



Peesam Limited v Public Procurement Administrative Review Board & 2 others (Miscellaneous Application E060 & E064 of 2025 (Consolidated)) [2025] KEHC 4966 (KLR) (Judicial Review) (25 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4966 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
MISCELLANEOUS APPLICATION E060 & E064 OF 2025 (CONSOLIDATED)**

JM CHIGITI, J

APRIL 25, 2025

BETWEEN

PEESAM LIMITED APPLICANT

AND

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD 1ST RESPONDENT

THE ACCOUNTING OFFICER, KENYA REVENUE AUTHORITY 2ND RESPONDENT

KENYA REVENUE AUTHORITY 3RD RESPONDENT

RULING

Brief background;

1. On 22nd April 2025 The Applicant herein made an oral application to withdraw its application dated 11th March 2025 with no orders as to costs. The same was allowed by consent save for the fact that the 2nd and 3rd Respondents insisted that this Court should award them costs.
2. The oral application was premised on the fact that on 11th April 2025, the Court of Appeal in Civil Appeal No. E145 of 2025 made an order setting aside the Judgment and Orders of this Honourable Court made on 21st February 2025 (“Court of Appeal Judgment”).



The Ex-parte Applicants in E60 of 2025 case;

3. It is their submission that The Court of Appeal Judgment and Orders in Court of Appeal in Civil Appeal No. E145 of 2025 meant that there were no further or valid proceedings after the judgement of this court issued on 21st February 2025 was set aside.
4. It is its case that before the Court of Appeal Judgment, no party to these proceedings could have foretold the outcome of the Court of Appeal Judgment as a result of which all parties proceeded on the basis of Judgment of 21st February 2025.
5. The 1st Respondent (the Board) proceeded to implement the Judgment of this Honourable Court of 21st February 2025, and gave its Decision on 28th February 2025. Being dissatisfied with the Board's Decision of 28th February 2025, the Applicant, in exercise of its right of access to justice, moved this Honourable Court on 11th March 2025 and challenged the Board's Decision of 28th February 2025.
6. The Applicant had a right seek judicial review of the 1st Respondent's decision of 28th February, 2025 even during the pendency of the appeal at the Court of Appeal since the 1st Respondent had proceeded to re-hear the matter and even as a result of the decision of the 1s Respondent issued on 28th February 2025, the 2nd and 3rd Respondent proceeded to terminate the subject tender on account of the decision of the 1st Respondent even when they had filed an appeal.
7. The 2nd and 3rd Respondents cannot therefore condemn the Applicant to pay costs where they filed this application after the appeal was filed. It is their case that there were no any stay orders that were obtained by the 2nd and 3rd Respondents to stop the applicant from challenging the decision of the 1st Respondent vide the current proceedings pending the hearing and determination of the appeal.
8. All parties therefore proceeded on the assumption that all the proceedings herein were valid and proper until the Court of Appeal's Judgment and Order of 11th April 2025 when it became obvious, given the Court of Appeal's Judgment and Order, that the pendency of these proceedings was untenable.
9. Whereas the 2nd and 3rd Respondent's argue that the principle is that costs follow the event, they fail to complete the principle which states that costs follow the event unless for good reason the Court orders otherwise.
10. The "costs follow the event" principle means that the successful party in a lawsuit is generally awarded their legal costs, while the losing party is responsible for their own legal fees and, often, those of the successful party. This principle aims to compensate the successful party for the expenses incurred in prosecuting or defending the case, not to penalize the losing party.
11. The applicant submits that the practice of this Honourable Court in procurement matters has always been to order that each party meets its own costs for litigation.

