REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

ELECTION PETITIONS NO. 1 OF 2017

SILVERSE LISAMULA ANAMI...PETITIONER

VERSUS

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

HENRY BAHATI LUMITI (Returning Officer, Shinyalu Constituency)........2ND RESPONDENT

JUSTUS GESITO MUGALI M'MBAYA...3RD RESPONDENT

RULING

1. The application herein is by way of a notice of motion dated 17th December, 2019 brought under the provisions of Article 165 (3) of the Constitution of Kenya 2010 in which the applicant seeks for substantive orders for review of this court's judgment delivered on the 19th February, 2018 wherein the court condemned the applicant to pay costs of Ksh. 5,000,000/= to the respondents.

2. The grounds of the application are that:-

> *1. That this Honourable Court on 19th February, 2018 delivered a judgment condemning the petitioner to pay costs capped at Ksh. 5,000,000/= to the respondents.*
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> *2. That the petitioner being aggrieved with the whole of the judgment appealed to the Court of Appeal at Kisumu which Appeal was dismissed and the petitioner subsequently appealed to the Supreme Court.*
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> *3. That the Supreme Court in making an order that each party should bear its costs found that the petitioner's "cause is partly successful with the potential of greatly contributing to the jurisprudence of this county with regard to the choice of forum when handling pre-election disputes".*
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> *4. That the Court of Appeal in its judgment on the 8th November, 2019 in Kenya Human Rights Commission & Another Vs AG & 6 Others (2019) eKLR held that "Public interest litigation, in most cases, is for the benefit of the public and not the persons or entities that institute the proceedings. Condemning an unsuccessful party to pay costs in genuine public interest litigation can become a deterrent. More likely than not, many a party would hesitate to institute suits in defence of the Bill of rights and the Constitution for fear of being condemned to pay costs."*

5. That the Supreme Court on 16th July, 2014 in Petition 9 of 2014 Anami Silverse Lisamula Vs Independent Electoral & Boundaries Commission & 3 Others (2014) eKLR, overturned the decision of costs in both High Court and Court of Appeal. The Petition in the Supreme Court was as a result of an Election Petition by the 3rd Respondent herein.

6. That an election petition being proceedings that are brought in the interest of the public, no party should be condemned to pay costs.

7. That the decision of the Court of Appeal was delivered on 8th November, 2019, therefore this is new and important material which the court did not have opportunity to consider when making its judgment of 19th February, 2018.

3. The application was supported by the affidavit of the applicant and written submissions of his advocates, **Ngeresa & Okallo Associates**. The application was opposed by the 1st and 2nd respondents through their grounds of opposition dated 7th February, 2020 filed through the firm of **Mukele Moni & Co. Advocates**. The same was opposed by the 3rd respondent by way of a notice of preliminary objection dated 7th February, 2020 filed through the firm of **Marende & Nyaundi Advocates**.

4. The background to the application is that this court heard the applicant's election petition and dismissed it with costs on the 19th February, 2018. He moved to the Court of Appeal where also he was unsuccessful and was ordered to pay costs. Undaunted he moved to the Supreme Court in Petition No. 30 of 2018 where he was partly successful and the court ordered each party to bear its own costs. He then came back to this court with the instant application seeking for review on the order of costs on the grounds that his appeal to the Supreme Court was partly successful in that the court found that the appeal had the potential of greatly contributing to the jurisprudence of the country as a result of which the court ordered each party to meet its own costs. Further that the election petition was filed in the interest of the public. That the Court of Appeal in a judgment delivered on 8th November, 2019 in **Kenya Human Rights Commission & another –V- Attorney General & 6 Others (2019) eKLR** held that:-

> ***"Public interest litigation, in most cases, is for the benefit of the public and not the persons or entities that institute the proceedings. Condemning an unsuccessful party to pay costs in genuine public interest litigation can become a deterrent. More likely than not, many a party would hesitate to institute suits in defence of the Bill of rights and the Constitution for fear of being condemned to pay costs."***

5. That as his petition was a public interest litigation, it is only fair and just for the court to review its judgment in respect to the order on costs.

6. The advocates for the 1st and 2nd respondents submitted that the High Court was required to hear the election petitions within 6 months of filing. That the period has long lapsed. That the court therefore lacks jurisdiction to sit as an election court and conduct proceedings with regard to the present application. That the judgment of the Court of Appeal delivered on 8th November, 2019 cannot act retrospectively. That the issue of costs was determined by the Court of Appeal and by the Supreme Court which are courts of superior status to the High Court. That their decisions are not subject to challenge and/or review by this court. Therefore that the application is incompetent, incurably defective, an abuse of the process of the court and bad in law.

