REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW CASE NUMBER 472 OF 2014

BETWEEN

REPUBLIC……APPLICANT

VERSUS

COMMUNICATION AUTHORITY OF KENYA….....….RESPONDENT

AND

FINSERVE AFRICA LIMITED..….....…….....…….INTERESTED PARTY

EX PARTE LEGAL ADVICE CENTRE aka KITUO CHA SHERIA

RULING

1. The issue for determination in this ruling is by whom the costs of this application ought to be paid.
2. What provoked these proceedings was a decision by the Respondent to authorize the use of the thin SIM technology by the Interested Party in the mobile money telephony communication sector in Kenya. The Applicant, which describes itself as a Non-Governmental Organization registered as such under the ***Non-Governmental Organizations Co-ordination Act*** whose stated objectives include fighting for social justice, constitutionalism and the rule of law as well as engagement in public interest litigation instituted these proceedings seeking substantially an order of certiorari to quash the said decision.
3. The said application was based substantially on the ground that following the publicity around the foregoing authorization, many members of the public visited the Applicant organization and raised legitimate concerns regarding the security of the information of their already subsisting mobile phone devices, the ability of the thin SIM to intercept their PIN numbers and bank account details arising from the mode of operation of the thin SIM technology. Pursuant to these complaints, the Applicant undertook a detailed research into the antecedents and the activities subsequent to the authorization by the Respondent for the Interested Party to use the thin SIM technology. It was contended that the said authorisation was made before the Respondent was satisfied as to the security of the Thin Sim technology.
4. When the matter came up for hearing on 9th November, 2015, **Mr Ongoya**, learned counsel for the Applicant applied to withdraw these proceedings and pleaded with the Court not to penalise the Applicant on costs. According to learned counsel the decision to withdraw these proceedings was informed by the decision of **Mr Justice Lenaola** in **High Court Nairobi Petition Number 503 of 2014 - Bernard Murage vs. Finserve Africa Limited & 3 Others** since, in learned counsel's view it would be difficult to invite this court to reach a decision contrary to the one

reached in the said case.

5. According to **Mr Ongoya**, the matters the subject of these proceedings were technical and not straightforward and so the question was not an idle one hence to punish the applicant with costs when the applicant presented an important question for consideration by the Court would discourage litigants from testing the same. It was submitted that the applicant is a Public Benefit Organisation and not a player in the telecommunications sector and was unlikely to commence litigation with a view to achieving private goals. Having granted ex parte orders in favour of the applicant, it was submitted that this Court appreciated that the issue to be determined were not trivial.
6. On the issue of similarities of the cause herein and in **Bernard Murage vs. Finserve Africa Limited & 3 Others** (supra) it was submitted that the applicant herein was not a party to the said proceedings. However, the applicant has withdrawn these proceedings due to the respect for jurisprudence in the said case and urged this Court to be guided by the Court's approach to costs in the said case where the Court declined to award costs. To learned counsel this Court ought to take into account the unique circumstances of this case and as an incentive to the parties not to penalise the Applicant in costs.
7. On his part **Mr Wambua Kilonzo** who appeared with Miss Okimaru for the Respondent while lauding the move taken by the Applicant to withdraw the Application was of the view that the Respondent deserved to be awarded costs. Learned Counsel drew the Court's attention to the fact that there were two interlocutory applications which were filed and determined by this Court. Subsequently, the Respondent responded to the Application by filing a replying affidavit and submissions both of which were voluminous which was indicative of the industry put in by the Respondent. He submitted that the Respondent, a public body, had taken the trouble to instruct counsel and that the judgement of **Lenaola, J** aforesaid having been handed down in May 215 the Applicant had ample opportunity to make a decision earlier on. While acknowledging the role of the applicant, leaned counsel argued that in the circumstances of this case, the decision to institute these proceedings was ill thought hence it was only fair that the Respondent be restituted.
8. On his part, **Mr Ochieng** learned counsel for the interested party while associating himself with the Respondent's position added that since the costs follow events and as the effect of the withdrawal of these proceedings is that the interested party is a successful party, it ought to be awarded costs. He submitted that though the dispute was between the Applicant and the Respondent, the interested party was dragged into the proceedings in a matter in which the issues were similar to those in ***Murage Case***. He similarly contended that the interested party had spent time and energy and incurred expenses in opposing the matter. To him the matter herein had nothing to do with public interest and was purely a commercial matter.
9. I have considered the foregoing submissions.
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:

