



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**MISC. APPLICATION NO. 214 OF 2015**

**IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLES 47(1) & 50(1)**

**AND**

**IN THE MATTER OF LAW REFORM ACT, CHAPTER 26 LAWS OF KENYS, SECTIONS 8 & 9**

**AND**

**IN THE MATTER OF RETIREMENT BENEFITS ACT, SECTIONS 11,39, 41 & 48**

**IN THE MATTER OF CLAUSE 4 & 5 OF THE KENYA RAILWAYS STAFF RETIREMENT BENEFITS SCHEME TRUST DEED AND RULES DATED 3<sup>RD</sup> MAY, 2006**

**AND**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF MANDAMUS**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**-VERSUS-**

**CHIEF EXECUTIVE OFFICER, RETIREMENT BENEFITS**

**AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**CORPORATE & PENSION TRUST**

**SERVICES LIMITED.....2<sup>ND</sup> RESPONDENT**

**EX-PARTE APPLICANT.....ROBERT AZARIAH**

**RULING**

1. By a Motion dated 29<sup>th</sup> September, 2014, the ex parte applicant herein, **Robert Azariah**, sought the following orders:

**a) The court do issue an order of mandamus compelling the 1st Respondent to act upon complaints contained in the letters dated 27<sup>th</sup> April 2015 and 11<sup>th</sup> May 2015, written on behalf of the ex-parte Applicants.**

**b) Cost to be awarded to the Applicant.**

2. According to the applicant, a member of the Kenya Railways Staff Retirement Benefits Scheme (hereinafter referred to as “the Scheme”), during the AGM of the Scheme held on 24<sup>th</sup> April, 2015, he noticed from the audited accounts presented that the auditor gave a qualified opinion on the Scheme’s accounts.

3. He wrote to the 1s Respondent who is the Chief Executive Officer of the Retirement Benefits Authority in charge of the day to day operations of the Authority to complain about what he thought were blatant breaches of the **Retirement Benefits Act** to the detriment of members of the Kenya Railways Staff Retirement Benefits Scheme. However, despite the said complaints, the 1<sup>st</sup> Respondent refused to invoke his powers as provided in the Retirement Benefits Act to safeguard the interest of the members of the scheme by for example appointing inspector to expect the activities within the scheme as carried out by the 2<sup>nd</sup> Respondent.

4. It was the applicant’s contention that the said refusal left him in a limbo because while the Retirement Benefits Act establishes a Tribunal to which appeals against decisions of the Chief Executive Officer may be made, such mechanisms is only available when the Chief Executive makes a decisions unlike in the present case where for inexplicable reason she has refused to make a decision. The applicant therefore contended that the failure to act on his complaints by the 1<sup>st</sup> Respondent denied him his right to a fair administrative action and indeed amounted to a breach of what the law requires of the chief Executive Officer.

5. It was therefore the applicant’s case that the failure to act on the part of the 1<sup>st</sup> Respondent essentially gave the 2<sup>nd</sup> Respondent a blank cheque to run his scheme in an unregulated way to the potential gross detriment of the members of the scheme and in total disregard of its role as a trust.

6. The applicant was opposed by the 1<sup>st</sup> Respondent which contended that though the letter by the applicant was received, it was unable to act on the same as there were pending Court proceedings in High Court Civil Appeal No. 159 of 2015 emanating from Chief Magistrate’s Civil Case No. 86 of 2015 which information the 1<sup>st</sup> Respondent brought to the attention of the applicant. However a meeting was called to deliberate on the issues raised and the applicant requested that the meeting be deferred and as arrangements for the meeting had been finalised the matter proceeded though the applicant failed to attend the same. Instead the applicant simultaneously filed these proceedings. After the meeting the applicant’s advocates were informed of the Authority’s decision not to deliberate on a matter which was pending in Court though it expressed its willingness to discuss the same issues at length. It was therefore contended that not only was the application premature but that the application had been overtaken by the events as what was being sought to be compelled had already taken place.

