



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
JUDICIAL REVIEW DIVISION
MISC. APPLICATION NO. 388 OF 2017

BETWEEN

REPUBLIC.....APPLICANT

-VERSUS-

INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION..... RESPONDENT

AND

HASSAN HUSSEIN OSMAN.....1ST INTERESTED PARTY

ABDINASIR ADANI IBRAHIM.....2ND INTERESTED PARTY

EX-PARTE : ALINOOR DEROW ABDULLAHI & OTHERS

RULING

1. These proceedings were instituted by way of a Notice of Motion dated 28th June, 2017 by which the ex parte applicants herein sought the following orders:

i. That the honourable court be pleased and do hereby grant judicial review order of Certiorari removing into this honourable court and to quash the decision of the respondent to reverse the transfer of votes by the ex parte applicants and 50,000 other votes to various wards in Mandera East, Banisa, Mandera South, Mandera West and Lafey Constituencies, during the first and second phase of the Mass Votes Registration Exercise.

ii. That the honourable court be pleased and do hereby grant judicial review order of prohibition to remove into this honourable court and prohibit the respondent from reversing the votes transferred to various Wards in Mandera East, Banisa, Mandera South, Mandera West and Lafey Constituencies, during the first and second phase of the Mass Voters Registration Exercise.

iii. That the honourable court be pleased and do hereby grant judicial review order of Mandamus to remove into this honourable court and compel the respondent to make public the Final Register of voters for all the wards and constituencies in Mandera County as the Ex

parte Applicants and votes in Mandera County are apprehensive that the respondent has interfered with the voters register for wards in Mandera East, Banisa, Mandera South, Mandere North, Mandea West and Lafey Constituencies, in Mandera County during the first and second phase of the Mass Voters Registration Exercise.

2. The cause of action according to the applicants arose from the alleged decision of the Respondent to reverse the transfer of voters in certain wards in Mandera South Constituency, Mandera East Constituency, Banisa Constituency, Mandera West Constituency and Lafey Constituency. According to the applicants, after registering as voters they and 50,000 other voters, pursuant to section 7 of the ***Elections Act*** and Regulation 14(4) of the ***Elections (Registration of Voters) Regulations, 2012***, transferred their votes from various wards within and without Mandera County to various wards in Mandera South Constituency, Mandera East Constituency, Banisa Constituency, Mandera West Constituency and Lafey Constituency in Mandera County. However they were not accorded acknowledgement slips despite following the laid down process. Further their transfer forms were not serialised.

3. It was averred that the applicants and other voters duly verified their votes at the designated voter verification centres. However the Respondent unilaterally and without following the legal procedures reversed the transfer of votes by the applicants and other voters under the pretext that the transfer was done without the consent of the voters themselves. It was averred that this decision was made arbitrarily without the applicants being consulted as required by the law and in contravention of the applicants' constitutional rights.

4. After directions had been given but before the matter could be determined, the ex parte applicants on 26th July, 2017 applied to have the application withdrawn on the ground that the orders sought herein had been exhausted. Whereas the Respondent and the interested parties did not object to the withdrawal, they sought for costs. The Court then directed the parties to file submissions on costs.

5. The said submissions were filed on behalf of the ex parte applicants and the interested parties while the Court was informed that the Respondent was relying on the submissions filed on behalf of the interested parties.

6. According to the interested parties, they were joined to these proceedings pursuant to leave and directions given on 21st June, 2014(sic). They submitted that the decision to withdraw these proceedings was made only after the ex parte applicants had perused the interested parties' affidavit and submissions and following several court attendances.

7. In support of their submissions and prayer for costs, the interested parties relied on section 27 of the ***Civil Procedure Act, Ledama Ole Kina vs. Samuel Kuntai & 9 Others [2015] eKLR, Cecilia Karuru Ngayu vs. Barclays Bank of Kenya and Another [2016] KLR, Republic vs. Ihururu Dairy Farmers Cooperative Society Limited ex parte Rosemary Wairimu Munene Judicial Review Application No. 6 of 2014*** for the proposition that the issue of costs is the discretion of the Court the basic rule being that costs follow the event though the principle is not to be used to penalise the losing party but for the compensation of the successful party. However the onus is on the party contending that the successful party ought to be deprived of costs to justify that position.

8. In this case the Court was urged to consider the fact that this was a high stake litigation, the application was voluminous,, comprehensive responses and submissions we filed, there were several attendances and substantial costs in filing and making copies were incurred. Based on ***Okiya Omtatah Okiti vs. Communications Authority of Kenya & 14 Others [2015] eKLR*** it was submitted that frivolous suits ought not to be treated as public interests litigation for the purposes of costs and it was prayed that the ex parte applicants be penalised in costs.

9. On behalf of the ex parte applicants, the Court was urged to consider the fact that this application is a breakaway from the main matter being Misc. Application No. 453 of 2017 – ***Republic vs. IEBC ex parte Mohamed Ibrahim Abdi & 4 Others [2017] KLR*** which the Court dismissed but with no order as to

costs.

