



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

**PETITION NO.112 OF 2015**

**BETWEEN**

**C K O.....PETITIONER**

**AND**

**J M O.....1<sup>ST</sup> RESPONDENT**

**COMMERCIAL BANK OF AFRICA LTD.....2<sup>ND</sup> RESPONDENT**

**RULING**

**Introduction**

1. The Petitioner filed the Petition dated 23<sup>rd</sup> March 2015 in which he sought the following orders:
  - a. A declaration do issue that the Petitioner is entitled to the Pension which the 1<sup>st</sup> Respondent withdrew from the account held by the 2<sup>nd</sup> Respondent and where the 2<sup>nd</sup> Respondent directed the funds to.*
  - b. A declaration that the Petitioner is entitled to know what investment the Respondents invested in for the Petitioner's retirement.*
  - c. A declaration that the Petitioner has a right to know jointly and severally from the 1<sup>st</sup> and 2<sup>nd</sup> Respondents through statements of account where the monies from the joint account went to between March, 2005 to the present.*
  - d. Consequential damages upon the issue of the above declarations that the Petitioner is entitled to compensation from the 1<sup>st</sup> Respondent for the deprivation of the Petitioner's right to his pension now that he has retired in the sum of U.S \$ 90, 735.50, and an additional U.S \$ 173, 327.50, being the amount of pension plus interest the Petitioner would have earned if the pension money had been put in an ordinary fixed call deposit at an interest rate of 9% per annum from 24<sup>th</sup> March, 2005 to date.*
  - e. Interest on (d) above at Court rates until payment in full.*
  - f. Costs of this Petition.*

*g. Such other orders as this Honourable Court shall deem fit and just to grant.*

2. Subsequently, on 24<sup>th</sup> February 2016, the Petitioner filed a Notice of Discontinuance of the Petition, dated 23<sup>rd</sup> February, 2016, and the Court directed the Parties to file submissions in regard to the question of costs. This Ruling is in relation to that question only.

**The Petitioner's Case**

3. In his Written Submissions dated 21<sup>st</sup> June, 2016, the Petitioner asserts that although the present claim was filed as a constitutional Petition, it is indeed a matrimonial dispute between him and the 1<sup>st</sup> Respondent, who is his wife. For that reason, he argued that since the matter is essentially a family dispute, the order that each Party bears its own costs in such circumstances ought to be invoked following the withdrawal of the claim, in regard to the 1<sup>st</sup> Respondent.

4. As pertaining to the 2<sup>nd</sup> Respondent, it was his submission that under **Rule 26 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules, 2013**, costs are in the discretion of the Court and that pursuant to **Section 27 of the Civil Procedure Act**, the Court has been given wide discretion in regard to orders and normally, costs follow the event unless the Court, for good reasons, orders otherwise.

5. It was also his argument that the discretion as regards an order for costs ought to be exercised judicially and as was stated in the case of **Karanja vs Kabugi and Another, (1976-1985) EA 165**, a successful Party ought not to be deprived of his costs unless his conduct has led to the litigation and that but for his conduct such litigation might have been averted.

6. The Petitioner further asserted that he had been made destitute by the actions of the 1<sup>st</sup> Respondent and when he sought for information pertaining to the events leading to his destitution from the 2<sup>nd</sup> Respondent, such information was not forthcoming and the bank, through its Affidavit in Reply filed in the present proceedings, did not supply him with the statements of account he had requested for and that in any event, the deponent did not indicate that it was the 2<sup>nd</sup> Respondent that had provided him with the statement of account attached to his Affidavits.

7. For the foregoing reasons, it was his argument that the 2<sup>nd</sup> Respondent, by its conduct in not providing him with a statement of accounts, forced him to file the present Petition and hence it ought not to be granted the costs of this Petition.

**The 1<sup>st</sup> Respondent's Case**

8. In her Written Submissions dated 14<sup>th</sup> June 2016, the 1<sup>st</sup> Respondent pointed out that the instant Petition was filed by the Petitioner against her in her private capacity as an individual, and not as his wife and the allegations raised therein bordered on alleged fraudulent activity and misappropriation of funds in cahoots with the 2<sup>nd</sup> Respondent.

9. Further, that in the Petition, the Petitioner sought an award of damages together with interest from her as a result of alleged infringement of his rights and that she responded to the various claims raised in the said Petition and participated in proceedings prior to the withdrawal of the same.

