REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 300 OF 2014

(CONSOLIDATED WITH PETITION NO. 490 OF 2014, JUDICIAL REVIEW APPLICATION NOS. 35 & 247 OF 2014

BETWEEN

REAL DEALS LIMITED & 3 OTHERS.....APPLICANT/PETITIONER

NAIROBI COUNTY GOVERNMENT…….....2ND APPLICANT/PETITIONER

OUTDOOR ADVERTISING ASSOCIATION OF KENYA…3RD APPLICANT/PETITIONER

COUNCIL OF GOVERNORS….....4TH PETITIONER/INTERESTED PARTY

AND

KENYA NATIONAL HIGHWAYS AUTHORITY….....1ST RESPONENT

KENYA ROADS BOARD.…….....……..2ND RESPONDENT

RULING

Introduction

1. On 22nd July 2014 this Court upon consolidating these suits made the following directionsfor the purposes of the trial:

1. Real Deals Ltd, the Petitioner in Petition 33 of 2014 would be the 1st Applicant/Petitioner.

2. The County Government of Nairobi, the Petitioner in Constitutional Petition No. 490 of 2014 would be the 2nd Applicant.

3. Out-door Advertisement Association of Kenya the Applicants in JR 35 and 247 of 2014 would be the 3rd Applicant.

4. The "Council of Governors/ the Interested Party" would be the 4th Applicant.

5. Kenya National Highways Authority was ordered to be the 1st Respondent.

6. Kenya Roads Board would be the 2nd Respondent.

2. On 5th October, 2015, I delivered a judgement in these consolidated petitions in which I issued the following orders:

1. A declaration that the Public Notices and Invitation to Tender issued by the Respondents on or about May 2014 to June 2014, or any other date, are *ultra vires* the mandate and functions of the Respondent under Section 4 of the Kenya Roads Act Cap 408, Laws of Kenya and are therefore null and void

2. A declaration that Section 49(3) of the Kenya Road Act does not confer upon the 1st Respondent the power or authority to levy charges or exercise any control over outdoor advertisements on Road Reserves or abutting areas save for the charges relating to permission to undertake its mandate thereunder.

3. A declaration that Regulation 6 and Part 1A of the Schedule to the Kenya Roads (Kenya National Highways Authority) Regulations, 2013 is unconstitutional to the extent that it allows the Respondent to levy charges on approvals to place commercial advertisements or Billboards on Road Reserves or abutting areas, as opposed to charges for permits under section 49 of the Kenya Roads Act, which mandate vests in the County Governments under Article 186(1) of the Constitution and Part 2(3) of the Fourth Schedule to the Constitution of Kenya.

4. An order of Certiorari removing into this Court for the purposes of quashing the Public Notices and Invitation to Tender issued by the Respondent on or about May 2014 to June 2014 calling on members of the public to pay advertisement fees to the Respondent and inviting tenders for the temporary use of class A, B & C Road reserve land and structures for placement of advertisements or notices which notices and invitation are hereby quashed.

5. An order of permanent injunction do issue to restrain the Respondent from levying charges on outdoor advertisements or in any way interfering with or usurping the exclusive mandate of County Governments under Article 186(1) of the Constitution of Kenya and Part 2(3) of the Fourth Schedule to the Constitution of Kenya.

6. An Order of *certiorari* be and is hereby issued to remove into this Court for the purposes of being quashed the entire decision by the Respondent made on 18th December, 2013, inviting bids with a view to entering into a consultancy contract for the design, fabrication, installation, testing and commissioning of billboards, marketing, management and maintenance of outdoor advertising services along the Northern Corridor, which decision is hereby quashed.

7. An Order of Prohibition be and is hereby issued prohibiting the Respondents from receiving and acting upon bids with a view to entering into consultancy contract for the design, fabrication, installation, testing and commissioning of billboards, marketing, management and maintenance of outdoor advertising services along the Northern Corridor and/or from entering into any contract in respect thereof.

8. With respect to the order for Mandamus compelling the Respondents to refund all monies paid by the Owners of advertisements in Nairobi County, in respect of the said advertisements, in compliance with the illegal Public Notices issued by the Respondent, I decline to grant the same for the simple reason that such an order is vague and uncertain and is incapable of being supervised by this Court.

3. The matters which gave rise to the consolidated judgement were as follows:

a. Petition No. 300 of 2014 filed by the 1st Petitioner against the 1st Respondent claiming that the 1st Respondent's act of inviting tenders for temporary use of class A, B and C road reserve land and structures for placement of advertisements pursuant to the Kenya Roads (Kenya National Highways Authority) Regulations, 2013 would lead to double taxation of outdoor advertising industry and was unconstitutional, unlawful and contravened statute.

b. Petition No. 490 of 2014 filed by the 2nd Petitioner against the 1st Respondent claiming that the authority to levy fees or charges on outdoor advertisements consequently any purported action by the 1st Respondent to impose any charges or fees on outdoor advertisements would be unconstitutional.

