



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

JUDICIAL REVIEW NO. E007 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

REPUBLIC..... APPLICANT

VERSUS

KENYA UNIVERSITIES AND COLLEGES

CENTRAL PLACEMENT SERVICE.....1ST RESPONDENT

CHRISTINE L. MUKHONGO.....2ND RESPONDENT

EX-PARTE DR. JOHN MURAGURI

RULING

1. Before me for determination is the Respondent's application for costs following withdrawal of the suit herein by the Ex Parte Applicant. Mr. Kioko for the 1st Respondent did not object to the withdrawal of the suit with no orders for costs. However, Counsel for the 2nd Respondent Mr Walukwe insisted on costs for his client.
2. The Court directed that the issue of costs of the 2nd Respondent be canvassed by way of written submissions.

Ex-partie Applicant's Submissions

3. The Ex-partie Applicant submits that the cause of action dissipated after the Ex-partie Applicant's term expired on the 9th March 2021 and another Chief Executive Officer appointed to replace him which events rendered the judicial review otiose necessitating the withdrawal of the suit
4. The Ex-partie Applicant submits that the suit was instituted pursuant to rule 7(2) of the Employment and Labour Relations Court (Procedure) Rules, 2016 and the same was withdrawn under Civil Procedure Rules, 2010 which rule makes no provision for costs.
5. The Ex Parte Applicant relies on **Mulla The Code of Civil Procedure 18th Edition 2011** which posits that

“This is so because withdrawal of the suit under sub-section (i) is complete as soon as it takes place and in any case, when the court is informed of it ...”

6. He also relies on the case of **Smt Raisa Sultana Begam & Others v Abdul Qadir & Others AIR (1966 ALL 318)** where it was held that –

“Either it is done: there is nothing like its being incompletely or ineffectively. The consequence of an act of withdrawal is that the plaintiff ceases to be the plaintiff before the court. If it is the only plaintiff and withdraws the whole of the suit, the suit comes to an end and nothing remains pending before the court ...”

7. The Ex-partie Applicant submits that withdrawal of the suit is effectual and final and prays that the court dismisses the application for costs.

2nd Respondent's Submissions

8. The 2nd Respondent submits that Section 12(4) of the Employment and Labour Relations Court Act (No. 20 of 2011) provides that –

In proceedings under this act the court may, subject to the rules make such orders as costs as the court considers just.

9. The 2nd respondent relies in the case of **Joseph Odour Anode v Kenya Red Cross Society, Nairobi HCC no. 66 of 2009(2012) eKLR Odunga J.** observed:

“...whereas this Court has the discretion when awarding costs, that discretion must, as usual, be exercised judicially. The first point of reference, with respect to the exercise of discretion is the guiding principles provided under the law. In matters of costs, the general rule as adumbrated in the aforesaid statute [the Civil Procedure Act] is that costs follow the event unless the court is satisfied otherwise. That satisfaction must, however, be patent on record, in other words, where the Court decides not to follow the general principle, the Court is enjoined to give reasons for not doing so. In my view it is the failure to follow the general principle without reasons that would amount to arbitrary exercise of discretion...”

10. The 2nd Respondent submits that costs should follow the event especially since the 2nd respondent was called upon to defend the proceedings which she successfully did. She also relies on Justice Kuloba's words [**Judicial Hints on Civil Procedure, at page 94**], where the retired Judge states as follows:

i. *“The object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure ... Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action.”*

Analysis and determination

11. I have considered the submissions by the 2nd Respondent and Ex Parte Applicant. On 29th September 2020 while considering the Ex Parte Applicant's application for leave dated 24th September 2020, the Court ordered as follows:-

“IT IS HEREBY ORDERED:

(1) *Spent.*

(2) *THAT leave is granted to the Ex parte Applicant to commence Judicial Review proceedings in terms of prayers 2, 3 and 4 of the Chamber Summons*

(3) *THAT the application for the leave to operate as stay is fixed for inter partes hearing on a date to be set by the Deputy Registrar within 7 days.*

(4) *THAT the application to be filed within 21 days.”*

12. It is evident from the record that following the application by the Ex Parte Applicant for leave to institute proceedings against the Respondents, and for leave to operate as stay, the Ex Parte Applicant did not file the substantive motion but instead, withdrew the entire suit. The only application dealt with by the Court was the Chamber Summons.

13. It is further evident from the record that the 2nd Respondent did not attend Court except on the date that the Court was considering the Notice of Withdrawal on 2nd November 2020. The matter was coming up for taking of a ruling date on the Ex Parte Applicant's application for leave to operate as stay.

14. As stated by Mr. Wahukwe on 2nd November 2020, his client was never served with the application for leave. The nature of chamber summons in judicial review proceedings is that it is supposed to be ex parte unless the Court orders that the same be heard inter partes. In this case what was to be heard inter partes was the prayer in the application for leave to operate as stay. The application for stay did not concern the 2nd Respondent who in any event, had not been served and therefore had not yet been called upon to respond to the application.

15. **It is for this reason that I order that the withdrawal of the suit is with no orders for costs.**

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF AUGUST 2021

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 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 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