REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 398 OF 2016

BETWEEN

MBITHI PETER MUTUKU……...……..……...….....……...PETITIONER

-VERSUS-

COUNCIL OF LEGAL EDUCATION.…….…….....….1ST RESPONDENT

PROFESSOR BITONYE KULUNDU

(SECRETARY COUNCIL OF LEGAL EDUCATION….……...…..…….2ND RESPONDENT

KENYA SCHOOL OF LAW…..……..3RD RESPONDENT

RULING

1. This petition was commenced by the petitioner, **Peter Mutuku Mbithi**, who contended that following successful completion of his university education leading to the award of Bachelors Degree of Laws and Master of Laws he applied for admission to the Advocates Training Program for the year 2015-2016 and was admitted thereto by the 3rd Respondent though he deferred the same after admission.

2. On 8th January, 2016, he received a letter informing him that he had qualified for admission to the Kenya School of Law for the 2016-2017 program and he was duly registered as a student of the school after payment of the requisite tuition fees and commenced his studies. He however averred that despite being issued with library cards and school ID expiring on 31st December, 2018, the Council for Legal Education omitted his name from those students who had been cleared to undertake the bar examinations which were due to commence in November, 2016. According to him the decision declining to approve his registration to sit for the said exams, on the ground that he did not qualify to be admitted to LL.B, was arrived at without him being accorded an opportunity of being heard.

3. The petitioner averred that though he sat for oral ATP Exams in July, 2016, which were supervised by the 1st and 2nd Respondents, his results were never released.

4. The petitioner contended that though he appealed against the decision denying him registration, the appeal had not been heard by the time he instituted these proceedings. The petitioner therefore contended that the action of the respondents was unfair and oppressive and was in breach of the rules of natural justice.

5. The petitioner therefore sought orders quashing the said decision, an order compelling the 2nd respondent to register him to the programme, issue him with examination cards/pass and allocate him examination centre for the academic year 2016/2017. He also sought a declaration that his rights had been infringed and violated as well as an award of costs.

6. The petition was not opposed by the Respondents. However on 3rd October, 2016, the parties informed the Court that the petitioner's appeal had been heard by the Respondents and was allowed hence rendering these proceedings unnecessary. The Respondents therefore urged the Court to mark the matter as compromised but with no order as to costs. The Petitioner, on the other hand insisted that he was entitled to costs as costs follow the events.

7. It is therefore the issue of costs that falls for determination in this ruling.

8. 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.***

9.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".**

10. 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.

11. 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 1st 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."***

12. In determining the issue of costs, the Court is entitled to consider 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, whether a party has succeeded on part of his case, even if he has not been wholly successful, the extent of such success, the subject of litigation and 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. With respect to the conduct of the parties this includes the conduct before as well as during, the proceedings and in particular the extent to which the parties followed any relevant pre-action protocol and directions issued by the Court; whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; the manner in which a party has pursued or defended his case or a particular allegation or issue; and whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim. See ***Halsbury's Laws of England*** vol. 10 4th Edition of the re-issue at para 22 and **Hussein Janmohamed & Sons vs. Twentsche Overseas Trading Co. Ltd [1967] EA 287** and ***Mulla (12th Edn) P. 150.***

13. 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.

14. 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 nolonger 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."

15. 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."

16. In this case it is clear that the event that led to the termination of these proceedings was the determination of the appeal in favour of the petitioner. When the petitioner moved this Court, he had instituted the appellate process which was yet to be determined. He was however concerned about the delay which was occasioned by the hearing and determination of the said appeal. What options are available to a party who has invoked the appellate jurisdciton of a Tribunal and the determination thereof takes unreasonably too long to be heard and determined? Article 47 of the Constitution provides:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

17. In my view an appellate Tribunal is enjoined constitutionally to put into motion the process of hearing and determination of an appeal pending before it expeditiously, efficiently, lawfully, reasonably and fairly. Where it does not do so this Court is empowered pursuant to section 11(1)(f) of the ***Fair Administrative Action Act, 2015*** to compel it to perform the "duty owed in law and in respect of which the applicant has a legally enforceable right." In this case that right is the right to have the petitioner's appeal heard expeditiously.

18. In this case therefore the petitioner ought to have moved this Court for an order compelling the Respondents to hear and determine his appeal. By seeking orders compelling the Respondents to issue him with the examination cards/pass and allocate him an examination centre, the petitioner whose appeal was pending hearing and determination had jumped the gun. That order would have the effect of determining his pending appeal in a particular way. As was held in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996,** where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way. No doubt the Respondents are empowered by statute to hear and determine appeal and this Court cannot compel it to determine the same in a particular manner. This Court can only come in after a decision is made on the appeal. Before then, this Court can only compel them to hear and determine the appeal expeditiously.

19. Unfortunately that is not the order the petitioner sought in these proceedings.

20. It is therefore unlikely that without amending the petition this Court would have granted the orders sought herein.

21. In the premises the order which commend itself to me and which I hereby grant is that the parties herein will bear their own costs.

22. It is so ordered.

Dated at Nairobi this 10th day of October, 2016.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Cohen for the Petitioner