

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 132 OF 2019

EVE MALENYA.....APPLICANT

AND

INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION & 2 OTHERS.....RESPONDENTS

AND

ORANGE DEMOCRATIC PARTY & ANOTHER..... INTERESTED PARTIES

RULING

1. This ruling disposes the question whether the applicant's Notice of Withdrawal dated 4th December 2019 should be allowed with or without costs to the first and third Respondents. In order to appreciate the respective parties' arguments, a brief historical background of this case is necessary.
2. The applicant moved this court on 29th April 2019 seeking leave to apply for the writ of *Certiorari* to quash Gazette Notice Number 3123 of 2019 published on 5th April 2019. He also prayed that the leave if granted operates as stay of the impugned Gazette Notice. Essentially, the leave sought was to challenge the third Respondent's nomination by the Orange Democratic Movement (ODM) and her subsequent Gazettement by the first Respondent as a Member of the Nairobi County Assembly.
3. On 29th April 2019, Nyamweya J directed the applicant to serve the application and scheduled the *inter partes* hearing for 8th May 2019. On the said date, the court granted the first and third Respondents time to file reply and fixed the matter for hearing on 24th June 2019.
4. The third Respondent filed her replying Affidavit on 8th May 2019. She averred that she is a member of the ODM and that in April 2017, she presented her name to the ODM for nomination as a Member of the Nairobi County Assembly. She deposed that ODM submitted her name to the first Respondent which published it in the newspapers. She averred that her name was mysteriously removed from the list and the first Respondent proceeded to gazette the applicant as a nominated member of the Nairobi City County Assembly.
5. She further deposed that she unsuccessfully challenged her removal in RMCC Election Petition No. 3 of 2019. However, her appeal to the High Court in Election Petition No. 4 of 2018 succeeded. Subsequently, she obtained orders de-gazetting the applicant paving way for the impugned Gazette Notice. She also deposed that the dispute in question is an election dispute which ought to have been challenged by way of an election Petition.
6. Concurrent with the above affidavit, she filed a Notice of Preliminary Objection dated 8th May 2019 stating that this court lacks jurisdiction citing sections 75 (1A), (4) (a) and (b) of the Elections Act.[\[1\]](#)
7. On its part, the first Respondent filed a Replying affidavit on 21st June 2029 opposing the application citing the court order which ordered the immediate gazetting of the third Respondent.
8. The second Interested Party filed a Replying Affidavit reiterating *inter alia* that no illegality has been established on its part.
9. On 24th Jun 2019, I ordered that the Notice of the Preliminary Objection shall argued on 25th September 2019. On the said date counsel for the third Respondent did not attend court, hence, I adjourned the matter to 19th November 2019. On the said date, the applicant's counsel appeared in court but left before the matter was called out. Since the date was taken in court in the presence of all the parties I ordered the hearing to proceed. The parties present argued the PO and I reserved the ruling for 19th November 2019.
10. On 4th December 2019, while the matter was pending Ruling on the Preliminary Objection, the applicant's counsel filed a Notice of Withdrawal seeking to withdraw this case. I asked that the matter be mentioned in court to afford the other parties the opportunity to state whether they objected to the withdrawal. On 11th December 2019, Mr. Mokuia, counsel for the applicant asked for time to serve the other parties. I fixed the matter for 17th December 2019, but on the said date the applicant's counsel stated that he had not served the other parties. I scheduled the matter for 25th February 2020, but on the aid date there was no appearance by the parties nor is there evidence to show that the Respondents had been served. Nyamweya J ordered that the matter be mentioned on 23rd March 2020, which date was disrupted by the COVID 19 outbreak.

11. On 2nd June 2020, I directed the parties do address the court on the Notice of Withdrawal via video link but none of the parties logged in despite the video link having been forwarded to them. Again on 9th June 2020 none of the parties logged in, hence, I granted the Respondents 14 days to confirm in writing whether they objected to the withdrawal in default the suit would stand as withdrawn with no orders as to costs. By a letter dated 23rd June 2020, counsel for the first respondent stated that they were conceding to the withdrawal subject to costs.

The arguments

12. **Mr. Mokuu**, the applicant's counsel urged the court not to award costs citing the nature of the case the applicant was intending to prosecute. He argued that had the case proceeded to full hearing the court could have determined the germane issue which is whether the election of a Member of a County Assembly can be questioned by way of judicial review proceedings. It was his submission that the question raised is whether a person who was not qualified could be elected. He described it as a novel question which has not been determined. He also argued that award of costs is a matter of the courts discretion, and, that costs follow the event. He argued that the applicant withdrew the case at the earliest opportunity possible and urged the court to exercise its discretion and order each party to bear its costs.

