**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIVASHA**

**(CORAM: R. MWONGO, J)**

**CONSTITUTIONAL PETITION NO. 2 OF 2018**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS AS ENSHRINED UNDER ARTICLES 35(1)(b) OF THE CONSTITUTION OF KENYA 2010**

**BETWEEN**

**EVANS AMUKOYA MALOBA.........................................................PETITIONER**

**AND**

**SOUTHLAKE MEDICAL CENTER.............................................RESPONDENT**

**JUDGMENT**

**Background and Parties' Submissions**

1. The only issue for determination in this Petition is whether costs should be paid and if so, by whom. The reason is that the subject of the Petition was compromised by a consent between the parties, save for the issue of costs which are still not agreed.

2. Briefly, the background of the Petition is as follows. On 9th February, 2018, the Petitioners through their counsel, wrote to the Respondent requesting the medical records of the Petitioner who had been treated by the Respondent for a work related accident. The letter invoked the provisions of **Article 35 (1)** of the **Constitution** and **Section 4** of the **Access to Information Act No. 31 of 2016**. It gave a deadline of 6th March, 2018 by which the information should have been availed. The letter warned the Respondent that they must act on the request within 21 days and further that failure to respond was an offence for which a fine of Shs 100,000/= or imprisonment for a term of up to 6 months could be meted.

3. The Respondent did not reply to the letter. On 21st March 2018, the Petitioner filed the petition seeking:

> ***"(1) A declaration that failure by the Respondent to provide information sought under Article 35(1) (b) of the Constitution on the basis of the petitioner request dated 9th February, 2018 is a violation of the petitioner right of access to information.***
>
> ***(2) An order of the court compelling the respondent to forthwith provide at the respondent costs, information sought by the petitioner in his letter to the respondent dated 9th February, 2018.***
>
> ***(3) Costs of the petition assessed at Kshs 500,000.00.***
>
> ***(4) Such further orders as the court may deem just and appropriate to grant."***

4. The Petition was served on the Respondent on 22nd March 2018. In response, the Respondent wrote a letter to the Petitioner's counsel dated 26th March 2018. In that letter, the Respondent requested the following information from the Petitioner:

> ***"i. Complete identifying information of the persons whose information is sought i.e. Full names and at least a National Identification Number;***
>
> ***ii. A signed Affidavit by the person in (i) above authorizing the release of their personal medical information to a named third party or their agent.***

*iii. In absence of the above, a duly issued Order of a Court of Law of the Republic of Kenya."*

5. When the Petitioner first came for mention for directions on 8th May 2019, the parties agreed to settle the matter and the following consent was recorded:

*"By consent it is agreed and directed that:*

*(1) The Petitioners do provide an Affidavit to which will be annexed a copy of the Petitioner's ID. The same to be availed to the Respondents advocates within 7 (seven) days of today's date.*

*(2) Respondents to avail the particulars requested in the Petition within 21 days after being served the Affidavit in (1).*

*(3) Costs reserved for argument in court.*

*(4) …….;*

*(5) The parties, if unable to agree on costs, shall file written submission on costs limited to three pages for hearing."*

6. The Petitioner argues that the petition was instituted by necessity of the Respondent's failure to avail the requested information; that the petition was filed 37 days after the request; and that the Respondent's reply requesting the Petitioner's details was made four days after the petition was served on them.

7. The Petition is premised on **Section 27 (1)** of the **Civil Procedure Act** which provides, inter alia, 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."* (Underlining added)

The Petitioner amplifies this section by reference to Kuloba J.'s **Judicial Hints on the Civil Procedure Act 2nd Edition** Page **99;**

*"The words "the event" means the result of all the proceedings to the litigation…… Thus the expression 'the costs shall follow the event' means that the party who on the whole succeeds in the action gets the general costs of the action"*

Further in **Judicial Hints,** Kuloba J. stated:

*"Furthermore a successful party cannot be deprived of his costs merely because the suit proceeded ex parte or uncontested. This is to say, the fact that the unsuccessful party did not contest the case as not in itself a ground for refusal of costs but is a factor that can be taken into account if other good reason exists."*

8. He further submits, in reliance on the case of **Supermarine Handling Services Ltd v Kenya Revenue Authority Civil Appeal No. 85 of 2006**, the Court of Appeal's position that costs follow the event. He also relies on several other authorities that re-emphasise the general rule as to costs, and in addition, on the following authorities:

**Peter Mule Muthungu v Kenyatta National Hospital [2013] eKLR** where Ougo J, ordered a recalcitrant party to produce medical documents required at trial and stated:

*"Since the defendant had refused to hand over the records earlier to the applicant forcing him to seek an order from the court, they will pay costs to this application."*

**Republic v Kisii University Ex parte Mercy Jebet Mutai [2018] eKLR**, where the applicant sought a certificate of Library and Information Science, which was declined, until she sought it through an order of mandamus. Sewe J, stated that she agreed with the applicant that:

*"……had the respondent headed her (Applicant's) pleas, the filing of this Judicial Review application would have been obviated. Accordingly I am satisfied that the applicant is entitled to costs of this Judicial Review Application including the costs of the application for leave……"*

9. The Respondent's submissions are that the medical records of the Petitioner constitute confidential information protected in law and practice. These could therefore not be released without any of:

a) The patient's consent without information of the patient including his Identity Card or;

b) An affidavit by the person authorizing release or;

c) Pursuant to a court order. Their letter of reply dated 26th March, 2018 did contain that information.

