



**Director of Public Prosecution v Kamau & 4 others (Petition
18 of 2019) [2020] KESC 14 (KLR) (Civ) (23 September 2020) (Ruling)**

Director of Public Prosecution v Michael Sistu Mwaura Kamau & 4 others [2020] eKLR

Neutral citation: [2020] KESC 14 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA**

CIVIL

PETITION 18 OF 2019

PM MWILU, DCJ & V-P, MK IBRAHIM, SC WANJALA, NS NDUNGU & I LENAOLA, SCJJ

SEPTEMBER 23, 2020

BETWEEN

DIRECTOR OF PUBLIC PROSECUTION APPELLANT

AND

MICHAEL SISTU MWAURA KAMAU 1ST RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

INSPECTOR GENERAL OF THE NATIONAL POLICE 4TH RESPONDENT

CHIEF MAGISTRATE'S COURT, MILIMANI ANTI-CORRUPTION

COURT 5TH RESPONDENT

*(Being an appeal against the Judgment and Orders of the Court of
Appeal given on 14th Jul 2017 by Justices of Appeal Asike Makhandia,
William Ouko, Kathurima M'noti in Civil Appeal No.102 of 2016)*

Factors to consider in awarding costs where a suit involved matters of public interest

The court considered the principles applicable to the award of costs in a public interest matter that had been withdrawn. The award of costs would normally be guided by the principle that costs followed the event. However, the vital factor in setting the preference was the judiciously exercised discretion of the court, accommodating the special circumstances of the case, while being guided by ends of justice. In the exercise of that discretion, the relevant factors included claims of the public interest as well as the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.

Reported by Kakai Toili



Civil Practice and Procedure – costs – awarding of costs – where parties had withdrawn a suit but failed to agree on costs – where the suit involved matters of public interest - what were the factors to consider in awarding costs.

Brief facts

In September 2019 the court recorded a consent order marking the instant petition as withdrawn. The parties were however unable to agree on costs and thus the court directed parties to file submissions limited to the question on whether costs should be paid to the respondents consequent upon the withdrawal of the petition. The appellant, the Director of Public Prosecutions, argued that no order as regards costs should be made as the issue of costs was never raised at both the High Court and the Court of Appeal. The respondents, save the 3rd, 4th and 5th respondents disagreed and submitted that costs had to follow the event even as it was a matter of discretion for the court.

Issues

What were the factors to consider in awarding costs where a suit which involved matters of public interest?

Held

1. The award of costs would normally be guided by the principle that costs followed the event: the effect being that the party who called forth the event by instituting suit, would bear the costs if the suit failed; but if that party showed legitimate occasion, by successful suit, then the defendant or respondent would bear the costs. However, the vital factor in setting the preference was 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 would be a relevant factor, in the exercise of such discretion, as would be the motivations and conduct of the parties, prior-to, during, and subsequent to the actual process of litigation.
2. Although there was good sense in the basic rule of costs, that costs followed the event, it was not an invariable rule. The ultimate factor on award or non-award of costs was a judicial discretion. Therefore, costs did not, in law, constitute an unchanging consequence of legal proceedings.
3. The fact that the appellant was a public entity was not in itself a reason to deny an opposing but entitled party its costs in appropriate circumstances. Each case had to be looked at in its specific circumstances and costs awarded or denied at the complete discretion of the court.
4. Whereas the appellant had withdrawn the petition when it was ready for hearing and while the respondents had spent time and resources preparing for the hearing, the issues raised in the appeal were of great public interest. The included issues on the extent of powers bestowed upon the Ethics and Anti-Corruption Commission and whether corruption related offences could be initiated when the Commission was not properly constituted and whether the President could direct the Commission or the Director of Public Prosecutions in the execution of their constitutional mandates. Those matters transcended the specific interests of the parties and had settled in the public sphere thus attracting the public interest. An order of costs against any party would in the circumstances not be fair.

Petition marked as withdrawn; each party to bear its costs of the appeal.

Citations

Statutes

None referred to

Advocates

None mentioned



RULING

1. On 26th September 2019, Ibrahim SCJ recorded a consent order marking the Petition herein as withdrawn. Parties were however unable to agree on costs and so the learned Judge directed parties to file submissions limited to the question whether costs should be paid to the Respondents consequent upon the withdrawal aforesaid.
2. All parties subsequently filed their submissions and digests of authorities which we have taken note of. Suffice it to say that the Appellant, the Director of Public Prosecutions, has made the point that no order as regards costs should be made as the issue of costs was never raised at both the High Court and the Court of Appeal and it is strange that it has now become a contested issue. The Respondents, save the 3rd, 4th and 5th disagree and submit that costs must follow the event even as it is a matter of discretion for the Court.
3. On our part, in *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others* [2014] eKLR, we stated as follows:

“(18) 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.”
4. We further stated as follows:

“... in the classic common law style, the Courts have to proceed on a case by case basis, to identify “good reasons” for such a departure. An examination of evolving practices on this question shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs ...”
5. On discretion, we stated thus:

“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.”
6. We reiterate the above holdings as properly applicable to the present case and would only add that the fact that the Appellant is a public entity is not in itself a reason to deny an opposing but entitled party its costs in appropriate circumstance – see Reference No.1 of 2014, *Council of Governors v The Senate & 2 Others*. Each case must be looked at in its specific circumstances and costs awarded or denied at the complete discretion of the Court.



7. Having so stated, we note that the initial proceedings at the High Court were commenced by the 1st Respondent challenging his arrest and arraignment in Court for certain criminal offences laid at the instance of the Appellant and the 2nd Respondent. In determining the matter, the High Court stated that, “as the issues raised herein were issues of great public interest not restricted to the Petitioners, we make no order as to costs”
8. The Court of Appeal on its part also exercised discretion and directed that each party ought to bear its own costs “on account of the public interest issues raised in the appeal”.
9. We have considered the rival submissions and are convinced that, whereas the Appellant has withdrawn the Petition when it was ready for hearing and while the Respondents have spent time and resources preparing for the hearing aforesaid, we must agree with both the High Court and the Court of Appeal that the issues raised in the Appeal were of great public interest – i.e. the extent of powers bestowed upon the Ethics and Anti-Corruption Commission and whether corruption related offences can be initiated when the said Commission was not properly constituted and whether the President of the Republic of Kenya can direct the Commission or the Director of Public Prosecutions in the execution of their constitutional mandates. These matters transcended the specific interests of the parties and have settled in the public sphere thus attracting the public interest. An order of costs against any party would, in the circumstances, not be fair.
10. In the event, we hereby exercise discretion and order as follows:
 - i. The Petition of Appeal herein is marked as withdrawn.
 - ii. Each Party shall bear its costs of the Appeal.
11. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2020

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P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

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NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

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I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original



**REGISTRAR,
SUPREME COURT OF KENYA**

