



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURT

MISCELLANEOUS CIVIL APPLICATION NO. JR 167 OF 2012

IN THE MATTER OF AN APPLICATION FOR BY MEN FOR THE EQUALITY OF MEN AND WOMEN, AND WOMEN’S POLITICAL ALLIANCE-KENYA FOR ORDERS OF PROHIBITION, CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF THE SHORTLISTING, SELECTION, AND APPROVAL PROCESS ON RESPECT OF CANDIDATES FOR THE POSITION OF CHAIRPERSON AND MEMBERS OF THE NATIONAL POLICE SERVICE COMMISSION

REPUBLIC APPLICANT

VERSUS

HIS EXCELLENCY PRESIDENT MWAI KIBAKI..... 1ST RESPONDENT

THE RIGHT HON. RAILA AMOLO ODINGA.....2ND RESPONDENT

FESTUS M. LITIKU.....3RD RESPONDENT

AHMEDNASIR ABDULLAHI4TH RESPONDENT

LYDIA GACHOYA.....5TH RESPONDENT

CAROLI OMONDI.....6TH RESPONDENT

MUTEA IRINGO.....7TH RESPONDENT

DR. S. KIPNG’ETICH TOROREY.....8TH RESPONDENT

PETER MWANGI.....9TH RESPONDENT

- EX-PARTE:**
- 1. MEN FOR THE EQUALITY OF MEN AND WOMEN**
 - 2. WOMEN’S POLITICAL ALLIANCE-KENYA**

RULING

1. These proceedings were commenced by way of a Notice of Motion dated 10th May, 2012 in which the Applicants were seeking the following orders:

1. THAT an order of prohibition directed to the 1st Respondent do issue prohibiting him and/or his officers, servants or agents from receiving from the Speaker of the National Assembly for appointment names of Applicants for the position of Chairperson and Members of the National Police Service Commission now awaiting approval by the National Assembly based on a list or lists forwarded to the 1st Respondent and/or the 2nd Respondent by the National Police Service Commission Selection Panel and/or by individual Members of the said Panel (the 3rd to 9th Respondents, both inclusive), in purported furtherance of Section 6(7) and (8) of the National Police Service Commission Act;

2. THAT an order of Certiorari do issue to remove the decision of the National Police Service Commission Selection Panel and/or of individual Members of the said Panel (the 3rd to 9th Respondents, both inclusive) ultimately made on 22nd February 2012 by which names of applicants for the position of Chairperson and Members of the National Police Service Commission were forwarded to the 1st Respondent and/or the 2nd Respondent for their consultation and subsequent forwarding to the National Assembly, in purported furtherance of Section 6(4)(e), (f) and (g), (5), (6), (7), and (8) of the National Police Service Commission Act, and to bring up the same into the High Court for the purpose of its being quashed;

3. THAT an order of Mandamus directed to the National Police Service Commission Selection Panel and/or the individual members of the National Police Service Commission Selection Panel do issue, compelling the panel and/or the members (the 3rd to 9th Respondents, both inclusive) to shortlist afresh applicants and to forward names of persons for the position of Chairperson and Members of the National Police Service Commission pursuant to Section 6(4)(e), (f) and (g) of the National Police Service Commission Act in accordance with performance ranking through the scoring tallied on 22nd February 2012.

4. THAT costs of this Motion be awarded to the Applicants.

2. On 20th April, 2012, **Warsame, J** (as he then was) granted the applicants leave to commence judicial review proceedings proper. However on the issue whether or not the grant of leave would operate as stay, the learned Judge directed that the application be served for inter partes hearing of the issue. On 10th May, 2012, the learned Judge directed the grant of leave to operate as a stay. However, it is within the public domain that the process which was meant to be stayed came to pass. This Court does not know under what circumstances this happened but that is water under the bridge.

3. The proceedings herein having been overtaken by events as a result of the appointment of the members of the National Police Service Commission, the main application was on the application of the applicants marked as withdrawn on 2nd May, 2013. However, as the parties were unable to agree on whom to bear the costs, the matter was left for determination of the Court based on the submissions of the parties.

4. The applicants' case is that they ought to be awarded the party and party costs since it was the action of the 1st and 2nd Respondents that removed the substratum of the application. According to the applicant this action by the 1st and 2nd Respondents was undertaken notwithstanding the existence of a Court order staying the appointment of the said Commissioners. Relying on Article 159 of the Constitution and section 27 of the *Civil Procedure Act*, it was submitted that this Court has full discretion to award costs incidental to the instant application. In support of their submissions the applicants relied on Party of Independent Candidate of Kenya & Another vs. Mutula Kilonzo & 2 Others HCEP No. 6 of 2013 and Nedbank Swaziand Ltd vs. Sandile

Dlamini No. 144/2010 of 2013. In the former, 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 SandileDlaminiNO.(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 (*FrippvsGibbon & 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.”