c. JR Application No. 247 of 2014 filed by the 3rd Petitioner against the 1st Respondent claiming that the Kenya Roads (Kenya National Highways Authority) Regulations, 2013 contravened section 11 of the Statutory Instruments Act, 2013 and that the 1st Respondent's act of inviting tenders for temporary use of class A, B and C road reserve land and structures for placement of advertisements pursuant to the said Regulations would lead to double taxation of outdoor advertising industry and was unconstitutional.

d. The 3rd Petitioner also filed a Judicial Review Application No. 35 of 2014 against the 2nd Respondent claiming that the 2nd Respondent's act of inviting bids with a view of entering into a contract for the design, fabrication, installation, testing and commissioning of billboards, marketing, management and maintenance of outdoor advertising services along the Northern Corridor was unconstitutional, illegal and contravened statute.

e. On 22nd July 2014, the 3rd Petitioner made an application for consolidation of these four proceedings which application was allowed.

1st Respondent/Applicant's Case

4. By an application dated 2nd August 2016, the 1st Respondent herein, **Kenya Highways Authority Road Board** (hereinafter referred to as "KENHA") seeks to review the judgement and set aside the order awarding costs to the petitioners and interested parties. Instead it is sought that the said order be substituted with an order that each party bears own costs.

5. According to KENHA the award of the said costs amounted to an error apparent on the face of the record as these proceedings were purely a matter of public interest and were of great public importance. To KENHA, the issues which were decided in this matter arose from a conflict between the provisions of statute law with that of the Constitution and therefore action to resolve the discord was not perceived by KENHA as a proper occasion to merit an award of costs since the matter was brought purposely to cure a serious lacuna in the law by helping the parties to properly understand the scope of their mandate hence the public interest of construing essential paths of jurisprudence should attach to neither party a diagnosis such as supports an award of costs.

6. Based on the decision in High Court Petition No. 472 of 2014, it was contended that KENHA expected the court to direct that each party bears own costs.

7. KRB averred that as a result of the judgement herein, it has been bombarded with Bill of costs from the Petitioners.

8. Based on Order 45 rule 1 of the ***Civil Procedure Rules***, it was submitted that there appears to be a mistake or error apparent on the face of the record in the judgment delivered on 5th October, 2015 particularly paragraph 80 where costs of these consolidated proceedings were awarded to the petitioners and interested party as this was purely a matter of public interest and of great public importance. In this respect KRB referred to **Jasbir Singh & 3 Others vs. Tarlochan Singh Rai & 4 Others[2014] eKLR** where court noted that;

> **"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 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."**

9. It was reiterated that the issues that were decided in this matter were issues of great public importance as they arose from a conflict between the provisions of statute law with that of the constitution and therefore action to resolve the discord was not perceived by the 1st Respondent as a proper occasion to merit an award of costs to the losing party and reference was made to **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank and Two Others, Sup. Ct. Application No.2 of 2011 [2012] eKLR**, where Court ordered each party to bear their own costs since the matter had arisen from a conflict between the provisions of statute law with that of the constitution which is the case in this present matter. In KENHA's view, this matter was brought purposely to help parties properly understand the scope of their mandate which can be evidenced by the declaratory orders that the petitioners were seeking in this matter, therefore the public interest of constructing essential paths of jurisprudence was not expected to entitle any party an award of costs as was buttressed in the case of **Raila Odinga and Others vs. The Independent Electoral and Boundaries Commission and Others, Sup. Court Petition No.5 of 2013** as follows:

> **"..this matter provides for the court a suitable occasion to consider further the subject of costs, which will continually feature in its regular decision-making. The public interest of constructing essential paths of jurisprudence, thus, has been served; and on this account, we would attach to neither party a diagnosis such as supports an award of costs"**

10. To KENHA similar circumstances prevailed in **The Council of county Governors vs. The Attorney General & 4 Others Petition No.472 of 2014** where the issues that were decided in the said matter were similar to this present matter and court properly acknowledged that this was indeed a matter of public interest and accordingly ordered each party to bear its own costs.

11. While conceding that there was some delay in bringing the instant application, it was submitted that the delay was not inordinate so as to deny this Court a proper occasion to reconsider its decision and correct an error that would lead to an injustice considering the nature of the case; and the consultations that were required to be done with government institutions. In this respect KENHA relied on **Peston vs. Allsopp [1971] 3 ALL ER**, where **Edmund Daviews.L.J** stressed that the overriding consideration always is whether or not justice can be done despite the delay.

12. KENHA contended that in its replying Affidavit dated 9th December, 2016 to the 1st Respondent's Application, it raised an important issue as to whether the council of governors has legal capacity to sue or be sued. In its view, under the ***Inter-Governmental Relations Act*** the Council of Governors is an unincorporated body and therefore lacks capacity of suing or being sued as it is not a juristic person. It is our humble view that the presence of proper parties before the court is *sine quo non* exercise of jurisdiction of the court and relied on **Appex International Ltd & Anglo Leasing & Finance International Ltd vs. Kenya Anti-Corruption Commission [2012] eKLR** and **County Government of Meru vs. Ethics and Anti-Corruption Commission [2014] eKLR** where the County Government was said to be a state organ and therefore not a "person" who can petition the High Court for violation of its fundamental rights & freedoms against another state organ.