7. The 3rd respondent in his preliminary objection contended that the issue of costs was adequately handled by the parties during the hearing of the election petition. That if the applicant felt aggrieved he should have raised the issue during the appeal at the Court of Appeal. That the applicant is now bound by the doctrine of issue estoppel. That the order of the Supreme Court did not overturn the judgments of the High Court and Court of Appeal on costs but was rather applicable to the case before the Supreme Court. That the applicant has misconceived the Supreme Court to state that any matter that helps to raise jurisprudence in the country amounts to a public interest litigation where no costs attach but rather that

the order applied to the appeal that was before the said court. That this court is *functus officio* over the matter and has no jurisdiction to review its own judgment.

8. The application has been brought under Article 165 (3) of the Constitution of Kenya, Sections 1A, 1B and 3A of the Civil Procedure Act which grants the courts of the land inherent powers to make such orders as may be necessary for the ends of justice. The advocates for the applicant submitted that the matter herein is pending taxation. That as long as there are ongoing proceedings, this court has jurisdiction to hear and determine any and all matters incidental to the question of the election of the 3rd respondent. That the court therefore has jurisdiction to hear and determine the application. Counsels cited the case of **Republic –Vs- Public Procurement Complains Review and Appeals Board and Another Ex parte Jacorossi Lapress Spa Mombasa HCMA 365/2006** where it was held that the court has power under its inherent jurisdiction to make orders that may be necessary for the ends of justice and to enable the court maintain its character as a court of justice and that this repository power is necessary to be there in appreciation of the fact that the law cannot make express provisions against all inconveniences.

9. It was submitted that the Supreme Court in making an order that each party bears its own costs found that the petitioner's case was partly successful with the potential of contributing to the jurisprudence of the country with regard to the choice of forum when handling pre-election disputes. That the quest for justice by the applicant was therefore not in vain. That his efforts were lauded by the Supreme Court. That in the **Kenya Human Rights Commission & Another –Vs- The Attorney General & Others** (supra), the Court of Appeal found that in public interest litigation matters, each party should bear their own costs. That the validity of the election of the 3rd respondent was a question that was in the interest of the public. Therefore that costs should not be awarded in public interest cases. The advocates cited the following cases: **Republic –Vs- Independent Electoral and Boundaries Commission & 2 Others Ex-parte Alinoor Derow Abdullahi & Others –Vs- Public Service Board of Marsabit County & Another (2016) eKLR**, **Brian Agin & 2 Others –Vs- Wafula W. Chebukati & 9 Others (2017) eKLR**.

10. The advocates for the 3rd respondent submitted that the issue of costs has been litigated upon by the parties during the hearing of the election petition after which the court made a determination. That there is a judgment of a court of competent jurisdiction. That the issues are not available for litigation by this court. That invocation of the same issue amounts to a collateral attack on the final decision of the court which is an abuse of the court process. That the applicant is precluded by the doctrine of collateral estoppel, also known as issue estoppel or issue preclusion to raise the same issue again. The advocates referred to the definition of the said doctrine as set out in Halsbury's Laws of England (4th Edition) at Pg. 861 thus:-

> ***"An Estoppel which has come to be known as an issue estoppel may arise where a plea of res judicata could not be established because the causes of action are not the same. A party is precluded from contending the contrary of any precise point which having once already been distinctly put in issue, has been solemnly and with certainty determined against him. Even if he objects of the first and second actions are different, the finding on a matter which came directly (not collaterally or incidentally) in issue on the first action, provided it is embodied in a judicial decision is final, is conclusive in a second action between the same parties and their privies. This principle applies whether the point involved in the earlier decision, and as to which the parties are estopped, is one of fact or one of law, or one of mixed fact and law."***

11. Counsels referred the court to the case of **Fatuma A. Chamkono & 40 Others –Vs- District Commissioner, Msambweni District & Another (2013) eKLR** where Tuiyot J. applied the said doctrine.

12. Counsels submitted that the application does not meet the threshold for review as set out in Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules 2010. That the application does not show whether there is self-evident error or omission on the face of the High Court judgment. That a review application is incompetent after an appeal has been heard. The court was

referred to the cases of **National Bank of Kenya –Vs- Ndungu Njau** and **Kwame Kariuki & Another –Vs- Mohamed Hassan Ali & 4 Others (2014) eKLR**, **Francis Njoroge –Vs- Stephen Maina Kamore (2018) eKLR** and **Kisya Investments Ltd –Vs- Attorney General & Another (1996) eKLR** for those propositions.

13. It was submitted that the Supreme Court in Petition No. 30 of 2018 did not overturn the decision on costs in the High Court and the Court of Appeal but only ordered under paragraph 60 that the parties to bear their own costs in regard to the appeal that was before it.

14. I have considered the application, the objections and the submissions filed by the advocates for the parties. The issues for determination in the application are –

(1) Whether this court has jurisdiction to hear and determine the application.

(2) Whether the application meets the threshold for review.

(3) Whether the orders sought out to be granted.

15. Article 105 (1) and (2) of the Constitution of Kenya 2010 requires an election court to hear and determine an election petition within 6 months of lodging of the petition. In this case this court heard the petition within the stipulated period. The matter then went to the Court of Appeal and the Supreme Court where the said superior courts made some orders on costs. The applicant herein has come back to this court seeking for the court to review its order on costs.

16. The advocates for the 3rd respondent submitted that a review of a court's order ought to be made under Section 80 of the Civil Procedure Act and under Order 45 Rule 1 of the Civil Procedure Rules 2010. The advocates for the petitioner submitted that the application is not made under the said provisions but under Article 165 (3) of the Constitution of Kenya and Sections 1A, 1B and 3A of the Civil Procedure Rules that gives the court inherent power to make such orders as may be necessary for the ends of justice. The question then is whether the application is properly before the court.

17. It is the position of the law that invocation of the inherent powers of the court is resorted to when there is no statutory law to provide for a particular thing. This means that if there is a law in force it would be an abuse of the process of the court for the court to invoke its inherent jurisdiction to determine an issue. In this I am guided by the Court of Appeal decision in the case of **Wilfred N. Konosi T/A Konosi & Co. Advocates –Vs- Flamco Limited (2017) eKLR** where it was held that:-

> ***"…An inherent jurisdiction cannot be invoked where adequate statutory provision exists. It was held in Taparn –Vs- Roitel (1968) EA 618 that inherent jurisdiction should not be invoked where there is specific statutory provision to meet the case…"***

18. In matters of review in civil cases the operative law is Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules 2010. The court cannot therefore invoke its inherent jurisdiction in face of clear provisions of the law. The submission by the applicant on the issue does not hold. The application is therefore defective in that respect. That however does not preclude the court from determining the application on its merit.

19. Order 45 Rule 1 of the Civil Procedure Rules 2010 provides as follows:-

> ***"(1) Any person considering himself aggrieved—***
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> > ***(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***
> >
> > ***(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due***

diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

20. The law is therefore clear that a court can only review its orders if the following grounds exist:-

(a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or

(b) There was a mistake or error apparent on the face of the record; or

(c) There were other sufficient reasons; and

(d) The application must have been made without undue delay.

This was reiterated by the Court of Appeal in **Otieno, Ragot & Company Advocates –Vs- National Bank of Kenya Limited (2020) eKLR** where the court stated that:-

"The main grounds for review are therefore discovery of new and important matter or evidence; mistake or error apparent on the face of the record; or for any other sufficient reason and most importantly, the application has to be made without unreasonable delay."

21. The court has to consider whether the applicant's case meets these principles. On the question of error apparent on the fact of the record, I am guided by the Court of Appeal decision in the case of **National Bank of Kenya Limited –Vs- Ndungu Njau** (supra) where it was held that:-

"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evidence and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the court proceed on an incorrect exposition of the law."

22. No error on the face of the record of this court's judgment has been pointed out. The application therefore cannot be granted on that basis.

23. The applicant says that the referred to decision of the Court of Appeal is a new matter that this court did not consider when it made its order on costs. As stated above an incorrect exposition of the law cannot be the basis for review. A court of law has the right to err. That is why the appeal process is provided for. Court precedents do not apply retrospectively. The referred to judgment that was delivered in 2019 does not apply to a judgment delivered in 2018.

24. It is further clear to me that a court cannot entertain an application for review after an appeal has been heard by a superior court. In the case of **Kwame Kariuki & another –Vs- Mohamed Hassan Ali & 4 Others** (supra) it was held that:-

"It is evident that the relief of review is only available where an appeal has not been preferred as against an order. Once an appeal is preferred then the door is closed on review and for good reason, as the Appellant is then seeking a re-examination of the affected order on its merits, and the court whose order is appealed from cannot purport to review or further interfere with the said order as such action is likely to affect the outcome of the appeal."

25. In **Kisya Investments Limited –Vs- Attorney General & Another** (supra) it was held that:-

> ***"….. An appeal may be filed after an application for review, but once the appeal is heard, the review cannot be proceeded with ….. A review application is incompetent after appeal is preferred."***

In the premises the application herein does not meet the threshold stated in Order 45 Rule 1 of the Civil Procedure Rules.

26. The election petition herein was heard by this court in exercise of its jurisdiction as an election court. The timelines for election disputes are governed by the Constitution and various statutes. Any determination by an election court has to be within the stated timelines. The question of costs amounts to a determination. The issue has already been determined by this court. I have no reservation that the court is *functus officio* over the issue. In the case of **John Nduati –Vs- Independent Electoral & Boundaries Commission & 4 Others (2018) eKLR** Tuiyott J. considered whether an election court could review its judgment after the expiry of the 6 months statutory period and held that:-

> ***"It seems to this court that for purposes of giving due regard to the wish of the people of Kenya that Election Disputes be determined expeditiously, and which wish has been unequivocally expressed in the Constitution and Statute, an Election Court sitting as a Court of first instance must down its tools and cannot make any orders in respect to the determination of the dispute after the expiry of 6 months period. If an Election Court has rendered its determination, then any application in respect to the court decision that comes post the date of the determination must be heard and determined prior to the expiry of the 6 months."***

I am in agreement with the position taken by the learned judge.

27. The applicant urgues that the legal position in regard to costs in public litigation matters is that losers should not be condemned to pay costs. It is settled law that the trial court has the discretion to order which party in a dispute ought to pay costs. But however that the discretion has to be exercised judiciously. Public litigation is not an exemption to this rule. The Supreme Court has underlined this position in the case of **Muhammed Mahamud Ali –Vs- Independent Electoral and Boundaries Commission (2019) eKLR** where it rendered itself thus:-

> ***"This court has previously settled the law on award of costs, deeming that costs follow the event. Further, that a Judge has the discretion in awarding the same. This was our decision in the case of Jasbir Singh Rai & 3 Others –Vs- Tarlochan Singh Rai & 4 Others Petition No. 4 of 2012; [2014] eKLR (Jasbir Singh Case) where we 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 the 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.'***
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>> ***'[22] 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. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the applicant.'"***

28. The same position was stated by the said court in **Okiya Omutatah Okoiti –Vs- Independent**

Electoral and Boundaries Commission & Another; **Uhuru Muigai Kenyatta & 7 Others Interested parties (2020) eKLR** where the court ordered the applicant to pay costs in a public litigation case and held that:-

> ***"[55] We have considered the parties' submissions regarding the issue of costs. We have times without number, stated the general principle that costs follow the event. We have at times departed from this principle, to order that each party should bear its own costs in exceptional circumstances. As observed in our post decisions, although election petitions are almost invariably filed by private individuals (losing candidates), they, by their very nature, bear a certain element of public interest.***
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> ***[56] However, not every election petition can be classified as public interest litigation, unless it exhibits a distinct focus on furthering the public interest. Each case has to be determined on its own merits. In the instant case, we are not convinced that this petition was filed for the distinct objective of furthering the public interest. We are not able to perceive how the petitioner, having actively participated in and supported the election agenda of the 2nd interested party, suddenly experienced an epiphany that propelled him into the just course of public interest litigation, in the wake of the fresh presidential election of October, 26th 2017.***
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> ***[57] In the circumstances, as costs follow the event, having failed in his Petition, the petitioner must bear the costs of the petition being struck out."***

29. I do not understand the Court of Appeal in **Kenya Human Rights Commission & Another –Vs- The Attorney General & Others (2019) eKLR** to be saying that in every case of public litigation each party must bear its own costs. The caveat in the case was "genuine public interest litigation" cases which amounts to the same thing as espoused by the Supreme Court that each case has to be determined on its own merits. In my view, the submissions by the applicant that losers in public litigation matters should not be condemned to pay costs is a misinterpretation of the referred to Court of Appeal decision.

30. The Supreme Court in the appeal by the applicant did not state that its order on costs was to apply to the appeal by the parties at the Court of Appeal and at the trial at the High Court. Nothing prevented the applicant from appealing on this court's order on costs at the Court of Appeal and upto the Supreme Court. This court cannot delve into matters that were decided by courts of superior status than itself. It is clear that a review of a court's orders cannot be resorted to after an appeal.

31. In the foregoing, it is my finding in respect to the prayers sought that this court is, by dint of the law, *functus officio* over Kakamega Election Petition No. 01 of 2017 and has no jurisdiction to hear and determine the application dated 17th December, 2019. Moreover, the application does not meet the threshold for review. In the premises the application is dismissed with costs to the respondents.

Delivered, dated and signed at Kakamega this 5th day of June, 2020.

J. N. NJAGI

JUDGE

Representation:

By consent of Miss Ngeresa through e-mail for Applicant

By consent of E. Mukele through e-mail for 1st and 2nd Respondents

By consent of Mr. Clapton through e-mail for 3rd Respondent

Applicant - Absent

Respondents - Absent

Court Assistant – Polycap

30 days right of appeal.