apply the matter. The relief: it does not mean that if a party does not seek a relief he is not entitled to costs.

The case went on after the notice of cancellation of the invitation. The interested party was not a party to the withdrawal of the suit. The party litigated over 4 years. The ex parte applicant should have withdrawn the case in 2008 when the notice cancelled the invitation. It does not matter that the interested party came into the proceedings one month after the cancellation of the notice the interested party was joined by an order of the court and the suit went on for 4 years. The dismissal of the interested party's application was interlocutory and is no way determined the main matter. It indicates that there was a good case to to be heard until the end.

Mrs. Ikegu

KPA was not aware of the stay. We were served on 7.10.2008 and which was served on 4.10.2008. We came to court and indicated that we did not wish to participate as the substratum had been destroyed following the cancellation of the notice. We did not understand the continuation of the distance after the cancellation. the interested party came to court after over 1 month under certificate of urgency yet there was nothing to challenge after cancellation. There was no substance in the suit.”

DETERMINATION

11. As a general principle under section 27 of the Civil Procedure Act, costs follow the event. Section 27 of the Act provides as follows:

“(1) 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

aforsaid; 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.”

The principle of ‘costs follow the event’

12. In the Court of Appeal case of **Devram Nanji Dattani vs Haridas Kalidas Dawda**, Civil Appeal No. 11 of 1949, (1949) 16 EACA 35, Sir John Gray, CJ. stated that “[A] successful defendant, **who after all is brought into court against his will**, can only be deprived of his costs when it is shown that his conduct, either prior to or during the course of the action, has led to litigation, which but for his own conduct might have been averted.”

13. In my view, with respect, it does not matter how a party joins the suit – whether by original joinder by

the applicant as a defendant or respondent, or by leave of court subsequently. What matters is that the Court found that the party had an interest or is a necessary party in the matter justifying his joinder in the suit. If such party turns out to be the successful party, he should be entitled to costs on the basis of the principle that costs follow the event. It is a question only of occurrence of the event which crystalizes costs for the successful party.

14. In **Republic v. Senior Principal Magistrate, Mombasa and Ors. Ex-Parte Nicholas Katumo Peter** Mombasa Misc. Civil Application (JR) No. 65 Of 2013, in considering the principle that costs follow the event, I held that –

*“The court must consider that litigation as with other legal business is costly in terms of time, money, inconvenience and the opportunity cost while attending to the court matter, and a party who by conduct **causes another to seek relief in court** or who seeks court’s intervention upon grounds that the court ultimately dismisses as unmeritorious must be ready to meet the costs incurred by the other party in seeking the court’s intervention or in defending himself or protecting his interest in the subject matter. **The successful party is entitled to the costs in accordance with the principle that costs follow the event. The law as set out in section 27 of the Civil Procedure Act requires good reasons for departing from the said principle.**”*

15. I respectfully agree with Nyamweya, J. in the case of *Thomas Gitau Njogu & 4 Others v. Patrick Waruinge Muhindi & 2 others* [2013] eKLR that success of the case is the primary consideration in an award of costs and that in determining the successful party in an order by consent of the parties, consideration of the nature of the consent is necessary. In that decision the learned judge held that:-

*“[T]he only material event under section 27 of the Civil Procedure Act is the success or otherwise of a suit. Fault is only material when it comes to exercise of the courts discretion whether or not to award costs due to a successful party on account of their conduct. **It is also my view that it is not always given that in a Consent there will be a successful and unsuccessful party. To determine the successful party in a consent order the court will need to examine the content and nature of the said consent in relation to the pleadings by the parties.**”*

See also the Court of Appeal decision in **Singh v. Qurbanlite Ltd** (1985) KLR 920 that the discretion of the court is to be exercised on the basis of the extent of success of the case.

CONCLUSION

Which was the successful party?

16. In the present circumstances, I have considered the following matters as determinant in my decision on costs:

1. The suit was concluded by way of a consent - to which the Interested Party was not a party - to withdraw the motion. However, by the time the motion was withdrawn the subject matter had been overtaken by events - owing to the cancellation of the offending notice by the respondent.
2. The interested party sought to be enjoined as parties to this suit by their own volition after the offending notice had been cancelled. Their interest in the matter was that of a potential competitor to the applicant, but they could not have placed their bid since the notice for expression of interest was cancelled. The claim of costs cannot be a compensation for loss of opportunity to express interest in the grain handling facility so the claim for costs on assertion that cancellation of notice was politically motivated cannot hold. The Interested Party could only be considered to have been the successful party had its application for setting aside of leave and discharge of stay granted to the ex parte applicant been granted.
3. Moreover, this was not an application by the Interested Party against the respondent for an order compelling it to invite tenders or other related relief. The Interested Party’s success could only be

- measured against the realisation of an order of court reinstating the respondent's notice or directing the respondent to invite tenders in which exercise the Interested Party would have participated. There was no such prayer before the court. In these circumstances, the Interested Party cannot be taken to have succeeded in its goal. It cannot be the successful party in the suit.
4. It is, however, not necessary for a party to be successful that it should have sought various reliefs which are granted. There is success for a party when relief sought against it or its interests is dismissed by the court. But nothing turns on that distinction in this case.
 5. As it happened, it is the ex parte applicant who triumphed in having the offending notice removed. The Respondent had withdrawn the publication before the order for stay and documents in the judicial review proceedings was served on it. But the ex parte applicant had come to court to protest the notice. With such a justifiable cause to approach the court, upon which it obtained leave to file judicial review proceedings and an order for stay, the subsequent cancellation of the notice and removal of the substratum of the suit – whether as a consequence of the court orders or not – the proceedings must be taken to have been in favour of the ex parte applicant and it must, therefore, be considered to have succeeded in the litigation to the extent that the impugned notice had been cancelled after the filing of the suit by the ex parte applicant. It is the respondent's conduct in publishing the notice inviting the tenders that caused the ex parte applicant, considering itself aggrieved, to file the suit, which was successful to the extent that leave of court and an order for stay were granted by the court.
 6. The parties to the consent just withdrew the dispute from the determination of the court before it was heard and determined on the merits, and after the withdrawal of the notice which prompted the suit. There was, accordingly, no successful party on the merits of the case and, therefore, no basis for an award of the full costs to any party in the suit.
 7. There would be a case for the grant of costs of the ex parte Chamber Summons for leave to file judicial review proceedings, as the notice of cancellation came after the institution of the proceedings and grant of leave to file the judicial review proceedings, albeit without service of the stay order upon the respondent, but as the ex parte applicant and the respondent agree that each party should bear its own costs, the ex parte applicant must be taken to have waived its right to such costs.

ORDERS

17. Accordingly, for the reasons set out above, the court makes an order that each party bears its own costs.

DATED AND DELIVERED THIS 27TH DAY OF MARCH 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

No appearance for the Applicant

Mr. Kyandi for the Respondent

Mr. Gichana for Mr. Taib for the Interested Party

Ms. Linda - Court Assistant.