



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW CASE NO. 365 OF 2014

IN THE MATTER OF TRANSGLOBAL CARGO CENTRE LIMITED

AND

IN THE MATTER OF KENYA AIRPORTS AUTHORITY ACT, CAP 395 LAWS OF KENYA

AND

IN THE MATTER OF AN EXTENDED CONCESSION AGREEMENT FOR GROUND HANDLING SERVICES AT JOMO KENYATTA INTERNATIONAL AIRPORT

BETWEEN

REPUBLIC APPLICANT

VERSUS

KENYA AIRPORTS AUTHORITY.....

RESPONDENT

KENYA AIRWAYS LIMITED 1ST INTERESTED PARTY

KENYA AEROTECH LIMITED 2ND INTERESTED PARTY

TRADEWIDS AVIATION LIMITED 3RD INTERESTED PARTY

EUROCRAFT AGENCIES LIMITED 4TH INTERESTED PARTY

SWISSPORT KENYA LIMITED 5TH INTERESTED PARTY

EX PARTE TRANSGLOBAL CARGO CENTRE LIMITED

RULING

1. By a Motion dated 29th September, 2014, the ex parte applicant herein, **Transglobal Cargo**

Centre Limited, sought the following orders:

2. To that application the Respondent, the 1st, 2nd, 3rd, 4th and 5th interested parties filed replying affidavits urging the Court to dismiss the same. There were two further affidavits sworn and filed on behalf of the ex parte applicant together with submissions. The respondents and interested parties similarly filed their submissions and on 8th July, 2015, this Court fixed the application for hearing by way of highlighting submissions on record on 13th October, 2015.
3. However by a Notice dated 31st July, 2015 filed the same day, the ex parte applicant herein intimated an intention to withdraw the application but with no order as to costs. That notice was opposed by way of affidavits by the interested parties.
4. On 13th October, 25 when the matter came up for hearing, **Mr Ibrahim**, learned counsel for the ex parte applicant brought to the Court's attention the said notice of withdrawal. While **Mr Angwenyi**, learned counsel for the Respondent did not object to the withdrawal, **Mr Ouma**, who was holding brief for **Mr Mugo** for the interested parties however opposed the notice which objection was however overruled by this Court on the basis that the Court could not compel an applicant to prosecute an application which it had no intention of proceedings with. The Court could only express its displeasure where appropriate by an award of costs. The Court then directed the parties concerned to file and exchange submissions on the issue of costs. It is the decision on costs which forms the subject of this ruling.
5. I have considered the submissions made on behalf of the ex parte applicant and the interested parties herein.
6. 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.

7. 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”.

8. 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.
9. 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.”

10. 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.**
11. 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.
12. 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.”

13. 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."

14. In this case the proceedings were initiated by the applicant. Before the proceedings could be determined in the normal manner, 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. This was the position adopted by **Sergon, J** in **Stephen Chege Waweru vs. Ephantus Mwangi & Others Nyeri HCCC No. 173 of 2008** where he expressed himself as follows:

"There is no dispute that the Plaintiffs filed this suit. The plaint and the summons were served upon the defendants. A defence and counterclaim was filed to resist the plaintiff's suit. In fact the plaintiffs filed an answer to the defence to the counterclaim. There is no denial that the plaintiffs unilaterally filed a notice of withdrawal of the suit and by the time of filing the notice of withdrawal, the defendant had incurred money in hiring an advocate to defend the suit. The proviso to section 27 of the Civil Procedure Act clearly states that 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 plaintiffs are the ones who filed this suit thus prompting the Defendants to engage the services of an advocate to defend themselves. It is clear from the prayers in the Plaint that the plaintiffs had asked for costs at the end of the suit. On their part, the defendants asked for the suit to be dismissed with costs. There is no peculiar reason which should make the court deny the defendants costs. The court is convinced costs should follow the event."

16. I associate myself with that position.

17. In this case no reasons were advanced for withdrawing the application. In the ruling dated 24th October, 2015 in this matter, this Court expressed itself *inter alia* as follows:

"From the application itself it is clear that the cause of action arises from an alleged Ground Handling Concession Agreement which the Respondent has purportedly declined to finalise so as to extend the operations to all licensed transit shed operators hence promoting monopolistic tendencies. It is alleged that the Respondent is conducting itself in a discriminatory manner. Prima facie, it is evident that there are some players in the sector who it is being alleged are being treated in a preferential manner to the detriment of the applicant. The documents filed herein mention certain entities among them the intended interested parties as those whom the Respondent has licensed to do ground handling. In my view, to hear and determine these proceedings without bringing the said parties on board when allegations are made that they are the beneficiaries of the Respondent's alleged differential treatment would amount to abetting the very conduct which the applicant complains of – selective treatment of persons without considering the positions of the other players in the subject undertaking. In the premises I am of the view that not only are the intended interested parties persons directly affected by these proceedings but that they ought to be joined to these proceedings in the interest of justice thus they have satisfied the criteria under Order 53 rule 3(2) and (4) of the Civil Procedure Rules. [Emphasis added].

18. It is therefore clear that the interested parties were not mere joyriders in these proceedings but were parties who stood to be affected by the grant of the orders sought herein. It is not alleged that

they by their conduct have become disentitled to the costs of these proceedings which they opposed and have been terminated in their favour by the prayers which would have adversely affected them not being granted. It does not matter whether the termination of the proceedings are by an order of the Court or by consent as long as the event is favourable to the party seeking costs. Therefore absent any mitigating factors, there is no basis for denying the interested parties costs.

19. Accordingly, I award the costs of these proceedings to the interested parties to be borne by the ex parte applicant.

20. It is so ordered.

Dated at Nairobi this 17th day of December, 2015.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Wanjohi for Mr Ibrahim for the Applicant

Mr Ouma for the interested parties

Cc Mutisya