13. It was therefore submitted tat the council of county Governors is not an entity that is capable of suing or being sued and accordingly pray that this error be corrected by striking its name off from these proceedings as its participation in these proceedings was a nullity.

14. KENHA therefore argued that there are sufficient reasons to review, vary and/or set aside paragraph 80 of the judgment delivered on 5th October, 2016 dealing with the issue of costs.

2nd Applicant/Respondent's Case

15 The application was supported by the 2nd Respondent herein Kenya Roads Board (hereinafter referred to as "KRB") which apart from supporting the grounds upon which KENHA's application was based disclosed that it had likewise applied for the review of the same judgement vide its application dated 9th May 2016.

16. In the its application KRB sought the following orders:

> **1. THAT this application be certified as urgent and heard ex parte in the first instance.**
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> **2. THAT the Honourable Court be pleased to review and vary and/or set aside paragraph 80 of its Judgment dated 5th October, 2015 in which the Court awarded the costs of the consolidated proceedings to the Petitioners/Applicants and interested party."**
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> **3. THAT the Honourable Court be pleased to order instead that the Respondent in Judicial Review Application No. 35 of 2014 Kenya Roads Board to meet the costs of the Ex-parte Applicant therein - Outdoor Advertising Association of Kenya.**
>
> **4. THAT in the alternative, the Honourable Court be pleased to order that each Respondent to meet the costs only of the respective original party that sued it.**
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> **5. THAT the Honourable Court be pleased to order a stay of taxation proceedings that are currently before the Taxing officer for assessment of the 1st Petitioner's Party and Party Bill of Costs dated 22nd February 2016 and 3rd Petitioner's Party and Party Bill of Costs dated 5th February, 2016 pending the hearing and determination of this application.**
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> **6. THAT the Honourable Court be pleased to grant such other or further orders or relief as it may deem fair and just in the circumstances.**
>
> **7. THAT cost of this application be provided for**

17. According to KRB, although these suits were consolidated, the faculty of consolidation of proceedings falls among the court's general powers of case management and at the time of the consolidation of these proceedings, it could not have been foreseeable to KRB that the result of the consolidation were that it would have to pay costs of a party with whom it had no justiciable case.

18. It was disclosed that as a result of the judgement, the 1st and 3rd Petitioners have respectively filed separate Party and Party Bill of Costs against KRB seeking instructions fees of Kshs 2,5000,000/= and Kshs 3,000,000/= respectively. KRB was therefore apprehensive that the 2nd petitioner and the interested parties would follow suit and file similar bills. It was however its view that it should not be made liable to pay the 1st and 3rd Petitioner's costs in proceedings in which KRB was not a party to whatsoever but for the mere fact of consolidation of suits. KRB contended that the award of costs consequent upon the consolidation of the suits has resulted in an unfair and disproportionate outcome and has, contrary to the overriding objective, resulted in increase of legal costs which KRB has to bear.

19. It was therefore contended that there are sufficient reasons to review, vary and or set aside the portion of judgement dealing with the issue of costs hence the application ought to be allowed.

20. It was submitted on behalf of KRB that that the faculty of consolidation of proceedings falls among the court's general powers of case management and that this position has been reiterated by the Supreme

Court of Kenya in **Law Society of Kenya vs. Centre for Human Rights & Democracy & 12 Others [2014] eKLR** and the decision the Court of Appeal in **David Ojwang Okebe & 11 Others vs. South Nyanza Sugar Company Limited & 2 Others [2009] eKLR**.

21. It was submitted that in the present instance, the application for consolidation of the said four proceedings was made by the 3rd Petitioner in Judicial Review proceedings No. 247 of 2014 where the KRB was not a party and that KRB became aware of the consolidated proceedings on 30th July, 2014 when it's counsel attended the Court for mention of JR. Appl. No. 35 of 2014 and was notified by Court that the application was made and allowed in the other proceedings on 22nd July, 2014. It was therefore submitted that KRB did not have an opportunity to consider the application for consolidation in the context of apportionment of costs or at all. In support of its case KRB relied on the decision of the High Court of South Africa (Orange Free State Provincial Division) in **Application No.: 3260/2001** between **The Maize Board vs. F.H. Badenhorst & 18 Others** where it was held that:

> **"In an application [for consolidation], the Court has a discretion whether or not to grant the application. In *New Zealand Insurance Co Ltd v Stone & Others 1963 (3) SA 63 (C)*, Corbett, AJ stated the following at 69AC:**
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> **"In such an application for consolidation the Court, it would seem, has a discretion whether or not to order consolidation, but in exercising that discretion the Court will not order a consolidation of trials unless satisfied that such a course is favoured by the balance of convenience and that there is no possibility of prejudice being suffered by any party. By prejudice in this context it seems to me is meant substantial prejudice sufficient to cause the Court to refuse a consolidation of actions, even though the balance of convenience would favour it. The authorities also appear to establish that the onus is upon the party applying to Court for a consolidation to satisfy the Court upon these points."**
>
> **The purpose of joinder under Rule 11 is to ensure that issues which are essentially the same are heard and determined in one trial so as to avoid a multiplicity of actions with the concomitant disadvantages and prejudice. The paramount test in regard to consolidation of actions is convenience. Convenience would usually dictate that a multiplicity of actions and the costs incidental thereto should be avoided."**