7. On behalf of the 2<sup>nd</sup> respondent, it was contended that being a private body, the orders sought cannot issue against it hence it was wrong to join the 2<sup>nd</sup> respondent to these proceedings.

8. The 2<sup>nd</sup> respondent reiterated the averments made by the 1<sup>st</sup> Respondent and stated that there was no wrongdoing by the 2<sup>nd</sup> respondent.

9. When the matter came up for hearing on 28<sup>th</sup> October, 2015, learned counsel for the applicant informed the Court that prayer 1 in the Motion which was the substantive was no longer tenable as the same was spent.

10. Therefore the only issue for determination was the issue of costs which is the subject of this ruling.

11. I have considered the submissions made on behalf of the parties herein.

12. The general rule as to costs is provided for in **section 27** of the *Civil Procedure Act* which provides as follows:

*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.*

13. This provision has been the subject of several judicial pronouncements. In the case of **Supermarine Handling Services Ltd vs. Kenya Revenue Authority Civil Appeal No. 85 of 2006** the Court of Appeal expressed itself thus:

**“Costs of any action or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. 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 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, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where the reasons are given if it considers that those reasons do not constitute “good reason” within the meaning of the rule...In the instant case the learned Judge gave no reasons whatsoever for his decision to deprive the successful plaintiff of its costs and yet it was not shown that the defendant had been guilty of some misconduct which led to litigation. In the court’s view the learned Judge’s order was wrong and for the foregoing reasons, the plaintiff’s appeal succeeds as to the award of interest and costs on the principal sum awarded”.**

14. In **Devram Manji Daltani vs. Danda [1949] 16 EACA 35** it was held that a successful litigant can only be deprived of his costs where his conduct has led to litigation, which might have been averted.

15. In **Party of Independent Candidate of Kenya & Another vs. Mutula Kilonzo & 2 Others HCEP No. 6 of 2013**, it was held:

**“The main reason why this Petition should be withdrawn is due to the demise of the 1<sup>st</sup> Respondent. This would call upon the Court considering ordering each party to bear their own costs. In the case of *Nedbank Swaziland Ltd verses Sandile Dlamini No.(144/2010) [2013] SZHC30 (2013) Maphalala J.* referred to the holding of *Murray C J in the case of Levben Products VS Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227*, who stated as follows:**

**“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (*Fripp vs Gibbon & Co., 1913 AD D 354*). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at...In the second place the general rule that costs should be awarded to the successful party, a rule which**

*should not be departed from without the exercise of good grounds for doing so.”*

16. 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. See **Hussein Janmohamed & Sons vs. Twentsche Overseas Trading Co. Ltd [1967] EA 287** and **Mulla (12<sup>th</sup> Edn) P. 150.**

17. In my view section 27 of the ***Civil Procedure Act*** provides for the general rule which ought to be followed unless for good reasons to be recorded.

18. When all things are equal, however, the only consideration is the “event”. As was held by the Supreme Court of Uganda in **Impressa Ing Fortunato Federice vs. Nabwire [2001] 2 EA 383:**

**“The effect of section 27 of the Civil Procedure Act is that the Judge or court dealing with the issue of costs in any suit, action, cause or matter has absolute discretion to determine by whom and to what extent such costs are to be paid; of course like all judicial discretions, the discretion on costs must be exercised judiciously and how a court or a judge exercises such discretion depends on the facts of each case. If there were mathematical formula, it would no longer be discretion... While it is true that ordinarily, costs should follow the event unless for some good reason the court orders otherwise, the principles to be applied are: - (i). Under section 27(1) of the Civil Procedure Act (Chapter 65), costs should follow the event unless the court orders otherwise. This provision gives the judge discretion in awarding costs but that discretion has to be exercised judicially. (ii). A successful party can be denied costs if it is proved that but for his conduct the action would not have been brought. The costs should follow the event even when the party succeeds only in the main purpose of the suit...It is trite law that where judgement is given on the basis of consent of parties, a court may not inquire into what motivated the parties to consent or to admit liability since admission of liability implied acceptance of the particulars of injuries enumerated in the plaint and the evidence in favour of the Respondent, including loss of hearing and speech.”**