The Applicant's Written Submissions on Costs in E64 of 2025

12. It is it's case that on 11th April 2025, the Court of Appeal in Civil Appeal No. E145 of 2025 made an order setting aside the Judgment and Orders of this Court made on 21st February 2025 which meant that there were no further or valid proceedings after 21st February 2025 upon which the Originating Motion dated 11th March 2025 filed herein would have been anchored.
13. It is submitted that before the Court of Appeal Judgment, no party to these proceedings could have foretold the outcome of the Court of Appeal Judgment. As such, all parties proceeded on the basis of this Honourable Court's Judgment of 21st February 2025.



14. In particular, the Board proceeded to implement the Judgment of this Honourable Court of 21st February 2025, gave its Decision on 28th February 2025, and being dissatisfied with the Board's Decision of 28th February 2025, the Applicant, in exercise of its right of access to justice, moved this Honourable Court on 11th March 2025 and challenged the Board's Decision of 28th February 2025.
15. It is important to also note that the Respondents also moved this Honourable Court and all parties filed their responses to the proceedings on the basis that the proceedings before the Board and the Board's Decision of 28th February 2025 were valid.
16. The Respondents defended the Decision of the Board. The 2nd and 3rd Respondent's even moved this Honourable Court by their Notice of Motion Application dated 17th March 2025 and the Applicant's responded to the said Application.
17. All parties therefore proceeded until the Court of Appeal's Judgment and Order of 11th April 2025 when it became obvious, given the Court of Appeal's Judgment and Order, that the pendency of these proceedings was untenable.
18. The "costs follow the event" principle means that the successful party in a lawsuit is generally awarded their legal costs, while the losing party is responsible for their own legal fees and, often, those of the successful party. This principle aims to compensate the successful party for the expenses incurred in prosecuting or defending the case, not to penalize the losing party.
19. It is their submission that the event in these proceedings was the withdrawal of the proceedings on the basis of the Court of Appeals Judgment which the Applicant never expected. The withdrawal was as a matter of cause ensuing from the Orders of the Court of Appeal, rather than as a loss in their arguments in these proceedings.
20. As such, no party has lost or won in these proceedings and no party should be condemned to pay costs for the withdrawal of these proceedings.
21. It is their case that The Court of Appeal in its Judgment of 17th April 2025 exercised discretion and allowed the 2nd and 3rd Respondent's Appeal with costs on the basis that they were successful.
22. It is further their case that in consenting to do so, parties have saved precious judicial time.

The 2nd and 3rd Respondents case;

23. It is their case that on 22nd April 2024, the Applicant sought to withdraw the suit with no orders as to costs, following the Court of Appeal's decision of 11th April 2025 in Nairobi Civil Appeal NoE145 of 2025.
24. They believe that they should be compensated for the time, effort and expertise expended to defend the suit and prepare for hearing. It is their case that the matter is being withdrawn after the Respondents have filed responses and submissions and matter having been heard and submissions highlighted on 9th April 2025.
25. The Applicants are withdrawing the suits as a result of the outcome in Nairobi Civil Appeal No. E045 of 2025, since the Appeal herein cannot be sustained in the face of the Court of Appeal judgement.
26. Consequently, the Applicant's withdrawal is essentially a loss and costs should follow the event, and be awarded to the Respondents as the successful party unless the court for good reason orders otherwise.
27. It is their case that the Applicants were aware of the court of appeal proceedings that was filed long before the current applications and the merits of the appeal pending before the Court of appeal.



28. Reliance is placed on the cases of *Joseph Oduor Anode v Kenya Red Cross Society*, Nairobi High Court Civil Suit No 66 of 2009; [2012] eKLR; and *Rai & 3 others v Rai & 4 others* [2014] KESC 31 (KLR); and *Kuloba, R., (Ed) (2011) Judicial Hints on Civil Procedure Nairobi: Law Africa 2nd Edn p 94*. 6. Mackay, JPH., (Baron of Clashfern) (Ed) (1991) *Halsbury's Laws of England London: LexisNexis Butterworths 4th Edn Re-Issue Vol 10 para 16* is instructive on the Court's discretion on costs in general, where it was stated 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. If the court decides to make an order about costs the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but the court may make a different.
29. They also rely on Nairobi Civil Appeal No. E1011 of 2024 is instructive. Nairobi Civil Appeal No. E1011 of 2024 was the Respondent's appeal against the High Court's decision of 21st December 2024 at the Court of Appeal.
30. They invite the court to note that, the Applicant has already taxed the costs and a ruling dated 17th April 2025 rendered by the Court of Appeal awarding Kshs. 215,712/=.