5. On their part the Respondents submitted that the Court could not interfere with the decision of the 1st and 2nd Respondents unless it was demonstrated that the selection panel contravened either the substantive or procedural requirements of the law. In support of this submission, the Respondents relied on **Trusted Society of Human Rights vs. Attorney General HCPT No. 229 of 2012.**
6. It was further submitted that it is trite law that Courts are not to be engaged in academic discussions or that judicial time should not be expended in engaging in moot questions which is the essence of justiciability and reliance for this submissions was sought in **Patrick Ouma Onyango and 12 Others vs. Attorney General.**
7. In the Respondents’ view, costs are meant to reimburse a litigant for the expenses incurred in litigation and not meant to be punitive. In deciding what costs to award the Court was urged to have regard to the circumstances of the case including the conduct of the parties which include conduct of the parties before and after proceedings, whether it was necessary/reasonable for a party to raise or pursue a particular allegation or issue and whether a winning party has exaggerated its claim. The Respondents relied on **Community Advocacy and Awareness Trust & 8 Others vs. Attorney General Interested Party National Gender and Equality Commission & 5 Others [2012] eKLR** where it was held:

“The court is not well suited to determine matters which are best discussed and agreed upon at a policy level in an environment that fosters public participation, consensus building and civic education. It is possible that a set of principles developed over time will emerge as various cases going through the court process upto the apex court but one case or dispute cannot determine the whole course of how ethnic and regional diversity is to be achieved in public appointments. In the case of *Prinsloo v Van der Linde and Another (Supra) at para 20*, the Consitutional Court of South Africa warned against making sweeping statements about difficult and complex area of equality and discrimination. The court observed that in view of the history of that country,

“All this reinforces the idea that this Court should be astute not to lay down sweeping interpretations at this stage but should allow equality doctrine to develop slowly and, hopefully, surely. This is clearly an area where issues should be dealt with incrementally and on a case by case basis with special emphasis on the actual context in which each problem arises.”

8. It was therefore submitted that the Applicant is not entitled to costs as the 1st and 2nd Respondents had filed all their pleadings before the ex parte applicant chose to withdraw his Notice of Motion. Further the issues were of great public interest and the ex parte applicants should not be entitled to the costs of the suit as their suit was not justiciable.
9. 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.

10. 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”.

11. 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.
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.
13. In this case the proceedings were initiated by the applicant. Before the proceedings could be determined the applicant withdrew the same. In the normal course of events a withdrawal of proceedings amounts to a determination thereof in favour of the respondents thereto and pursuant to the provisions of section 27 aforesaid the respondents would be entitled to costs. However, in

this case it was contended that the event which led to the withdrawal of these proceedings was the conduct of the 1st and 2nd Respondents of violating the order of stay which was issued by this Court. Unfortunately that issue was not gone into by the parties in depth in order to enable the Court decide that the said order was violated in the sense that the same was brought to the knowledge of the said Respondents before they took the action they took. In other words there is no evidence as to when the said Commissioners were appointed by the said two respondents whether before or after the stay order was issued and brought to their attention. Accordingly, this Court based on the material before it is unable to find with certainty that the stay order was violated. In any event if the same was violated that ipso facto would not have left the applicants without a remedy to warrant the withdrawal of the application since if properly advised the applicants would still have moved the Court for the nullification of the said actions.

14. What has however weighed on the mind of the Court is the subject of the litigation. This was a matter which was undoubtedly public interest litigation and I doubt whether the Court would have ordered the applicants to bear the costs even if they had not succeeded. That being the position, it follows that the converse must be true that even if the applicants had succeeded the Court if my view is correct would not have awarded the costs to the applicants.
15. 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 Jannohamed & Sons vs. Twentsche Overseas Trading Co. Ltd [1967] EA 287** and **Mulla (12th Edn) P. 150.**
16. I have considered all those facts and the order which commends itself to me and which I hereby make is that there be no order as to costs. In other words each party will bear their own costs.

Dated at Nairobi this 9th day of July 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Kerubo for Mr Kamau for the 1st and 2nd Respondents

Mr Arusei for Mr Nderitu for the Applicant

Cc Kevin