



**Ngungiri v Njoki & 2 others (Election Petition E001 of 2022)
[2022] KEHC 14632 (KLR) (31 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14632 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

ELECTION PETITION E001 OF 2022

REA OUGO, J

OCTOBER 31, 2022

**IN THE MATTER OF THE ELECTIONS ACT 2011, THE
ELECTIONS (GENERAL) REGULATIONS 2012 AND THE
ELECTIONS) (GENERAL) (AMENDED) REGULATIONS), 2017**

AND

IN THE MATTER OF ARTICLES 81 & 86 OF THE CONSTITUTION

AND

**IN THE MATTER OF THE ELECTIONS OF THE MEMBER OF THE NATIONAL ASSEMBLY
ELECTIONS FOR BAHATI CONSTITUENCY NUMBER 174 NAKURU COUNTY**

BETWEEN

HONORABLE ONESMUS KIMANI NGUNGIRI PETITIONER

AND

HONOURABLE IRENE NJOKI 1ST RESPONDENT

**GEORGE KAMAU (RETURNING OFFICER) BAHATI CONSTITUENCY 2ND
RESPONDENT**

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 3RD
RESPONDENT**

RULING

1. The petitioner herein filed an Election Petition dated September 8, 2022 challenging the election results for Bahati Constituency, Nakuru County that were declared on August 11, 2022. The petitioner challenged the results of the election process on grounds of voter intimidation; illegal, irregular and un-procedural assistance of voters that were illiterate and disabled. There were allegations that the 3rd respondent's officers made false entries resulting to improper tallying. The petitioner also



alleged that there was bribery of voters, presiding officers, clerks and the deputy county Commissioner of Bahati sub-county.

2. The petition elicited responses from the parties herein who filed their respective responses. However, before the matter was set down for pre-trial, the petitioner through his counsel, Mr. Gikonyo, filed an application dated October 7, 2022 seeking to withdraw the Election Petition pursuant to Rules 21 (1), (2) & (3) of the *Elections (Parliamentary and County Elections) Petitions Rules, 2017*. The application was on grounds that the petitioner did not intend to pursue the petition for the good of the constituents of Bahati Constituency so as to allow development of the constituency under the elected member of parliament (1st Respondent). According to the petitioner, he prefers to move on with his life without the rigorous pursuit of an election petition and has therefore withdrawn the petition at this early stage to save on precious judicial time and costs on all parties involved. The application was also filed together with the supporting affidavit sworn by Onesmus Kimani Ngunjiri.
3. The application to withdraw the petition was not by the respondents and the only issue that remains for the court's determination is costs.

Petitioner's Submissions

4. The petitioner submitted that the law does not require an election court to adhere to the costs – follow- the event principle. He referred this court to the provisions of Rule 22 (2) of the *Elections (Parliamentary and County Elections) Petitions Rules, 2017* which provides as follows;
 - (2) The elections court may grant leave to withdraw a petition on such terms as to payment of costs or as the election court may otherwise determine.
5. The Petitioner extensively cited the case of *Jasbin Singh Rai & 3 Others -v- Tarloch Singh Rai & 4 Others* [2014] eKLR where the Supreme Court held as follows;

“ [8] The law does not require the Supreme Court to adhere to the costs-follow-the-event principle.....the Supreme Court, much like the other superior Courts, has an open-ended mandate of application of discretion to ensure ends of justice. This element of the judicial mandate is to be found in other law as well. Thus the *Civil Procedure Act* (Cap. 21, Laws of Kenya), the primary law of judicial procedure in civil matters, thus stipulates (Section 27(1)):

“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 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”.

.... It emerges clearly that, whether in this Court or any other superior Court, costs
[11] are awarded at the discretion of the Court or Judge.....

- (15) It is clear that there is no prescribed definition of any set of “good reasons” that will justify a Court’s departure, in awarding costs, from the general rule, costs-follow-the-event. In the classic common law style, the Courts have proceeded



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.....

- (16) Another example is the landmark Presidential election petition Ruling in Raila Odinga and Others v. The Independent Electoral and Boundaries Commission and Others, Sup. Court Petition No. 5 of 2013, in which the parties were required to bear their own respective costs; the Court’s reasoning being given as follows [paras. 309, 310]:

“Yet we have to take into account certain important considerations.

