



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CIVIL APPLICATION NO. 274 OF 2013

REPUBLIC.....APPLICANT

VERSUS

THE MEDICAL PRACTITIONERS AND DENTIST BOARD.....RESPONDENT

AND

JOHN PAUL ODERO

(ON BEHALF OF THE LATE SYBIL MASINDE).....1<sup>ST</sup> INTERESTED PARTY

DR BARTILOL KIGEN.....2<sup>ND</sup> INTERESTED PARTY

DR GERALD MONIZ.....3<sup>RD</sup> INTERESTED PARTY

EX PARTE: THE KENYA HOSPITAL ASSOCIATION

**RULING**

1. The issue for determination in this ruling is by whom the costs of this application ought to be paid.
2. It is on all fours that this application was conceded to by the respondent before the same could be heard.
3. On 3<sup>rd</sup> March, 2014, the applicant applied to have the application withdrawn. The withdrawal of the application was apparently occasioned by the fact that the Respondent had conceded.
4. On behalf of the applicant it is contended that it is entitled to costs of the application since the costs follow the event and the filing of these proceedings was occasioned by the failure on the part of the Respondent to follow the law relating to the handling of the complaints. It was contended that in bringing these proceedings the applicant did not act unreasonably hence ought not to be deprived of the costs.
5. In support of its position the applicant relied on **Cooper vs. Whittingham 15 Ch.D 501, 507**, **First American Bank of Kenya vs. Shah and Others [2002] 1 EA 64**, **Harrison vs. Leutner [1881] 16 Ch. D 559** and **Abdulrehman Haji Suleman & Others vs. Bhadurali Khetsi Hansray & Another [1964] EA**.
6. On behalf of the 1<sup>st</sup> interested party, it was submitted that the Court has an open ended mandate to ensure justice is done and that section 27 of the ***Civil Procedure Act*** gives the Court absolute discretion to make orders as to costs.
7. It was submitted that since these proceedings were withdrawn after the applicant had brought the parties to these proceedings which parties had hired advocates who attended and incurred costs, the Court ought to award the 1<sup>st</sup> interested party costs as compensation for the burden placed on him. In support of the submissions the 1<sup>st</sup> interested party relied on **Ngui Mulangu vs. Ndeto Mutvu [2009] eKLR**.
8. On behalf of the Respondents it was submitted that though section 27 of the Civil Procedure Act gives the general rule as to costs, the rule is subject to the Court's discretion and the factors to be considered as such factors as the special circumstances of the case, public interest, motivations and the conduct of parties prior to, during and subsequent to the actual process of litigation as well as the interest of justice hence a part has no right to costs until the Court awards the same. It was submitted that since the applicant withdrew the application it is not entitled

to costs. Further since the matter is still under inquiry by the Board of the PCC as a result of the applicant's negligent acts together with the 2<sup>nd</sup> and 3<sup>rd</sup> interested parties, the same may well be subject of future litigation.

9. The court was urged to consider the fact that the proceedings herein were compromised and the applicant did not get the exact orders it was seeking so as to entitle it to costs.

10. In support of its submissions the Respondent relied on **Dr Andrew Kibet Cheruiyot Another vs. The Medical Practitioners and Dentists Board and 2 Others Petition No. 260 of 2013, Jasbir Singh Rai & 3 Others vs. Tarlocan Singh Rai & 4 Others [2014] eKLR, Judicial Hints on Civil Procedure**, 2<sup>nd</sup> Edn. by Richard Kuloba.

11. 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.*

**12. 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”.**

13. 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.

14. 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 DlaminiNO.(144/2010) [2013] SZHC30 (2013)*Maphalala J. referred to the holding of *Murray C J in the case ofLevben 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 (*FrippvsGibbon & 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.”**

15. In this case the proceedings were initiated by the applicant. Before the proceedings could be determined the applicant withdrew the same. In the normal cause 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**.

16. However, in this case the event which led to the withdrawal was the Respondents concession. 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 (12<sup>th</sup> Edn) P. 150**.

17. In this case it is true that the event which led to the withdrawal of these proceedings was the Respondent's concession. Therefore strictly speaking the “event” in relation to the costs ought not to be the withdrawal of the proceedings but the concession by the Respondents. The

Court is however entitled to consider the conduct of the parties. In this case, the Respondent threw in the towel when the proceedings were still in its infancy. Even the Motion had not been filed and the records do not show that even leave had been granted. In other words judicial review proceedings proper had not yet been commenced. It is therefore important to properly understand at what stage in judicial review proceedings are the said proceedings properly deemed to have been commenced. Judicial Review, are mandatorily required as a matter of law to be commenced by way of leave. Accordingly Order 53, rule 1(1) of the **Civil Procedure Rules** provides:

***No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.***

18. The word “leave” is defined by **Black’s Law Dictionary**, 9<sup>th</sup> Edn. at page 974 as “*Judicial permission to follow a non-routine procedure*”. “Leave” is clearly therefore a permission to take a particular judicial procedure and in this case it is permission to commence judicial review proceedings.

19. It is therefore clear that an application for judicial review is not made until after leave is granted. If the grant of leave was to be construed as an application for judicial review, it would in my view constitute an absurdity. If the Rules Committee was of the view that an application for leave constitute the suit as is contended by the objector, the said Committee would in my view have used the phrase such as “***an application for an order of mandamus, prohibition or certiorari shall be commenced by leave***” or similar provision.

20. The issue is, however not moot. The Court of Appeal in **R vs. Communications Commission of Kenya & 2 Others Ex Parte East Africa Televisions Network Ltd. Civil Appeal No. 175 of 2000 [2001] KLR 82; [2001] 1 EA 199** held that proceedings under Order 53 can only start after leave has been obtained and the proceedings are then originated by the notice of motion filed pursuant to the leave granted. Similarly in **Matiba vs. Attorney General Nairobi H.C. Misc. Application No. 790 of 1993** it was held by a three Judge bench of this Court that it is consequent upon leave being granted that an application is brought. In **Mike J. C. Mills & Another vs. The Posts & Telecommunications Nairobi HCMA No. 1013 of 1996**, this Court held that application for leave does not commence judicial review until such permission is granted to institute appropriate Judicial Review application.

21. Therefore both on the letter of the law and on authorities, judicial review proceedings are commenced after leave therefore is granted. It is not disputed that the application did not go past the stage of the application for leave to commence judicial review proceedings. It follows that the application for judicial review proper had not been commenced as the application was still-born.

22. I have considered the conduct of the Respondent in conceding to the application in the early stages of the proceedings, the fact that the Respondent was investigating a complaint placed before them rather than that it stood to reap any personal benefits from the said proceedings, the interest of the public therein as well as the fact that the matter has not been finally determined. As was held by the Supreme Court in **Jasbir Singh Rai & 3 others v 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.”**

23. 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.”**

24. 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.”**

25. Similarly in **Halsbury’s Laws of England**, 4<sup>th</sup> 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.”**

26. Therefore having considered the foregoing, the order which commends itself to me in respect of costs and which I hereby make is that each party ought to bear own costs of these proceedings.

27. It is so ordered.

**Dated at Nairobi this 23<sup>rd</sup> day of October 2014**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Miss Maathai for the Applicant**

**Miss Awinja for Mr Munga for the Respondent**

**Miss Mutunga for the 1<sup>st</sup> Interested Party**

**Cc Patricia**