



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

JUDICIAL REVIEW & HUMAN RIGHTS DIVISION

PETITION NO. 1 OF 2021

FORMALLY NAIROBI HIGH COURT PETITION NO. 433 OF 2017

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS & FREEDOMS UNDER ARTICLES 2,4,10,19,20 ,21,22,23,27,38,47,48,56,
77,81,88,90,159,177,232,258, AND 260 OF THE CONSTITUTION OF KENYA, 2010**

AND

SECTION 4 (N) OF THE IEBC ACT

AND

SECTION 34, 55, AND 56 OF THE ELECTION (GENERAL) REGULATIONS, 2012

AND

REGULATION 26 OF THE ELECTION (PARTY PRIMARIES AND PARTY LISTS) REGULATIONS, 2017

BETWEEN

DANILA NTALASON LENATIMAYAMA..... PETITIONER

VERSUS

INDEPENDENT ELECTORIAL AND BOUNDARIES COMMISSION.....1ST RESPONDENT

WAFULA CHEBUKATI.....2ND RESPONDENT

RULING

1. The petitioner, Danila Ntaloson Lenatimayama, has filed a notice dated 8th July 2021 seeking to withdraw the entire petition herein against all the respondents and the interested parties with no order as to costs. The application is based on the ground that the matter has been overtaken by events.

2. The Respondents are not opposed to the application save that they sought to be paid their costs to the petition.

3. **Mr. Mutuma** acting for the petitioner argued before the court that the matter is a constitutional petition that was filed on behalf of a marginalized community. That the court file went missing and they had to re-construct the file. The matter was then transferred from Nairobi to Marsabit. That the matter was in the meantime overtaken by events. That it was not their fault that the court file went missing. That it is the practice that in cases of public interest litigation such as this one the courts do not award costs. Counsel urged the court not to award costs.

4. **Mr. Opwokwa** while holding brief for Mr. Kisaka for the 1st and 2nd respondents sought for costs to the two respondents. He argued that the petitioner had ample time to prosecute the petition.

5. I have considered the application. There is no objection to the withdrawal of the suit. The issue in contention is whether the respondents should be awarded costs of the suit. The Applicant argues that the petition was in the nature of public-interest litigation and therefore that costs are not awardable.

6. Costs in a suit are at the discretion of the court. It is a well-established principle of law that costs follow the event. Section 27 of the Civil Procedure Act provides that:

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7. The Black's Law Dictionary 9th Edition defines public interest as:

“...the general welfare of the public that warrants recognition and protection, something in which the public as a whole has stakes, especially that justifies Governmental regulation”. In litigating on matters of “general public importance”, an understanding of what amounts to ‘public’ or ‘public interest’ is necessary. “Public” is thus defined: concerning all members of the community; relating to or concerning people as a whole; or all members of a community; of the state; relating to or involving government and governmental agencies; rather than private corporations or industry; belonging to the community as a whole, and administered through its representatives in government, e.g. public land.”

8. In the case of **Mumo Matemu vs Trusted Society of Human Rights Alliance and 5 others [2014] eKLR** the Supreme Court explained the essence of public interest litigation thus;

“Public Interest Litigation plays a transformative role in society. It allows various issues affecting the various spheres of society to be presented for litigation. This was the Constitution’s aim in enlarging locus standi in human rights and constitutional litigation. Locus standi has a close nexus to the right of access to justice. In instances where claims in the interest of the public are threatened by administrative action to the detriment of constitutional interpretation and application, the Court has discretion on a case by case basis, to evaluate the terms and public nature of the matter vis a vis the status of the parties before it. This discretion is drawn from the command of Article 259 (1), to interpret the Constitution in a manner that promotes its values and purposes, advances the rule of law, human rights and fundamental freedoms, permits the development of the law and contributes to good governance”.

9. In **Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 others [2014] eKLR** the Supreme Court held as follows:

“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.”

10. In the case of **Brian Asin & 2 others v Wafula W. Chebukati & 9 others [2017] eKLR** the issue as to whether public interest litigation should attract costs was determined as follows:

“60. The Public Interest Litigation was designed to serve the purpose of protecting rights of the public at large through vigilant action by public spirited persons and swift justice. But the profound need of this tool has been plagued with misuses by persons who file Public Interest Litigations just for the publicity and those with vested political interests. The courts therefore, need to keep a check on the cases being filed and ensure the bona fide interest of the petitioners and the nature of the cause of action, in order to avoid unnecessary litigations. Vexatious and mischievous litigation must be identified and struck down so that the objectives of Public Interest Litigation aren’t violated. The constitution envisages the judiciary as “a bastion of rights and justice...”

63. The question is whether the proceedings before me are frivolous or vexatious bearing in mind that it is the duty of the court to see whether the petitioner who approaches the court has a bona fide intention and not a motive for personal gain, private profit or political or other oblique considerations.”

11. In **Feisal Hassan & 2 others v Public Service Board of Marsabit County & another [2016] eKLR** it was held that:

“3. In constitutional litigation, the principle of access to the court must, consistently with the public importance and interest

in the observance and enforcement of the Bill of Rights in the Constitution, override the general principle that costs follow the event, unless it can be shown that the petition was wholly frivolous, or that petitioner was guilty of abuse of the constitutional court process by say filing a constitutional petition on matters that do not raise purely constitutional issues and which properly belonged to other competent courts or tribunals, and which should, therefore, have been filed and competently disposed of by those other courts or tribunals. However, a petitioner for constitutional enforcement need not present a case that must succeed and it cannot therefore, be taken against him that his petition is eventually lost if it otherwise meets the public interest criteria. Although developed in the realm of protection and enforcement of rights and fundamental freedoms, the principle applies with the same force in general constitutional litigation for interpretation and enforcement of the Constitution. Indeed, the rights of access to court under Article 22 and 258 of the Constitution for the enforcement, respectively, of the Bill of Rights and the other parts of the Constitution are in the same terms.”

12. In **Republic v Independent Electoral and Boundaries Commission & 2 Others Ex-parte Alinoor Derow Abdullahi & Others (2017)Eklr**, Odunga J. summarized some of the factors to consider on whether or not to award costs in a public litigation case as follows:

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.

13. The principles which emerge from these authorities are that public interest cases are by and large in the interest of the public and not the petitioner. A petitioner in a clear case of public interest ought not be condemned to pay costs. The petitioner must however establish that the case was not frivolous or an abuse of the process of the court.

14. The petition herein was based on the grounds that the respondents had published the name of the petitioner in the **Sunday Nation** newspaper of 23rd July 2017 as the nominee for Marsabit County Assembly to represent a marginalized group, the El-Molo tribe. However, that vide a gazette notice dated 28th August 2017 the 2nd respondent gazetted a list of persons allocated special seats to represent the interests of the minority and marginalized groups and failed to include the petitioner’s name and instead allocated the said seats to persons who were neither from marginalized nor minority groups.

15. Though the petitioner did not prosecute the petition, it is clear to me in the first place, that the matter was purely an electoral dispute that ought to have been resolved under electoral laws. For the petitioner to have filed an electoral dispute while disguising it as a constitution petition amounted to an abuse of the process of the court.

16. Secondly, it is apparent that the petition did not meet the criteria of public-interest litigation as it is the petitioner who was to benefit from the appointment as a Member of County Assembly. The petition was therefore geared towards achieving private gain rather than public good. The respondents had a right to defend the transgression by the petitioner. There was no fault or blame on their part in defending the suit. There is no reason to deny them their right to costs.

17. In the premises, I do allow the application to withdraw the petition. The petition is accordingly withdrawn with costs to the respondents.

DELIVERED, DATED AND SIGNED AT MARSABIT THIS 14TH OCTOBER 2021.

JESSE N. NJAGI

JUDGE

In the presence of:

N/A for Petitioner

Mr. Kisaka – Virtually - for Respondents

Parties: - Absent

Court Assistant - Mr. Kashane

30 days Right of Appeal.