



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION NO. 20 OF 2008

(MILIMANI LAW COURTS, CIVIL DIVISION)

**IN THE MATTER OF THE PRESIDENTIAL AND PARLIAMENTARY ELECTIONS
REGULATIONS AND THE NATIONAL ASSEMBLY (ELECTION PETITIONS) RULES**

**AND IN THE MATTER OF THE ELECTION OFFENCES ACT CHAPTER 66 LAWS OF
KENYA**

AND IN THE MATTER OF THE ELECTION FOR KANDARA CONSTITUENCY

ALICE MUTHONI WAHOME.....PETITIONER

VERSUS

JAMES MAINA KAMAU 1ST RESPONDENT

REUBEN WARUI CHEGE.....2ND RESPONDENT

INTERIM INDEPENDENT ELECTORAL COMMISSION..... 3RD RESPONDENT

JUDGMENT

Background

1. This is the only election petition from the 2007 election cycle that remains un-concluded. It constitutes what we can only be referred to as superfluous backlog. That is to say, it is a form of superficial backlog in of cases in the court records in respect of which there is no substantive suit to be determined.
2. The only issue remaining to be determined in this matter is the liability of the parties, or a party thereto, to costs. At diverse mentions in court between 25th October 2016 and 15th March 2017, the parties consensually agreed that, the substantive election petition having not been determined within the challenged five-year parliamentary electoral term of the 1st Respondent, it had essentially abated by effluxion of time. Accordingly, any continuance with it would be wasteful of judicial time and a meaningless academic exercise. In their written submissions filed in January and March, 2017, they have reasserted that position.
3. On this score, the court agrees with the parties, and takes this opportunity to clarify, by declaration, that the substantive petition should be, and is hereby, terminated by consent for lack of any substantive triable

issue for determination therein. This ruling now addresses only the question of liability as to costs for the petition that was never concluded.

4. A brief background of this matter is in order. The petition challenging the election of the 1st Respondent's election as Member of Parliament for Kandara Constituency under the repealed constitution was filed on 23rd January, 2008. The then Chief Justice, Hon. Evan Gicheru gazetted Nyamu, J (as he then was) to preside over the petition, and a mention fixed for 1st February, 2008. On 23rd, 24th and 25th June, 2008, the parties appeared before the judge.

5. There was little movement on the file thereafter, and as the hand-written court proceedings are not on the file, I have to rely on the contents elicited from the documents file. Justice Nyamu was appointed as a judge of the Appeal Court Judge in April 2009, and thereupon ceased to handle the petition. Typed proceedings of 14th May 2009 disclose that Wendoh, J directed that the file be referred back to the Chief Justice for appointment of another judge. A hand script dated 21st May 2009 by the Chief Justice on a file movement note by the Principal Deputy indicates:

“Have this matter listed for mention before me on a date convenient to me and the parties”

6. No replacement judge appears to have been immediately gazetted. By a Gazette Notice No 2060 dated 25th February, 2011, and published on 4th March, 2011, then Chief Justice Gicheru appointed Lady Justice P M Mwilu (then of the High Court) to hear the petition. The documents on record show that the parties prosecuted a number of motions in the petition before Lady Justice Mwilu, which she heard and determined. In all, the Judge delivered reasoned rulings on 31st May, 2011, two rulings on 19th September, 2011, and another one 14th October, 2011.

7. Lady Justice Mwilu was appointed to the Court of Appeal on 8th November, 2012, and on 19th December, 2012, she directed that the file be forwarded to the Chief Justice for appointment of a High Court Judge to hear the petition. For whatever reason, no Judge was thereafter appointed.

8. This matter came to my attention as Principal Judge in October, 2016, for directions. There is correspondence on the file indicating that the file had been delivered to and retrieved from the secretariat of the Judges and Magistrates Vetting Board. However the court proceedings appear not to have found their way back onto the file thereafter. After several mentions before me, it was eventually agreed that I hear the parties only on the question of costs.

9. The Petitioner and the 1st Respondent filed their wwritten submissions, but the 2nd and 3rd Respondents did not.

Parties' submissions

10. Only the Petitioner and the 1st Respondent filed submissions in this matter

11. The Petitioner filed her submissions on 31st January, 2017 together with an affidavit in support deponed on her behalf by her counsel, Mr Havi. Annexed to the Affidavit are numerous documents that show the history of the matter. Counsel submits that the 3rd Respondent's failure to deliver 27 ballot boxes out of 105 utilised in the election, shows that the IIEC was never ready for the hearing and would not have successfully defended the petition. Further, that 94 of the ballot boxes were tampered with, making it impossible for the 3rd Respondent to effectively defend the case.

12. Counsel asserts that the Petitioner's entitlement to costs is grounded in **Section 29** of the **National Assembly and Presidential Elections Act, Cap 7**, which provides:

“An election court may, in its discretion, award against the petitioner the costs of and incidental to a petition which is dismissed or rejected.”

Counsel argues that the petition was neither dismissed nor rejected, and as such they are entitled to costs.

