



Elms & another v Director of Public Prosecutions & 2 others (Civil Appeal 226 of 2017) [2022] KECA 582 (KLR) (24 June 2022) (Judgment)

Neutral citation: [2022] KECA 582 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 226 OF 2017
DK MUSINGA, MSA MAKHANDIA & K M'INOTI, JJA
JUNE 24, 2022**

BETWEEN

GUY SPENCER ELMS 1ST APPELLANT

RAFFMAN DHANJI ELMS & VARDEE ADVOCATES 2ND APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

DIRECTORATE OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

AGNES KAGURE KARIKI 3RD RESPONDENT

*(An appeal from the Judgment and Decree of the High Court at Nairobi
(Odunga, J. dated 14th June 2017 in HC J. R. App. No. 574 of 2016)*

JUDGMENT

1. In *National Assembly of Kenya v Okiya Omtata Okiiti & Another*, CA. No. 53 of 2019, this Court expressed itself as follows on the doctrine of mootness:

“By its nature, judicial adjudication concerns itself with resolution of live and concrete disputes, not theoretical propositions or pursuits, however lofty or academically stimulating. The doctrine of mootness, which courts in this jurisdiction have had occasion to apply, stands for the proposition that courts will not decide cases in which there is no longer any actual controversy.”

2. At the hearing of this appeal on 14th March 2022, Mr. Oscar Litoro, learned counsel for the appellants, disclosed that on 12th June 2020 the 1st respondent terminated and withdrew the criminal charges against the 1st appellant, namely, Criminal Case No. 1537 of 2017, Republic v Guy Spencer Elms, which were the subject of the litigation in the High Court and the basis of this appeal. That



information was confirmed as correct by Mr. Njeru, learned counsel for the 1st and 2nd respondents and Mr. Mingo, learned counsel for the 3rd respondent. The Court drew attention of learned counsel to the fact that the appeal was now moot because the appellants were seeking orders of certiorari and prohibition to quash and stop the prosecution, which the 1st respondent had, in any event, stopped. At that juncture, Mr. Litoro agreed to withdraw the appeal, save against the award of costs by the High Court to the respondents in the impugned judgement. Accordingly, this judgment is limited to the question of costs only.

3. By way of background, the appellants, after obtaining leave to initiate judicial review proceedings, moved the High Court on 1st December 2016, for an order of certiorari to quash a decision made by the 1st respondent on 2nd November 2016 to charge the 1st appellant with the offence of forgery and for an order of prohibition to stop his arrest or prosecution. The application was based on several grounds, among them, that the intended prosecution was malicious, in bad faith, an abuse of discretion, and that the foundation of the intended criminal charges was a civil dispute then pending before the Environment and Land Court in Nairobi. By a judgment dated 14th June 2017, the High Court found that the appellants had not demonstrated that the intended prosecution was unfair or unlawful, and accordingly dismissed the application with costs. The appellants were aggrieved and lodged the present appeal.
4. On the strength of the award of costs, the 3rd respondent filed in the High Court a bill of costs for a whopping sum of Kshs 21, 205, 546.00. On 6th May 2020, the appellants applied to this Court for stay of further proceedings and assessment of costs in the High Court, pending the hearing and determination of this appeal. By a ruling dated 8th August 2021, the Court granted an order of stay, after finding that the appeal was arguable and would be rendered nugatory if the bill of costs was taxed and the appeal subsequently succeeded.
5. As regards the appeal against award of costs by the High Court, counsel for the appellants, in a brief virtual address, submitted that the termination of the criminal prosecution by the 1st respondent supported the appellants' position that the prosecution had no merit and was based on ulterior motives related to the civil proceedings. In the circumstances, counsel submitted, the Court should allow the appeal against the award of costs, which in any event he contended were astronomical and wholly unjustified in light of the subsequent termination of the criminal proceedings. The appellants also urged us to award them costs of the appeal.
6. Counsel for the 1st and 2nd respondents and counsel for the 3rd respondent did not make any submissions in regard to the award of costs and both left the matter to the Court's determination.
7. We have carefully considered the appeal as regards the award of costs. We bear in mind that by dint of section 27(1) of the [Civil Procedure Act](#), costs of and incidental to any action, cause, matter, or issue are in the discretion of the court or judge. The proviso thereto provides that such costs shall follow the event, unless the court or judge, for good reason, orders otherwise. To the extent that costs are at the discretion of the court, this Court will not readily interfere with the exercise of the trial court's discretion on costs, unless it is demonstrated that the discretion was wrongly exercised. (See *Clement Kungu Waibara v Anne Wanjiku Kibeh & Another* [2020] eKLR).
8. In *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others* [2014] eKLR, the Supreme Court expounded on the court's discretion on award of costs as follows:

“ Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non- award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an



unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the applicant.”

9. Ultimately the Supreme Court concluded as follows:

“It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.” (Emphasis added).

10. We have taken note that the judicial review application in which the costs were awarded against the appellants raised pertinent public interest issues, in particular, the manner of exercise of the discretion of the Director of Public Prosecutions when preferring criminal charges against a citizen. The principal respondents to the application were public institutions, namely the 1st and 2nd respondents. In making the award of costs, the trial court did not advert to that aspect of the application for judicial review. Although the High Court found for the respondents, in the fullness of time, the 1st respondent, on his own volition, elected to terminate the prosecution of the 1st appellant, which the appellants had all along been challenging. While it is true we do not have before us the reasons that prompted the 1st respondent to terminate the criminal charges, nevertheless we agree with the appellants that the termination of the prosecution does suggest that their complaints were not entirely frivolous or baseless. Instructively, the respondents do not defend the award of costs against the appellants in the High Court, and are happy to leave the issue squarely in the hands of the Court.

11. Taking into account the peculiar circumstances of this appeal, which we have set out above, the outcome that best commends itself to us is to allow the appeal against the award of costs to the respondents by the High Court. As regards costs of this appeal, we direct each party to bear its own costs. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF JUNE, 2022

D. K. MUSINGA, P.

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original



Signed

DEPUTY REGISTRAR

