



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 168 OF 2017**

**KHELEF KHALIFA .....1<sup>ST</sup> PETITIONER**

**MAINA KIAI.....2<sup>ND</sup> PETITIONER**

**TIROP KITUR.....3<sup>RD</sup> PETITIONER**

**VERSUS**

**THE INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION .....1<sup>ST</sup> RESPONDENT**

**KENYA BUREAU OF STANDARDS .....2<sup>ND</sup> RESPONDENT**

**RULING**

1. In the petition dated 25<sup>th</sup> April 2017, the petitioners/applicants herein sought the following orders:

**i. A declaratory order that the actions of the respondents in exempting the electronic/biometric voter identification devices from a pre-export verification of conformity undermines Articles 27, 38(2), 86(a) and (d) of the Constitution.**

**ii. An order that in keeping with the principles of public participation enumerated in Article 10, the electronic/biometric voter identification devices be subjected to a process of public examination and verification as to their suitability to their intended purpose before they are deployed for use in the general elections scheduled to take place in August 2017.**

**iii. An order that the applicants, respondents and other necessary stakeholders to be determined by the court, to participate in the public examination and verification of the electronic/biometric voter identification at a date to be determined by the Honourable court.**

**iv. That the parties to prepare a joint report of the public examination and verification of the electronic/biometric voter verification devices which report is to be made public and filed before Honourable Court.**

**v. An order that if the equipment is discovered to be lacking in merchantable quality and unfit for the purpose for which they are intended and imported, the 1<sup>st</sup> respondent acquire other equipment of merchantable quality and suitable for the purpose of ensuring electronic/biometric identification of voters in keeping with its mandate under the Constitution and the need for transparency in the electoral process.**

**vi. Costs of this petition.**

**vii. Any further relief or orders that this Honourable court may deem just and fit to grant.**

2. In a judgment delivered on 19<sup>th</sup> July 2017, Mr Justice Mativo dismissed the applicants petition and awarded costs of the suit to the respondents thereby precipitating the instant application in which the applicants seek orders:

1. That this Honourable Court be pleased to partly review and set aside the judgment of the Honourable Mr Justice Mativo awarding

the costs to the respondents.

The application is based on the grounds:

- 1. That the learned judge rendered a decision in the said judgment at paragraph 77 on the issue of costs *per incuriam*.**
- 2. That the petition subject to these review proceedings was founded on Article 258(c) of the Constitution allowing for the institution of a suit public interest as it sought to protect the rights guaranteed in Article 38, 81 and 86 of the Constitution of Kenya.**
- 3. That this application has been made without unreasonable delay.**
- 4. That it is fair and just that the orders sought be granted.**

3. The application is supported by the affidavit of the 2<sup>nd</sup> applicant sworn on 28th July 2017 in which he avers that the petition was filed as a Public Interest Litigation (PIL) in a bid to protect rights guaranteed in Article 38(2), 81 and 86 of the Constitution and that the applicants did not take into account the subsisting practice and judicial precedents on the issue of award of costs in Public Interest Litigation suits.

4. He further avers that the decision on costs was made *per incuriam* as it is now trite law in Public Interest Litigation that each party bears their own costs of the case regardless of the outcome of the suit.

5. The respondents opposed the application through the grounds of opposition dated 27<sup>th</sup> February 2018 and set out the following grounds:

- 1. The application does not meet the legal threshold for the grant of orders for review;**
- 2. If as the applicant alleges, the judgment was *per incuriam* on the issue of costs, that in issue for appeal and not for review.**
- 3. The award of costs is at the discretion of the decision maker. No basis has been laid to demonstrate that the discretion has not been judiciously exercised.**
- 4. It is factually incorrect to suggest that the petition by the petitioners was solely public interest litigation. The petitioners had a personal/vested interest in the outcome of the decision.**

6. Parties thereafter canvassed the application by way of written submissions which I have carefully perused. At the hearing of the application, Miss Oraro, learned counsel for the applicants submitted that the petition was brought under Article 22 and 258 of the Constitution to protect constitutional rights and in the interest of the public. Counsel argued that the award of costs to the respondents was made in total disregard to the evolving practice in our courts that recognizes that cases filed in interest of the public be exempted from the award of costs in which case, costs should follow the event.

