



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 465 OF 2018**

MARY ANG'AWA.....1<sup>ST</sup> PETITIONER

PROF. JOSEPH KIEYAH.....2<sup>ND</sup> PETITIONER

**VERSUS**

NAIROBI CLUB.....1<sup>ST</sup> RESPONDENT

JOSEPH MUITA CHACHA.....2<sup>ND</sup> RESPONDENT

JULIUS OGONY.....3<sup>RD</sup> RESPONDENT

**AND**

JULIUS KOROS.....1<sup>ST</sup> INTERESTED PARTY

JANE THIRIKALI.....2<sup>ND</sup> INTERESTED PARTY

DAVID ADUDA.....3<sup>RD</sup> INTERESTED PARTY

**RULING**

1. Mary Ang'awa and Prof. Joseph Kieyah are the petitioners. Nairobi Club, Joseph Mwitaa Chacha and Julius Ogony are the respective 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents. Julius Koros, Jane Thirikali and David Aduda are the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties respectively.
2. On 26<sup>th</sup> November, 2019 counsel for the petitioners notified the court that they got what they were seeking in the petition through an Annual General Meeting held on 24<sup>th</sup> May, 2019. He told the court that the petition had therefore been overtaken by events.
3. The advocates for the petitioners and the respondents failed to agree on the issue of costs and they have asked the court to make a decision on the question. When the matter came up for hearing on 11<sup>th</sup> November, 2019, the parties indicated that they were relying on the written submissions.
4. In brief, counsel for the petitioners through the submissions dated 2<sup>nd</sup> October, 2019 contended that the substratum of the cause of action was extinguished on 24<sup>th</sup> May, 2019 when new office bearers were elected at the 1<sup>st</sup> Respondent's Annual General Meeting. According to counsel, the only issue that remains to be settled by the court is the issue of costs.
5. Counsel urged that by virtue of the proviso to Section 27 of the Civil Procedure Act, costs follow the event. Further, that although costs are awarded at the discretion of the trial judge, in exercising the discretion the court takes into account factors including the conduct of the parties in the proceedings.
6. According to the petitioners, the substratum of the cause of action was extinguished as a result of the respondents stalling the proceedings and blatantly disobeying the court orders made on 21<sup>st</sup> December, 2018 and they should therefore bear the costs of the case.
7. The decision in the case of **Peter Muriuki Ngure v Equity Bank (K) Ltd [2018] eKLR** was cited in support of the proposition that costs are intended to indemnify the injured party. Counsel stressed that the reason the petitioners seek costs against the respondents is that the

respondents in the early stages of this litigation took every possible objection to what the petitioners were seeking. Counsel submitted that the court record speaks for itself on this. Further, that the respondents blatantly refused and neglected to obey the orders issued by this court on 21<sup>st</sup> December, 2018 even when it was obvious that their actions were unlawful.

8. Counsel for the petitioners clarified that they do not seek costs against the interested parties as they were not substantially involved in the petition.

9. Through the submissions dated 10<sup>th</sup> December, 2019, counsel for the respondents urged that the appropriate order in the circumstances of this case is to order each party to bear own costs.

10. The respondents paint a different narrative as to how the events unfolded. According to the respondents, a conservatory order directing the reinstatement of the petitioners to that 1<sup>st</sup> Respondent Club and allowing them to fully participate at the Annual General Meeting scheduled for 24<sup>th</sup> May, 2019 was issued by Makau, J on 22<sup>nd</sup> May, 2019 in a related petition being Nairobi HC Petition No. 180 of 2019, Mary Ang'awa & 2 others v Nairobi Club & 2 others.

11. It is the respondents' case that they indeed complied with the order and reinstated the petitioners' membership and allowed them to participate in the Annual General Meeting held on 24<sup>th</sup> May, 2019. Further, that notices were published to all members of the 1<sup>st</sup> Respondent and all the reciprocating clubs notifying them of the reinstatement of the petitioners and this was a clear manifestation of good faith on the part of the respondents.

12. According to the respondents, the principle that costs follow the events was affirmed by the Supreme Court in **Jasbir Singh Rai & 3 others v Tarlocham Singh Rai & 4 others [2014] eKLR**. The respondents submitted that the principles to be taken into account by the court in exercising its discretion on costs are those stated in **Republic v Independent Electoral and Boundaries Commission Ex-parte Mohamed Ibrahim Abdi & others [2017] eKLR**.

13. The respondents urged that costs should not be awarded to any of the parties on the grounds that the 1<sup>st</sup> Respondent wholly complied with the directions and orders of the court in this matter and in Petition No. 180 of 2019; that at the instance of the respondents the parties attempted a settlement of the matter as can be seen from the proceedings of 27<sup>th</sup> February, 2019; and that the petition was overtaken by events and the facts in issue in the petition were never substantively determined; that owing to the orders in Petition No. 180 of 2019 the petition was terminated at the early stage of the proceedings as the matter did not proceed to hearing; and, that whereas the respondents had the option to pursue the proceedings to conclusion after the issuance of the interim orders in Petition No. 180 of 2019, the respondents chose to terminate the proceedings at that stage.

14. The respondents also urged the court to consider the relationship between the parties herein, more so the fact that the 1<sup>st</sup> Respondent is owned by its members who include the petitioners, and an order for costs will mean payment of costs from members' funds. Further, that there is need to promote reconciliation between the parties herein pursuant to Article 159(2) of the Constitution.

15. Who should meet the costs of the proceedings? The respondents have clearly enumerated the factors that they believe should lead the court into declining to award costs to the petitioners. Those factors are self-explanatory and need no restatement at this juncture.

16. The fact that the respondents actually complied with the court orders issued in Petition No. 180 of 2019 and allowed the petitioners to fully participate in the 1<sup>st</sup> Respondent's Annual General Meeting of 24<sup>th</sup> May, 2019 was not rebutted by the petitioners. That order is actually what resolved this petition.

17. It has also been pointed out that awarding costs to the petitioners will mean that the 1<sup>st</sup> Respondent will meet those costs from the members' contributions. I agree that an order directing the respondents to meet costs will amount to saddling the entire membership of the 1<sup>st</sup> Respondent with costs in respect of mistakes made by a few members in leadership positions. This is not necessary and only unjust.

18. I also agree with the respondents that it is important to reconcile the members of the 1<sup>st</sup> Respondent. An award of costs will scuttle any attempt at reconciliation as it will unnecessarily prolong a dispute which all the parties are agreed has been overtaken by events.

19. Considering the circumstances of this case, I agree with the respondents that this is not a case in which costs should be awarded. As such, I direct that the parties will meet their own costs of the proceedings.

**Dated, signed and delivered at Nairobi this 3<sup>rd</sup> day of April, 2020.**

**W, Korir,**

**Judge of the High Court**