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 this case the proceedings were initiated by the applicant. Just before the hearing, the applicant withdrew the same. In the normal course of events a withdrawal of proceedings amounts to a determination thereof in favour of the respondents thereto and pursuant to the provisions of section 27 aforesaid the respondents would be entitled to costs. See **Joseph Oduor Anode vs. Kenya Red Cross Society [2012] eKLR**.
15. However, in this case the event which led to the withdrawal, according to the Applicant, was the decision by this Court in the ***Murage Case*** (supra). In an earlier ruling delivered in this matter I did find that the issues in controversy in both matters were substantially the same. However the Applicant was saved by my finding that in both proceedings the claimants were not litigating under the same title. However **Lenaola, J** proceeded to dismiss the ***Murage Case***. As rightly submitted by **Mr Wambua**, the Applicant ought to have been put on notice and ought to have immediately taken remedial measures in order not to subject the Respondents and the interested party to anxiety and the agony of having to prepare for the case. Although this Court did set aside the stay granted herein thus alleviating to some extent the Respondent's and interested party's agony, all the same the fact that litigation was still alive must have exerted some measure of anxiety on their part. I however cannot say that had this matter gone to full hearing I would have necessarily associated myself with the decision of **Lenaola, J**. Whereas a decision of a Court of concurrent jurisdiction is entitled to respect, the Court is not bound therewith. As appreciated by ***F.A.R Bennion MA on Statutory Interpretation*, Fourth Edition Butterworths** from pages 135

and 433 and particularly the last paragraph of page 434**:**

"..... Although of course the courts of this country are bound by the doctrine of precedent, sensibly interpreted, nevertheless it would be irresponsible for judges to act as automations (sic), rigidly applying authorities without regard to consequences. Where therefore it appears at first sight that authority compels a judge to reach a conclusion which he senses to be unjust or inappropriate, he is, I consider under a positive duty to examine the relevant authorities with scrupulous care to ascertain whether he can, within the limits imposed by the doctrine of precedent (always sensibly interpreted), legitimately interpret or qualify the principle expressed in the authorities to achieve the result which he perceives to be just or appropriate in the particular case".

16. However, where a persuasive decision reflects the true legal position there would be no basis for a Court of concurrent jurisdiction to form a different opinion. **Benjamin Cardozo's,** in ***'The Nature of the Judicial Process',*** **New Haven; Yale University Press (1921) p. 149** opines:

"In these days, there is a good deal of discussion whether the rule of adherence to precedent ought to be abandoned altogether. I would not go so far myself. I think adherence to precedent should be the rule and not the exception. I have already had occasion to dwell upon some of the considerations that sustain it. To these I may add that the labour of judges would be increased almost to breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."

17. The House of Lords similarly held in **R vs Knuller (Publishing, Printing and Promotions) Ltd (1973) A.C 435** :

"It was decided by this House in Shaw vs Director of Public Prosecution [1962] A.C 220 that conspiracy to corrupt public morals is a crime known to the law of England…I dissented in Shaw's case. On reconsideration I still think that the decision was wrong and I see no reason to alter anything which I said in my speech. But it does not follow that I should now support a motion to reconsider the decision. I have said more than once in recent cases that our change of practice is no longer regarding previous decision of this House as absolutely binding does not mean that whenever we think that a previous decision was wrong we should reverse it. In the general interest of certainty in the law we must be sure that there is some very good reason before we so act… I think that however wrong or anomalous the decision may be it must stand and apply to cases reasonably analogous unless or until it is altered by Parliament."

18. I also associate myself with the decision of **Lord Wilberforce** in **Fitzleet Estates vs Cherry (1971) 1 WLR 1345**, where he expressed himself as follows;

"Nothing could be more undesirable, in fact, than to permit litigants, after a decision has been given by this House with all appearance of finality, to return to this House in the hope that a differently constituted committee might be persuaded to take the view which its predecessors rejected …[D]oubtful issues have to be resolved and the law knows no better way of resolving them than by the considered majority opinion of the ultimate tribunal. It requires much more than doubts as to the correctness of such opinion to justify departing from it."