10. According to the ex parte applicants, this matter is a constitutional one, a chapter four matter touching on the rights of the applicants in the Bill of Rights hence any award of costs would have a negative effect on those who strive to ensure observance of the Constitution. In support of this position the applicants relied on **Raila Odinga & 5 Others vs. Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR** where the Supreme Court while directing each party to bear own costs expressed itself as hereunder:

“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.”

11. It was submitted that that the instant matter provides an opportunity to determine a key point in the public interest matter touching on the right to vote as a universal suffrage right which when curtailed could affect the ex parte applicants’ right to vote. The ex parte applicants’ submissions were further hinged on Articles 3(1) and 258(1) of the Constitution.

12. I have considered the submissions made on behalf of the parties herein.

13. The general rule as to costs is provided for in section 27 of the ***Civil Procedure Act*** which provides as follows:

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 to try the suit 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.

14. This provision has been the subject of several judicial pronouncements. In the case of **Supermarine Handling Services Ltd vs. Kenya Revenue Authority Civil Appeal No. 85 of 2006** in which the Court of Appeal expressed itself thus:

“Costs of any action or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts. If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance...Thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where the reasons are given if it considers that those reasons do not constitute “good reason” within the meaning of the rule...In the instant case the learned Judge gave no reasons whatsoever for his decision to deprive the successful plaintiff of its costs and yet it was not shown that the defendant had been guilty of some misconduct which led to litigation. In the court’s view the learned Judge’s order was wrong and for the foregoing reasons, the

plaintiff's appeal succeeds as to the award of interest and costs on the principal sum awarded”.

15. In **Devram Manji Daltani vs. Danda [1949] 16 EACA 35** it was held that a successful litigant can only be deprived of his costs where his conduct has led to litigation, which might have been averted.

16. In **Party of Independent Candidate of Kenya & Another vs. Mutula Kilonzo & 2 Others HCEP No. 6 of 2013**, it was held:

“The main reason why this Petition should be withdrawn is due to the demise of the 1st Respondent. This would call upon the Court considering ordering each party to bear their own costs. In the case of *Nedbank Swaziland Ltd verses Sandile Dlamini No.(144/2010) [2013] SZHC30 (2013)* Maphalala J. referred to the holding of *Murray C J in the case of Levben Products VS Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227*, who stated as follows:

“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (*Fripp vs Gibbon & Co., 1913 AD D 354*). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at...In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

17. In determining the issue of costs, the Court is entitled to look at *inter alia* the conduct of the parties, the subject of litigation, the circumstances which led to the institution of the legal proceedings, the events which eventually led to their termination, the stage at which the proceedings were terminated, the manner in which they were terminated, the relationship between the parties and the need to promote reconciliation amongst the disputing parties pursuant to Article 159(2)(c) of the Constitution. In other words the court may not only consider the conduct of the party in the actual litigation, but the matters which led up to litigation, the eventual termination thereof and the likely consequences of the order for costs. See **Hussein Janmohamed & Sons vs. Twentsche Overseas Trading Co. Ltd [1967] EA 287** and **Mulla (12thEdn) P. 150.**

18. In my view section 27 of the ***Civil Procedure Act*** provides for the general rule which ought to be followed unless for good reasons to be recorded.

19. When all things are equal, however, the only consideration is the “event”. As was held by the Supreme Court of Uganda in **Impressa Ing Fortunato Federice vs. Nabwire [2001] 2 EA 383:**

“The effect of section 27 of the Civil Procedure Act is that the Judge or court dealing with the issue of costs in any suit, action, cause or matter has absolute discretion to determine by whom and to what extent such costs are to be paid; of course like all judicial discretions, the discretion on costs must be exercised judiciously and how a court or a judge exercises such discretion depends on the facts of each case. If there were mathematical formula, it would no longer be discretion...While it is true that ordinarily, costs should follow the event unless for some good reason the court orders otherwise, the principles to be applied are: - (i). Under section 27(1) of the Civil Procedure Act (Chapter 65), costs should follow the event unless the court orders otherwise. This provision gives the judge discretion in awarding costs but that discretion has to be exercised judicially. (ii). A successful party can be denied costs if it is proved that but for his conduct the action would not have been brought. The costs should follow the event even when the party succeeds only in the main purpose of the suit...It is trite law that where judgement is given on the basis of consent of parties, a court may not inquire into what motivated the parties to consent or to admit liability since admission of liability implied acceptance of the particulars of injuries enumerated in the plaint and the evidence in favour of the Respondent, including loss of hearing and speech.”

20. I associate myself with the decision of Kampala High Court in **Re Ebuneiri Waisswa Kafuko (Deceased) Kampala HCMA No. 81 of 1993** in which it was held that:

“The Judge in his discretion may say expressly that he makes no order as to costs and in that case each party must pay his own costs. If he does not make an order as to costs, the general rule is that he shall order that the costs follow the event except where it appears to him in the circumstances of the case some other order should be made as to the whole or any part of the costs. But he must not apply this or any other general rule in such a way as to exclude the exercise of the discretion entrusted to him and the material must exist upon which the discretion can be exercised. This discretion, like any other discretion, must be exercised judicially and the judge ought not to exercise it against the successful party except for some reason connected with the case. It is not judicial exercise of the judge’s discretion to order a party who has been completely successful and against whom no misconduct is even alleged to pay costs.”

