



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, J.J.A.)

CIVIL APPEAL NO. 2 OF 2015

BETWEEN

JARED ODOYO OKELLOAPPELLANT

AND

THE BOARD OF MANAGEMENT,

PONGE PRIMARY SCHOOL 1ST RESPONDENT

THE BOARD OF MANAGEMENT,

AWASI PRIMARY SCHOOL 2ND RESPONDENT

THE BOARD OF MANAGEMENT,

KALUORE PRIMARY SCHOOL..... 3RD RESPONDENT

THE BOARD OF MANAGEMENT,

WANG'ANGA PRIMARY SCHOOL 4TH RESPONDENT

THE BOARD OF MANAGEMENT,

YOGO PRIMARY SCHOOL 5TH RESPONDENT

THE BOARD OF MANAGEMENT,

SARE PRIMARY SCHOOL..... 6TH RESPONDENT

THE BOARD OF MANAGEMENT,

LUORA AYWEYO PRIMARY SCHOOL 7TH RESPONDENT

THE BOARD OF MANAGEMENT,

DISI PRIMARY SCHOOL.....8TH RESPONDENT

THE BOARD OF MANAGEMENT,

BWANDA PRIMARY SCHOOL.....9TH RESPONDENT

THE BOARD OF MANAGEMENT,

ALENDU PRIMARY SCHOOL..... 10TH RESPONDENT

THE BOARD OF MANAGEMENT,

OSINO PRIMARY SCHOOL11TH RESPONDENT

THE BOARD OF MANAGEMENT,

KOCHOGO YOUTH POLYTECHNI.....12TH RESPONDENT

AND

FREDRICK OTIENO OUTA, (INTERESTED PARTY)....13TH RESPONDENT

(Appeal of the ruling and/or order of the High Court of Kenya at Kisumu (**Maina, J.**) dated 13th November, 2014 in **High Court Petition No. 13 Of 2014**)

JUDGMENT OF THE COURT

[1] **Jared Odoyo Okello** (herein the appellant), unsuccessfully lodged a petition against the respondents who are all board of management of different schools. The appellant claimed that his right of access to information was violated by the respondents through their refusal to produce visitors books from the respective schools that the appellant intended to rely upon in an application for review in Supreme Court Petition No. 6 of 2014. The appellant sought what he describes as ‘a conservatory’ order compelling the 1st to 12th respondents to produce the visitors’ books used in their institutions in the months of February and March, 2013, to enable the court verify the signatures attributed to Fredrick Otieno Outa who was the respondent in Supreme Court Petition No. 6 of 2014 and who is now the 13th respondent in this appeal.

[2] The appellant’s petition was heard by the High Court and in a ruling delivered on 13th November, 2014, the learned judge (Maina J) dismissed the petition contending that the proceedings were a disguised prayer for discovery and not a genuine constitutional petition for access to information. The learned judge ordered the appellant to bear the costs of the petition. The appellant has now lodged an appeal against the judgment of the High Court.

[3] In a memorandum of appeal dated, 9th January, 2015, the appellant raised eight (8) grounds basically challenging the order of dismissal and the order for costs. During the hearing of this appeal, the appellant was represented by Mr. Maxwell Ogonda, while Mr. Ojuro held brief for Mr. Oluoch who was appearing for the 1st to 6th respondents. The 7th to 12th respondents were represented by Mr. Nyamita, and Mr. Ojuro appeared for the 13th respondent, who had been joined in the High Court constitutional petition as an interested party.

[4] In arguing the appeal, Mr. Ogonda opted to pursue only the issue of costs. He submitted that the learned judge did not exercise her discretion judicially in awarding costs to the respondents; that she failed to take into account that the appellant had succeeded in his petition as the prayers he sought were granted at an interlocutory stage by Tuiyot J and Mabeya J.

[5] In addition, Mr. Ogonda argued that the learned judge awarded costs to parties who had not participated in the proceedings; that except for the 5th and 7th respondents, all the other respondents did not file any response to the constitutional petition, nor did they participate in the proceedings. Counsel referred the Court to a hearing notice that was served on the 1st to 12th respondents, wherein several head teachers endorsed on the hearing notice that they had no objection to the orders sought by the appellant in the constitutional petition being issued. Mr. Ogonda further submitted, that although the 13th respondent was granted leave to become a party in the constitutional petition, he did not take any part in the proceedings and therefore no costs should have been awarded to any of the respondents.

[6] Mr. Ojuro, submitting for the 13th respondent, opposed the appeal. Counsel pointed out that the appellant lodged the constitutional petition 28 days after the delivery of the judgment of the Supreme Court in Supreme Court Petition No. 10 of 2014, that allowed the election petition appeal of the 13th respondent against the judgment of this Court and reinstated the judgment of the election court that was against the appellant. Mr. Ojuro submitted that the learned judge considered the constitutional petition and the circumstances, and rightfully awarded costs to the respondents; that the appellant having opted to argue the constitutional petition which petition was dismissed by the High Court, the learned judge was properly guided by section 27 of the Civil Procedure Act.

[7] Mr. Ojuro drew the Court’s attention to an affidavit sworn by the 13th respondent as well as a preliminary objection, both contained in the record of appeal, which confirmed that the contest in the constitutional petition was between the appellant and the 13th respondent. In addition, counsel pointed out that the final orders made by the Supreme Court were in favour of the 13th respondent. He therefore urged the court to uphold the order of the High Court awarding costs to the 13th respondent. Mr. Ojuro, also relied on the submissions that he had made on behalf of the 13th respondent to reiterate the 1st to 6th respondents position urging the Court to dismiss the appeal. Mr. Nyamita, counsel for the 7th to 12th respondents also associated himself with the submissions made by Mr. Ojuro, and urged the Court to dismiss the appeal with costs.