22. It was therefore contended that any contemplated consolidation of proceedings should not cause a party to suffer prejudice yet in this case KRB has been prejudiced by the Petitioners' Bill of Costs that have exposed it to potential legal costs of **Kes.195,000,000/-** and which have been filed pursuant to the said paragraph 80 of the Honourable Court's Judgment dated 5th October, 2015 hence it stands to suffer an injustice that is directly traceable to the act of consolidation of proceedings done on 22nd July, 2014. According to it, should the said paragraph 80 of Court's Judgment dated 5th October, 2015 be allowed to stand, the same would occasion to it an unfair burden of footing legal costs of parties against whom it had no legal contest. Further, it would amount to prejudice to the Applicant were the 1st Petitioner to gain, by reason of consolidation only, the sum of Kes.3,455,681/- as instruction fees and other costs when in fact the said 1st Petitioner's Advocates did not receive instructions to sue and did not sue the Applicant in Constitutional Petition No. 300 of 2014. Similarly, it would amount to prejudice to the Applicant were the 3rd Petitioner to gain, by reason of consolidation only, the sum of Kes.4,325,025/- as instruction fees and other costs when in fact the said 3rd Petitioner's Advocates did not receive instructions to sue and did not sue the Applicant in Judicial Review application No. 247 of 2014. In addition, it would amount to prejudice to the Applicant were the interested party to gain, by reason of consolidation only, the sum of Kes.188,162,655/- as instruction fees and other costs when in fact the said interested party's Advocates did not receive instructions to sue and did not sue the 2nd Respondent in any proceedings.

23. It was therefore averred that the prayers sought in this application are necessary to release the Applicant from having to incur these oppressive legal costs in respect of proceedings which, but for the convenience of consolidation, it was a complete stranger to. KRB submitted that it is a state corporation

which depends on budgetary allocations to operate. It has no money of its own and any legal costs imposed on the Applicant are a burden to every Kenyan who pays her taxes. Consequently, it is necessary to keep these costs at a minimum or to avoid them all together where they are avoidable. It therefore argued that paragraph 80 of Court's Judgment dated 5th October, 2015 is an error apparent on the face of the record which is rectifiable by a review and relied on the Court of Appeal case of **Anthony Gachara Ayub vs. Francis Mahinda Thinwa [2014] eKLR** which quoted with approval the judgment of the High Court in **Draft and Develop Engineers Limited vs. National Water Conservation and Pipeline Corporation**.

24. KRB submitted that it is inconceivable that there could be any two opinions on the issue that has been presented to the Honourable Court for determination in this application. In KRB's view, it's arguments in its application have received support from the 2nd Petitioner while the 1st and 3rd Petitioners on the other hand have not opposed the Applicant's application. According to KRB, Its argument that each Respondent should bear the costs of Petitioner in the respective suits is a substantial point of law that stares one in the face and does not require a long drawn process of reasoning to establish.

25. Dealing with the position of the interested party, reliance was placed on the opinion of t**he Editors of the *Black's Law Dictionary*, 9th edition wherein an interested party or intervener is defined as one who voluntarily enters a pending lawsuit** *because of a personal stake* **in it.**

26. According to KRB, there has been no event that could possibly entitle the interested party to seek costs against the Applicant. To the contrary, it is KRB's legitimate expectation that has been violated by being ordered to pay costs of an interested party with whom it had no contest. Accordingly, the Court's discretion to award costs in consolidated proceedings should be exercised to avoid an injustice and in so submitting, it relied on the case of **Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others [2014] eKLR**.

27. It was submitted that the Petitioners and interested party cannot demonstrate any expense they have incurred, which they should be reimbursed by the Applicant, in the individual suits they filed against KRB and based ***Jasbir Singh Rai Case*** submitted that it would be unjust and oppressive to the Applicant to be condemned to pay the legal costs of an interested party, particularly, who voluntarily applied to join the consolidated proceedings and whose participation in the consolidated proceedings was not decisive in the end.

28. On the definition of the word "event" as used in the expression "costs follow event", KRB relied on that definition supplied in **Justice Kuloba's** (as he then was) work ***Judicial Hints on Civil Procedure*** 2nd edition cited in **Morgan Air Cargo Limited vs. Everest Enterprises Limited [2014] eKLR**.

29. It was submitted that the only event that can make KRB a paying party and the Petitioners and interested party receiving parties is an unsuccessful outcome in Judicial Review application No. 35 of 2014 where it was a party. It was therefore submitted that there are sufficient reasons to warrant a review and variation of paragraph 80 of the Honourable Court's judgment dated 5th October, 2015 awarding costs of the consolidated proceedings to the Petitioners and interested party and KRB cited in support of its application **Stephen Gathua Kimani vs. Nancy Wanjira Waruingi t/a Providence Auctioneers [2016] eKLR**.

