



Republic v Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries and Cooperatives & another; United Eastern Kenya Coffee Marketing Company Limited & 4 others (Exparte Applicants) (Judicial Review E148 of 2021) [2023] KEHC 22613 (KLR) (Judicial Review) (25 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22613 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW E148 OF 2021
JM CHIGITI, J
SEPTEMBER 25, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

**CABINET SECRETARY, MINISTRY OF AGRICULTURE, LIVESTOCK,
FISHERIES AND COOPERATIVES 1ST RESPONDENT**

NAIROBI COFFEE EXCHANGE 2ND RESPONDENT

AND

**UNITED EASTERN KENYA COFFEE MARKETING COMPANY
LIMITED EXPARTE APPLICANT**

**MURANG'A COUNTY COFFEE DEALERS COMPANY LTD EXPARTE
APPLICANT**

KIPKELION BROKERAGE COMPANY LIMITED EXPARTE APPLICANT

**MOUNT ELGON COFFEE MARKETING AGENCY LTD EXPARTE
APPLICANT**

NATIONAL COFFEE CO-OPERATIVE UNION EXPARTE APPLICANT

RULING

1. The Ex-parte Applicants commenced the substantive Application through a Notice of Motion dated November 2, 2021 and amended on November 11, 2021. On October 26, 2022, the ex-parte Applicant



- proceeded to withdraw the suit; giving rise to the issue of cost. The issue of cost was canvassed by way of written submissions.
2. The ex-parte Applicants in their written submissions dated February 8, 2023 where it was averred that on costs section 27 of the *Civil Procedure Act* applies. That the courts discretion, under section 27, must be exercised judicially taking into account: (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) (e) of the *Constitution*. Relied on Civil Case No 17 of 2014 *Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another* [2016] eKLR; and Uganda Supreme Court in *Impressa Ing Fortunato Federice vs Nabwire* cases; and Retired Justice Kuloba's book *Judicial Hints on Civil Procedure*, 2nd Edition, (Nairobi) Law Africa) 2011.
 3. The ex-parte Applicants posited that they have acted diligently through the course of these proceedings. However, that the Respondents and Interested Party conduct has been mischievous through the course of the proceedings; resulting to judicial time being spent in an inexpedient manner.
 4. According to the ex-parte Applicants, upon realizing that this suit had been overtaken by events, the Applicants did not waste time requesting the court to mark the matter closed on the prayers that had been rendered moot. That on the other hand, the Respondents and Interested Party had adequate opportunity to invite the Applicants for an alternative form of dispute resolution as contemplated by the *Constitution*, but elected to pursue the judicial process.
 5. Therefore, that this court awards costs against the Respondents and Interested party in favour of the Applicants; and in particular the cost so orders be paid personally by the holder of the 1st Respondent office. to avoid burdening the taxpayer for actions of an errant public official.
 6. Conversely, the Interested Party, in their written submissions dated February 15, 2023 posited that the ex-parte Applicant ought to bear the cost of the suit and be awarded to them (Interested Party). Basing on Section 27 of the *Civil Procedure Act*, the Interested Party stated that the cost of and incidental to all suits shall be in the discretion of the court or judge, and 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. That cost shall follow events, unless for some good reason the court orders otherwise. Relied on the cases of *Reid Hewitt & Co v Joseph*, AIR 1918 Cal 717; *Myres v Defries* (1880 5 Ex D 180; and *Party of Independent Candidate of Kenya & another v Matula Kilonzo & 2 others* [2013] eKLR.
 7. However, that the discretions must be exercised judiciously. Also, that costs are not an automatic right of a party but depend on the circumstances of a case besides being discretionary, considering: (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) (e) of the *Constitution*. Reliance was placed on Halsbury's Laws of England, 4th Edition (Re-issue), [2010], Vo10. para 16; and the cases of *Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] eKLR, and *Republic v. Rosemary Wairimu Munene (Ex parte Applicant) Ibururu Dairy Farmers Co-operative Society Ltd* Judicial Review Application No. 6 of 2004.
 8. Resultantly, that the ex-parte Applicant does not deserve the award of cost for reasons that their Application did not succeed, and that there are no good reasons to award the ex-parte Applicant the costs, with the Judicial review matter being brought in public interest. Thus, that the Interested Party



