REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

JUDICIAL REVIEW MISC APPLICATION NO. 184 OF 2019

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE SPEAKER OF THE ASSEMBLY OF KITUI.....RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST INTERESTED PARTY

BARIDI FELIX MBEVO.....2ND INTERESTED PARTY

EX PARTE: MUSEE MATI

RULING

1. In these proceedings, the ex parte applicant herein sought an order of mandamus to compel the 1st Respondent to issue a Notice to the 1st interested party declaring a vacancy in respect to Member of the County Assembly for Mutongoni Ward in Kitui County.

2. The history of this matter is that the High Court sitting in Kitui in High Court Election Petition Appeal No. 1 of 2017 annulled the Elections for Member of the County Assembly for Mutongoni Ward and the 1st interested party was directed to proceed and conduct a fresh election in respect of the said ward. It was contented that pursuant to the provisions of the Elections Act, where a vacancy arises in the seat of a member of a county assembly, the respective Speaker is expected to issue notices to the 1st interested party declaring the vacancy within 21 days of the said occurrence.

3. According to the ex parte applicant, despite the decision of the court having been delivered on 20th June, 2018, the Respondent refused and or failed to declare the said seat vacant hence abdicating its statutory notwithstanding the fact that there was no order staying the execution of the said decision.

4. The ex parte applicant exhibited a copy of his advocate's letter dated 23rd January, 2019 in which he requested that Respondent to perform his functions under section 19(3) of the ***Elections Act*** and issue the requisite notice. In a further affidavit sworn on 13th February, 2019 and filed on 13th February, 2019, the ex parte applicant annexed a copy of the judgement of a five judge bench of the Court of Appeal being Nairobi Court of Appeal Election Petition Appeal (Application) No. 261 of 2018 between **Mohamed Ali Sheikh vs. Abdiwahab Sheikh & Others**, in which the said Court held that it has no jurisdiction to hear a second appeal from the judgement of the High Court in an election petition for an MCA as to do so would be a negation of the people's aspiration for timely settlement of electoral disputes as reflected under Article 87(1) 0f the Constitution. The said decision was delivered on 19th December, 2018.

5. In its objection to the petition the Respondent contended that since the matter was pending before the Court of Appeal in Election Petition Appeal No. 28 of 2018 between **Musee Mati vs. Baridi Felix Mbevo & 2 Others**, the matter was still *sub judice*.

6. In its replying affidavit, the 1st interested party averred that following the decision in **Mohamed Ali Sheikh vs. Abdiwahab Sheikh & Others** (supra) most of the similar appeals pending before the Court of Appeal were withdrawn. While the ex parte applicant withdrew its appeal, the 2nd interested party did not. However, while the 1st interested party was always ready, willing and able to conduct its statutory and constitutional duty upon the vacancy being declared by the Respondent, the Respondent had not so declared the said seat vacant and

therefore the 1st interested party's responsibility had not crystallised.

7. When the matter came up before this Court on 24th June, 2019, learned counsel for the Respondent informed the Court that the said seat had since been declared vacant following the decision of the Court of Appeal. The Respondent has furnished this Court with a copy of the said notice dated 12th June, 2019 received by the 1st Respondent on 13th June, 2019.

8. It follows that since the substratum of this application no longer exist, the application is therefore spent.

9. However, the ex parte applicant insists on costs. According to its learned counsel, **Mr Otieno Willis**, despite the attention of the Respondent having been drawn to the Court of Appeal decision, the Respondent declined to declare the said seat vacant hence necessitating these proceedings. On her part **Miss Mulondu**, who appeared on behalf of the Respondent contended that the costs should instead be borne by the ex parte applicant who instituted these proceedings during the pendency of the proceedings before the Court of Appeal. On his part, **Mr Muli**, for the 1st interested party did not pursue the costs and left the matter to the court.

Determinations

10. I have considered the foregoing including the submissions filed on behalf of the parties herein and the authorities relied upon.

11. The general rule as to costs is provided for in **section 27** of the ***Civil Procedure Act*** which provides as follows:

> ***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 to give all necessary directions for the purposes aforesaid; and the fact that the court or judge 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 order.***

12. This provision has been the subject of several judicial pronouncements. In the case of **Supermarine Handling Services Ltd vs. Kenya Revenue Authority Civil Appeal No. 85 of 2006** the Court of Appeal expressed itself thus:

> **"Costs of any action or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts. If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance...Thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where the reasons are given if it considers that those reasons do not constitute "good reason" within the meaning of the rule...In the instant case the learned Judge gave no reasons whatsoever for his decision to deprive the successful plaintiff of its costs and yet it was not shown that the defendant had been guilty of some misconduct which led to litigation. In the court's view the learned Judge's order was wrong and for the foregoing reasons, the plaintiff's appeal succeeds as to the award of interest and costs on the principal sum awarded."**

13. In **Devram Manji Daltani vs. Danda [1949] 16 EACA 35** it was held that a successful litigant can only be deprived of his costs where his conduct has led to litigation, which might have been averted.