30. In its view, this application has been made without unreasonable delay. The 1st and 3rd Petitioners and interested party's Party and Party Bill of Costs were filed only on 23rd February, 17th March, and 10th June, 2016 respectively and have not been taxed as yet.

2nd Petitioner's Case

31. In opposing the applications, the 2nd Petitioner herein, the **County Government of Nairobi** (hereinafter referred to as "the County"), averred that the application by the 1st Respondent calls to question the scope of the discretionary power of a Judge in the awarding of costs in a suit as envisaged by

law and donated to him by virtue of the office he holds. To the County, this Honourable Court is therefore invited to make a determination, based on set parameters, the propriety of the impugned paragraph of the Judgment dated 5th October 2015 awarding costs to the petitioners and interested party. The application in the same vein invites this Court to determine whether the matter meets the threshold for public interest litigation and if so, what is the scope of the discretionary power of the Court in the awarding of costs in public interest litigation suits vis-a vis ordinary civil suits.

32. Based on section 27(1) of the ***Civil Procedure Act,*** it was averred that the courts have unfettered discretion to determine by whom and out of what property and to what extent costs are to be paid, and to give all necessary directions for the purpose aforesaid and relied on **Morgan Air Cargo Limited vs. Evrest Enterprises Limited [2014] eKLR.**

33. The County was of the view that in determining whether the impugned award by the Honourable Judge was made judicially, the Court will have consider the peculiar circumstances of the case and make a determination based on that and reliance was sought in **Cecilia Karuru Ngayu vs. Barclays Bank of Kenya & Another [2016] eKLR**.

34. It was accordingly contended that there is a preponderance of authorities in our justice system with the continued clarion call and passionate appeal to the Judge not to deny a successful party costs, unless in very exceptional circumstances**.** In this case all parties submitted themselves willingly to the consolidated proceedings and it is only fair that the extra expenses incurred and the industry invested by the victorious parties, due to the addition of parties at a fairly young stage of the proceedings, be recouped by the global award ordered by the Court.

35. According to the County, the Courts have spelt out as ingredients or building blocks to a public interest suit properly so called and relied **John Wekesa Khaoya vs. Attorney General [2013] eKLR.** Based on the foregoing, it was contended that in the entire scheme of things, the petitioners in the 4 original suits, which were eventually consolidated, stood to either loose or gain financially depending on the final outcome of the matter. It was clarified that 2 of the petitioners in this matter, for purposes purely of demonstration are **Real Deals Limited**, a company engaged in trade and business of outdoor advertising and signage in Nairobi and elsewhere in the Republic of Kenya and **Outdoor Advertising Association of Kenya**, an association comprising different companies engaged in the trade and business of outdoor advertising in Nairobi and elsewhere in the Republic of Kenya. Accordingly, it would not be far-fetched to suggest that the remedy they sought was predominantly a private financial gain, in the manner of alleviating being charged heavy taxes through unconstitutional means. Therefore only a fraction of the populace in Kenya would have the interest, let alone capital to invest in, the outdoor advertising industry. Even the 2nd Petitioner and the Interested Party, although exercising sovereign power donated to them by the people of Kenya had a financial interest that could be said to be unique only to them.

36. It was averred that it is such fine lines as the one between private gain and public interest that informs the wisdom behind laying the discretion of deciding on costs upon a Judge, on a case-by-case basis for it would be a tall order attempting to establish a mathematical formula to be used by Judges enjoined principally to interpret the law. That the task of calculating the particulars of costs is properly before the Taxing Officer, a key player in all systems of justice across the world.

37. In any case even if this case was to be categorized as Public interest litigation, the discretionary power would still be available to the Judge in making a determination with regard to costs. To the County, the Court was simply enjoined to exercise this power judicially and it relied on the decision of Kampala High Court in **Re Ebuneiri Waisswa Kafuko (Deceased) Kampala HCMA No. 81 of 1993.**

38. It was averred that the petitioners and the interested party in this matter approached the court to protect their rights, have been completely successful and indeed the Judge while exercising his discretion with regard to costs found no misconduct attributed to them. The award of costs as awarded in the impugned paragraph 80 of the Judgment of 5th October 2015 is therefore beyond reproach and properly within the jurisdiction of the Taxing officer.

