



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

PETITION NO 337 OF 2009

EXPRESS CONNECTIONS LIMITED.....1ST PETITIONER
MICHAEL KANYAGO2ND PETITIONER
COMUTER TRAIN SHUTTLE TRANSPORT LTD3RD PETITIONER
SYLVESTER GITHINJI4TH PETITIONER
STATELINE EXPRESS (K) LTD5TH PETITIONER
FREDRICK WAIGANJO6TH PETITIONER
ELIZABETH WANGAI MWANGI.....7TH PETITIONER
EXPRESS LINK LTD.....8TH PETITIONER
INTEGRITY EAST AFRICA LTD.....9TH PETITIONER
ROSE MBUYA MUGO.....10TH PETITIONER
SAMUEL KINYANJUI.....11TH PETITIONER
JOHN ODHIAMBO12TH PETITIONER

VERSUS

THE ATTORNEY GENERAL1ST RESPONDENT
THE CITY COUNCIL OF NAIROBI2ND RESPONDENT

RULING

1. On 18th March, 2008, the 2nd respondent enacted the City of Nairobi (Matatu Terminus) Amendment By-laws. The by-laws prevented the 1st petitioner's public service vehicles from accessing the central

business district of the city of Nairobi. According to the petitioner, a public service transport company, the by-laws prohibited it from dropping or picking passengers from the Kencom, Ambassador and Gill House termini. As a result, the petitioner filed the present petition dated 10th June 2009 seeking the following orders:

- (a) It be declared that the said by-laws made on 18th March 2008, contravene the petitioners rights under sections 75, 77(9), 81 and 82 of the constitution and are null and void.*
- (b) It be declared that the said by-laws are ultra vires section 72(a) of the Traffic Act and are null and void.*
- (c) It be declared that the said by-laws are unreasonable, oppressive, unjust and null and void.*
- (d) It be declared that the said Muthurwa Omnibus Station was established illegally.*
- (e) A permanent injunction do issue restraining the 2nd respondent from enforcing the said purported by-laws.*
- (f) As an alternative to (e) above, an order of Certiorari do issue to bring to this Honourable Court the said by-laws and the said be quashed.*
- (g) General damages.*
- (h) The costs of this application be provided for.*

2. On 1st October 2014, the 1st petitioner withdrew the petition on the basis that it had been overtaken by events. This was because the 2nd respondent had allowed the 1st petitioner to operate its vehicles within the central business district. According to the 1st petitioner, some of the other petitioners were members of the public who were affected by the bylaws enacted by the 2nd respondent.

3. The 2nd respondent, while acceding to the withdrawal of the petition, insisted that it was entitled to the costs of the proceedings. I therefore directed the parties to file submissions on the question of costs. The 1st respondent did not insist on payment of costs. This ruling therefore relates to the issue of costs between the petitioners and the 2nd respondent.

4. Having read the respective submissions of the parties on this question. I believe that there is no dispute with respect to the principles on which the Court will grant costs. Key among these principles is that the issue of costs is within the discretion of the Court.

5. The petitioners referred to, among others, the decision of the Court in the case of **John Harun Mwau & Others vs Attorney General & Others Nairobi High Court Petition No. 65 of 2011** in which the Court observed as follows:

[180.] In matters concerning public interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed. Costs should therefore not be imposed on a party who has brought a case against the state but lost. Equally, there is no reason why the state should not be ordered to pay costs to a successful litigant. The court also retains its jurisdiction to impose costs as a sanction where the matter is frivolous, vexatious or an abuse of the court process.

6. I also bear in mind rule 26 of the **Constitution of Kenya (Protection Of Rights And Fundamental Freedoms) Practice And Procedure Rules, 2013** which provides as follows:

26(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.

7. The 1st petitioner argues that the petition was brought in the public interest as the impugned by-laws affected members of the public who boarded its vehicles.

8. The 2nd respondent agrees with the petitioner with respect to the facts forming the basis of the petition, and the fact that it was withdrawn, having been overtaken by events. It takes the position, however, that costs should follow the event, placing reliance on section 27 of the Civil Procedure Act, which states that:

27. (1) 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. The 2nd respondent further relies on the words of Richard Kuloba in his book **Judicial Hints on Civil Procedure 2nd Edition** at page 99 in which he observed:

The words “the event” mean the result of all the proceedings to the litigation. The event is the result of entire litigation. It is clear however, that the word “event” is to be regarded as a collective noun and is to be read distinctively so that in fact it may mean the “events” of separate issues in an action. 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, but that, where the action involves separate issues, whether arising under different causes of action or under one cause of action, the costs of any particular issue go to the party who succeeds upon it. An issue in this sense need not go to the whole cause of action, but includes any issue which has a direct and definite event in defeating the claim to judgment in the whole or in part.

10. The 2nd respondent submits that in the circumstances of this case, the withdrawal of the petition meant the end of the litigation, and the costs must follow the withdrawal. It has also relied on the decision in **Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others (2014)eKLR** to submit that costs should be awarded to reimburse the successful party for amounts expended in the litigation. It therefore seeks costs to reimburse it for the expenses incurred in preparing and lodging various documents in Court.

11. I have considered the respective submissions of the parties and their conflicting positions on the issue of costs. I have also noted the authorities relied on in support. I bear in mind, however, that this was a matter in public law, a constitutional petition alleging violation of constitutional rights, as well as the provisions of the statute that regulates the transport sector, the Traffic Act.

12. As observed by the 1st petitioner, the petition was overtaken by events because the 2nd respondent reconsidered its by-laws regarding the 1st petitioner’s access to the central business district. While the withdrawal of the petition meant that the respective positions of the parties were not considered on merit, there was, on the face of it, some merit to the dissatisfaction of the petitioners with the by-laws, which the 2nd respondent indirectly conceded.

13. In the circumstances, in my view, an award of costs against the petitioners is unjustified. It would be

to discourage parties with grievances relating to the actions of public bodies from seeking redress for fear of being penalized with costs. This is not to suggest that costs should never be awarded against a party and in favour of a public body, but in the present circumstances, it is my view that such costs would be unjustified.

14. I therefore direct that each party bears its own costs of the petition.

Dated, Delivered and Signed at Nairobi this 15th day of July 2015

MUMBI NGUGI

JUDGE

Mr. Ombati instructed by the firm of Kefa Ombati & Co. Advocates for the petitioner

Mr. Moimbo instructed by the State Law Office for the 1st respondent

Ms. Maina holding brief for Mr. Omotii instructed by the firm of E.N Omotii & Co. Advocates for the 2nd respondent