13. **Mr. Onyango**, counsel for the first Respondent submitted that the applicant was not keen on prosecuting her case as shown by the history of case. He submitted that on 29th April 2019, the applicant sought leave and prior to the granting the leave, a Preliminary Objection was filed by the third Respondent. He argued that on 8th May 2019, they attended court but the matter did not proceed because the applicant's counsel was absent. Also, he argued that on 24th June 2019, the matter did not proceed. He submitted that on 25th September 2019 the party raising the PO was absent forcing the court to grant the last adjournment and scheduled the matter to 19th November 2019, but on the said date, the applicant's counsel walked out of court and the court allowed hearing to proceed and the first and third Respondents made their submissions and the court reserved a ruling date. He argued that the hearing lasted over one hour, hence, it's only fair that they be compensated by way of costs.

14. Lastly, he argued that before the ruling was delivered, the applicant filed the Notice of Withdrawal on 4th December 2019. He submitted that the Respondents were keen to have the matter determined and they incurred considerable costs. He urged the court to exercise its discretion and award costs to the first Respondent or in the alternative he urged the court to proceed and render the ruling.

15. **Mr. Ogado**, counsel for the third Respondent adopted Mr. Onyango's submissions. He argued that the applicant has not cited convincing grounds to warrant the courts' discretion. He argued that the matter had progressed and it was pending ruling. He submitted that the Respondents were keen to have the matter determined and also they incurred considerable costs. He urged the court to exercise its discretion and award the third Respondent costs. He also argued that section 27 of the Civil Procedure Act^[2] does not require novel issues as argued by the applicant's counsel. He urged the court to award the third Respondent costs because of the inconveniences occasioned to her.

Determination

16. At the outset, it is important to reproduce section 27 of the Civil Procedure Act.^[3] It provides:-

27 (1) 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 give all the necessary directions for the purposes aforesaid; and the fact that the court 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 direct.

17. In *Republic v Rosemary Wairimu Munene, Ex-Parte Applicant v Ihururu Dairy Farmers Co-operative Society Ltd*^[4] this court held:-

"The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case."^[5]

18. I find useful guidance in the following passage from the *Halsbury's Laws of England*:^[6]

"The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice" (Emphasis added).

19. Writing on the same subject *Mr. Justice (Retired) Kuloba*^[7] states:-

"Costs are {awarded at} the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise..."

20. There appears to be no clear or prescribed definition of what constitutes “good reasons” that will justify the courts departure, in awarding costs, from the general rule that ‘costs follow the event’ a position appreciated by the supreme court of Kenya in *Jasbir Singh Rai & Others vs Tarlochan Rai & Others*^[8] thus:-

“in the classic common law style, the courts have to proceed 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...”

21. In the *Party of Independent Candidate of Kenya v Mutula Kilonzo & 2 others*,^[9] it was held *inter alia* that:-

“It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is a matter in which the trial Judge is given discretion. ...But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could 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.**”

22. Section 27 of the Civil Procedure Act^[10] provides the general rule which ought to be followed *unless for good reason to be recorded*. The section does not make distinctions between determinations made by consent or on courts own determination or *withdrawals*, a position appreciated by *Richard Kuloba* in the above cited book where he observed that:-

“the fact that the unsuccessful party did not contest the case is not in itself a ground for refusal of costs but it is a factor that can be taken into account if other good reason exists.”

23. The only consideration is the “event” a proposition appreciated by the supreme court of Uganda in *Impressa Ing Fortunato Federice v Nabwire*^[11] as follows:-

“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 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, 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... 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.....”

24. Also relevant is *Re Ebuneiri Waisswa Kafuko*^[12] where the court held:-

“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 he 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. The discretion, like any other 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 was completely successful and against whom no misconduct is even alleged to pay costs.”

25. In determining the issue of costs, the court is entitled to look at *inter alia* (i) the conduct of the parties, (ii) the subject of litigation, (iii) the circumstances which led to the institution of the proceedings, (iv) the events which eventually led to their termination, (v) the stage at which the proceedings were terminated, (vi) the manner in which they were terminated, (vii) the relationship between the parties and (viii) the need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of the Constitution.^[13] In other words the court may not only consider the conduct of the party in the actual litigation, but the matters which led to the litigation, the eventual termination thereof and the likely consequences of the order for costs.^[14]

26. I have considered the arguments advanced by the parties. In my considered opinion the conduct of the applicant prior and after filing this suit is a relevant issue. It is not in dispute that the dispute had been litigated and determined by the High Court. That notwithstanding, the applicant decided to re-litigate over the same issues, this time framing the case as a judicial review proceeding.

