



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**Misc. Application No 121 Of 2013**  
**CHILDREN'S CASE NUMBER 1016 OF 2013**

**J K B.....APPLICANT**

**VERSUS**

**G C T.....RESPONDENT**

**RULING**

**PLEADINGS**

On 9<sup>th</sup> December, 2014 the parties herein; Ms. Mudesh Muhanda for the Respondent and Ms. Arwa for the Applicant on the hearing of an application on award of costs.

Ms. Muhanda sought award of costs for the Applicant filed in Court dated 22<sup>nd</sup> November, 2013 where she entered appearance for her client on 27<sup>th</sup> November, 2013, the Applicant through the advocate Ms. Arwa filed a Notice of withdrawal without any order as to costs.

**ORAL SUBMISSIONS**

During submissions; Ms. Arwa informed the Court that she on behalf of the client, filed the application of 22<sup>nd</sup> November, 2013 under certificate of urgency while seeking leave from Court to institute committal proceedings or contempt of Court against the Respondent; with regard to non compliance of access to the child of the marriage order issued in the **Children's Court 1016 of 2013** of 17<sup>TH</sup> October, 2013. The advocate withdrew the application after the Respondent complied with the Court order and allowed the Applicant access to the child. The application was now taken over by events and it was of no value or use.

Ms. Muhanda informed the Court that the application was withdrawn without reasons advanced on the action to withdraw.

The Applicant merely filed a Notice of the withdrawal in Court. Petitioner the Respondent's Counsels on being served with the applications of 22<sup>nd</sup> November, 2013, obtained interests from the court, filed a Notice of appearance, and filed A Replying Affidavit. The Respondent also was allowed access to the child. Therefore the Respondent to the application 22<sup>nd</sup> November, 2013 is entitled to costs.

The Court received written submissions on the legal aspect on grant of Court from both counsel filed on

15<sup>th</sup> February, 2014 and 19<sup>th</sup> December, 2014 respectively.

## **ISSUES**

The issue before the Court for determination is whether costs should be awarded to the Respondent after the application of 22<sup>nd</sup> November, 2009 was withdrawn.

The Applicant advocate submitted that no formal application was filed in Court on the issue of costs and the submissions made were from the bar. Be that as it may; the Applicant's advocate was of the view that the interpretation given to "Costs follow the event" should be as follows; the withdrawal of the proceedings of 22<sup>nd</sup> November, 2013 was the obedience and compliance of the Children's Court Order of 17<sup>th</sup> October, 2013 to allow the Applicant access to the child of the marriage.

## **LAW**

The Applicant's advocate relied on the following legal provisions;

### **Section 27 of the Civil Procedure Act**

- i. ***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.***

- ii. ***The Court or Judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.***

On the discretion of the Court to award costs the Applicants advocate relied on; **The Advocate Remuneration Order Rule 54 2009** that in the effect that costs shall follow the event.

In **Devram Manji Daltani Vs Danda (1949) 16 EACA 35** quoted with approval **Republic Vs The Medical Practitioners and Dentists Board Misc. Application No. 274 of 2013 and held that;**

***"A successful litigant can only be deprived of his costs where his conduct has led to litigation which might have been averted"***

The Applicant's advocate outlined that the disobedience of the Court Order of 17<sup>th</sup> October, 2013 led to the filing of the application therein. The Respondent should not be awarded costs.

Reference is also made to Supreme Court case of **Jasbir Singh Rai and 3 others Vs Tarlochan Singh Rai and 4 others (2014) eKLR** when the Court alluded to the discretion of the Court on the award of costs;

***"The initial fact inn setting the preference in the judiciously exercised discretion of the Court, accommodating the special circumstances of the case while being guided by the ends of justice....."***

The Respondent's advocate also submitted extensively on the matter at hand of award of costs.

The Chamber Summons was filed by the Applicant on 22<sup>nd</sup> November, 2013 and the application was

listed for hearing on 5<sup>th</sup> December, 2014. Upon service of the application, Counsel entered appearance filed on 27<sup>th</sup> November, 2013 and filed a Replying Affidavit on 28<sup>th</sup> November, 2013 not among that the application of 22<sup>nd</sup> November 2013 was withdrawn and she realized the withdrawal was effected on 3<sup>rd</sup> December, 2013.

In withdrawing the application, the Applicant did not give any reasons why the same was withdrawn and this prompted the Respondent to ask for costs.

The Respondent is entitled to cost relying on **Section 25 Rule 23 of the Civil Procedure Rules;**

***“Upon request in writing by any dependant the Registrar shall sign Judgment for the costs of a suit which has been wholly discontinued, and any defendant may apply as hearing for costs or any part of the claim against him which has been withdrawn”***

In the normal cause of events withdrawal of proceedings amounts to a determination in favour of the Respondent. In the instant case, the Applicant withdrew the application of 22<sup>nd</sup> November, 2013 by a Notice filed in court.

In the meantime, the Respondent’s Counsel obtained instructions and filed a Replying Affidavit. The cited authorities on the issue of costs are as referred to in the case of; **Jasbir Singh Rai and 3 others Vs Tarlochan Singh Rai and 4 others (2014) eKLR.**

***“So the basic role on arbitration of cost 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”.***

The Respondent’s advocate’s submission is that relying on Judicial Hints on Civil Procedure at Page 94.

***“The 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 means by which a successful litigant is recouped for expenses to which he has been put in fighting an action’.”***

The Respondent’s advocate is of the view that the event of withdrawing the instant application without cause after the Respondent had filed all necessary documents for purpose of defending the suit entitles her to costs.

## **FINDINGS**

The Court has considered the submissions of both learned Counsels on record and finds as follows;

The miscellaneous Application 121 of 2013 was filed pursuant to non compliance of Court Orders by the Children Court issued on 17<sup>th</sup> October, 2013. The Applicant in the Children Court declined to allow access of the child of the marriage to the Respondent upon filing and service of the application of 22<sup>nd</sup> November, 2013 to the Respondent; the Applicant obtained access to the child of the marriage and the application was overtaken by events. The substantive issue had been resolved by compliance of the Court Orders of 17<sup>th</sup> October, 2013. The matter was withdrawn by the Applicant.

Ordinarily, the party who withdraws a matter, application or suit is entitled to pay costs to the other party. However, in the instant case, the matter was withdrawn due to compliance of Court Orders by the Respondent.

If the Respondent complied with the Court Order the application would not have been filed. Therefore the inconvenience and trouble that the Respondent’s advocate took to prepare and file the documents to oppose the application filed in Court can only be borne by the Respondent in form of legal fees to her

Counsel.

The Court will exercise its judicial discretion and not award costs for the withdrawal of the application of 22<sup>nd</sup> November, 2013 as the withdrawal was due to the Respondent's eventual compliance. To have the Court Order complied with took the Applicant and Counsel effort and time to file the application and were presumably ready to pursue the orders therein. Upon compliance by the Respondent they could have sought costs for the labour and inconvenience but did not.

Infact, they abandoned the application once the Court Orders were complied with and did not demand costs. Finally, these are family matters and the rate on award of costs is used sparingly.

The application for costs is dismissed.

**READ, DELIVERED AND SIGNED AT NAIROBI THIS 11<sup>TH</sup> DAY OF FEBRUARY, 2015.**

**MARGARET MUIGAI**

**JUDGE**

*In the presence of:*

Mr.....for Applicant

Mr.....for Respondent