10. It was also her submission that where a Petitioner withdraws his Petition against the Respondent, the Respondent is entitled to costs of the Petition as was stated by the Court in **Ralf Keeper and Another v Erustus Gicharu Kimani [2015] eKLR**. Furthermore, that she filed a denial of liability as provided under **Paragraph 1 (b) of Schedule VI of the Advocates Remuneration Order, 2014**, and as such, the payment of full instruction fees was necessitated and it does not matter that the Petition was later withdrawn by the Petitioner. In that regard, she relied on the holding in **First American Bank of Kenya v Shah and Others [2002] 1 EA 64** for the proposition that full instruction fees to defend a suit are

earned the moment a defence is filed and the subsequent progress of the matter is irrelevant.

11. Further, according to the 1<sup>st</sup> Respondent, in the event that the Petition had gone to full hearing and the Court found in favour of the Petitioner, she would be liable to pay damages to the Petitioner together with interest and furthermore, she was dragged into this matter at the behest of the Petitioner and as a consequence, she incurred costs by giving instructions to her advocates on record. In the circumstances, it would only be fair if she is restored to the position she was in prior to being involved in these proceedings and she therefore urged the Court to award her the costs of the Petition.

### **The 2<sup>nd</sup> Respondent's Case**

12. Through its Written Submissions dated 28<sup>th</sup> May 2016, the 2<sup>nd</sup> Respondent asserted that the Petitioner had made very serious allegations against it relating to the operation of the bank account that was originally opened by the 1<sup>st</sup> Respondent and then converted to a Joint Account operated by both the Petitioner and the 1<sup>st</sup> Respondent.

13. It was also its contention that in order to answer to the allegations made by the Petitioner, it had to investigate the history of the account, the changes to the mandate and the operation of the account, and prepare an Affidavit to answer all the matters raised in the Petition. That it also filed a list of Authorities on 15<sup>th</sup> December, 2015 and pointed out that the matrimonial dispute between the Petitioner and the 1<sup>st</sup> Respondent was already the subject of proceedings in the Family Division of the High Court and as such, it was unnecessarily dragged into the said dispute and the fact that the present matter has been discontinued shows that there was no point or justification in the proceedings being instituted.

14. Further, according to the 2<sup>nd</sup> Respondent, it was the Petitioner's decision to involve it in the present proceedings and hence, it is just and proper that he should pay the costs following his withdrawal of the Petition.

### **Determination**

15. Who then should bear the costs of these proceedings? This being a constitutional Petition, premised on the Bill of Rights, the Rules pertaining to the procedure and any matters relating to such Petitions is outlined under the **Constitution of Kenya (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules, 2013** and **Rule 26** thereof provides that:

***“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.”***

16. In that regard, the Supreme Court in the case of ***Jasbir Singh Rai and 3 Others vs Tarlochan Singh Rai and 4 Others, Petition No. 4 of 2012***, made the following observation:

***“[14] So the basic rule on attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to penalize the losing party; rather, it is for compensating the successful party for the trouble taken in prosecuting or defending the suit. In Justice Kuloba's words [Judicial Hints on Civil Procedure, at p.94]: “[T]he object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure...Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action.”***

***[15] It is clear that there is no prescribed definition of any set of “good reasons” that will justify a Court's departure, in awarding costs, from the general rule, costs-follow-the-event. In the classic common law style, the Courts have proceeded on a case-by-case basis, to identify “good reasons” for such a departure.”***

17. I am duly guided and following various other decisions rendered by this and other Courts, it will be noted that being a matter of pure discretion, the outcomes of the different cases have produced different views in regard to the orders of costs. Whereas in some cases the aim has been said to be the need to reimburse the successful party, in others, such as public interest litigation, the Courts have relaxed the rule on costs so as to encourage litigation for good causes, in the public interest.

18. In the present case, it will also be noted that the Petitioner instituted the proceedings alleging violation of his right to receive his pension and in that regard sought for compensatory orders in the form of damages and interests thereon from both Respondents. The Court also notes that the matter was filed under Certificate of Urgency and the urgency was instigated by allegations among others, that the Respondents had jointly misappropriated the Petitioner's pension and thereby leaving him destitute and forcing him to beg from relatives, well-wishers and friends for monies and in so doing, the Respondents had infringed on his right to human dignity guaranteed under **Article 28**; the right not to be subjected to psychological torture and to be treated or punished in a cruel, inhuman or degrading manner, as stipulated under **Article 29 (d) and (f)**; and the right to own property as guaranteed under **Article 40** of the **Constitution**.