27. In *Agnes Muthoni Nyanjui & 2 Others v Annah Nyambura Kioi & 3 others*^[15] I observed that the court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The black's law dictionary defines abuse as “Everything which is contrary to good order established by usage that is a complete departure from reasonable use. An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use.”^[16]

28. The concept of abuse of court/judicial process is imprecise. It involves circumstances and situations of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.^[17]

29. Situations that may give rise to an abuse of court process are indeed in exhaustive. They involve situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. Examples are:-

(a) *Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.*

(b) *Instituting different actions between the same parties simultaneously in different court even though on different grounds.*

(c) *Where two similar processes are used in respect of the exercise of the same right.*

(d) *Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.*

(e) *Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.* [18]

(f) *Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.*

(g) *Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.*

(h) *Where two actions are commenced, the second asking for a relief which may have been obtained in the first.* [19]

30. Abuse of judicial process is a term generally applied to a proceeding which is wanting in *bona fides* and is frivolous, vexatious and oppressive. [20] Abuse of process can also mean abuse of legal procedure or improper use of the legal process. [21] Justice Niki Tobi JSC of Nigeria observed that abuse of court process creates a factual scenario where a party is pursuing the same matter by two court process. In other words, a party by the two court process is involved in some gamble; a game of chance to get the best in the judicial process. [22]

31. It's settled law that a litigant has no right to pursue *paripassu* two processes which will have the same effect in two courts at the same time with a view of obtaining victory in one of the process or in both. Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks. In my humble view, the two processes are in law not available simultaneously. The pursuit of the two processes at the same time constitutes and amount to abuse of court/legal process. [23]

32. Thus, the multiplicity of actions on the same matter between the same parties even where there exist a right to bring the action is regarded as an abuse. [24] The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right *per se*. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interfere with the administration of justice. [25] Turning to this case, I find no difficulty in concluding that the instant case arising from the same set of facts and circumstances already litigated in the Magistrates court and determined on appeal by the High Court and seeking substantially the same relief's amounts to gross abuse of court process. On this ground alone I am inclined as I hereby do, to find that the applicant does not merit courts' discretion in determining the question of costs.

33. Also relevant is the fact that the case was a non-starter from the beginning. Framing the same dispute as judicial review application does not alter the character, colour, pith and substance of the dispute. It is pure and simple an abuse of court process, a game of chess aimed at misusing court processes. Had the court been misled into granting a stay order at the *ex parte* stage, such an order could have effectively contradicted the High Court decision. Mr. Moku's argument that this judicial reveal would have determined novel issues of law is legally frail. He ought to have advised his client to appeal against the High Court decision instead of mounting another case.

34. The conduct of the applicant's counsel such as the number of times the matter was adjourned for failure to serve, absence from court, walking out of court on the of the hearing demonstrates a well calculated effort to delay the determination of this case. Such conduct disentitles the applicant the courts' discretion.

35. Lastly, after the attempts to delay the determination of the Preliminary Objection failed, counsel filed the Notice of Withdrawal when this case was pending ruling on the Preliminary Objection. One wonders why the decision to withdraw was not made much earlier even after the being served with the Notice of the Preliminary Objection. The timing of the withdrawal smacks bad faith.

36. Considering the entire chain of events from filing this suit, and guided by the above cited provision of the law and judicial pronouncements, I find and hold that the first and second Respondents plea for costs is merited. Accordingly, I allow the applicant's Notice of withdrawal dated 4th December 2019 and order that this suit be and is hereby marked as withdrawn with costs. Accordingly, the applicant shall pay the costs of this suit to the **first** and the **third** Respondents on the higher scale.

Right of appeal.

Signed, dated and delivered at Nairobi this 9th day of July 2020

John M. Mativo

Judge

[1] Act No. 24 of 2011.

[3] Cap 21, Laws of Kenya.

[4] Judicial Review application no 6 of 2014.

[5] Citing *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & others* {2014} e KLR.

[6] 4th Edition (Re-issue), {2010}, Vol.10. para 16.

[7] Judicial Hints on Civil Procedure, 2nd Edition, (Nairobi) Law Africa) 2011, page 94.

[8] Supra note 4.

[9] HC EP No. 6 of 2013.

[10] Cap 21, Laws of Kenya.

[11] {2001} 2 EA 383.

[12] Kampala HCMA No. 81 of 1993 cited by Odunga J in Pet No 466 of 2014 cited above, see note 11.

[13] See Odunga J in JR No. 466 of 2014 between Republic vs Kenya National Highway Authority & Others , Ex parte Kanyingi Wahome

[14] See Hussein Janmohamed & Sons vs Twentsche Overseas Trading Co. Ltd {1967} EA 287 and Mulla 12th Edition AT Psage 150

[15] Succ Cause no 920 of 2009

[16] Black Law Dictionary, Sixth Edition Black, Henry Campbell, Black Law Dictionary Sixth Edition, Continental Edition 1891- 1991 P 990 P 10-11

[17] *Public Drug Co v Breyerke cream Co*, 347, Pa 346, 32A 2d 413, 415.

[18] *Jadesimi v Okotie Eboh* {1986} 1NWLR (Pt 16) 264.

[19] (2007) 16 NWLR (319) 335.

[20] In the words of **Oputa J.SC** (as he then was) in (1998) 4SCNJ 69 at 87.

[21] Ibid.

[22] Supra.

[23] Supra note 1

[24] Ibid

[25] Ibid