



**Omwoyo v Independent Electoral & Boundaries Commission & another
(Petition E005 of 2023) [2024] KEHC 8315 (KLR) (11 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8315 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
PETITION E005 OF 2023
WA OKWANY, J
JULY 11, 2024**

BETWEEN

MICHELLE KEMUMA OMWOYO PETITIONER

AND

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 1ST
RESPONDENT**

THE SPEAKER, NYAMIRA COUNTY ASSEMBLY 2ND RESPONDENT

RULING

Background

1. The Petitioner/Applicant herein sued the Respondents through the Petition dated 29th June 2023 seeking the following orders: -
 - a. An order does issue compelling the 1st Respondent's Chief Executive Officer to gazette the Petitioner as a Member of the Nyamira County Assembly under the Gender Top Up List representing Jubilee Party within 7 days.
 - b. Failure to comply with order (a) above, within the stipulated time, the Honourable Court be and is hereby pleased to direct the 2nd Respondent to swear in the Petitioner as the duly nominated member of the County Assembly Nyamira, under the Gender Top Up list representing Jubilee Party.
 - c. Failing to comply with order (a & b) above within the stipulated time, the Petitioner be deemed as having been elected and she be at liberty to take her position as a Member of Nyamira County Assembly representing Jubilee Party under the Gender Top Up Category.



- d. A Declaration that the Constitutional Rights of the Petitioner as set out under Articles 27 (1) & (2), 28, 29 (d), 40 (3), 41 (1) and 47 (1) of the Constitution as read together with Section 4 (1) of the Fair Administrative Actions Act has been violated by the Respondents.
 - e. A declaration that the 2nd Respondent (Enock Okero) has breached the provisions of Chapter 6 of the Constitution of Kenya and he is unfit to hold any public office in the Republic of Kenya.
 - f. General Damages for the violation of the Petitioner’s rights under Articles 27 (1) & (2), 28, 29 (d), 40 (3) and 47 (1) of the Constitution as read together with Section 4 (1) of the Fair Administrative Actions Act.
 - g. Costs of the Petition and interest thereon.
 - h. Any other and further relief that this honourable court may deem fit and just to grant in the circumstances.
2. Concurrently with Petition, the Petitioner filed an Application dated 29th June 2023 seeking, inter alia, orders to compel the 1st and 2nd Respondents to gazette her as the duly nominated member of the Nyamira County Assembly under the Gender Top Up List representing the Jubilee Party. Wide Ruling dated 31st October 2023, this Court allowed the Application and directed the 2nd Respondent to swear the Petitioner into office within 24 hours from the time of the delivery of the Ruling. The court also ordered that the costs of the Application would abide the outcome of the main Petition.
 3. The Petitioner filed a Notice of withdrawal of the Petition dated 5th April 2024 upon being sworn into office. The parties have now come back to this court for a determination on the issue of costs.
 4. The 1st Respondent (IEBC) argued that it should be granted the costs of the Petition following its withdrawal while the 2nd Respondent took the position that each party should bear its own costs. Mr. Owuor advocate for the 1st Respondent submitted that the Commission spent money to hire an advocate to represent it.
 5. Mr. Mokua, advocate for the Petitioner, on the other hand, opposed the 1st Respondent’s prayer for costs while arguing that the Petition was over a matter of public interest for which no party should be condemned for costs. He also submitted that the Petition was not a frivolous as it raised the pertinent issue of gazettement and that the petitioner saved the court precious judicial time by withdrawing the case.
 6. Mr. Nyambati, learned Counsel for the 2nd Respondent, concurred with the Petitioner’s submissions and urged the court to make a determination on costs that was not to be couched in mandatory terms.
 7. I have considered the parties’ rival submissions and the nature of the case that was before this court. I am guided by the principles espoused in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others (Sup. Ct. Petition No 4 of 2012); [2014] eKLR where the Supreme Court stated: -

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“(18) 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....

Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this court in other cases.”

8. In the present case, I note that the Petition was withdrawn before it was listed for hearing. The Application before this Court was premised on the issue of gazette of the Petitioner following her nomination as a Member of the County Assembly of Nyamira County. It cannot be said that any of the parties was at fault. This court takes judicial notice of the fact that the 1st Respondent (the IEBC) is currently not properly constituted and that this was the reason for the Petitioner’s decision to seek this court’s interpretation on what was to happen following her nomination.

9. The situation that the parties found themselves in was in the nature of a constitutional impasse which required resolution by a Court of Law. For the above reasons, I find that no party can be faulted or condemned for costs. I am guided by the decision in *Sonko v Clerk, County Assembly of Nairobi City & 12 others* (Petition 14 (E021) of 2021) [2022] KESC 17 (KLR) where the learned judges held thus: -

“ iii. Having so stated, we note from the record that the petition was withdrawn before the respondents had filed any responses or substantive submissions to the appeal save for the 7th respondent who filed a notice of preliminary objection. The appeal, at the time of withdrawal was not ripe for hearing. While applying the principle in *Jasbir Singh Rai* that costs normally follow the event, has an event to which costs would follow materialized? The answer is in the negative. Such an event has not happened. We note that the applicant’s appeal did not proceed as the occurrence of the event that would have led to the applicant being successful crystallized as the 11th respondent was sworn in as Governor of Nairobi County. We therefore come to the conclusion that each party shall bear its costs before this court.

8. And having therefore considered the submissions by the respective parties, we now order that each party shall bear its costs of the appeal.”

10. In the same manner, I also order that each party herein shall bear its own costs in this suit.

11. It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS AT NYAMIRA THIS 11TH DAY OF JULY 2024.

W. A. OKWANY

JUDGE

