REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CIVIL APPEAL NO.4 OF 2018

DAVID NDUNGU NDEGWAH.....APPELLANT

V E R S U S

IEBC.....1ST RESPONDENT

JUBILEE PARTY.....2ND RESPONDENT

MARGARET WANJIRU IRERI.....3RD RESPONDENT

GEOFFREY KARIUKI NGARUIYA.....4TH RESPONDENT

ESTHER WANJIKU MUHOHO.....5TH RESPONDENT

JOSEPH KARIUKI WAITHERA.....6TH RESPONDENT

J U D G M E N T

Before me are two applications. The Chamber Summons dated 17/1/2018 filed by the petitioner in Pet.2/2017. The 2nd application is dated 6/1/2018 filed by the 1st respondent in Pet.2/2017.

In the Chamber Summons dated 6/1/2018 filed by the 1st respondent, the following order is sought:

1. That the court be pleased to set aside/review or revise the decision of the trial magistrate made on 5/1/2018.

The 1st respondent contends that they did not participate in the said proceedings and the 1st respondent was denied a right to be heard; that the 1st respondent was not served with notice of the hearing on costs and that the capping of costs at Kshs.150,000/= is below reasonable costs in the circumstances.

Counsel relied on the case of ***Regina Chepkemboi Chebet v Jubilee Party & 16 others E.P.1/2017 (Eld)*** where the court capped costs at Kshs.500,000/= and awarded IEBC Kshs.250,000/=in a matter that was dismissed for failure to comply with requirement to deposit security for costs.

Mr. Mbugua counsel for the applicant filed grounds of opposition in opposing this application; that the 1st respondent is the author of his own misfortune when they failed to appear before the court on 13/12/2017 when a ruling on the preliminary objection dismissing the petition was determined and a subsequent date for assessment for costs was fixed and then on 18/12/2017 when the matter was adjourned to a further date given for 22/12/2017 when the court heard submissions on costs.

In the Chamber Summons dated 17/1/2018, the applicant/petitioner, David Ndungu moved this court for grant of the following orders:

(1) Spent;

(2) That this court be pleased to set aside and revise or raise the decision of the magistrate in Nyahururu C.M.'s Election Petition No.2 of 2017 dated 5/1/2018 sitting as a taxing officer for purposes of Section 84 of the Elections Act;

(3) That the costs be revised downwards more specifically in respect of the award of Kshs.650,000/= awarded to the respondents and in the alternative the court be pleased to cap the total costs payable to the respondents within the legal confines i.e.

Kshs.100,000/= for the 1st respondent Kshs.100,000/= for the 4th respondent and Kshs.100,000/= for the 3rd, 5th and 6th respondent's counsel.

(4) That pending the hearing and determination of the application, there be a stay of execution of the trial magistrate's order dated 5/1/2018.

The applicant contends that the costs are excessive since the petition was never heard on merit. The petition was dismissed for noncompliance with mandatory provisions of the relevant electoral laws i.e. payment of security for costs; that the applicant is handicapped and registered with the Council for Persons Living with Disability and had a legitimate public interest in the electoral process with regard to election of special seats and should not be condemned or punished for standing up for the truth.

The application is supported by the affidavit of Mr. Mbugua Counsel of the applicant who added that under Schedule 7 paragraph 3 of the Advocates Remuneration Order 2014, the minimum instruction fees to present or oppose an election petition should not be less than Kshs.100,000/= and that therefore Kshs.100,000/= is sufficient for each counsel. Counsel deposed that so far, the applicant has not even been able to pay his fees.

Counsel relied on the decision of ***Ombati v IEBC Ep.9/2017*** where the trial court observed that where a petition has been withdrawn or not heard on merit, the court should consider awarding the expenses incurred by the parties and the court applied the sum deposited as security to pay the respondent's costs.

The applicant also filed a supplementary affidavit dated 19/2/2015 reiterating the same grounds.