10. The Respondents referred to **Section 20** of the **Medical Practitioners and Dentists Board Act**, for the doctor-patient confidentiality. I have looked at that section and note that it does not directly establish doctor patient confidentiality. They also argue that the petition was filed before a response was given. They rely on the cases of:

- **Nairobi Constitutional Petition No. 195 of 2013 David Lawrence Kigera Gichuki v Aga Khan University Hospital** where Mumbi Ngugi J highlighted abuse of professional confidence under **Rule 8** of the **Medical Practitioners and Dentists Board (Disciplinary Proceedings) Procedures Rules** as follows:

> ***"Abuse of Professional Confidence:***
>
> ***A practitioner or an institution shall not disclose to a third party information which has been obtained in confidence from a patient or the patient's guardian, where applicable. The practitioner or institution shall safeguard the confidential information obtained in the cause of practice, teaching research or other professional duties subject only to such exceptions as are applicable. The following are possible expectations:***
>
> ***1. The patient or his lawyer may give a valid consent.***
>
> ***2. The information may be required by law or through a Court Order.***
>
> ***3. Public interest may persuade a Practitioner that his/her duty to the community overrides the one of the patient."***

11. I understand the Respondent's argument to mean that being in the position of a steward of the confidential information of its patients made the respondent slower and more scrupulous in releasing such information without the consent of the patient.

Finally the Respondent relied on the dicta in the Ugandan case of **Impressa Ing Fortunato Federice v Nabwire [2001] 2 EA 383**. There, the Uganda Supreme Court stated that costs are at the discretion of the court, but that such discretion:

> ***"must be exercised judiciously, and how a court or judge exercises such discretion depends on the facts of each case. If there were a mathematical formula, it would no longer be discretion….."***

The Respondent urges that the Petitioner acted in such a manner as to unnecessarily incur expenses by not providing the respondent with the identification sought.

**Analysis and Determination**

12. I have carefully considered the parties' positions and the documentation availed. There is no doubt that in considering stating the phrase *"costs follow the event"*, I must describe what that event is. The event in my understanding is the overall outcome of the proceedings.

13. The petitioner sought the overall outcome stated in his prayers. There were two essential prayers, ignoring for the moment in prayer on costs and other orders deemed fit by the court. These were: a declaration that the respondent's failure to provide information was a violation of the Petitioner constitutional right to access the information; secondly, the petitioner sought an order compelling the respondent to provide the information sought.

14. When the parties entered into a consent, the first order sought was obviated. The second order sought was obtained, except that it was obtained in exchange for the petitioner providing an affidavit attaching his identification documents as sought in the respondent's letter upon being served with the petition. These, in my view, are the events: information to Petitioner in exchange for information to Respondent.

15. The petition is stated to be premised on violation of Article 35 (1) (b) on access to information, and **Sections 4, 8,** and **9** of the **Access to Information Act 2016. Section 4** provides that:

> ***"Subject to this Act and any other written law, every citizen has the right of access to information held by:***
>
> ***a) the state; and***
>
> ***b) another person and where that information is required for the exercise or protection of any right or fundamental freedom.***
>
> ***(2) …….;***
>
> ***(3) Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost."*** *(Underlining added)*

There is no doubt that Section 4 (3) would apply to the respondent.

16. The respondents in their replying affidavit stated that they did not deny the petitioner his right but that they required information from him before releasing the doctor patient confidential information.

17. In light of the parties' postures and perusal of the authorities, the question that comes to mind is whether the Petitioner's objective could have been achieved without the necessity of a petitioner as argued by the petition or whether the petition was necessitated by the respondent's refusal to provide the information sought.

18. To answer the above question, there are several issues to bear in mind. The first is whether the petitioner, as a person who had a doctor patient relationship with the Respondent had himself unsuccessfully attempted to obtain the said information. There is no documentation or information availed to show that he did so, other than the demand letter written to the Respondent by his advocate. Had the petitioner gone directly to the hospital to obtain his records and been denied them, that would have amounted, in my view, to a justification for a finding of violation of his right to his information.

19. The second is whether there was notice of intention to use. I note the fact that in this case, the petitioner's demand letter did not amount to a notice of intention to sue. Looked at carefully, the letter: requests the information sought; gives a time frame of 21 days within which the said information should be awaited; notifies the respondents of their legal obligation to provide the information; and notifies them that it is an offence not to avail the said information i.e. a fine of Shs 100,000/= or imprisonment for a term not exceeding six months. Nowhere does the petitioner's letter give a notice of intention to sue.

20. It must be stated that there is no statutory or legal obligation imposed on a petitioner to issue a notice of intention to use. However, in a matter where the main question may be whether the conduct of a party who holds privileged information of doctor/client nature necessitated the filing of a suit, it would be important in my view, to consider whether in such case a formal notice of intention to sue was issued.

