



REPUBLIC OF KENYA



KENYA LAW
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Itolondo v Vice Chancellor of Kenyatta University (Miscellaneous Application E069 of 2022) [2023] KEELRC 173 (KLR) (27 January 2023) (Ruling)

Neutral citation: [2023] KEELRC 173 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E069 OF 2022

SC RUTTO, J

JANUARY 27, 2023

IN THE MATTER OF: ARTICLES 3, 10, 21, 22, 23, 47, 48, 50, 159, 162, 165, 232 AND 258 OF THE CONSTITUTION OF KENYA, 2010.

IN THE MATTER OF: THE ALLEGED VIOLATION OF ARTICLES 3, 10 21, 22, 35, 47, AND 232 OF THE CONSTITUTION OF KENYA, 2010.

IN THE MATTER OF: THE ALLEGED VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS IN ARTICLES 35

AND 47 OF THE CONSTITUTION OF KENYA, 2010.

IN THE MATTER OF: THE ALLEGED VIOLATION OF SECTIONS 3, 4, 5, 7, 9, 11, 14 AND 22 OF THE ACCESS OF

INFORMATION ACT OF 2016 AND SECTIONS 4, 5, 6, 7 AND 11 OF THE FAIR ADMINISTRATIVE ACTION ACT OF 2015.

IN THE MATTER OF: FAILURE TO PROVIDE THE REPORT OF REFORMS AND RESTRUCTURING OF KENYATTA UNIVERSITY.

IN THE MATTER OF: FAILURE TO ENSURE TRANSPARENCY, ACTIVE INVOLVEMENT BY KENYATTA UNIVERSITY STAFF AND THE GENERAL PUBLIC IN THE REFORMS AND RESTRUCTURING OF KENYATTA UNIVERSITY.

BETWEEN

DR. WILFRIDA A. ITOLONDO APPLICANT

AND

THE VICE CHANCELLOR OF KENYATTA UNIVERSITY RESPONDENT



RULING

1. Before me for determination is the issue of costs following the applicant's notice of withdrawal dated August 31, 2022. The respondent indicated that it had no objection to the withdrawal of the Application save that the same be subject to costs.
2. The respondent further filed an affidavit sworn on September 16, 2022 by Gerishon Ng'ang'a, its counsel on record. Mr. Ng'ang'a avers that the respondent was in the process of filing an appeal against the court's Ruling of July 8, 2022 but halted any actions to proceed, following the applicant's confirmation that the matter stood withdrawn. That further, the applicant has now filed ELRC Petition No. 153 of 2022, Dr. Wifrida Itolondo vs the Vice Chancellor of Kenyatta University. That the Petition is strikingly similar to the Miscellaneous Application.
3. Mr. Ng'ang'a further stated that the respondent had used considerable resources and time in defence of the Miscellaneous Application and hence is entitled to recover costs in respect of the withdrawn suit.
4. In response to the respondent's affidavit, the applicant swore an affidavit on November 16, 2022, through which she avers that:
 - i. The filing of the affidavit on costs by the respondent for withdrawing the Miscellaneous Application is meant to intimidate, scare and discourage the her from litigation.
 - ii. The withdrawal of the Application was based on the respondent's argument in the grounds of opposition that the prayers sought in the Application cannot be granted in a miscellaneous application and ought to wait the full hearing.
 - iii. Proceedings in the substantive suit had not begun.
 - iv. She cannot be punished to pay costs when the main suit was never canvassed in court by the parties because of the delaying tactics of the respondent.
 - v. She did not move to court for any personal gain.
 - vi. Allowing the affidavit on costs would discourage potential litigants who would wish to move to court in defense of the Constitution and also out of public interest.
5. The issue was canvassed by way of written submissions. The respondent submitted that it was entitled to costs in that costs follow the event. In support of its position, the respondent placed reliance on the case of DGM v EWG (2021) eKLR. It was further submitted that by withdrawing the Application, the applicant was conceding to the respondent's grounds of opposition. That this was despite the Ruling delivered on July 8, 2022 being in her favour.
6. The Respondent further argued that by filing ELRC Petition No. 153 of 2022, the Applicant is reframing her case to cure the defects pointed out by the Respondent. That further, the Miscellaneous Application was ill advised and thus a waste of the court's time. It further urged that the interests of both parties must be weighed proportionately. That the Miscellaneous Application is neither a constitutional petition nor a public interest litigation but a standard employer employee dispute that allegedly affects the Applicant as an employee of the Respondent institution. In further submission, the Respondent stated that it was compelled to defend itself in the proceedings under circumstances of extreme urgency thus being exposed to untold anxiety and expenditure. That further, the Application was withdrawn after it had taken full instructions and carried out extensive research and filed its



Grounds of Opposition. That the withdrawal came after the respondent's advocates had attended court on various dates and made considerable steps in filing their Appeal against the Ruling dated July 8, 2022.

