



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A. C. Mrima, J.)

CONSTITUTIONAL PETITION NO. E017 OF 2021

-BETWEEN-

MOMANYI AUDREY BOSIBORI.....PETITIONER

-VERSUS-

KENYATTA UNIVERSITY..... RESPONDENT

JUDGMENT

Introduction:

1. This is a matter where both parties were in agreement that it was overtaken by events and ought to be marked as settled.
2. There was, however, a divergence on the aspect of costs.
3. As a result, although the matter is up for judgment, the main issue for determination is the aspect of costs.
4. This Court will, nevertheless, recount the parties' cases.

The case:

5. At the time of instituting this suit, the Petitioner, *Momanyi Audrey Bosibori*, was a 4th Year student at *Kenyatta University*, the Respondent herein.
6. Through a letter dated 21st December, 2020 the Respondent suspended the Petitioner from the institution on allegation that she had forged Constituency Development Fund (hereinafter referred to as '*the CDF*') Bursary allocation for Kitutu-Chache Constituency and allocated herself Kshs. 10,000/- ten times by deleting the names of other beneficiaries.
7. The Petitioner was aggrieved by the suspension. Through the Petition dated 11th January, 2021 and supported by the Affidavit of the Petitioner deponed to on 9th January, 2021 the Petitioner sought the intervention of this Court. It was her case that the ten times allocation was done in error by the CDF.
8. The Petitioner further took issue with the constitutionality of the suspension on the basis that she had not been accorded the opportunity to be heard before the Disciplinary Committee.
9. It was her case that the Respondent's actions amounted to violation of her right to education under Article 43(1)(f) of the Constitution.
10. The Petitioner prayed that the letter suspending her from the institution be declared null and void; an order compelling the Respondent to reinstate her to the institution; a declaration of violation of fundamental rights and freedoms under Article 27(1), 27(2), 28, 43(1)(f), 47, 48, 50(1) and 55 of the Constitution; compensation for mental and psychological and emotional anguish and costs of the Petition.
11. Simultaneously filed with the main Petition were two applications. One of them was a Chamber Summons dated 11th January, 2021 where she sought the leave of the Court to be heard during the Court's recess.

12. The other application was a Notice of Motion dated 21st January, 2021 seeking conservatory orders lifting the suspension.
13. On 27th January, 2021 this Court, upon hearing the parties, ordered the Petitioner to proceed on with her studies pending hearing and determination of the matter and also set the Respondent at liberty to proceed on with the disciplinary process against the Petitioner.
14. The Petition was opposed.
15. Parties were then directed to file submissions on the main Petition.
16. When the matter came up on 28th June, 2021 for highlighting of submissions, *Miss. Wenene*, Counsel for the Petitioner, informed the Court that the Respondent had served the Respondent with a letter indicating that they had settled the matter internally. As a result, Counsel informed the Court that the matter was overtaken by events and wished to have the Petition marked as settled with no orders as to costs.
17. *Miss. Muriithi*, Counsel for the Respondent, was in agreement with the position that the Petition be marked as settled. However, she was opposed on the aspect of costs. She submitted that the Petition be marked as withdrawn with costs.
18. Given the lack of consensus, the matter was fixed for judgment, but the main issue being the issue of costs.
19. The parties relied on their respective prayers for costs in their submissions.

Analysis and Determination:

20. The aspect of withdrawal and settlement of Petitions and costs thereof is not only codified, but also widely litigated with precedents from various superior Courts.
21. *The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (hereinafter referred to as '*the Mutunga Rules*') provide for *inter alia* the withdrawal of Petitions and settlement of Petitions by consent.
22. Rule 27 of the Mutunga Rules is on withdrawal or discontinuance of Petitions. It provides as follows: -
 - (1) *The Petitioner may-*
 - (a) on notice to the court and to the respondent, apply to withdraw the petition; or
 - (b) with the leave of the court, discontinue the proceedings.
- (2) *The Court shall, after hearing the parties to the proceedings, decide on the matter and determine the juridical effects of that decision.*
- (3) *Despite sub rule (2), the Court may, for reasons to be recorded, proceed with the hearing of a case petition in spite of the wish of the petitioner to withdraw or discontinue the proceedings.*

23. Rule 29 of the Mutunga Rules is on settlement by consent. The rule provides as follows: -

29. The parties may, with leave of the Court, record an amicable settlement reached by the parties in partial or final determination of the case.

24. On costs, Rule 26 of the Mutunga Rules states as follows: -

(1) The award of costs is at the discretion of the Court.

(2) In exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms.

24. Section 27 of the Civil Procedure Act, Cap. 21 of the Laws of Kenya provides as follows: -

(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:

(2) 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.

25. The Supreme Court has severally pronounced itself on costs in instances where parties consent to have a dispute marked as withdrawn.

26. Petition of Appeal No. 18 of 2019, *Director of Public Prosecution -vs- Michael Sistu Mwaura Kamau & 4 others* [2020] eKLR, is such one instance. The Apex Court presided over the contention where parties were unable to agree on costs upon withdrawal of the Petition.

27. In determining the issue, the Learned Judges gave meaning to Section 27 of Civil Procedure Act and in so doing made reference to its earlier decision in *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others* where it was observed as follows: -

[18] 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. (emphasis added).