- should be awarded the costs, also for the reason that the ex-parte Applicant did not object to the Interested Party being joined in these proceedings.
9. Further, the office of the Attorney General for the Respondents, in their written submissions dated March 6, 2023 contended that the 1st Respondent diligently executed his mandate in the course of the proceedings and did nothing to delay the course of justice in this suit. It was asserted that Section 27 of the Civil Procedure Act is the applicable law; providing 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. Jasbir Singh Rai & Others vs Tarlochan Rai & Others case; and Ugandan case of Re Ebuneiri Waisswa Kafuko were relied upon.
 10. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case; and the discretion be exercised judiciously, while taking into considerations enumerated in the case of and relied on the case of Morgan Air Cargo Limited v Evrest Enterprises Limited (Supra).
 11. The interested Party stated that the courts have affirmed that in the classic common law style, the courts have to proceed on a case by case basis, to identify ‘good reasons’ for such a departure; and that in the instant case no good reason is found from the Applicant’s submissions to warrant the award of costs against the Respondent as the Applicant failed to prove so. Resultantly, that the court should decline to exercise its discretion in favour of the ex-parte Applicants, and ought to allow the withdrawal of the Application herein with no orders as to cost. Relied on Jasbir Singh Rai & Others vs Tarlochan Rai & Others (supra).
 12. On their part, the 2nd Respondents, in urging the court to award cost in their favour--in written submissions dated 16th February, 2023--submitted that the applicable law is Section 27 of the Civil Procedure Act. Further, relying on the case of Sonko v Clerk, County Assembly of Nairobi City & 12 others [2022] KESC 17 (KLR); Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] eKLR wherein it was affirmed that costs follow the events; the 2nd Respondent contended that the Applicant case was unsuccessful for having not secured the orders sought, and defeated by the 2nd Respondents submissions which prompted that ex-parte Applicant to withdraw the suit. Relied on Joseph Kobia Nguthari v Kiegoi Tea Factory Limited & 2 others [2021] eKLR.
 13. Further, that the change in the law leading to the Applicants suit being overtaken by events had been gazetted way back on June 9, 2022. That this was a period of five months which was ample time for the Applicant to decide whether to amend their pleadings or withdraw the suit before parties filed their submissions. Also, that the Regulations in relation to the subject matter of the suit were in the process of being reviewed, which information was within the public and ex-parte’s Applicants knowledge.
 14. To the 2nd Respondents, the ex-parte Applicant having chosen to withdraw their suit at the last minute, the circumstances dictated that costs be awarded to them [Respondents]; and that the 2nd Respondents should be awarded the cost for having taken steps to defend their case.
 15. Notably, that Order 25 (1) and (2) of the Civil Procedure Rules provides for withdrawal, discontinuance, and adjustment of suits. That the Applicants in this matter withdrew their case under Order 25 (2)(2) of the Act, when directions for hearing by way of written submissions had been given. Reliance was placed on Canyon Properties Limited & 3 others v Eliud Kipchirchir Bett & 2 others [2017] eKLR where the Court of Appeal awarded costs to the Defendant, where a suit had been withdrawn under Order 25(2)(2) of the Act.
 16. The question for determination is: Whether upon the withdrawal of the notice of motion, the ex-parte Applicant should bear the costs of the suit.



17. The Law governing the issue of costs in suits is set out under Section 27 of the *Civil Procedure Act*. The Section provides;
- “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 give all the necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers”
18. In *Republic vs. Rosemary Wairimu Munene, Ex-parte Applicant vs. Kururu Dairy Farmers Co-operative Society Ltd* the court held;
- “The issue of costs is the discretion of the court as provided under the above Section. The basic rule on attribution of costs is that costs follow the event it is well recognized that the principle costs follow the event 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 case”
19. Flowing from the decision of the court in the above case, the steps taken by a party in a case become key indicators of the efforts and resources employed by a party since the filing of a suit. Such indicators would ultimately have a bearing on the court's exercise of discretion to award costs and the amount. Thus, for a party to be denied costs good reason (s) must exist.
20. Useful guidance on the subject is found in Mr Justice Richard Kuloba's book "*Judicial Hints on Civil Procedure*" where at page 94 he wrote;
- “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”
21. In buttressing the applicable legal principle on award of costs, I am in agreement with Mr. Justice J.M. Mativo's sentiment in *Cecilia Karuru Ngayu vs. Barclays Bank of Kenya* [2016] eKLR where at page 3 he states;
- “In my view Section 27 of the *Civil Procedure Act* provides the general rule which ought to be followed unless for good reason to be recorded. The said Section in my view does not make distinctions between determinations made by consent or on courts own determination or withdrawals. This position is well stipulated by Richard Kuloba in the above cited book where he observed that;
- “The fact that the unsuccessful party did not contest the case is not in itself a ground for refusal of costs but it is a factor that can be taken into account if other good reason exists”
22. Turning back to the instant suit, I note the Amended Notice of Motion dated November 11, 2021 was filed and served on the Respondents and Interested Party. Having been served with the Application, the Respondents and Interested Party certainly took steps and are entitled to compensation for the trouble taken in the process of defending the case.



- 23. However, I have considered the nature of the instant suit. The Applicant did not stand to gain personally and exclusively from the outcome of the suit. By its very nature, this is a public interest litigation and the applicants was advancing public interest as opposed to personal gain.
- 24. I have in exercise of my discretion considered the nature of the parties to the suit and the important role that they play in the coffee- sector supply chain and the fact that they represent farmers interests at diverse levels, the fact that Respondents are the custodian of the law, the nature of the commodity and its importance to the farmers, the economic value of coffee in Kenya, the economic interdependence and the special relationship between the parties, the fact that the cost will ultimately affect the coffee farmers social economic well-being, the fact that there was a trigger that propelled the call to withdraw the suit, the history and the wrangles that have historically bedeviled the coffee sector and the need to promote alternative dispute resolution under Article 159.
- 25. I have identified the foregoing to be "good reasons" for such a departure from the dictates of Section 27 of the *Civil Procedure Act*. It is my finding that condemning one of the parties to shoulder costs will not foster the spirit of a harmonious growth of the coffee sector.
- 26. My finding is guided by The Supreme Court in the case of *Jashir Singh Rai & Others vs. Tarlochan Rai & Others* holding that;

'In the classic common law style, the courts have to proceed 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...'
- 27. I am satisfied that good reasons abound to deny the Respondent and the Interested Party costs.

Order:

- 1. Prayer No 8 of the amended Notice of Motion dated NNovember 11, 2021 is dismissed.
- 2. Each party shall bear its own costs.

DATED, SIGNED AND DELIVERED THIS 25TH DAY OF SEPTEMBER 2023.

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J. CHIGITI (SC)
JUDGE

In the presence of:
 Court Assistant – Nyabuto/Abdinasir
 Applicant:
 Respondent:

