



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.555 OF 2014

BETWEEN

JOSHUA KIILU MWONGA.....1ST PETITIONER

AND

WIPER DEMOCRATIC MOVEMENT OF KENYA.....1ST RESPONDENT

THE REGISTRAR OF POLITICAL PARTIES.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. I am required to determine whether costs are payable to the 1st Respondent once the Petition was withdrawn and the dispute between the Parties having been determined by the Political Parties Tribunal.
2. The 1st Respondent's Counsel in written Submissions filed on 18th August 2015 stated that his client was entitled to costs because upon being served with pleadings, he filed a Notice of Preliminary Objection dated 30th November 2014; a Replying Affidavit dated 4th December 2014 and attended Court on a number of occasions.
3. He also stated that during the pendency of the Petition herein, the Petitioner instituted similar proceedings before the Political Parties Tribunal and then withdrew the Petition and so the 1st Respondent is further entitled to costs for the following specific reasons reproduced verbatim:

“(1) The Petitioner filed this Petition to defend membership to a political party and whose effect was to defend an elective position as a member of the County Assembly of Machakos; had the disciplinary proceedings he sought to challenge proceeded it would have culminated into loss of his seat at the Assembly. This Court has in previous numerous decisions on election Petitions held that the Party who comes to Court to defend an elective position and loses the Petition must pay the Respondent costs. The 1st Respondent prays that his Court applies the same principles.

(2) The 1st Respondent instructed an Advocate who took instructions and steps to prepare the matter for hearing.

(3) The matter was fixed for hearing and mention on several occasions when the 1st Respondent's Advocate attended and was ready to proceed.

(4) The 1st Respondent filed a Notice of Preliminary Objection dated 30th November, 2014 as well as a Replying Affidavit dated 4th December, 2014.

(5) The 1st Respondent relies on the principle that costs follow the event and this Court ought to apply the said principle."

4. On his part, Counsel for the Petitioner submitted that the Petitioner was properly entitled to file his Petition and was prepared to prosecute it until 11th February 2015 when he received news that he had been expelled from the 1st Respondent, a Political Party. He then decided to approach the Political Parties Tribunal and upon the decision of the Tribunal being delivered, he decided to withdraw the Petition, the same having been overtaken by events. That since it was the 1st Respondent's actions that triggered the filing of the Petition, it cannot benefit from its unlawful actions and that the best order would be that each Party should bear its own costs.

5. On my part, I note that the proceedings herein were instituted pursuant to *inter alia* **Articles 22, 27, 32, 38, 47, 48 and 50** of the **Constitution** which are part of the Bill of Rights.

6. If that be so, **Rule 26** of the **Constitution** of Kenya (**Fundamental Rights and Freedoms) Practice and Procedure Rules, 2013** provide as follows;

"(1) The award of costs is at the discretion of the Court.

(2) In exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms."

7. Like all discretion therefore, in exercise thereof, the Court ought to act judiciously and within the guidance given by the Rules above. In that regard, it cannot be true as argued by Counsel for the Petitioner that his client was justified in coming to Court because the Petition was never determined on its merits and I do not know the basis for the decision of the Political Parties Tribunal and whether it favoured him. All I know is that the dispute between the Parties related to disciplinary proceedings between the Petitioner (the Member of the County Assembly of Machakos representing Masinga Central Ward) and his political party of choice, the 1st Respondent, and that the decision of the Tribunal triggered the withdrawal of the Petition.

8. Access to justice is a principle embedded in **Rule 26** above and flows from the provisions of **Article 48** of the **Constitution**. The Petitioner, to that extent, was entitled to seek recourse where he felt that his fundamental rights may have been violated. It is also true that the 1st Respondent spent time in responding to the Petition and was party to the proceedings before the Tribunal where the dispute between them was finally resolved.

9. Having said so, the Petitioner is a member of the 1st Respondent and is in fact its representative for Masinga Central Ward in Machakos County. To expect him to pay costs for a dispute that was lawfully resolved one way or the other would only fuel a dispute that is dying.

10. In the event, noting the circumstances of the case, the relationship between the Parties and the need to bring the dispute to a close, I agree with Mr. Nyamu, Counsel for the Petitioner, that discretion would best be exercised by ordering that in the present Petition, upon its withdrawal, each Party ought to bear its own costs.

11. The final orders are therefore that the Petition is marked as withdrawn and each party shall bear its

own costs.

12. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF FEBRUARY, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Mr. Ngatia holding brief for Mr. Nyamu for Petitioner

No appearance for Respondents

Order

Ruling duly read.

ISAAC LENAOLA

JUDGE

19/2/2016