Analysis and determination:

31. The Court has looked at the rival submissions and the history of the suits. The only issue that forms the subject of this ruling is costs.
32. In *Halsbury's Laws of England, 4th ed Re-Issue (2010), Vol. 10, para. 16*:

"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" [emphasis supplied].
33. In *Joseph Oduor Anode v. Kenya Red Cross Society*, Nairobi High Court Civil Suit No. 66 of 2009; [2012] eKLR Odunga, J. thus observed:

"...whereas this Court has the discretion when awarding costs, that discretion must, as usual, be exercised judicially. The first point of reference, with respect to the exercise of discretion is the guiding principles provided under the law. In matters of costs, the general rule as adumbrated in the aforesaid statute [the *Civil Procedure Act*] is that costs follow the event unless the court is satisfied otherwise. That satisfaction must, however, be patent on record. In other words, where the Court decides not to follow the general principle, the Court is enjoined to give reasons for not doing so. In my view it is the failure to follow the general principle without reasons that would amount to arbitrary exercise of discretion ..." [emphasis supplied].



34. The *Civil Procedure Act* (Cap. 21, Laws of Kenya), the primary law of judicial procedure in civil matters, thus stipulates (Section 27(1)):

“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 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” [emphases supplied].

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]:

“The 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.”

35. 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.

36. The court is further guided by the case of *Morgan Air Cargo limited v Evrest Enterprises Limited* wherein it was held that in determining the issue of costs, the court should take into consideration the following factors:

- a. the conduct of the parties
- b. the subject of litigation
- c. the circumstances which led to the institution of the proceedings
- d. the events which eventually led to their termination
- e. the stage at which the proceedings were terminated
- f. the manner in which they were terminated
- g. the relationship between the parties and
- h. The need to promote reconciliation amongst the disputing parties pursuant to Article 1 (c) of *the Constitution*.

37. All the parties herein proceeded on the basis of this Honourable Court’s Judgment of 21st February 2025 wherein The Board proceeded to implement the Judgment of this Honourable Court of 21st February 2025, giving its Decision on 28th February 2025.



38. Being dissatisfied with the Board's Decision of 28th February 2025, the Applicant, in exercise of its right of access to justice, moved this Honourable Court on 11th March 2025 to challenge the Board's Decision of 28th February 2025.
39. There is no way the Parties would have known of the Court of Appeal's outcome at the time parties exchanged pleadings and attended court for the highlighting of the submissions.
40. On its part, given that this was a procurement case that is strapped in the 45 days statutory clock under the Public procurement and Assets Disposal Act, the court allowed the parties to proceed up to the submissions phase pending the determination of the Appeal since there was no order for the stay of the proceedings.
41. The parties consented that this was the ideal way to proceed and they conducted themselves in a professional way as each pursued justice in the court.

Disposition:

42. This court in exercise of its discretion is of the view that it can depart from the principle that costs follow the event in the circumstances of this case.
43. In so holding the court is guided by the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR [13] it was held, to the same intent Mr. Justice (Rtd.) Kuloba thus writes in his work, *Judicial Hints on Civil Procedure*, 2nd ed. (Nairobi: Law Africa, 2011), p. 94:

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: *Chamilabs v. Lalji Bhimji and Shamji Jinabhai Patel*, High Court of Kenya, Civil Case No. 1062 of 1973.”

Order:

Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25RD DAY OF APRIL, 2025.

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J. CHIGITI (SC)

JUDGE