21. With respect to the nature of litigation as a consideration in the award of costs, it is clear that in genuinely public interests litigation, Courts are reluctant to award costs. This in my view must be so for the realisation of the spirit of Article 3(1) of the Constitution which provides that:

Every person has an obligation to respect, uphold and defend this Constitution.

22. One of the ways in which this obligation performed is provided for in Article 258(1) and (2) of the Constitution which states that:

(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

23. Therefore the Constitution itself recognises that a person may commence legal proceedings not for his own interest but in the interests of the public. This was clearly appreciated by the Supreme Court in **Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 others [2014] eKLR** where it was held that:

“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. In *Amoni Thomas Amfry and Another v. The Minister for Lands and Another*, Nairobi High Court Petition No. 6 of 2013, Majanja, J concurred with the decision in *Harun Mwau and Others v. Attorney-General and Others*, Nairobi High Court Petition No. 65 of 2011, [2012] eKLR, in which it was held [para.180]:

“In matters concerning public-interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed. Costs should therefore not be imposed on a

party who has brought a case against the State but lost. Equally, there is no reason why the State should not be ordered to pay costs to a successful litigant.”

“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.”

24. I also agree with Lenaola, J (as he then was) in **Okiya Omtatah Okiti vs. Communications Authority of Kenya & 14 Others [2015] eKLR**, where he expressed himself as hereunder:

“In my view, this Court has a duty to protect the noble motive of public interest litigation from those who file claims out of mischief and less than genuine interest in the guise of protecting a public interest. The filing of false and frivolous public interest litigation which risk diverting the Court’s attention from genuine cases will not be entertained.”

25. This position was also well captured in In **John Harun Mwau and 3 Others vs. Attorney General and 2 Others [2012] eKLR** the Court remarked at paras 179 and 180 that:

“The intent of Articles 22 and 23 of the Constitution is that persons should have free and unhindered access to this court for the enforcement of their fundamental rights and freedoms. Similarly, Article 258 allows any person to institute proceedings claiming the Constitution has been violated or is threatened. The imposition of costs would constitute a deterrent and would have a chilling effect on the enforcement of the Bill of Rights...In matters concerning public interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed.”

26. It is therefore clear that where a person is genuinely advancing public interest under the Constitution as he is obliged to do under Article 3(1) of the Constitution he ought not to be penalised in costs.

27. However this right to institute such proceedings ought not to be abused in order to achieve collateral purposes such as to in effect litigate on behalf of other persons who are able to litigate on their own but for some ulterior motives do not want to be in the forefront of litigation.

28. I therefore agree with the decision of Warsame, J (as he then was) in **Truth Justice and Reconciliation Commission vs. Chief Justice of the Republic of Kenya & Another [2012] KLR**, that:

“Though as Courts we spare no efforts in fostering and developing liberal and broadened litigation, yet we cannot avoid but express our opinion that while genuine litigants with legitimate grievances relating to matters which are dear to them must be addressed, the meddlesome interlopers having absolutely no grievances but who file claims for personal gain or as a proxy of others or for extraneous motivation break the queue by wearing a mask of public interest litigation and get into the Court corridors filing vexatious and frivolous cases. This criminally wasted the valuable time of the Court and as a result of which genuine litigants standing outside the Court in a queue that never moves thereby creating and fomenting public anger, resentment and frustration towards the courts resulting in loss of faith in the administration of justice.”

29. In this case it is clear that the ex parte applicants were agitating not only on their behalf but also the

rights of others to elect leaders of their choice. Article 83(3) of the Constitution provides that:

Administrative arrangements for the registration of voters and the conduct of elections shall be designed to facilitate, and shall not deny, an eligible citizen the right to vote or stand for election.

30. The ex parte applicants' case was that the arrangements made by the Respondents were not only unlawful but were not geared towards the achievement of the said purpose. The issue as to whether the arrangement made by the electoral body are meant to achieve the objects of the right to vote in my view is clear a matter that concerns the public and unless it is shown that the litigation was frivolous or meant to achieve collateral purpose such litigation ought not to be punished by the applicant being penalised in costs.

31. In my view it is not the number of attendances or the voluminous nature of the pleadings that determine whether in such proceedings costs ought to be imposed. Rather it is the substance of the proceedings that is the determinant factor.

32. I have considered the proceedings and I am not satisfied that the same were frivolous. The ex parte applicants clearly had a reasonable belief even if mistaken that the actions of the Respondents were designed to deny them their rights to vote in an environment conducive to them.

33. It is therefore my view and I hold that this is a fit case for not penalising the applicants in costs.

34. In the circumstances each party will bear own costs of these proceedings.

35. It is so ordered.

Dated at Nairobi this 31st day of October, 2017.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Gichamba for Mr Wetangula for the Respondent

Miss Mugo for the interested party

CA Ooko