13. The petitioner relied on the following authorities: **East African Standard Ltd v The Coast Guardian Ltd (1934) 16(1) KLR**; **Shankerdass Mayer & 4 Otehrs v Trustees of Rahimtullah Lalji Hirji Charitable Trust (1955) 18 EACA**; **William Kabogo Gitau v George Thuo & 2 Others (2010) eKLR**; and **Staeven Kariuki v George Mike Wanjohi & 2 Others (2014)e KLR**.

14. The Petitioner asserted that for all practical purposes they are the beneficiaries of the failure of hearing and determination of the petition. Accordingly they argued, the 3rd Respondent should be directed

15. In addition, in paragraph 13 of Mr Havi's affidavit on behalf of the Petitioner, he appears to lay blame for delay in the hearing of the petition on: the 1st Respondent for filing many interlocutory applications, the elevation of Justice Nyamu to the Court of Appeal and the delayed appointment of judges to conclude the hearing.

16. In response, the 1st Respondent points out that the established principle that costs follow the event, which in this case meant the actions and omissions of the parties towards abatement of the substance of the petition. Counsel asserts that the 3rd Respondents frustration of the petition by refusing to supply election materials, and the failure of the Petitioner to mount the case after dragging the 3rd Respondent to court are what found the liability to costs.

17. The 1st Respondent's Counsel asserted that the filing of interlocutory applications in the matter was not a factor of delay but an exercise of their constitutional right to a full and fair hearing. Counsel also relied on the **William Kabogo Case**.

Analysis and Determination

18. Having carefully considered the parties submissions I come to the following determination.

19. The first principle regarding who must pay costs remains that costs follow the event or the overall outcome. In this case what is the event? In this petition, the substantive question was whether the petitioner was unfairly denied the Kandara parliamentary seat in the electoral contest. This question has not and cannot be answered as the substantive petition will now never be determined on its merits.

20. In **Judicial Hints, Paragraph 152**, Kuloba, with clarity and several examples, defines the words 'the event' as follows:

"The words 'the event' mean the result of all the proceedings incidental to the litigation. The event is the result of the entire litigation. It is clear, however, that the word "event" is to be regarded as a collective noun and to be read distributively so that in fact it may mean the "events" of separate issues in an action. Thus, the expression "the costs shall follow the event" means that the party who on the whole succeeds in the action gets the general costs of the action, but that, where the action involves separate issues, whether arising under different causes of action or under one cause of action, the costs of any particular issue go to the party who succeeds upon it. An issue in this sense, need not go to the whole cause of action, but includes any issue which has a direct and definite event in defeating the claim to judgment in whole or in part.

But it is not on every issue in a suit that success will bring a right to the costs of that issue. So, what is the measure of success which entitles the successful party in a suit to get his costs? In case of total success, the successful party may be deprived of the costs of a separate issue on which he was unsuccessful if it was a matter involving inquiry (e.g. the calling of witnesses) and not merely arguments of the advocates. But for the decision of an issue to have the effect of entitling the party successful on that issue, though unsuccessful on the main issue in the suit, to his costs on that issue, it must be an issue which has, in a money suit, affected the amount of the

decree. A Defendant is entitled to put his back against the wall and to fight from every available point of vantage; and it would, therefore be extremely hard on Defendants if as a rule they were told at the end of a trial: "You have beaten the Plaintiff, but because you have raised some points on which you have not succeeded you shall not have all the costs of the action". In resisting the claim he may have recourse to different alternative defences, and if it cannot be said that any of the defences were frivolous or were put forward unnecessarily, he will be entitled to his costs and there would be no good reason for making a distributive order as to costs: Sir Joseph Sheridan CJ in Jiwan Singh v. Rugnath Jeram (1945) 12 EACA 21 at 31, 32, (20 February 1945), Court of Appeal for Eastern Africa, on appeal from Kenya.

Subject to the above explanation, costs normally follow the event, that is, the party who succeeds is entitled to have his costs paid by the party who loses. The court, however, has discretion in the matter of costs. That discretion must be exercised judicially on fixed legal principles, in accordance with the rules of reason and justice not according to private opinion, or benevolence or even sympathy. When there are no materials before the court on which it can exercise its discretion, it is not justified in depriving a successful party of costs; Thacker J in Norman Main v. Adam Ferguson [1942-43] 20 (1) KLR 5 at 7, (13 February 1942)."

21. Given the foregoing elaborate background, my analysis of the matter at hand is as follows.

22. The Petitioner's and the 1st Respondent's argument that the 3rd Respondent should pay costs because the 3rd Respondent was not ready for the petition as it did not produce election materials and could therefore not have mounted a successful defence of the election results is, in my view, purely speculative. None of the evidence of any of the parties was tested. And no findings of success or otherwise were made. As such, no party can authoritatively suggest how the outcome might have played out. A court is not entitled to rely on speculative propositions and neatly presented probabilities of outcome to determine how the costs should be awarded.

