



Muhammad & another v Kenya Copyright Board & 2 others; Kenya Association of Music Producers & 2 others (Interested Parties) (Judicial Review Application E107 of 2023) [2025] KEHC 4229 (KLR) (Judicial Review) (1 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4229 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E107 OF 2023**

RE ABURILI, J

APRIL 1, 2025

BETWEEN

HATIBU ABDALLA MUHAMMAD 1ST APPLICANT

LINCOLN KARIUKI MWANIKI 2ND APPLICANT

AND

KENYA COPYRIGHT BOARD 1ST RESPONDENT

**THE CABINET SECRETARY YOUTH AFFAIRS, SPORTS &
ARTS 2ND RESPONDENT**

THE HONOURABLE ATTORNEY GENERAL 3RD RESPONDENT

AND

KENYA ASSOCIATION OF MUSIC PRODUCERS INTERESTED PARTY

PERFORMER RIGHTS SOCIETY OF KENYA INTERESTED PARTY

MUSIC COPYRIGHT SOCIETY OF KENYA INTERESTED PARTY

RULING

1. A brief background of the matter before this Court is that the Applicants filed a judicial review application on 8th August 2023 seeking leave to file for judicial review orders of certiorari, prohibition, and mandamus against the Respondents. The main contention was that the 1st Respondent, Kenya Copyright Board had renewed and/or issued Certificates of Registration to the Interested Parties even though the 2nd Respondent, Cabinet Secretary for Youth Affairs, Sports and Arts had not appointed a Board of Directors for it.



2. This Court, in its Ruling delivered on 8th August 2023, granted the Applicants leave and directed that the applicants file and serve their substantive Notice of Motion within 7 days. The Respondents and Interested Parties were also directed to file and serve their responses within 7 days of the date of service of the substantive Notice of Motion.
3. The matter was mentioned on 2nd October 2023. However, by that date, neither of the respondents or interested parties had complied with the Court's directives and the court enlarged the period for compliance, directing that those responses be filed within 7 days. The court also gave directions on filing and service of written submissions. A date for highlighting of submissions was set for 6th December 2023. However, when the matter came up for highlighting, it emerged that no responses had been filed.
4. The matter was again fixed for hearing on 6th March 2024. However, on that date, the Court (Judge Ngaah) was on leave. Subsequently, the matter was mentioned on 20th May 2024, and on this day, the Applicants sought for the matter to be marked as withdrawn, as the application had been overtaken by events. Counsel for the 1st and 2nd Interested Parties, Mr. Okubasu, intimated that they were seeking costs, and as such, this ruling addresses the issue of costs only.
5. The issue of costs was canvassed by way of written submissions. The Applicants filed written submissions dated 15th July 2024, contending that, based on the events leading to the withdrawal of the suit, the Interested Parties are not entitled to costs. They refer to section 27 of the *Civil Procedure Act*, which provides 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, order otherwise."
6. According to the Ex parte Applicants, the Certificate issued on 5th May 2023, which the Applicants sought to quash, expired on 31st December 2024. Additionally, that the Board whose appointment was being sought had already been appointed.
7. The Applicants submit that, by the time the Notice of Motion was withdrawn, none of the parties had filed responses. They further note that only the 3rd Respondent filed a response to the Chamber Summons dated 3rd August 2023, but that since the application was ex parte, it did not require any response.
8. The Applicants rely on the case of Joseph Oduor Anode v. Kenya Red Cross Society [2012] eKLR, where the court observed that costs are typically awarded to the winning party unless the court decides otherwise, with such reasons clearly documented in the court record.

Interested Parties' Submissions

9. The 1st and 2nd Interested Parties filed written submissions dated 11th October 2024 in which they also refer to section 27 of the *Civil Procedure Act* and note that, although the award of costs is discretionary, it is guided by principles set out in various judicial pronouncements. According to them, one such principle is that the party who initiated the event by instituting the suit would bear the costs if the suit failed. Conversely, that if the party showed legitimate cause by successfully prosecuting the suit, the defendant or respondent would bear the costs. They rely on Cecilia Karuru Ngayu v. Barclays Bank of Kenya & Credit Reference Bureau Africa Ltd [2016] KEHC 7064 (KLR) in support of this argument.
10. The Interested Parties contend that they are entitled to costs, as the Applicants filed the instant suit despite being aware that a similar suit had already been determined. They argue that, despite this, the Applicants insisted on proceeding with the case. They further assert that they had to instruct advocates



to enter appearance and defend the suit on their behalf and that, since the matter had been set down for hearing, they are entitled to getting-up fees.

11. They also rely on the case of *Party of Independent Candidates of Kenya v. Mutula Kilonzo & 2 Others* [2013] eKLR, where the court observed that it would be unreasonable for the Respondents to bear their own costs after having instructed counsel and attended court as required. A similar position was held in *Kofinaf Company Limited & Another v. Nahashon Ngige Nyagah & 20 others* [2017] eKLR.
12. The 3rd Interested Party also filed written submissions dated 15th July 2024, relying on the case of *Republic v. Rosemary Wairimu Munene Ex-Parte Applicant v. Ihururu Dairy Farmers Co-operative Society Limited* [2014] eKLR, where it was held that the principle that costs follow the event is not meant to penalize the losing party but to compensate the successful party.
13. The 3rd Interested Party also relies on the case of *Haraf Traders Limited v. Narok County Government* [2022] eKLR, where the court outlined factors to be considered in awarding costs, including the conduct of the parties, the stage at which the proceedings were terminated, and the broader constitutional goal of promoting reconciliation and accountability pursuant to Article 159(2)(c) of *the Constitution*.
14. The 3rd Interested Party argues that the Applicants' delays rendered the case redundant, and that despite these delays, they had filed a response and were ready to be heard. They also refer to *In the Matter of the Council of Governors; Senate & another (Interested Parties)* [2014] eKLR, where it was noted that counsel should advise their clients when similar matters are pending before the court.