19. Accordingly, a Court ought only to depart from its earlier findings, if there is a substantial cause and in exceptional circumstances. I however wish to say no more on the matter as this case was not determined on its merits.
20. In determining the issue of costs, the Court is entitled to look at the conduct of the parties, the subject of litigation and the circumstances which led to the institution of the legal proceedings and the events which eventually led to their termination. 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. See **Hussein Janmohamed & Sons vs. Twentsche Overseas Trading Co. Ltd [1967] EA 287**

and ***Mulla (12th Edn) P. 150.***

21. It is clear that the Respondents acknowledged the wisdom of withdrawing these proceedings without subjecting them to the rigours of a hearing and further anxiety and agony during the pendency of the judgement.
22. This Court in determining the case ought to consider the conduct of the parties and the nature of the proceedings. Although the respondents contended that this was not a public interest litigation and was in fact meant to advance some private interests, there is no evidence on the basis of which I can determine that issue. From the pleadings filed, the applicant's case was that it was moved by complaints made to it by the mobile phone subscribers who were apprehensive of the effect of the Thin Sim technology on their confidential information. I cannot find that that was not the case based on the material before me. That the Applicant is an organisation whose objectives include fighting for social justice, constitutionalism and the rule of law as well as engagement in public interest litigation was appreciated by the Respondents.
23. I, however must emphasise that where such a body institutes litigation which is not geared towards the achievement of its objectives but meant to advance the interests of some other sectarian groups not related to its mandate, such litigation, if unsuccessful may well invite the wrath of the Court when it comes to costs. Public Interest litigation ought to be instituted for the purposes of vindicating public rights and ought not to be annexed for the purposes of advancing collateral purposes.
24. In this case, I do not have material to find either way.
25. I have considered the conduct of the Applicant herein and whereas I agree that the Applicant could have terminated these proceedings earlier on, it is my view that this Court ought not to take dim view of the Applicant's efforts in realising its objectives which are no doubt meant for the general public good unless it is shown that its action was uncalled for. I am not convinced that the Applicant by instituting these proceedings stood to reap any personal benefits from the outcome of these proceedings. As was held by the Supreme Court in **Jasbir Singh Rai & 3 others vs. Tarlochan Singh Rai & 4 others [2014] eKLR:**

"So the *basic rule* on attribution of costs is: costs follow the event. But it is well recognized that this principle 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 suit. In Justice Kuloba's words [*Judicial Hints on Civil Procedure,* at p.94]:

> **"[T]he object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure…Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action."**

26. The Court continued:

It is clear that there is *no prescribed definition* of any set of "good reasons" that will justify a Court's departure, in awarding costs, from the general rule, costs-follow-the-event. In the classic *common law style*, the Courts have proceeded 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. In *Amoni Thomas Amfry and Another v. The Minister for Lands and Another*, Nairobi High Court Petition No. 6 of 2013, Majanja, J concurred with the decision in *Harun Mwau and Others v. Attorney-General and Others*, Nairobi High Court Petition No. 65 of 2011, [2012] eKLR, in which it was held [para.180]:

> **"In matters concerning public-interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed. Costs should therefore not be imposed on a party who has brought a case against the State but lost. Equally, there is no reason why the State should not be ordered to pay costs to a successful litigant."**

27. In conclusion the Supreme Court held:

> **"It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the *judiciously-exercised discretion of the Court,* accommodating the *special circumstances of the case,* while being guided by *ends of justice.* The *claims of the public interest* will be a relevant factor, in the exercise of such discretion, as will also be the *motivations and conduct of the parties*, prior-to, during, and subsequent-to the actual process of litigation."**

28. Similarly in ***Halsbury's Laws of England,*** 4th ed Re-Issue (2010), Vol. 10, para. 16 it is stated:

> **"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 award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice."**

29. Therefore having considered the foregoing, as the application to withdraw these proceedings was not opposed I hereby allow the same and order that these proceedings be and are hereby withdrawn with no order as to costs.
30. It is so ordered.

Dated at Nairobi this 18th day of November, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Achoki for Mr Ongoya for the ex parte applicant

Mrs Kinara for Mr Kilonzo for the Respondent

Miss Ndirangu for Mr Kimani for the interested party

Cc Patricia