... 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 ...

28. In the case of *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others* (supra) the Apex Court further discussed discretion and how it ought to be exercised. It observed as follows: -

... Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

29. After reiterating its earlier findings as reproduced in the foregoing paragraphs, the Learned Judges of the Supreme Court in *Director of Public Prosecution -vs- Michael Sistu Mwaura Kamau & 4 others* case (supra) discussed the legal position in scenarios where a party withdraws a Petition when it is ready for hearing. In ordering each party to bear its own costs, the Court stated as follows: -

9. We have considered the rival submissions and are convinced that, whereas the Appellant has withdrawn the Petition when it was ready for hearing and while the Respondents have spent time and resources preparing for the hearing aforesaid, we must agree with both the High Court and the Court of Appeal that the issues raised in the Appeal were of great public interest – i.e. the extent of powers bestowed upon the Ethics and Anti-Corruption Commission and whether corruption related offences can be initiated when the said Commission was not properly constituted and whether the President of the Republic of Kenya can direct the Commission or the Director of Public Prosecutions in the execution of their constitutional mandates. These matters transcended the specific interests of the parties and have settled in the public sphere thus attracting the public interest. An order of costs against any party would, in the circumstances, not be fair....

30. In *Reference No. 1 of 2014, Council of Governors vs. Senate & another* [2014] eKLR the only issue before the Supreme Court was who bears costs upon the withdrawal of a Petition before Court. In determining the issue, the Court referred to its earlier decisions and stated as follows: -

[25] The issue whether the Court can order for costs upon withdrawal of a matter before it was settled in the John O. Ochanda v. Telkom Kenya limited, Motion Application No. 25 of 2014 in which Ibrahim, SCJ held:

... I do hold the view that a prospective appellant is at liberty to withdrawal a Notice of appeal at any time before the Appeal has been lodged and any further steps taken. No proceedings have commenced strictly. I am also of the view that just like under the Civil Procedure Rules or Court of Appeal Rules, the right to withdrawal or discontinue proceedings or withdraw a notice of Appeal respectively ought to be allowed as a matter of right subject to any issue of costs which can be claimed by the respondents if any....

31. The Court further discussed discretion and the obligation upon the party praying for costs as under: -

Since it (award of costs) is a discretionary power, what matters is that the same has to be exercised judicially and not whimsically. A party who moves the Court to make such an order for costs has an obligation to lay a firm basis by giving sufficient reasons why he should be awarded costs.

32. In the said case, the Court made an award against the party that withdrew the application on the basis that it had abused Court process, wasted judicial time and failed his professional duty and obligation it had to the Court. For clarity, the Court observed as follows: -

[32] The Court has reviewed its record since the time the Reference was filed until it was withdrawn. We agree with the chronological account given by the Senate. It is true that the applicant made an application for leave to amend the Reference. The same leave was given but the amendment was not done. An oral stay of proceedings application was again made. Directions were given, but again they were not heeded. The applicant then sat back and waited until the 1st Interested Party filed a Preliminary Objection and the matter was listed for hearing before a two judge bench. During the intended hearing of the Preliminary objection, the applicant then makes an application orally for withdrawal of the Reference. This conduct leaves a lot of questions to be asked by this Court on the real intent of the applicant.

33. From the foregoing, it is clear that at the very fore in the award of costs especially on withdrawal of Petitions is the Court's discretion

which must be exercised judicially.

34. In exercising such discretion, several factors ought to be considered including the conduct of the parties, the extent of effort, financial resources and time the Respondent expended in defending the Petition among many other considerations.

35. Taking guidance from the above, I now apply the findings and directions to this matter.

36. At the start of this judgment, I intentionally reproduced the chronology of events in the dispute. I set out in detail the extent of each party's participation in the dispute.

37. As a brief recap, the Petitioner filed the Petition and the two applications. On 24th February, 2021 the Respondent requested the Court to lift its conservatory orders. The request was opposed by the Petitioner. The Court urged the Respondent to file a formal application for discharging the orders. The matter was then set for hearing.

38. When the matter came up for hearing, the Petitioner's Counsel Miss Wenene informed the Court that the Petitioner had received a communication from the Respondent that the dispute had been internally resolved. It is on that basis that Counsel requested to have the Petition marked as settled with no orders as to costs. The Respondent opposed the prayer for costs. Counsel for the Respondent prayed that it be awarded costs for having filed a Response to the Petition and written submissions.

39. The communication that resulted to the request for withdrawal of the Petition was not availed to Court. As such, the manner and the extent to which the parties agreed and finally settled the matter is unknown to this Court. However, this Court applauds the combined efforts by the parties in resolving the matter amicably.

40. Given the peculiar circumstances in this matter and the calling in Rule 26 of the Mutunga Rules coupled with the failure of the parties to inform the Court the terms of settlement of the dispute, it is the finding of this Court that, although the matter is not a public interest litigation, the fairest order is that each party bears its own costs.

41. In the end, the following final orders do hereby issue: -

(a) The Petition dated 11th January, 2021 is hereby marked as settled by consent of the parties.

(b) Each party to bear its own costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF NOVEMBER, 2021.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Miss Wenene, Counsel for the Petitioner.

Miss. Muriithi, Counsel for the Respondent.

Elizabeth Wanjohi – Court Assistant.