Analysis & Determination

15. I have considered the submissions by counsel. The key issue for determination is whether the Interested Parties are entitled to costs.
16. Section 27(1) of the *Civil Procedure Act* provides that the award of costs is in the discretion of the court, with the general principle being that "costs follow the event" unless the court, for good reason, orders otherwise. This discretion must, however, be exercised judiciously.
17. In *Rai & 3 others v. Rai & 4 others* [2014] KESC 31 (KLR), the Supreme Court emphasized that while costs normally follow the event, courts have the discretion to depart from this principle for compelling reasons, including the conduct of the parties and the stage at which the withdrawal occurs.
18. Costs are in the discretion of the court, yet, follows the event. See the *Halsbury's Laws of England*; 4th Edition (Re-issue), [2010], Vol.10. para 16 that:

“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 to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice” (Emphasis added).



19. In Judicial Hints on Civil Procedure, 2nd Edition, (Nairobi) Law Africa) 2011, page 94 Justice (Retired) Kuloba observes that: -
- “Costs are {awarded at} the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise...”
20. “Good reasons” that justifies departure from the general rule that ‘costs follow the event’ will vary from case to case. The court in *Rai & 3 others v. Rai & 4 others supra* observed that:
- “There was no prescribed definition of any set of good reasons that can 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 that question show that, as an example, matters in the domain of public-interest litigation tend to be exempted from the award of costs.”
21. From the jurisprudence in this area of law, the exercise of discretion on costs depends on the facts of each case, and is guided by the principle that costs should follow the event unless the court orders otherwise. Such circumstances as are relevant include:
- i. the conduct of the parties;
 - ii. the subject of litigation;
 - iii. the circumstances which led to the institution of the proceedings;
 - iv. the events which eventually led to their termination;
 - v. the stage at which the proceedings were terminated;
 - vi. the manner in which they were terminated;
 - vii. the relationship between the parties; and
 - viii. the need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of *the Constitution*; (ix) public interest.
22. Thus, the exercise of judicial discretion in awarding costs must be guided by established jurisprudence to ensure fairness, reasonableness, and adherence to justice.
23. In the present case, it is clear that the Applicants’ conduct does not reflect malice, delaying tactics, or abuse of process. On the contrary, they acted responsibly by withdrawing the matter once it became evident that the substantive issues had been overtaken by events, namely the appointment of the Board and the expiry of the contested certificates.
24. It is also evident from the record, as discussed above, that the Interested Parties themselves failed to comply with court timelines on multiple occasions by not filing their responses. This contributed to procedural delays and tempers their argument that they incurred unnecessary legal costs.
25. As seen from the application and the affidavit and statutory statement in support, the Applicants’ case relates to governance, accountability, and procedural compliance in the issuance of certificates by a public body. Given this broader public interest, it cannot be viewed as a private dispute but rather as one involving institutional oversight and public concern.



26. In their pleadings, the Applicants, as members of the Interested Parties, raised legitimate concerns regarding the legality of certain administrative actions, particularly the issuance of certificates without a properly constituted Board. Their decision to initiate these proceedings was grounded on genuine questions of governance.
27. The subsequent resolution of these issues through the appointment of the Board and the natural expiration of the contested certificates was therefore beyond the applicants' control. This justified their voluntary and timely withdrawal of the matter.
28. Although it is contested that the Applicants were aware of a similar suit that had been heard and determined, no evidence has been adduced before this court and it is therefore this court's opinion that the applicants withdrew the case promptly upon recognizing that the issues had been overtaken by events, reflecting procedural diligence rather than any vexatious or frivolous intent.
29. As evidenced by the proceedings although the matter was coming up for the substantive hearing when the Applicants sought to withdraw the same, none of the parties other than the 3rd Interested Party had filed their responses. We can safely say that the costs that the Interested Parties claim to have incurred owing to court attendances was occasioned by their failure to comply with court directions.
30. Another factor that this court ought to consider is the relationship between the parties. It is noted that there is no evidence of animosity or misconduct between the Applicants and the Interested Parties. If anything, the Applicants' statutory statement in support of their application describes them as members of the Interested Parties, underscoring their shared interest. In this context, awarding costs could undermine the constitutional directive under Article 159(2)(c), which emphasizes reconciliation as a core objective in dispute resolution.
31. Public interest also plays a pivotal role in this case. The Applicants sought judicial review to address perceived gaps in the governance of a public body whose administrative action affects many artists in Kenya and in this Court's humble opinion, this is a matter of public significance. Courts have consistently held that genuine public interest litigation warrants special consideration, as seen in *Rai & 3 others v. Rai & 4 others* [2014] KESC 31 (KLR).
32. Awarding costs in public interest cases could deter future litigants from raising similar concerns, thereby limiting judicial oversight on issues of public concern.
33. In light of these principles, and based on the specific facts and circumstances of this case, the Court finds that a departure from the general rule that "costs follow the event" is warranted.
34. therefore, balancing fairness, public interest and the constitutional imperatives of accountability, reconciliation, and access to justice, the Court holds that each party shall bear their own costs of these proceedings which were withdrawn at the earliest opportunity as the subject matter was spent.
35. This file is therefore closed.

DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY THIS 1ST DAY OF APRIL 2025

R.E. ABURILI

JUDGE