14. In **Party of Independent Candidate of Kenya & Another vs. Mutula Kilonzo & 2 Others HCEP No. 6 of 2013**, it was held:

> **"The main reason why this Petition should be withdrawn is due to the demise of the 1st Respondent. This would call upon the Court considering ordering each party to bear their own costs. In the case of *Nedbank Swaziland Ltd verses Sandile Dlamini No.(144/2010) [2013] SZHC30* (*2013)* Maphalala J. referred to the holding of *Murray C J in the case of Levben Products VS Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227*, who stated as follows:**
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> > ***"It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (Fripp vs Gibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have 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."***

15. 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 (12th Edn) P. 150.

16. In my view section 27 of the ***Civil Procedure Act*** provides for the general rule which ought to be followed unless for good reasons to be recorded.

17. When all things are equal, however, the only consideration is the "event". As was held by the Supreme Court of Uganda in **Impressa Ing Fortunato Federice vs. Nabwire [2001] 2 EA 383**:

> **"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 a judge exercises such discretion depends on the facts of each case. If there were mathematical formula, it would nolonger 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 (Chapter 65), 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. The costs should follow the event even when the party succeeds only in the main purpose of the suit…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 since admission of liability implied acceptance of the particulars of injuries enumerated in the plaint and the evidence in favour of the Respondent, including loss of hearing and speech."**

18. I associate myself with the decision of Kampala High Court in **Re Ebuneiri Waisswa Kafuko (Deceased) Kampala HCMA No. 81 of 1993** in which it was held that:

> **"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 the 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. This discretion, like any other discretion, 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 has been completely successful and against whom no misconduct is even alleged to pay costs."**

19. In this case the proceedings were initiated by the applicant. Before the proceedings could be determined in the normal manner, the applicant withdrew the same. In the normal cause of events a withdrawal of proceedings amounts to a determination thereof in favour of the respondents thereto and pursuant to the provisions of section 27 aforesaid the respondents would be entitled to costs. See **Joseph Oduor Anode vs. Kenya Red Cross Society [2012] eKLR**.

20. This was the position adopted by **Sergon, J** in **Stephen Chege Waweru vs. Ephantus Mwangi & Others Nyeri HCCC No. 173 of 2008** where he expressed himself as follows:

> **"There is no dispute that the Plaintiffs filed this suit. The plaint and the summons were served upon the defendants. A defence and counterclaim was filed to resist the plaintiff's suit. In fact the plaintiffs filed an answer to the defence to the counterclaim. There is no denial that the plaintiffs unilaterally filed a notice of withdrawal of the suit and by the time of filing the notice of withdrawal, the defendant had incurred money in hiring an advocate to defend the suit. The proviso to section 27 of the Civil Procedure Act clearly states that costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order. The plaintiffs are the ones who filed this suit thus prompting the Defendants to engage the services of an advocate to defend themselves. It is clear from the prayers in the Plaint that the plaintiffs had asked for costs at the end of the suit. On their part, the defendants asked for the suit to be dismissed with costs. There is no peculiar reason which should make the court deny the defendants costs. The court is convinced costs should follow the event."**

21. In this case it has not been contended that the Court of Appeal issued a stay of execution of the judgement appealed from pending the hearing and determination of the appeal before it. That notwithstanding the Respondent failed to notify the 1st Respondent of the concurrence of the vacancy in the subject ward. As way back as 19th December, 2018 before these proceedings were commenced, the Court of Appeal had declared itself on the competency of similar appeals before it. Instead of the Respondent takin cue therefrom, it still did not take the necessary step till the matter matured for hearing. I have not been informed that the Election Petition Appeal No. 28 of 2018 between **Musee Mati vs. Baridi Felix Mbevo & 2 Others** has now been determined and if so when it was so determined. In the premises it is clear that the inaction of the Respondent in not declaring the subject seat vacant was uncalled for, at least after 19th December, 2018. It can no longer rely on an appeal whose mere existence did not restrain it from undertaking its statutory obligation and which after 19th December, 2018 became untenable as a ground for not taking meeting its obligations. It is clear that its inaction is what led to these proceedings and as the same have been terminated by its action which action is what the ex parte applicant sought in these proceedings, it is clear that the successful party is the ex parte applicant who is entitled to costs.

22. In the premises these proceedings are marked as spent but with costs to the ex parte applicant to be borne by the Respondent.

23. It is so ordered.

Read, signed and delivered in open court at Machakos this 10th day of July, 2019.

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

CA Geoffrey