



Kagiri v Business Registration Service; Mwangi (Interested Party) (Judicial Review E083 of 2023) [2025] KEHC 6078 (KLR) (Judicial Review) (15 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6078 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW E083 OF 2023
JM CHIGITI, J
MAY 15, 2025**

BETWEEN

BEATRICE WAIRIMU KAGIRI APPLICANT

AND

THE BUSINESS REGISTRATION SERVICE RESPONDENT

AND

TABITHA WAMBUI MWANGI INTERESTED PARTY

RULING

This a ruling in relation to the costs of the suit.

The Exparte Applicant's submissions

1. On the 2nd December 2024, the Exparte Applicant sought leave of this Honourable Court to withdraw the instant suit premised on the fact that the substratum of the suit had ceased to exist.
2. The Exparte Applicant's request for withdrawal was informed by the fact that vide a Judgment dated and delivered by this Honourable Court on the 7th October 2024 in Nairobi JR NO. E184 of 2023, quashed in its entirety the Interested Party's Complaint Letter dated 15th May 2023 to the Respondent herein and various other government agencies as being ultra vires and void ab-initio.
3. It is noteworthy that the same letter dated 15th May 2024 to various government agencies lay at the crux of the instant suit.
4. Having been quashed by this Honourable Court, it was the Exparte Applicant's submission that the substratum of the instant suit has been taken away rendering the proceedings herein a mere academic exercise.



5. It is also worth noting that the said letter dated 15th May 2023 was purportedly authored by a Non-Governmental Organization called Social Watch at the behest of the Interested Party herein alleging the Exparte Applicant had fraudulently altered the company records of St. John Junior School Njiru Limited.
6. Under section 27 of the *Civil Procedure Act*, Cap 21 of the laws of Kenya which provides thus:

“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. Reliance is placed in the Supreme Court in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR:

“.....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 for 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.”
8. Reliance is also placed in the case of *Sonko-vs-Clerk, County Assembly of Nairobi City & 12 others* (Petition 14(E021) of 2021) (2022] KESC17 (KLR) the court held inter-alia that:

“Having so stated, we note from the record that the petition was withdrawn before the respondents filed any responses or substantive submissions to the appeal save for the 7th respondent who filed a notice of preliminary objection. The appeal, at the time of withdrawal was not ripe for hearing. While applying the principle in *Jasbir Singh Rai* that costs normally follow the event, has an event to which costs would follow materialized? The answer is in the negative. Such an event has not happened.

We note that the applicant’s appeal did not proceed as the occurrence of the event that would have led to the applicant being successful crystallized as the 11th respondent was sworn in as Governor of Nairobi County. We therefore come to the conclusion that each party shall bear its costs before this court.”
9. It invites the court to look at the peculiar circumstances of each case and particularly the actions, motivations and conduct of the privy parties prior to, during and subsequent-to the actual process of litigation.



10. They submit that it is without a shadow of doubt that the Interested Party's letter dated 15th May 2023 and which lay at the crux of the instant suit, was tainted with gross mala fides and a callous stratagem to mislead not only this Honourable Court but also the Registrar of Companies.
11. Further that the said NGO, Social Watch, is alive to the jurisdictional limitations of its own license but nevertheless hurriedly drafted the said complaint letter to various government institutions thus necessitating the filing of the instant suit by the Exparte Applicant.
12. It is further its case that apart from the Respondent herein filing a preliminary objection, the Interested Party herein who now seeks costs, had not even filed any response to the substantive Notice of Motion application dated 10th July 2023 before the matter was withdrawn by the Exparte Applicant.
13. They submit that the "event" occurred for the simple reason that the substantive Notice of Motion dated 10th July 2023 did not proceed to hearing and was withdrawn with leave of this Honourable Court on the 2nd December 2024.

Interested Party's Case

14. The Interested Party relies on Section 27 of the Civil Procedure Act which provides that costs shall follow the event. This Section is specifically couched in the following terms: -
 - “(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 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.
 - (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.”
15. It is stated that the Learned Judge went ahead and found that the Interested Party in this matter was entitled to costs, where he stated: -

“We submit that the Interested Party is entitled to costs as demonstrated below:

Events

These Judicial Review Proceedings were initiated by the Applicant on 3rd July 2023.

5. The Interested Party was adversely mentioned in the Ex- Parte Application dated 3rd July 2023.
6. Upon learning of this suit together with Court Orders given on 4th July 2023, the Interested Party filed an Application for Joinder dated 8th November 2023.



7. Vide a Ruling delivered on 31st January 2024, this Honourable Court found that the Interested Party has an interest in this suit and subsequently allowed the Motion for Joinder.

8. On the same day of the Ruling, the Applicant herein, sought leave to file a Notice of Preliminary Objection (P.O) challenging jurisdiction of this Honourable Court.

The P.O was filed on 29th January 2024.

9. On 15th July 2024, the Court directed the 13.0 to be canvassed by way of written Submissions.

On 2nd December 2024, the Applicant intimated to the Court that she wished to withdraw the Suit.

Consequently, the Court was pleased to withdraw the Suit subject to Costs hence these Submissions.”

16. Reliance is also placed in Judicial Review Case No. 365 of 2014 Republic v Kenya Airports Authority & 4 others Exparte Transglobal Cargo Centre Limited [20151] eKLR, where the Learned Judge opined as follows: -

“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.’

“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.

Accordingly, I award the costs of these proceedings to the interested parties to be borne by the Ex parte applicant. It is so ordered.” (Emphasis mine.)

Analysis and determination:

17. The Court has looked at the rival submissions and the history of the suits. 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].

18. 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].

19. 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].

20. 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 objects 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.”

21. 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.

22. 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:

- 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 1 (c) of *the constitution*.
23. In the instant suit, the parties conducted themselves in a professional way as each pursued justice in the court.
24. 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.

Disposition:

25. This court in exercise of its discretion is of the view that it can depart from the principle that costs follow the event.
26. 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: LawAfrica, 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.”
27. 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*.
28. In the instant suit, the outcome was informed by the need to promote alternative dispute resolution.



Disposition:

29. This court in exercise of its discretion is of the view that it can depart from the principle that costs follow the event.
30. In so holding the court is guided by the case of Jasbir Singh Rai & 3 others v TarlochanSingh Rai & 4 others [2014] eKLR 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 THIS 15TH DAY OF MAY 2025.

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J. M. CHIGITI (SC)

JUDGE