7. Counsel submitted that this application satisfies the conditions under Order 45 Rule 1 of the Civil Procedure that set out the circumstances under which an order for review of judgment may be granted as the petition that gave rise to the award for costs was not frivolous.

8. Mr. Imende, learned counsel for the 1<sup>st</sup> respondent, submitted that the argument that the impugned judgment was made *per incuriam* is ground for appeal and not a basis for seeking an order for review. For this argument counsel relied on the decision in the case of **National Bank of Kenya vs Ndungu Njau Civil Application No. 211 of 1996**(unreported) in which it was held:

***“...the learned judge....made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.”***

9. Counsel further submitted that under Section 27 of the Civil Procedure Act, the decision on whether or not to award costs is at the discretion of the court and that the principle is that costs follow the event unless the court has good reasons to order otherwise. It was the 1<sup>st</sup> respondent's case that since the petition was dismissed, the court was perfectly in order to award the costs in favour of the 1<sup>st</sup> respondent.

10. It was further submitted that the proposition that no costs ought to be awarded in public interest litigation is erroneous. For this argument the 1<sup>st</sup> respondent cited the case of **Brian Asim and 2 Others vs Wafula W. Chebukati & 9 Others [2017] eKLR** wherein the court was of the opinion that:

***“The discretion, like any other must be exercised judicially and the court 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.”***

#### **Determination**

11. I note that the main issue for determination is whether the applicant has made out a case to warrant the review of the judgment delivered on 19<sup>th</sup> May 2017, specifically in respect to the award of costs to the 1<sup>st</sup> respondent. Section 80 of the Civil Procedure Act stipulates as follows on an application for review of judgment

***Any person who considers himself aggrieved-***

***a) By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or***

***b) By a decree of order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.***

Order 45 Rule 1 of the Civil Procedure Rules on the other hand provides as follows:

***(1) Any person considering himself aggrieved-***

***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 he 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.***

12. In the instant case, the applicant seeks an order for review on the basis that the award of costs to the respondent was made per incuriam and in disregard to the evolving practice of courts not awarding costs in public interest litigation suits. Section 27 of the Civil Procedure Act stipulates as follows on the award of cost:

***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 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.***

***2. The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.***

Blacks Law Dictionary (10<sup>th</sup> Edition) defines per incuriam as follows:

***“(Of a judicial decision) wrongly decided, because the judge or judges were ill informed about the applicable law.”***

13. My understanding of the above definition of per incuriam is that it is a misdirection or error on the applicable law. To my mind, such a misdirection or lack of information on the law does not fall under the ambit of the conditions set out under order 45 Rule 1 of the Civil Procedure Rules for seeking a review. An error in law can only be cured through an appeal.

14. While this court appreciates that the emerging practice in our courts is not to award costs in public interest litigation matters, the said practice does not in any way take away the discretionary powers of the court to award costs to successful litigants in such cases, where in the opinion of the judge, such an award is merited.

15. In the instant case, I find that in awarding costs to the 1<sup>st</sup> respondent, the Honourable Mativo J. exercised his discretion and was well within the law to award such costs. I find that in the circumstances of this case, reviewing the award of costs would be tantamount to this court sitting on appeal in the decision of a court of equal jurisdiction which is clearly not what was envisaged in the enactment of the provisions of Order 45 Rule 1 of the Civil Procedure Rules.

16. For the above reasons, I decline to allow the application dated 19<sup>th</sup> July 2017 which I hereby dismiss with no orders as to costs.

**Dated, signed and delivered in open court at Nairobi this 8<sup>th</sup> day of November 2018.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Miss Nyonje for the 1<sup>st</sup> respondent

Court Assistant – Kombo