39. In its submissions, the County largely reiterated the foregoing.

4th Petitioner's Case

40. On behalf of the 4th Petitioner herein, **the Council of Governors** (hereinafter referred to as "the Council"), the following grounds of opposition were filed:

> **1. The 2nd Respondent's/Applicant's Application dated 2nd August 2016 is completely misplaced, and does not apply in this Case because it is introducing issues that were never argued and/or canvassed during the hearing of the 2 applications and 2 were not pleaded by the second respondent/applicant, in all Her Pleadings.**
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> **2. The application flies in the face of clear provisions of the law including Order 45 of the Civil Procedure Rules which demands that an application for review be brought without "undue delay" "and a delay of more than 10 months," cannot be said to be undue delay.**
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> **3. The Second Respondent/Applicant has brought Her Application as an Afterthought, because the 1st respondent/applicant had brought her application on 9th May 2016 and after Three 3 Months She (2nd Respondent/Applicant) also decided to file a similar application to the application brought by the 1st respondent/applicant, after three months so as to compound the issue of taxation of party-and-party-bill of costs for costs, that were awarded to the applicants/respondents, after a full-scale trial by the judge in exercise of his discretion donated to him as a judge of the High Court by the Law.**
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> **4. The Application is Completely misplaced, it has no legs to stand on and it should be struck out from record and dismissed with costs on the higher scale.**

41. Apart from the grounds, it was deposed that having been made a party to the consolidated suit, on 22nd July 2014, the Council of Governors joined the Suit with the 1st and the 2nd Respondents as "the Respondents" in the Suit, and the Costs that were awarded to the "Interested Party" the 4th Applicant" were to be borne by the 1st and 2nd Respondents eequally because they were "the "Respondents" in the Suit at the time of her joining the suit by Order of the Court of 22/7/14.

42. It was averred that in allowing the "Council of Governors" to be "a "Party to the Consolidated Suit" as the 4th Applicant" ,the Court considered that the Council would be directly affected by the Bids that had been Invited by the Respondents "with a view of Entering into a Consultancy Contract for the Designs, Fabrication, Installation, Testing and Commission of Bill Boards, Marketing, Management and Maintenance of Out-door" Advertising" along "the "Northern Corridor" and would stand to "Lose Millions of Shillings by being denied Collections of that Revenue "after the Tender Committee" held a Meeting on 6th January 2014" to confirm the Sole Purpose of the Respondent's decision and the Intended action was to collect Revenue from Outdoor Advertising."

43. To the Council, under the law including section 27 of the ***Civil Procedure Act***, Cap 21 of the Laws of Kenya, the Court was not only justified in awarding costs to the Council on behalf of all the 47 Counties but also it had unfettered unlimited powers to award costs to a successful, party and since the Council was Successful, she is entitled to costs in this suit as per the "party-and-party bill of costs" which she filed against the Respondents on 10/6/16.

44. It was the Council's case that the application does not meet the full Ingredients of Order 45 of the ***Civil Procedure Rules*** which demands to be satisfied in an Application for Review due to the delay involved and reliance was laced on **National Bank of Kenya Limited vs. Ndungu Njau [1997] eKLR, Firoze Sharok Hirji (Suing through his duly authorized Attorney Sharok Kher Mohammed Ali Hirji vs. Housing Finance Company of Kenya & Another [2015] eKLR.** Based on **Abdulraham Adam Hassan vs. National Bank of Kenya Ltd** it was submitted that an unexplained delay of three

months was found to be unreasonable while in **Kenfreight (E.A) Limited vs. Star East Africa Company Limited**, **Onyango Otieno J**. (as he then was) "found a delay of three months to be very unreasonable" and disallowed an application for review. The Council also cited **Mbogo Gatuiku vs. The A-G**, where The Hon. Were **Mr. Justice Mwera J** emphasising on the need to file application for review without delay stated that "even a delay of a day or two calls for an explanation to be brought."

45. According to the Council, the general rule as to Costs is provided for in section 27 of the ***Civil Procedure Act*** and cited **Supermarine Handling Services Ltd vs. Kenya Revenue Authority Civil Appeal No. 85 of 2006.**

46. The Council also cited **Devram Manji Daltani vs. Danda [1949] 16 EACA 35,"** where 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, or led to a miscarriage of justice.

47. According to the County, an Award of Costs is the full Dilation of the Court. It is not a matter of course. In this Case, it was well within the discretion of the Judge to issue and award costs to the successful litigants.

Determination

48. I have considered the issues which were raised herein. In my view the two applications revolve around two issues. The first issue is whether in light of the public interest nature of the litigation costs ought to have been awarded to the Petitioners/Applicants.

49. 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.***

50. 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".

51. The question is what amounts to "the event" for the purposes of the said provision. According to **Morgan Air Cargo Limited vs. Evrest Enterprises Limited [2014] eKLR**:

> **"The words "the event" mean the result of all the proceedings to the litigation. The event is the result of entire litigation. It is clear however, that the word 'event" is to be regarded as a collective noun and is to be read distinctively so that in fact it may mean the "events" of separate issues in an action. Thus the expression "the costs shall follow the event" means that the party who on the whole succeeds in the action gets the general costs of the action, but that, where the action involves separate issues, whether arising under different causes of action or under one cause of action, the costs of any particular issue go to the party who succeeds upon it."**

52. 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.

53. 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…"**

54. 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:**
>
> ***"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 (Frippvs 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."***

55. 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.