The 1st respondent opposed the application. **George Nabina Mbaye**, counsel representing the 1st respondent swore an affidavit dated 6/2/2018 and filed submissions on 25/6/2018. Counsel deposed that they filed a preliminary objection in Pet.2/2017 before the Chief Magistrate to the effect that the petitioner failed to follow the procedure laid down of payment of security for costs; that the Petition was dismissed. However, the 1st respondent was never notified of the hearing on costs; that costs of Kshs.150,000/= is too low considering the complexity of the case; that having approached the election court for redress, the petitioner should have been aware of the consequences and cannot claim that the petition is a public interest litigation and cannot claim to be a man of straw. Counsel urged that they incurred high costs in defending the petition for which they should be compensated.

Counsel for the 3rd to 6th respondents opposed the application vide their grounds of opposition dated 8/2/2018 which was to the effect that the application is premature and defective as it contravenes the Advocates (Remuneration) Order, paragraph 11(1) general matters which provides that any party objecting to the decision of the taxing officer, may within 14 days after the decision, give notice in writing to the taxating officer of the items of taxation to which he objects as the reasons shall form the basis of the reference challenging the taxing officer's decision. Counsel relied on the decision of ***Machira & Co. Advocates v Arthur Magugu and Miriam Magugu Ltd CA 199/2002***

The firm of Kunini Advocate filed a replying affidavit sworn by the 4th respondent opposing the application. He deposed that the petition was dismissed for failure by the applicant to deposit security for costs, a mandatory requirement; that if the applicant knew that he was a man of straw, he should have applied to file the petition as a pauper; that the court was well within its power to comply with Section 84 of the Elections Act and Rule 30 of the Rules 2017; that the Advocates Remuneration Order 2014 provides that the court may impose reasonable costs but not less than Kshs.100,000/=, that the sum awarded by the Chief Magistrate is reasonable in the circumstances, to cover the court attendance and other attendant costs.

After considering the two applications and submissions of counsel, I think that it is proper that I address the application dated 6/1/2018 first.

I have seen a copy of the typed proceedings exhibited in this matter covering the period 13/12/2017 to 5/1/2018 when the ruling on costs was delivered. I do note that the 1st respondent's firm was never represented from 13/12/2017. This court has no idea why the trial court never noticed the fact that the 1st respondent was not represented and issue notice to them. It is indeed true that counsel for the 1st respondent was not present in court on 18/12/2017 either when the court gave the date of 22/12/2017 as the date for assessment of costs. The assessment proceeded in the absence of the 1st respondent's counsel without the court questioning whether or not they were aware of the date. Before a hearing proceeds, it is the duty of the curt to ascertain, and ensure that indeed all the parties to the proceedings have been properly served. The court failed to do that and I do agree that the 1st respondent's rights to be heard on the assessment of costs was breached.

So what should this court do? In my view, once the 1st respondent became aware of the assessment and felt aggrieved, the counsel should have moved with haste before the trial court and sought for a review of the order of that court. By 6/1/2018, which was the day after the ruling of the Chief Magistrate, when this application was filed, the 1st respondent was aware of the court's ruling on costs and the first port of call should have been the magistrate who made the order. It is before that court where the 1st respondent would have explained why they were not served. This court has no idea why the 1st respondent counsel never took up that option. I think that it is too late in the day for the 1st respondent to seek the review the said order before this court and this court therefore declines to grant the orders sought in the application dated 6/1/2018.

Coming now to the application dated 17/1/2018, the same was brought under Section 1A, 1B, 3 Civil Procedure Act and Section 84 of the Elections Act, Schedule 7 paragraph 3 of the Advocates Remuneration Order, 2014. The application was referred to as a reference.