21. In **Judicial Hints** (supra), Kuloba J (as he then was) in discussing whether costs should or should not be awarded, states:

> **"The giving or absence of notice to sue, before a suit is instituted is a relevant consideration in awarding costs. This is a circumstance on which, quite apart from misconduct, costs can b refused to a successful party."** (Underlining added)

22. In **Devram Dattan v Dawda [1949] EACA 35** it was held:

> ***"It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so, its exercise must be based on facts … if, however, there be, in fact some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of the sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance".***

Thus, a court will not interfere with judicial discretion on costs where there are reasons, unless those reasons do not constitute "good reasons" within the meaning of **Section 27** of the **Civil Procedure Act**.

23. The question of how costs are to be dealt with when parties have settled a matter by consent without resolving the costs, was dealt with by Nyamweya J in **Rufus Njuguna Muringu & Another v Martha Muriithi & 2 Others [2012] eKLR**. There the court stated:

> ***"…consent cannot be interpreted to mean that one or the other party has succeeded in a suit. Even if in the present case such settlement has worked out in the Defendants' favour, the successful determination of the dispute is still attributable to both the Plaintiffs and the 1st and 2nd Defendants… The issue of a party's conduct affecting the award of costs as submitted by the plaintiff's counsel in my opinion does not arise when parties have entered consent as they are deemed to have accepted their respective conduct prior to the consent. In addition, the Defendants' conduct would in the circumstances only be material if the plaintiff is seeking to set aside the consent order."***

The court finally determined that each party should bear their own costs.

24. In **Morgan Air Cargo Ltd v Everest Enterprises Ltd (2014) eKLR**, Gikonyo J took further the issue of award or costs in the face of a consent settlement. The Judge said:

> ***"It does not necessarily mean that, where parties have entered into a consent to settle a proceeding no costs should be awarded, or there is no successful party in the mater. The incidence of settlement by consent of the parties, to my mind, is just but a vital factor the court should consider within the circumstances of each case in deciding whether costs are payable or not. A consent recorded in settlement of a proceeding is not an automatic disentitlement of costs……The court should, therefore, look at the event within the circumstances of the case. And that exercise will inform the exercise of discretion by the court. It should also be understood well; that a successful party does not refer to a person who has been through the rigorous and convoluted motions of litigation by the other party. Similarly a party does not cease to be a successful party merely because he met no contest in his claim against the Defendant. He is a successful party because he is declared to be so by the Court after looking at the entire litigation which includes: negotiations or steps which culminates to, and the recording of a consent thereto, conduct of the Plaintiff etc."***

25. In the present case, you have a petitioner who is also a patient in a doctor-patient relationship. He asks for his medical records via his advocates through a demand letter that invokes threats of constitutional violations. The demand does not give notice of intention to sue, and no indication is given as to whether the patient has himself sought the same information and been denied it. Faced with threats of violations, the respondent naturally balks. It also has to approach an advocate to light of the nature of the demand, and in light of its own statutory and professional obligations as to disclosure of doctor-client information. It justifiably requests further particulars of the petitioner. Meanwhile a suit has been commenced.

26. What is transacted so far? The parties concluded pleadings here. Only two mentions are seen on the record. Only one of the mentions proceeded to a hearing for directions. At that mention, the only issue discussed was the settlement. The petitioner then seeks costs of the suit. The parties, being unable to agree, seek the court's determination thereon. This is the progression of the proceedings so far.

27. I have highlighted the summary of facts that have occurred here. My summary of the law from all the foregoing authorities is this. The general rule that costs to follow the event always holds. It may be deviated from at the discretion of the court where there are good reasons. The court's discretion must be exercised judiciously. In determining what is judicious, the complete circumstances of the case must be considered on their own merits. That includes the conduct of the parties, it includes the context within which the event was arrived at; it includes, where there is a settlement, an acknowledgement that the settlement in and of itself does not disentitle a party from an award of costs but that such settlement by its nature presumes that it was arrived on upon a mutual acknowledgment of the parties' conduct. Ultimately, that the award of costs will be determined by the court's pronouncement as to which was the successful party, if any, in the entire litigation given the circumstances of the case.

28. Having, as earlier noted, carefully perused the court file pleadings and proceedings in this matter including the consent settlement reached, I am of the view that each party was on the whole successful. The petitioner achieved an order requiring the respondent to release the information required. Likewise, the respondent's reticence to disclose the said information was rewarded by the consent order that the petitioner must avail an affidavit with information including the petitioner's Identity Card.

29. In light of the foregoing, I think this is a suitable case in which to depart from the general rule on costs, for all the reasons aforestated. Accordingly, the just and proper order in the circumstances is to direct that each party shall bear its own costs herein.

30. It is so ordered.

**Dated and Delivered at Naivasha this 4th Day of December, 2019.**

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**RICHARD MWONGO**

**JUDGE**

Delivered in the presence of:

1. Ms Bondi holding brief for B. G. Wainaina for the Petitioner
2. Ms Amboko holding brief for Wasonga for the Respondent
3. Court Clerk – Quinter Ogutu