It is already clear that the nature of the matters considered in a Presidential-election petition is unique. Although the petitions are filed by individuals who claim to have moved the Court in their own right, the constitutional issues are of a public nature – since such an election is of the greatest importance to the entire nation.

“Besides, this is a unique case, coming at a crucial historical moment in the life of the new Kenyan State defined by a new Constitution, over which the Supreme Court has a vital oversight role. Indeed this Court should be appreciative of those who chose to come before us at this moment, affording us an opportunity to pronounce ourselves on constitutional questions of special moment. Accordingly, we do not see this instance as just another opportunity for the regular professional-business undertaking of counsel” [emphasis supplied].”

6. The petitioner urged the court to find that it has discretion on whether to award costs or not. He argued that some of the factors that this court ought to consider in exercising its discretion on costs include a claim of the public interest, the motivations and conduct of the parties prior to, during and subsequent to and the actual process of litigation. The petitioner submitted that they acted in good faith during and subsequent to filing of the Petition. The petitioner wasted no time and took the earliest opportunity available to inform the court and opposing counsel of his intention to withdraw the Petition. It therefore saved the court and the parties from travelling to Nakuru for the pre-trial conference. The Petitioner submitted that the court should therefore direct the parties to bear their own costs, however in event the petitioner did not persuade the court to find so, it proposed costs at Kshs.150,000/- was reasonable for 2nd and 3rd Respondents.

Respondents Submissions

7. The 1st Respondent through her counsel, Mr. Issa indicated that she will not pursue costs.
8. The 2nd and 3rd respondents represented by M/s Muchemi & Co. Advocates on the other hand filed an affidavit and skeletal submissions dated October 14, 2022 seeking costs of the petition. The 2nd and 3rd Respondents submitted that they are entitled to costs of the petition having substantively responded to both the Petitioner’s petition dated September 8, 2022 and an interlocutory application dated September 26, 2022. In addition, they have also filed and served their interlocutory application dated September 30, 2022. They submitted that they engaged a team of 2 counsels whom together with the witnesses invested a lot of time, labour and resources in preparation of documentation to



respond to the petition and in gathering all the necessary evidence. The 2nd and 3rd Respondents further submitted that they have filed the following pleadings with regard to this petition:

- a. Response to petition dated September 22, 2022
 - b. Affidavit in support of Response sworn by the 2nd Respondent dated September 21, 2022
 - c. Affidavit evidence of John Nderitu Kamunya dated September 22, 2022
 - d. Affidavit evidence of Isaac Waigwa Gatimu dated September 22, 2022
 - e. Replying Affidavit sworn by 2nd Respondent dated October 6, 2022
 - f. Notice of Motion and supporting affidavit dated September 30, 2022
9. The respondents relied on the case of *Abdisalan Mohamed v Independent Electoral & Boundaries Commission* [2013] eKLR where the court awarded the 1st and 2nd respondents therein costs capped at Kshs. 1,000,000/- and Kshs. 1,500,000/- respectively. The Court in its holding stated:

“The Petitioner by filing an election petition and electing to withdraw the same has caused the Respondents to incur expenses which they would not have incurred were it not for the election petition. These expenses included those incurred in preparing the responses to the petition, in addition to the court attendances. The chronology of events given in this ruling shows the steps that were taken by the Respondents in this respect. For this reason, this Court find the Petitioner liable to meet the costs the Respondent have incurred as a result of the election petition

This Court is also granted the power under Rule 34 (1) (a) of the *Elections (Parliamentary and County Elections) Petitions Rules* of 2013 to set the total amount of costs that may be payable in this respect. I find it necessary to do so in the election petition filed herein as it did not proceed to full hearing.”

Analysis and Determination

10. As earlier observed in this ruling the only issue that is before the court for consideration is the award of costs. Section 84 of the *Elections Act* No. 24 of 2011 provides that ‘an election court shall award the costs of and incidental to the petition and such costs shall follow the cause.’
11. It is not in dispute that the petition did not proceed to full trial and was withdrawn before pre-trial conference. The petitioner argues that it promptly informed the court and all the parties involved of its intention to withdraw the suit and therefore did not cause it any inconvenience. The petitioner argues that an Election Court has discretion not to award cost for good reason pursuant to section 27(1)) of the *Civil Procedure Act*. To buttress his argument, the cited the case of *Jasbin Singh Rai & 3 Others* (*supra*) where the court highlighted examples of cases that departed from the costs-follow-the-event principle.
12. In my view, the discretion of the election court unlike that exercised in civil cases is limited considering that the purpose for awarding costs in electoral disputes is to compensate the successful litigant for expenses incurred in prosecuting the case. This was the finding of the Supreme Court in *George Mike Wanjohi v Steven Kariuki & 2 others* [2014] eKLR where the court held:

“(121) From the above statutory provisions and from case law, we are of the view that in election petition matters, Courts should in principle, award costs following the event. In instances where there is a vexatious claim brought by



the petitioner or the respondents, the Court will determine whether a party is to be disallowed costs, or the burden of paying costs will fall on such a party. A firm statutory framework for the award of costs in electoral dispute-settlement is established by the wording of Section 84 of the *Elections Act*, and of Rule 36 of the Election Petition Rules. The scope for discretion in this regard, it is clear, is more limited than is the case in normal civil procedure. The purpose is to compensate the successful litigant for expenses incurred in prosecuting the case.”

13. The Supreme Court in *Cyprian Awiti & another v Independent Electoral and Boundaries Commission & 2 others* [2019] eKLR set of guiding principles for the award of costs in electoral matters. The principles formulated by the court are that:

- “(a) the general rule that “costs follow the event” is applicable in election matters in which no special circumstances are apparent;
- (b) however, an election Court holds discretion in reserve, for awarding costs as merited by the occasion;
- (c) a discretion vests in the election Court to prescribe a ceiling for the award of costs;
- (d) in setting a ceiling to the award of costs, the election Court stands to be guided by certain considerations, namely:
 - (i) costs are not to be prohibitive, debarring legitimate litigants from moving the judicial process;
 - (ii) inordinately high costs are likely to compromise the constitutional right of access to processes of justice;
 - (iii) costs are not to bear a punitive profile;
 - (iv) Courts, in awarding costs, are to be guided by principles of fairness, and ready access to motions of justice;
 - (v) costs are intended for decent and realistic compensation for the initiatives of the successful litigant;
 - (vi) costs are not an avenue to wealth, and are not for enriching the successful litigants;
 - (vii) the award of costs shall not defer to any makings of opulence or profligacy in the mode of conduct of the successful party’s cause.”

14. In this instant case, the petitioner seeks to withdraw the petition. Rule 31 (3) of the Elections (Parliamentary and County Elections) Petition Rules, 2017 provides that the abatement of a petition shall not affect the liability of the petitioner or of any other person to the payment of previously incurred costs. Therefore, where an election petition abates for reason that the petition has been withdrawn or stuck out or for such reasons the petition has not been heard to its conclusion, costs shall be payable in such instances. (See *Anastasia Wanjiru Mwangi v Independent Electoral & Boundaries Commission & another* [2013] eKLR).



15. I agree with the submissions of the 2nd and 3rd respondent that in so far as the application to withdraw the suit was promptly filed and all parties notified of the petitioner's intention to withdraw the petition before the pre-trial conference was held, the 2nd and 3rd respondents did incur expenses which they would not have incurred were it not for the election petition. The 2nd and 3rd respondents appointed advocates and gave them instructions, prepared documents in response to the petition and collected evidence intended to challenge the petition. The 2nd and 3rd respondents applied some resources towards defending the suit and in my view; they are therefore entitled to costs.
16. In conclusion, I make the following orders:
1. The Petitioner is granted leave to withdraw Election Petition No. E001 of 2022 dated September 8, 2022 filed in Nakuru High Court, which Election Petition is hereby marked as withdrawn.
 2. The Petitioner shall pay the 2nd and 3rd Respondents the costs of the Election Petition filed herein and the total costs awarded to the 2nd and 3rd Respondents jointly shall not exceed Kshs. 800,000/-.
 3. The 2nd and 3rd Respondents shall forward their Bill of Costs to the Deputy Registrar of the High Court for taxation subject to the limitation on the total costs to be awarded as ordered hereinabove (no.2).
 4. The sum of Kshs. 500,000/- deposited in court by the Petitioner as security for costs shall be applied to the payment of the taxed costs of the 2nd and 3rd Respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT BUNGOMA THIS 31ST DAY OF OCTOBER, 2022.

R.E. OUGO

JUDGE

In the Presence:

Mr. Gikonyo Wahome For the Petitioner

M/s Sharon Maina For the 1st Respondent

Mr. Ndungu For the 2nd& 3rd Respondents

Ms Wilkister C/A