This application having arisen out of an election petition, the applicable law on the issue of costs is Section 84 of the Elections Act which provides that an election court shall award the costs of and incidental to a petition and such costs shall follow the cause. Rule 30 of the Elections (Parliamentary and County Elections) Petitions Rules of 2017 then goes ahead to provide more details on how the court may exercise its discretion to award the costs. The Rule provides as follows:

"30(1) The Election court may at the conclusion of an election petition, make an order specifying:

(a) The total amount of costs payable; and

(b) The maximum amount of costs payable;

(c) The person who shall pay the costs under paragraph (a) & (b);

(d) The person to whom the costs payable under paragraph (a) and (b) shall be paid;

(2) When making an order under sub Rule (1), the election court may:-

(a) Disallow any prayer for costs which may, in the opinion of the election court, have been caused by vexatious conduct, unfounded allegations or unfounded objections, on the part of either the petitioner or the respondent; and

(b) Impose the burden of payment on the party who has raised unnecessary expense, whether such party is successful or not, in order to discourage any such expense;

(3) The abatement of an election petition shall not affect the liability of the petitioner or of any other person to the payment of costs previously incurred."

A reading of the above two provisions indicates that the unsuccessful party will be condemned to pay the costs of the successful party. In this case, the petition did not go to full hearing but was struck out for non-compliance with the requirement of payment of security for costs and consequently the applicant was ordered to pay the costs because the filing of the petition caused the respondents to incur costs of hiring counsel, filing of responses to the petition and other attendant costs.

The applicant is aggrieved by the taxation/assessment done by the Chief Magistrate on 5/1/2018. The applicant seeks to have the orders reviewed or revised and the sums revised downwards.

Under Schedule 7 paragraph 3 of the Advocates Remuneration Order, 2014, the minimum instruction fee to present or oppose an election petition should not be less than Kshs.100,000/=. The court is guided by that minimum figure to award reasonable costs to the deserving party.

The advocate's Remuneration Order 2014 provides a forum for ventilation of any grievances arising from the decision of the taxing master and those grievances are presented to the judge by way of a reference under Rule 11.

The said Rule reads as follows:

"11

(1) Should any party object to the decision of the taxing officer, he my within 14 days after the decision, give notice in writing to the taxing officer of the items of taxation to which he objects;

(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on these items and the objector may within 14 days from the receipt of the reasons, apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection;

(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under sub paragraph (2) may, with the leave of the judge but not otherwise, appeal to the court of appeal;

(4) The High Court shall have power in its discretion by order, to enlarge the time fixed by sub paragraph (1) or sub paragraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days notice in writing or as the court may direct, and may be so made notwithstanding that the time sought to be an enlarged may have already expired."

The counsel for the 3rd, 5th and 6th respondent submitted that the application is incompetent and premature and relied on the decision in Machira & Co. Advocate (Supra). In that case, the court of appeal at paragraph of the ruling said:

"12. Sub-rule(1) requires the party objecting to give notice in writing within 14 days 'of the items of taxation to which he objects.' As the trial judge correctly found, the respondent's notice of 1st August, 2001 did not comply with that provision. It did not specify the items objected to so that the taxing officer could give his reasons on them."

The Court of Appeal faced the same issue as presented by this applicant. This application does not comply with Rule 11(1). The applicant did not give notice specifying the items which taxing officer could have given her reasons on.

The Court of Appeal in the above case pointed out that objections to bills of costs are dealt with by reference but not appeals or reviews for

purposes of expedition. At paragraph 13, the court stated:

> ***"13. As we have pointed out, the intendment of the Rules Committee in providing for objections to bills of costs to be dealt with by references and not appeals or reviews was expedition. If vague notices are given, taxing officers might be forced to give their reasons for their taxation of each item including even those not objected to. That would of course defeat the purpose of that expeditious procedure. Having not specified the items objected to and sought reasons for their taxation, the respondent's notice of 1st August, 2001 was fatally defective. It follows that the respondents reference based on it was incompetent and we agree with counsel for the appellant that it should have been struck out."***

Having failed to comply with the statutory provisions on how to challenge the taxing master's decision, I find that the application is premature and incompetent and the applicant cannot be availed the orders sought.

For the above reasons, I decline to grant the orders sought and dismiss the application dated 17/1/2018 with costs to the 1st, 3rd to 6th respondents.

Dated, Signed and **Delivered** at ***NYAHURURU*** this ***5th*** day of ***November,*** 2018.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Mbugua for applicant

Ms. Gikonyo holding brief for Karanja for 3rd, 5th and 6th respondent

Soi - Court Assistant