19. The Petition was filed on 24<sup>th</sup> March, 2015, and thereafter the Respondents entered appearance and filed their respective Affidavits in reply. The Court further notes that at the time of the institution of the present matter, there was already an ongoing matrimonial cause between the Petitioner and the 1<sup>st</sup> Respondent being **Nairobi High Court Divorce Cause No. 8 of 2015**. In that regard, prior to the filing of the present Petition, the Court in the said matter had issued certain interim orders and among them was an order restraining the Petitioner from withdrawing any sum of money from a Joint Account held by the Petitioner and the 1<sup>st</sup> Respondent pending the hearing and determination of that Cause.

20. Is this Petition similar to the Matrimonial Cause? Whereas the Respondents alleges that the present Petition although filed as a Constitutional Petition, is in fact a matrimonial dispute, the orders sought in the Petition reveal otherwise as can be seen from the complaints above. Whereas therefore the Family Division of the High Court has the jurisdiction to address any alleged violation of constitutional rights, I see no bar for the Petitioner to institute constitutional proceedings relating to specific allegations of violations of his rights as he has done. Having so said however, it is obvious to me that the Petitioner and the 1<sup>st</sup> Respondent are still embroiled in a tussle over their matrimonial life including joint properties and since the Divorce Cause is still pending resolution, it would be best that the present proceedings be terminated on final terms that would not include further acrimony on costs due from one of the estranged spouses to the other. Discretion would therefore tilt towards the making of an order that each of them should bear their own costs.

21. As regards the 2<sup>nd</sup> Respondents, the Petitioner made various allegations against it in the Petition, the key one being that the refusal by the 2<sup>nd</sup> Respondent to avail to him statements of accounts resulted to it being dragged into the present litigation. The Court however notes, as can be seen at Paragraph 24 of the Petitioner's Affidavit in support of his Certificate of Urgency, that the Petitioner had at one point requested the 2<sup>nd</sup> Respondent for information on the dealings with their Joint account and subsequently a certified copy of the bank statements was given to him by the 2<sup>nd</sup> Respondent's Bank branch at *[particulars withheld]*.

22. Furthermore, at Paragraph 26 thereof, the Petitioner asserts that he made a formal request to the 2<sup>nd</sup> Respondent through its *[particulars withheld]* branch, seeking to be advised on where his pension money was transferred to and by whom. He was duly informed by two officers of the bank that the account had been frozen and they were not authorized to divulge any further information on it. In that regard, the 2<sup>nd</sup> Respondent's response, as can be seen from Paragraph 15 of its Affidavit in response, was that on 3<sup>rd</sup> February 2015, it was served with a copy of an Order from the High Court and as such, it blocked the account pending further directions from the Court. That action was obviously justified as the 2<sup>nd</sup> Respondent was acting strictly in accordance with Court orders. It will also be noted that the 2<sup>nd</sup> Respondent supplied both the 1<sup>st</sup> and 2<sup>nd</sup> Respondents with copies of the statements of account in issue

and it asserts so in its Affidavit at Paragraph 10 which is to the effect that:

***“The statements of account for the Account are at pages 21 to 39 of the exhibit to the Petitioner’s Supporting Affidavit and exhibits ‘JMO 2 AND 3’ at pages 2 to 17 of the 1<sup>st</sup> Respondent’s Replying Affidavit. The fact that both the Petitioner and the 1<sup>st</sup> Respondent have copies of the statements of account shows that the allegations by the Petitioner that the 2<sup>nd</sup> Respondent has refused to provide copies of the statements of account is not correct.”***

23. It is thus apparent that the Petitioner had obtained the statements he had sought for prior to filing the Petition and at the very least, the best he could have done in the circumstances was to withdraw the Petition as early as possible and certainly soon after being served with the response by the 2<sup>nd</sup> Respondent. The Court notes however that the notice of withdrawal was filed on 24<sup>th</sup> February, 2016 nearly eight months after the filing of the said Affidavit. He had no reason in any event to have dragged the 2<sup>nd</sup> Respondent into this Petition from the onset.

**Disposition**

24. For the above reasons, and after a careful consideration of the Party’s respective cases, and the circumstances of the present Petition, it is fair and just that the Petitioner should bear the 2<sup>nd</sup> Respondent’s costs of this Petition. As regards the 1<sup>st</sup> Respondent, let her bear her own costs.

25. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 6<sup>TH</sup> DAY OF DECEMBER, 2016**

**ISAAC LENAOLA**

**JUDGE**

**DELIVERED AND SIGNED AT NAIROBI THIS 7<sup>TH</sup> DAY OF DECEMBER, 2016**

**EDWARD MURIITHI**

**JUDGE**