56. I therefore agree with the position adopted by Kampala High Court in **Re Ebuneiri Waisswa Kafuko**

(Deceased) Kampala HCMA No. 81 of 1993 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."**

57. However certain considerations have been pronounced to guide the Court in awarding costs. This however does not mean that the Court's discretion in the award of costs is fettered by the said guidelines. In **Cecilia Karuru Ngayu vs. Barclays Bank of Kenya & Another [2016] eKLR** it was held that:

> **"To my mind, 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.[11] In other wards 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."**

58. In determining the issue of costs, the Court is entitled to consider 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, whether a party has succeeded on part of his case, even if he has not been wholly successful, the extent of such success, the subject of litigation and 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. With respect to the conduct of the parties this includes the conduct before as well as during, the proceedings and in particular the extent to which the parties followed any relevant pre-action protocol and directions issued by the Court; whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; the manner in which a party has pursued or defended his case or a particular allegation or issue; and whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim. See ***Halsbury's Laws of England*** vol. 10 4th Edition of the re-issue at para 22 and **Hussein Janmohamed & Sons vs. Twentsche Overseas Trading Co. Ltd [1967] EA 287** and ***Mulla (12th Edn) P. 150.***

59. It therefore follows that the fact that a matter amounts to litigation in the public interest may be a factor that may be properly considered by the Court in the award of costs. It is however not the law that in all public interest litigation cost must never be awarded. Everything depends on the circumstances of each case and the Court's own appraisal of the various factors that went into the determination of the matter.

60. As to what amounts to public interest for the purposes of costs I associate myself with the position adopted by **Gikonyo, J** in **John Wekesa Khaoya vs. Attorney General [2013] eKLR** at para 15 that:

> **"The Constitution treats this subject as quite substantive, and its undiminished significance is seen in the constitutional requirement that the Chief Justice shall make express rules which should satisfy the criteria that no fees may be charged for commencing a proceeding under**

Article 22, and public interest litigation is one such proceeding. From the available judicial material, procedures and constitutional provisions, it seems that the acceptable constitutional bounds which will be used in determining this application should be that the litigation must:-

a) Be public interest litigation,

b) Be brought to advance a legitimate public interest,

c) Be one that will contribute to a proper understanding of the law; and

d) Not be aimed at giving the applicant a personal gain.

.... Let me emphasize that where an application for exemption is premised on the fact that the matter is to promote public interest, then two issues must be established, to wit, 1) the intended suit must be public litigation and 2) should not be aimed at deriving any personal gain to the applicant…Moreover, for purposes of an application of this nature, the prospective Petitioner on behalf of public interest under Article 22(2)(c), as sign of good faith, should satisfy the court that the intended suit is not aimed at giving personal gain to the applicant. By that requirement, the court gives effect to unhindered access to justice and legitimate efforts to protect public interest, but also prevents abuse by private litigants who may wish to take advantage of the Article for selfish, parochial and private gains. The court reckons that not all suits filed and styled as constitutional applications are public interest litigation."

61. In this case it is clear that the litigation was not entirely a public interest litigation. Without dealing with the claims of the County Government of Nairobi and the Council of Governors, it is clear that the claims by **Real Deals Limited** and **Outdoor Advertising Association of Kenya** were purely private matters and were not commenced for the benefit of the public.

62. It follows that this consolidated suit cannot be termed as a public interest litigation so as to automatically entitle the Respondents to an exemption in payment of costs. To that extent, the application by **Kenya National Highway Authority** fails and I dismissed.

63. With respect to the application by **Kenya Roads Board**, it is true that the four matters were consolidated. In **Hilton Walter Nabongo Osinya & Another vs. Savings & Loan (K) Limited & Another Nairobi HCCC NO. 274 of 1998 Ringera, J** (as he then was) held that:

"The whole point of consolidating suits is to enable common questions of law and facts to be tried together in the same forum with a view to saving judicial time and avoiding the possibility of conflicting decisions on the same issues by different courts. A consolidated trial of two actions results in one common decree and there is no question of abandoning any of the suits."

64. Therefore consolidation of suits is a case management tool and as held by **Kuloba, J** in **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63:**

"This means that whatever is done…it must as far as is practicable, be to ensure that the parties fight it out on level ground on equal footing, *attempt to minimise and save costs*, ensure expeditious and fair disposal of the case in hand, allotting to every case an appropriate share of judicial resources as account is taken of the need to allot those resources to other cases…" [Emphasis mine].

65. This was the position adopted by the Court of Appeal in **David Ojwang Okebe & 11 Others vs. South Nyanza Sugar Company Limited & 2 others [2009] eKLR**, where it was stated that:

"The main object of consolidation is to save costs and time by avoiding a multiplicity of

proceedings covering largely the same ground. Thus, where it appears to the court that there are common questions of law or fact; that the right to relief is in respect of the same transaction or series of transactions; or that for some other reason, it was desirable to make an order for consolidation of one or more cases, then the court will do so. Such was the case in the matter before us."

66. In this case I gather support from the **Law Society of Kenya case** (supra), that:

"Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it…In addition, the Court must be satisfied that no injustice would be occasioned to the respondents if consolidation is ordered as prayed."