[8] In reply to the submissions made by Mr. Ojuro, Mr. Ogonda, referred to **Rule 26(2)** of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, commonly referred to as the **Mutungu Rules**. He argued that this rule places an obligation on the court in awarding costs not to award costs to parties who have not appeared before the court. Mr. Ogonda pointed out that the affidavits that were filed by the 5th and 7th respondents, in the constitutional petition, were filed irregularly, without a memorandum of appearance having been filed. He urged the Court to take cognisance of the fact, that the proceedings in the High Court, in regard to the constitutional petition were not governed by the Civil Procedure Rules, but were governed by the Mutungu Rules, Rule 3 of which provided the overriding objective as facilitating access to justice for all persons.

[9] We have considered this appeal, and the arguments made by counsel. It is clear that the appellant has abandoned all the other grounds and limited his appeal to the issue of costs only. In this regard, section 27 of the Civil Procedure Act, provides as follows:

“27. (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and 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.”

[10] As the appellant’s suit was a constitutional petition, seeking to protect and enforce fundamental rights, section 27 of the Civil Procedure Act, should be read with section 26 of the Mutungu Rules which provides as follows:

“(i) The award of costs is at the discretion of the court

(ii) In exercising its discretion to award costs, the court shall take appropriate measures to ensure that every person has access to the court to determine their rights and fundamental freedoms.”

[11] In our view, what the above provisions mean, is that the court hearing a suit has the discretion to determine the award of costs, which discretion should, as usual, be exercised judicially taking into account the circumstances of the particular suit. In addition, in a suit where a party is seeking to enforce the protection of his fundamental rights and freedoms, as was the case with the appellant’s constitutional petition, the court should exercise its discretion in awarding costs in such a way that the award of costs does not become punitive; or make it difficult for a litigant to access the courts; or discourage other litigants from accessing courts.

[12] Applying the above to the appellant’s suit, the circumstances were such that the appellant had first moved to the High Court as an election court and sought to have the election of the 13th respondent nullified. The proceedings concerning the election petition escalated from the High Court to the Court of Appeal and finally the Supreme Court. The Supreme Court delivered its judgment on 3rd July, 2014, and it was thereafter, that the appellant filed the constitutional petition with the intention of using the information he required in an effort to have the judgment of the Supreme Court reviewed.

[13] In her judgment, the learned judge of the High Court dismissed the appellant’s constitutional petition, finding that it was not a genuine petition for access to information, but a disguised prayer for discovery which should have been made in the election court during the hearing of the election petition. With this finding, the learned judge took the appellant’s constitutional petition out of the realm of a constitutional petition. The appellant having abandoned all grounds save the issue of costs, the finding of the learned judge that the appellant’s petition was not a genuine constitutional petition stands unchallenged. In exercising her discretion, the learned judge did not give any specific reason for the order of costs, but it was apparent that the learned judge was applying the general principle that the costs follow the event, and therefore the appellant’s constitutional petition having been dismissed he was to bear the costs of the petition.

[14] It was argued that the learned judge did not take into account the fact that the prayers which the appellant sought in his constitutional petition, had in fact been granted. This does not seem to reflect the correct position. The record shows that the orders were in fact granted *ex parte* at an interlocutory stage. In her judgment, the learned judge correctly noted that the orders sought by the appellant in the constitutional petition, were granted at the interlocutory stage by the vacation judge. The orders given at the interlocutory stage, were not final orders but mere interlocutory orders to be confirmed or set aside after the full hearing. In effect, the issue whether the appellant was actually entitled to the relief sought, remained a live issue, and was only finally determined in the judgment delivered by the learned judge on 13th November, 2014.

[15] In **Mbogo vs Shah [1968] EA 93**, it was held that:

“The Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision or unless it is manifest from the case as a whole that the judge had been clearly wrong in the exercise of his discretion and that as a result there had been misjustice.”

[16] It is apparent from the record of appeal that the 13th respondent having been joined as a party in the constitutional petition, was actively represented by counsel in resisting the appellant’s constitutional petition up to the conclusion of the proceedings. In our view, in awarding

costs to the 13th respondent, the learned judge properly exercised her discretion taking into account the relevant circumstances. There is therefore, no justification for interfering with the orders made by the learned judge with regard to the order of costs made in favour of the 13th respondent.

[17] As regards the 1st to 12th respondents, they did not take an active part in responding to the appellant's constitutional petition. It is conceded though that the 5th and 7th respondents filed responses to the petition. It is only fair that the appellant having dragged the respondents to court, he should have been made to pay their costs. However, the court ought to have taken into account that except for the 5th and 7th respondents, the other respondents did not actively participate in the proceedings, and that the contest was basically between the appellant and the 13th respondent. The order for full costs was therefore not justified.

[18] The upshot of the above is that, we allow this appeal to the extent of setting aside the order of costs made by the trial judge in regard to the 1st, 2nd, 3rd, 4th, 6th, 8th, 9th, 10th, 11 and 12th respondents in the constitutional petition. We confirm the award for payment of costs by the trial judge to the 5th, 7th and 13th respondents only. In regard to this appeal taking into account the circumstances, the order that commends itself to us on costs is to award to the 13th respondent full costs and the 1st to 12th respondents' half their costs.

Those shall be the orders of the Court.

DATED and delivered at Kisumu this 1st day of February, 2019

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.