19. I associate myself with the decision of Kampala High Court in **Re Ebuneiri Waisswa Kafuko (Deceased) Kampala HCMA No. 81 of 1993** in which it was held that:

**“The Judge in his discretion may say expressly that he makes no order as to costs and in that case each party must pay his own costs. If he does not make an order as to costs, the general rule is that he shall order that the costs follow the event except where it appears to him in the circumstances of the case some other order should be made as to the whole or any part of the costs. But he must not apply this or any other general rule in such a way as to exclude the exercise of the discretion entrusted to him and the material must exist upon which the discretion can be exercised. This discretion, like any other discretion, must be exercised judicially and the judge ought not to exercise it against the successful party except for some reason connected with the case. It is not judicial exercise of the judge’s discretion to order a party who has been completely successful and against whom no misconduct is even alleged to pay costs.”**

20. In this case the proceedings were initiated by the applicant. Before the proceedings could be determined in the normal manner, the applicant withdrew the same. In the normal course of events a withdrawal of proceedings amounts to a determination thereof in favour of the respondents thereto and pursuant to the provisions of section 27 aforesaid the respondents would be entitled to costs. See **Joseph Oduor Anode vs. Kenya Red Cross Society [2012] eKLR.**

21. This was the position adopted by **Sergon, J** in **Stephen Chege Waweru vs. Ephantus Mwangi & Others Nyeri HCCC No. 173 of 2008** where he expressed himself as follows:

**“There is no dispute that the Plaintiffs filed this suit. The plaint and the summons were served upon the defendants. A defence and counterclaim was filed to resist the plaintiff’s suit. In fact the plaintiffs filed an answer to the defence to the counterclaim. There is no denial that the plaintiffs unilaterally filed a notice of withdrawal of the suit and by the time of filing the notice of withdrawal, the defendant had incurred money in hiring an advocate to defend the suit. The proviso to section 27 of the Civil Procedure Act clearly states that 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. The plaintiffs are the ones who filed this suit thus prompting the Defendants to engage the services of an advocate to defend themselves. It is clear from the prayers in the Plaint that the plaintiffs had asked for costs at the end of the suit. On their part, the defendants asked for the suit to be dismissed with costs. There is no peculiar reason which should make the court deny the defendants costs. The court is convinced costs should follow the event.”**

22. I associate myself with that position.

23. These proceedings were commenced on 15<sup>th</sup> July, 2015. However, the joint meeting of Kenya Railways Staff Retirement Benefits Scheme was held on 16<sup>th</sup> July, 2015. The Motion was however filed on 23<sup>rd</sup> July, 2015.

24. It is therefore clear that whereas the Chamber Summons for leave was filed before the said meeting took place, the Motion itself was filed after that meeting. Accordingly, the events that effectively brought the cause of action herein to an end took place on 16<sup>th</sup> July 2015, before the filing of the Motion. It is contended that the applicant was aware of the said proceedings but did not attend. Had the applicant attended the said meeting, he would have realised that there was no reason to file the Motion hence unnecessary costs would have been avoided.

25. In my view, whereas the applicant may have been justified in seeking leave to apply for mandamus, his action in filing the substantive Motion when had he attended the Authority’s meeting, he would have realised the futility of proceeding in that manner, cannot be warranted.

26. In the premises, it is my view that this is a matter in which the costs ought to lie where they fall.

27. Accordingly, the order which commends itself to me and which I hereby grant is that there shall be no order as to costs.

28. It is so ordered.

**Dated at Nairobi this 8<sup>th</sup> day of February, 2016.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Mshweshwe for the 2<sup>nd</sup> Respondent***

*MR Wafula for Mr Milimo for the Interested Party*

*Cc Patricia*