67. It follows that where as a result of consolidation of suits, parties who would not have incurred certain costs if the suits had not been consolidated are by the mere fact of consolidation burdened with extra costs, the rationale for consolidation of suits would be defeated and parties would be reluctant to have their suits consolidated and that would not achieve the overriding objective in sections 1A and 1B of the ***Civil Procedure Act***. I therefore agree with the holding in **Law Society of Kenya vs. Centre for Human Rights & Democracy & 12 others [2014] eKLR**, where the Supreme Court stated:

"The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes, and to provide a framework for a fair and impartial dispensation of justice to the parties."

68. It was therefore held in **Ajit Singh and Others vs. Harnam Singh [1967] EA 547** that:

"In a consolidated suit for libel the damages were correctly assessed as one sum but should have been apportioned as well as the costs between the individual defendants."

69. If I understood the decision correctly in consolidated suits damages as well as costs should be apportioned. This is meant to avoid saddling parties with the costs of defendants they did not sue in the first place unless the presence of the said defendants was necessary for the purposes of determination of their suits. Similarly, it is meant to avoid saddling defendants with costs of the suits which they were not called upon to defend. This position is supported by section 27 of the ***Civil Procedure Act*** itself which entitles and empowers the court or judge to full power to determine by whom and out of what property and to what extent the costs are to be paid, and to give all necessary directions for the said purposes.

70. This Court in paragraph 80 of the judgement gave a general order as to costs without apportioning the same as ought to have been done in consolidated suits.

71. In order to justify the Court in granting an application for review sought by the applicant under the provisions of Order 45 rule 1(b) of the ***Civil Procedure Rules***, certain requirements must be met. The said provision 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 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.

72. The foregoing provisions are based on section 80 of the ***Civil Procedure Act*** Cap 21 Laws of Kenya which states as follows:

> ***"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 or 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."***

73. It is clear that unlike Order 45 (which is a delegated legislation), section 80 of the ***Civil Procedure Act***, (which is the parent Act) gives the Court wide and unfettered jurisdiction in the exercise of its powers of review and does not prescribe the conditions upon which an application for review may be granted. In the case of **Official Receiver and Provisional Liquidator Nyayo Bus Service Corporation vs. Firestone EA (1969) Limited Civil Appeal No. 172 of 1998** the Court of Appeal held that section 80 of the ***Civil Procedure Act*** enables a court to make such orders on review application which it thinks just so that the words "or any sufficient reason" as used in Order 44 [now Order 45] rule 1 of the ***Civil Procedure Rules*** are not *ejusdem generis* with the words "discovery of new and important matter" etc. and "some mistake or error apparent on the face of the record" and that those words extend the scope of the review. Accordingly, the said court held that there is no reason why any other sufficient reason need be analogous with the other grounds in the Order because clearly section 80 of the ***Civil Procedure Act*** confers an unfettered right to apply for review and so the words "for any sufficient reason" need not be analogous with the other grounds specified in the Order.

74. In dealing with the delegated legislation made under the Act **Farrell, J** in **Sardar Mohamed vs. Charan Singh Nand Singh & Another HCCA No. 51 of 1959 [1959] EA 793** was of the following view, with which view, I respectfully associate myself :

> **"In terms section 80 of the Civil Procedure Ordinance confers an unfettered right to apply for review in the circumstances specified and an unfettered discretion in the court to make such order as it thinks fit. The omission of any qualifying words at the beginning of the section appears to have been deliberate, since the section is obviously based on section 114 of the Indian Code, which is qualified, and similar qualifying words appear in a number of the other sections. Under section 81(1) of the Ordinance the Rules Committee has power to make rules "not inconsistent with the provisions of this Ordinance". If a rule is inconsistent it is to that extent *ultra vires;* and if the Ordinance confers unfettered power, a rule which limits the exercise of the power is *prima facie* inconsistent with the Ordinance and *ultra vires.* If, however, a rule is capable of two constructions, one consistent with the provisions of the Ordinance, and one inconsistent, the court should lean to the construction which is consistent on the principle *"út res magis valeat quam pereat*". If the words "or for any other sufficient reason" can be given a liberal construction, there is nothing in Order 44, rule 1(1) in any way inconsistent with section 80 of the Ordinance. The paragraph is perhaps unnecessary, but serves to make it clear that at least the two grounds specified are such as would entitle an aggrieved party to apply for review".**

75. With respect to delay, unlike in Tanzania where a review is to be brought within a prescribed period, in our case there is no such prescription and what the Court must consider is whether the delay is inordinate. In this case considering the circumstances of this case, I am not prepared to hold that the delay herein though prolonged is so inordinate as to disentitle the applicants to the reliefs sought.

76. In the premises the order that commends itself to me is that with respect to the costs of **Real Deals Limited, The Nairobi County Government** and **Outdoor Advertising Association of Kenya,** they are only entitled to costs as against the parties against whom they brought their various suits. Where however a party filed two suits, it is only entitled to the costs of one suit due to the consolidation. With respect to

the costs of the **Council of Governors** its costs which will be treated as costs of one suit will be shared equally as between the two Respondents.

77. Each party will bear own costs of the two applications.

78. It is so ordered.

Dated at Nairobi this 15th day of June, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Havi for the 3rd Petitioner

CA Mwangi