7. On her part, the applicant submitted that she had filed the Miscellaneous Application under articles 3, 35 and 258 of the Constitution. That therefore, the respondent's argument that the Miscellaneous Application was neither a constitutional Petition nor a public interest litigation, does not hold ground.
8. It was the applicant's further submission that the withdrawal is not a concession of the respondent's issue. That the applicant knowing that the suit was of public interest nature never asked for costs and has not asked for costs in the Petition that has been filed to replace the Application. That further, she did not move the court for personal gain or else, she would have requested for costs. To buttress her arguments, the applicant sought to rely on the cases of John Harun Mwau & 3 others v Attorney General & 2 others (2012) eKLR and Dindi Oscar Okumu v Robert Pavel Oimeke & 5 others (2021) eKLR.
9. It is trite law that costs of a suit or other proceedings are always in the discretion of the Court. In this regard, section 27 of the Civil Procedure Act, 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. Evidently, section 27 provides for the general rule which ought to be followed unless for good reasons. In considering the import of this provision, the Court of Appeal held as follows in the case of Supermarine Handling Services Ltd v Kenya Revenue Authority Civil Appeal No. 85 of 2006:

“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.”

11. Bearing in mind, the above legal position, it is imperative to review the chronology of events from the time of filing the Miscellaneous Application upto its withdrawal, in order to put the matter into perspective.
12. The applicant filed the instant Miscellaneous Application under a certificate of urgency on May 12, 2022. The Respondent filed a Notice of Appointment through the firm of Njoroge Regeru & Company Advocates. It also filed Grounds of Opposition dated May 24, 2022, through which it contended that the Court lacked jurisdiction to hear and determine the matter and that the prayers sought in the Application could not be granted in a miscellaneous application.
13. The matter came up for inter partes hearing on May 24, 2022 and the court directed that the grounds be canvassed by way of written submissions. The court further granted the applicant's request to respond to the grounds of opposition and gave directions on filing of submissions.
14. Ruling on the grounds of opposition was reserved for July 8, 2022.



15. In its Ruling, the court dismissed the grounds of opposition and granted the respondent leave to file a substantive response to the Application.
16. The respondent was dissatisfied with the court's ruling hence prayed for leave to appeal and sought to stay further proceedings. The court granted the respondent's prayer for leave and stayed proceedings for 30 days.
17. The respondent filed a Notice of Motion Application dated August 3, 2022, through which it sought to stay further proceedings pending hearing and determination of its Appeal. The Application was scheduled to come up for hearing on September 19, 2022. Before it could be heard and determined, the Applicant filed the Notice of Withdrawal which is now the subject of this Ruling.
18. It is therefore evident that the Miscellaneous Application was withdrawn midstream and the court was yet to give its final determination. Nonetheless, considerable ground has been covered in the matter as evidenced by the chronology of events highlighted above. It can very well be said that a lot of water has gone under the bridge.
19. Coupled with the foregoing, it is notable that the applicant in withdrawing the Miscellaneous Application, has replaced it with a Petition, which is substantively similar to the said Application. Essentially, what this means is that litigation on the issues raised in the Miscellaneous Application is set to begin afresh. This takes the parties back to square one. It is therefore expected that the respondent has incurred expenses in defending the instant Application.
20. It is also notable that the filing of the Petition was notwithstanding the court's determination in its Ruling, that the Miscellaneous Application was properly before court as it was raising constitutional issues.
21. In light of the foregoing and considering the chronology of events leading up to the withdrawal of the Miscellaneous Application and the fact that there is a Petition over the same issue, it is only fair and just that the Respondent be awarded costs for its trouble in defending the Miscellaneous Application.
22. In arriving at this decision, I am fortified by the finding of the court in the case of *Joseph Oduor Anode v Kenya Red Cross Society* [2012] eKLR, where the learned Judge reckoned thus:

“In this case Mr Kuloba's view is that the event contemplated under section 27 aforesaid is the culmination of the final disposal of the suit. With due respect, I beg to disagree. Under section 27 aforesaid the court has powers to award costs of the suit as well as incidental costs. Incidental costs, I agree with Mr Litoro, include costs incurred as a result of interlocutory applications....It is therefore my view and I hold that the withdrawal of the application was an event for the purposes of section 27 aforesaid and called for the invocation of the discretionary powers of the court under the section.” Underlined for emphasis
23. It is against this background that I do order the applicant to pay the respondent costs of the Miscellaneous Application to be taxed by the Deputy Registrar.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JANUARY, 2023.

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STELLA RUTTO

JUDGE

Appearance:



For the Applicant in person

For the Respondent Mr. Regeru appearing together with Mr. Thuo

Court Assistant Abdimalik Hussein

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of April 21, 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the *Civil Procedure Rules*, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by article 159(2)(d) of the *Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under article 48 of *Constitution* and the provisions of section 1B of the *Civil Procedure Act* (chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