23. In the **Kabogo case**, which both Petitioner and 1st Respondent relied on, the petition was heard and nullification of the election results was ordered substantially on account of a finding by the court that the election declaration forms were defective and the ballot boxes were tampered with. The court there took into account the ingredients and test of what constitutes a free and fair election. It also took into account, and applied to the facts before it, the standard of proof in election petitions which it stated is higher than that which is applied in ordinary civil cases though not equal to that standard of proof beyond a reasonable doubt applied in criminal cases. On these bases, the Interim Independent Electoral Commission was found liable for glaring irregularities and electoral malpractices and condemned to pay costs. In the present matter, the substantive petition has not been tried at all and no substantive determinations have been made.

24. In **Kuloba's Judicial Hints**, it is stated that costs follow the event "*unless the court or the judge shall for good reason otherwise order*". Further, it is clear therein that costs are so distinctly in the unfettered discretion of the court, that such discretion will not even be interfered with by an appellate court, unless it is satisfied that the lower court acted on a wrong principle. There are numerous decided cases on these points, many of which are outlined at **Paragraph 151 of Judicial Hints**.

25. In the case of **Jiwan Singh v Rugnath Jeram (1945) 12 EACA, 21** the Court of Appeal of Eastern Africa, it was held that:

***"The general rule is that the party who on the whole succeeds in the suit gets the general costs of the suit but where the suit involves separate issues the costs of any particular issue go to the party who succeeds upon it..."** (Underlining added)*

This rule may be applied in the present matter where separate applications had different outcomes.

26. In this matter, although there was no trial on the merits of the petition, there were several substantive interlocutory applications and appeals which were fully argued and determined by this court or by the

Court of Appeal. In respect of these applications and the appeals, there were also determinations by the courts on costs. Applying **Jiwan**, I think it is proper to allocate to the parties their liability as to costs based on the determinations by the courts on issues or interlocutory applications therein.

27. The first ruling by Mwilu, J, as she then was, is dated 31st May, 2011. It concerned a notice of motion dated 10th May, 2008 by the Petitioner. The court made the following determination: the court found the application **“to lack merit and is hereby dismissed with costs”**. The costs of that application are therefore payable by the Petitioner.

28. The second ruling by Mwilu, J as she then was, is dated 19th September, 2011. It determines the 1st Respondent’s Notice of Motion dated 23rd March 2011 seeking striking out of the petition for being invalid and further seeks a declaration that the Petitioner’s inordinate delay in prosecuting the petition renders the proceedings invalid. The Court determined that it was unable to find that the Petitioner has occasioned delay and dismissal of the Petition for want of prosecution was unmaintainable. The **“application is [was] dismissed with costs”**. The costs of that application are therefore payable by the 1st Respondent.

29. The third ruling by Justice Mwilu is also dated 19th September, 2011. It concerns the 1st Respondent’s Notice of Motion dated 24th October 2008 seeking striking out of several prayers in the petition or alternatively striking out the entire petition for failure to supply adequate particulars. The court was unable to strike out the petition in its entirety, and found that: **“As the Applicant [1st Respondent] has been partly successful he shall have half the costs of the application”**.

30. The fourth ruling by Lady Justice Mwilu dated 14th October, 2011, concerns the 1st Respondents application seeking that the court do correct its ruling dated 19th September, 2011, on the grounds that the said ruling did not make a decision whether or not certain paragraphs of the Petition should be struck out. The court clarified its ruling and found that it had made an “accidental slip” in respect of some paragraphs of the ruling. On costs, the court decided that **“costs of this application will be in the in the result of the Petition”**. The substantive Petition having not been determined, costs of that application lie where they are and each party shall bear its own costs.

31. The final ruling by Mwilu J., as she then was, concerns an application by the 1st Respondent seeking her recusal from the petition. In the ruling, dated 24th November, 2011, the Judge declined recusal but was silent on the question of costs. The costs of that application lie where they are, and each party shall bear its own costs.

32. In the Court of Appeal, the Petitioner filed Civil Appeal No 217 of 2011 and the 1st Respondent filed Civil Appeal 220 of 2011. These were appeals against Justice Mwilu’s Ruling dated 19th September, 2011 and corrected on 14th October, 2011. The two appeals were consolidated and determined in the judgment dated 14th December, 2012. The Court of Appeal determined costs as follows:

“The appeal [Appeal No 217] as regards striking out of paragraphs 33 and 34 is dismissed. The appellant in that appeal who is the petitioner will have half the costs of the appeal.”

“The appeal No 220 of 2011 is dismissed in its entirety. The appellant in that appeal [1st Respondent] will pay costs to the respondent [petitioner] in that appeal.”

Disposition

33. The upshot of all the foregoing is that the liability as to costs in this matter shall be as follows:

a. On the substantive petition there has been no judicial determination as it was terminated by consent for lack of any substantive triable issue for determination. In that regard only, each party

shall therefore bear its own costs.

b. As regards liability for costs in relation to interlocutory applications and appeals in the petition, the parties shall bear costs as indicated in the respective rulings and judgment set out in the foregoing paragraphs 27 to 32 herein.

34. Orders accordingly.

Dated and Delivered at Nairobi this 24th Day of April, 2017

RICHARD MWONGO

PRINCIPAL JUDGE

Delivered in the presence of:

1.....for the Petitioner

2.....for the 1st Respondent

3.....for the 2nd and 3rd Respondents

Court Clerk.....