



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 71 OF 2015

IN THE MATTER OF APPLICATION FOR JUDICIAL REVIEW

AND

IN THE MATTER OF APPOINTMENT OF DR. LUCY WANJIRU MUSYOKA AS DIRECTOR OF PUBLIC HEALTH, NAIROBI CITY COUNTY

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

NAIROBI CITY COUNTY.....1ST RESPONDENT

NAIROBI CITY COUNTY

PUBLIC SERVICE BOARD.....2ND RESPONDENT

**EX PARTE VEDCK WAFULA & ASSOCIATION OF PUBLIC HEALTH OFFICERS (KENYA)
NAIROBI BRANCH**

RULING

Introduction

1. In these proceedings the ex parte applicant sought orders of certiorari to quash the decision by the 1st Respondent to appoint **Dr. Lucy Wanjiru Musyoka** as the Director of Public Health, Nairobi City County. It was alleged that the said appointee was not qualified to hold the position to which she was appointed by the Respondents though there were other qualified persons who were not considered for the position.
2. The application was opposed by the Respondents on grounds inter alia that this Court lacked the jurisdiction to determine the matter.
3. During the pendency of the application, counsel for the Respondents informed the Court that **Dr Lucy Wanjiru Musyoka**, the subject of these proceedings voluntarily resigned from her position as the Director of Public Health. On 24th July, 2015, this Court made an order compromising the application, save for the issue of costs, when it became obvious that the application had been overtaken by events.
4. The applicants insist that since the dispute was the process of appointment of the said subject rather than the subject in person, they were entitled to the costs of these proceedings.

5. 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.

6. 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”.

7. 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.
8. 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.”

9. In determining the issue of costs, the Court is entitled to look at the conduct of the parties, the subject of litigation and the circumstances which led to the institution of the legal proceedings and the events which eventually led to their termination. 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. See **Hussein Janmohamed & Sons vs. Twentsche Overseas Trading Co. Ltd [1967] EA 287** and **Mulla (12th Edn) P. 150.**
10. In this case, the determination was as a result of the realisation that no useful purpose would be served by the continuation of the proceedings as the subject matter of the litigation was no longer alive. The event that led to that decision was the resignation of the subject of these proceedings. The reasons that led to her resignation were neither disclosed nor is the Court able to unravel the same.
11. In the circumstances of this case “the event” cannot be traced to any of the parties to the dispute in order to apportion the liability to the parties herein. In other words the issue of the qualification of the subject remains undetermined. In order for me to penalise the Respondents in costs, I would have to make a finding that by appointing the said subject they acted unlawfully, a decision which I cannot make considering the stage at which these proceedings were at the time of the compromise.
12. Since the Motion was never heard, this Court cannot in deciding the issue of costs dissect the parties’ submissions with a view to making a determination as to whether or not the issues raised in the application were justiciable. To do that would amount to making a determination without affording the parties an opportunity of being heard on the main cause of action.
13. In the premises there is no material upon which this Court can make a determination as to which party is the successful party. In that event costs must fall where they lie and since they lie on a suit which has been compromised, it is my view and I so hold that each party ought to and will bear own costs.

Dated at Nairobi this 14th day of October, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Udoto for the Applicant

N/A for the respondent

Cc Patricia