REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 7 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF: THE VIOLATION AND/OR THREATENED VIOLATIONS OF

ARTICLES 1, 2, 3, 10, 19, 20, 21, 24, 41, 47, 73, AND 131 OF THE CONSTITUTION OF KENYA, 2020

AND

IN THE MATTER OF: THE VIOLATION OF THE FAIR ADMINISTRATION ACTION ACT, NO 4 OF 2015

AND

IN THE MATTER OF: THE VIOLATION OF THE EMPLOYMENT ACT, 2007

AND

IN THE MATTER OF: THE VIOLATION OF SECTION 35 OF THE UNIVERSITIES ACT NO. 42 OF 2012

BETWEEN

PROF. KIAMA STEPHEN GITAHI.....PETITIONER

VERSUS

THE CABINET SECRETARY, MINISTRY OF EDUCATION.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

AND

PUBLIC SERVICE COMMISSION.....1ST INTERESTED PARTY

THE UNIVERSITY OF NAIROBI.....2ND INTERESTED PARTY

PROF. MBECHE ISAAC MEROKA.....3RD INTERESTED PARTY

RULING

The petition herein was compromised by a consent order dated 25th February 2020 and filed on 27th February 2020 and adopted as an order of the Court on the same date. The parties however disagreed on the issue of costs of the 2nd Interested Party who insisted on payment of its costs by the 1st Respondent on the basis that the suit was unnecessary and it was not consulted on the consent recorded by the Court.

The court directed the issue of costs to be disposed of by way of written submissions.

Submissions by the Respondents

The Respondents submit that it is trite that costs are awarded at the discretion of the Court, citing Section 27 of the Civil Procedure Act, Cap 21, Laws of Kenya. They further relied on the decision in **Civil Case No. 149 of 2011 Little Africa Kenya Limited v Andrew Mwiti Jason (2014) eKLR** where the court affirmed that costs are awarded at the discretion of the court.

The Respondents submit that the basic legal principle with respect to the award of costs is that *"costs follow the event*". In the literary work of Justice Kulabo (as he then was), **Judicial Hints on Civil Procedure 2nd Edition**, page 99 it states that *"costs follow the event means that the party who on the whole succeeds in the action gets the general costs of the action"*.

That it is therefore trite that the basis for costs is whether liability has been found against a party so that success or loss by a party is then attributed.

That it is common knowledge that the suit was settled by way of the Consent. Therefore, there was no successful litigant, against whom compensation in the form of costs can be considered. That on this ground alone, there is no basis for awarding costs.

That in the circumstances, the court may, in the exercise of its discretion, be guided by various factors as laid out in the finding in **Petition 4 of 2012 Jasbir Singh Rai & others v Tarlochan Singh Rai & Others [2014] eKLR** where it was held that:

> *"The vital factor in setting the preference [for who bears costs] is the judiciously exercised discretion of the Court, accommodating the special circumstances of the case while being guided by the ends of justice. The claims of the public interest will be relevant in the exercise of such discretion, as will be the motivations and conduct of the parties, prior to, during and subsequent to the actual process of litigation."*

On the issue of who is a successful litigant, the Respondent submits that a consent cannot be interpreted to mean that one party has succeeded in a suit even where there is a settlement that favours one of the parties over another. That in **Civil Suit 416 of 2010 Rufus Njuguna Miringu v Martha Muriithi & 2 others [2012] eKLR** the court stated that even where the settlement worked out in one party's favour, the successful determination of the dispute was attributable to all parties involved reaching a common decision, and as such, it is "just" that each party bear their own costs. That this position was also held by the Court in **Civil Case 149 of 2011 Little Africa Kenya Limited v Andrew Mwiti Jason [2014] eKLR**.

That the Consent was an amicable settlement of issues between the main protagonists of the suit (the Applicants and the Respondents), thus representing a compromise that brought the dispute to an end.

That it is settled law that the allocation of costs must not be made as a penal measure. That costs is a mechanism by which a successful litigant is recouped for its expenses as was held **Civil Case No. 17 of 2014 Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] eKLR**.

That the 2nd Interested Party is not a successful litigant in the circumstances and as previously submitted, there is no basis for an award of costs in its favour.

That in the absence of an adverse finding of liability recorded against the 1st Respondent, there exists no state of affairs that would induce the court to punish the 1st Respondent with an award of costs against it. That to assign costs against the 1st Respondent in the circumstances would be purely punitive in nature rather than compensatory.

On the conduct of the 1st Respondent, it is submitted that the 1st Respondent acted in good faith and in furtherance of the public interest by participating in the entering of a consent to finalise the suit and ensure the resumption of operations and management of the 2nd Interested Party.

That the actions of the 1st Respondent are characteristic of a party attempting to amicably and expeditiously settle the matter as opposed to one whose conduct is geared to obstruct justice and the determination of the suit which good faith should not attract punishment.

That the 1st Respondent's conduct cannot be impugned for bad faith or malice and the considered effort put forth to finalise the matter is relevant and must be considered.

That the expeditious settlement of the foregoing matter is in the 2nd Interested Party's own interest as the prolonged conduct of the suit was disruptive to the operation and management of the 2nd Respondent. That the 1st Respondent therefore acted in consideration to the 2nd Respondent in being amenable to a compromise and consent.

The Respondents further submit that assigning costs to the 1st Respondent would be contrary to public interest as the appointment of an individual to the position of Vice Chancellor of the University of Nairobi, a public university, by the 1st Respondent being a governmental official, falls squarely within this definition.

That **Black's Law Dictionary, 9th Edition at page 1350** defines matters which are of public interest as matters in which the public as a whole has a stake and especially an interest that involves governmental regulation and powers.

The Respondents submit that the agreement to enter into a consent to enable the continuing and uninterrupted operations of the 2nd Interested Party was in furtherance of the public interest noting that prolonged suspension of operations would adversely affect the public at large.

That the tenor of the oral application to compel the 1st Respondent to pay the 2nd Interested Party's costs is penal in nature. Allocation of costs to penalize a vigilant litigant who acted in good faith would offend the public interest and the dictates of justice.

The Respondents submit that the Court has a duty to encourage parties to resolve matters through Alternative Dispute Resolution. The Respondents relied on Article 159(2)(c) of the Constitution of Kenya, 2010; and **Civil Case 249 of 2018 Southern Shield Holdings Limited v Tandala Investment Company Limited & 2 others [2018] eKLR.**

It is submitted that to punish the 1st Respondent for actions that promoted the expeditious and efficient disposal of the suit would be inconsistent with its duty and would instead discourage amicable resolution.

The 2nd Interested Party did not file submissions even after being granted leave to do so on 22nd February 2020, 26th May 2020 and a further 30 days on 8th July 2020.

Determination

The 2nd Interested Party, the University of Nairobi is the one that insisted on its costs being paid by the 2nd Respondent, the Attorney General. This was after the 2nd Interested Party insisted that it was not party to the consent that was adopted by the court which was to the effect that the petition herein be marked as settled with each party bearing its costs.

In view of the fact that both the 2nd Interested Party and the 2nd Respondent are government institutions and further in view of the fact that the 2nd Interested Party has failed to file submissions to justify the reason why the consent to the effect that each party bears its costs should not be adopted by the court, I order that there shall be no order for costs in this petition in which event each party is to bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF OCTOBER 2020

MAUREEN ONYANGO

JUDGE

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 21st April 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 has 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 the 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.

MAUREEN ONYANGO

JUDGE