



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JUDICIAL REVIEW CASE NO. 466 OF 2014

BETWEEN

REPUBLIC

VERSUS

KENYA NATIONAL HIGHWAY AUTHORITY.....1ST RESPONDENT

THE KASARANI POLICE STATION DTO.....2ND RESPONDENT

THE TRAFFIC COMMANDANT.....3RD RESPONDENT

HONOURABLE ATTORNEY GENERAL.....4TH RESPONDENT

EX PARTE KANYINGI WAHOME

RULING

Introduction

1. In these proceedings the ex parte applicant sought orders prohibiting the 1st, 2nd and 3rd Respondents from detaining the ex parte applicant's PSV vehicle KAZ 720E or removing its number plates. He further sought an order of mandamus compelling the 2nd and 3rd Respondents to release the said vehicle, Certificates of Motor Vehicle Inspection Report in respect of the same vehicle.

2. However on 18th December, 2014 the parties herein agreed that the said vehicle be released not later than 5 p.m. on 20th December, 2014. However, due to what the ex parte applicant deemed failure to comply fully with the orders it was seeking especially with respect to production of the said certificates, the matter could not be brought to a closure immediately. One such document was however handed over on 10th February, 2015 by counsel for the 2nd, 3rd and 4th Respondents. Following the revelations that there were no other documents to be submitted, on 27th May, 2015, the *ex parte* applicant withdrew the case against the 1st Respondent but insisted that the 2nd to 4th Respondent ought to bear the costs of the application.

Determination

3. This ruling is therefore limited to the issue of the costs of these proceedings.

4. 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.

5. 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”.

6. 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.

7. 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.”

8. 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 (12th Edn) P. 150.**

9. It was submitted by the applicant that since the 2nd to 3rd Respondents did not file replying affidavits, none of the factual bases of the Motion were contested.

10. It was the applicant's position that the Applicant's Motion having been effectively settled as sought the ex parte applicant was entitled to costs.

11. The 2nd to 4th Respondents on the other hand submitted that since the parties recorded a consent releasing the vehicle and the matter was subsequently settled by the grant the prayers sought by consent, the allegations that the 2nd to 4th Respondents did not reply to the application should be ignored as filing of the same was rendered unnecessary.

12. It was submitted that costs are not awarded as a matter of right and the grant or denial thereof is discretionary and must be exercised judicially and judiciously not capriciously, nor whimsically and upon defined legal principles.

13. Based on **Rufus Njuguna Miringu & Another vs. Martha Muriithi & 2 Others [2012] KLR** it was submitted that the material event referred to in section 27(1) of the *Civil Procedure Act* being the result of the proceedings, it is the successful party in the result who is normally awarded costs. However where parties have settled the matter by consent, the consent cannot be interpreted to mean that one or the other party has succeeded in a suit as the successful determination is attributable to both parties. In the Respondents' view the issue of the conduct does not arise in such circumstances.

14. 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. The section in my view does not make distinctions between determinations made by consent or on Court's own determination. This position is appreciated by **Justice (Rtd) Kuloba** in *Judicial Hints on Civil Procedure* where it is stated:

“...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 taken into account if other good reason exists”.

15. 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.”

16. 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.”

17. In this case, it is admitted even from the 2nd to 4th Respondents’ submissions that “all the prayers sought in the Application were granted by consent”. The applicant came to Court precisely for the grant of the said orders. Therefore “the event” for the purposes of the costs is the determination which in this case was the success of the ex parte applicant’s claim as demonstrated by the resultant consent.

18. 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.

19. However this Court in **Republic vs. Kenya National Highway Authority & 3 Others ex parte Alice Wanjiku Mwaura JR Case No. 458 of 2014** held that:

“...since the respondents have made the applicant’s work easier by not taking her through the submissions of an otherwise hopelessly un-defendable application, the 2nd Respondent will bear half the costs of the applicant”.

20. Therefore considering that the 2nd to 4th Respondents conceded the application without a hearing it is only fair that the Court ought not to be too hard on them. Such gesture ought to be encouraged.

21. I accordingly award half of the costs to the Applicant to be borne by the 2nd to the 4th Respondents.

22. It is so ordered.

Dated at Nairobi this 28th day of July, 2015.

GV ODUNGA

JUDGE

Delivered in the presence of:

Mr Munene for the Respondents

Cc Patricia