IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, WARSAME & KIAGE, JJ.A.)

CIVIL APPEAL NO. 63 OF 2014

BETWEEN

GLOBAL APPARELS (EPZ) LIMITED.....APPELLANT

AND

ATTORNEY GENERAL.....1ST RESPONDENT

INDUSTRIAL COURT.....2ND RESPONDENT

TAILORS AND TEXTIES WORKERS UNION....3RD RESPONDENT

(An appeal from the Judgment of the High Court at Nairobi (J. Gacheche and G. Dulu, JJ) dated 29th September 2011

in

Petition No. 43 of 2008

****

JUDGMENT OF THE COURT

The substratum of this appeal is a labour dispute. The brief summary of facts giving rise to the appeal is as follows: The appellant together with four other co-petitioners before the trial court were members of a group known as EPZ Apparels Manufacturing and Exporters Group of the Federation of Kenya Employers (EPZ Group). The said group regularly negotiated Collective Bargaining Agreements (CBAs) with the 3rd respondent, a trade union representing workers in the textile industry. While negotiating a CBA effective 1st October, 2005 and ending 30th September, 2007 to fix terms and conditions of service for their employees, the parties reached a stalemate necessitating the dispute to be referred at the first instance to the Ministry of Labour and Human Resource Development for resolution. Upon failing to come to a bargain, the dispute was referred to the 2nd respondent for adjudication being, ***Tailors and Textiles Workers Union vs. EPZ Apparel Manufacturers and Exporters Group of FKE***, Cause No.106 of 2006. In the said dispute the claims of the parties were as follows: the 3rd respondent demanded that the unionisable employees' salaries be increased by 30% and 40% in the first and second year of the agreement; the EPZ Group on the other hand, offered a nil increase citing their inability to pay attributing it to the losses experienced by the group thus an increase of salaries would place them in a precarious situation; these claims were based on a report by an Economist from the Ministry of Labour.

In determination of the dispute the court ruled in favour of the employees enhancing their general wage by 25% and house allowance by 12% for the said period of 1st October, 2005 to 30th September, 2007. The court proceeded to order the 3rd respondent to make the requisite calculations which if disputed by the petitioners, the head of the Economic Planning Division or his representative was to make the calculations which would form part of the court's award.

Naturally, aggrieved by this decision, the said petitioners approached the High court vide a petition dated 5th February, 2008 pursuant to **Section 84(1)** of the repealed Constitution claiming that the said award was in contravention of fundamental rights and freedoms under **sections 71, 73, 74, 75, 77, 80** and **82** of the repealed Constitution.

The petitioners sought the following declarations and reliefs:

"1. A declaration do issue that section 17 (2) of the Trade Disputes Act Cap.234 of the Laws of Kenya contravenes the petitioners' right under sections 71 (1), 73, (1), 74 (1), 75 (1), 77 (9), 80, 82 and 84 of the Constitution (repealed) on the protection of the law by denying the petitioners the right of access to the High Court to seek redress for breach of the petitioner's fundamental rights and further to seek judicial review and or nullification of an illegal award issued by the second respondent.

2. A declaration do issue that the petitioners' right to life under section 71 of the Constitution (repealed) has been and or is likely to be contravened by the award by the 2nd respondent in cause No.106 of 2006 as the execution of the award will result in the insolvency of the petitioners.

3. A declaration do issue that the petitioners' right under section 75 of the Constitution (repealed) is likely to and or has been contravened by the award in Cause 106 of 2006 in that the award seeks to deprive the petitioners of their capital which forms the basis of their property under circumstances not justified in the law.

4. A declaration do issue that the award in Industrial Court Cause No. 106 of 2006 would subject the petitioners to servitude and thereby violate their rights under section 73 (1) of the Constitution (repealed).

5. A declaration do issue that the award in Cause \|No. 106 of 2006 violates and or is likely to violate the petitioners' right against inhuman treatment as guaranteed by section 74 of the Constitution (repealed) in that the award imposes an obligation upon the petitioners to implement an award which is beyond their ability in a manner not constitutionally justified.

6. A declaration do issue that the petitioners' rights to a fair trial under section 77 (9) of the Constitution(repealed) has been or is likely to be contravened by the award of the 2nd respondent in Cause 106 of 2006 in that the award has been delivered –

(a) contrary to established factual considerations presented to the 2nd respondent;

(b) in excess of jurisdiction of the 2nd respondent

(c) in disregard of evidence and the law;

(d) with abundant malice, capriciousness and in bad faith;

(e) against the rules of natural justice.

7. A declaration do issue that to the extent that the illegal and unjust award orders the petitioners not to employ its employees if it cannot pay the wages and house allowance awarded by the 2nd Respondent the award contravenes section 80 of the Constitution (repealed) which guarantees the petitioners' right to associate and contract with persons of their choice under the law.

8. A declaration that the purported award made in favour of the 3rd respondent by the 2nd respondent in Cause No. 106 of 2006 offends the rule in Ole Nganai – vs- R Bor (1983) KLR 233 and is null and void for being a decision/ judgment which is uncertain, nebulous and indefinite as to what is decided and what it awards the parties before it and hence a calumniation of unfair trial contrary to section 77 (9) of the Constitution (repealed).

9. A declaration that the petitioners' right under section 82 of the Constitution (repealed) not to be subjected to arbitrary, capricious and unreasonable exercise of power by any authority including the 2nd respondent has been contravened by the respondents through the operation of an unconstitutional Industrial Court.

10. A declaration that the 2nd respondent having established that the petitioners had incurred financial loses and hence incapable of accommodating any wage and house allowance increase the 2nd respondent had no judicial or any Constitutional right to award a 25% wage increase and a 12% increase in house allowance.

11. A declaration that the 2nd respondent misconstrued the import of the Wages Guidelines and the application of section 14 (10) of the Trade Disputes Act.

12. A declaration that if the interpretation of the 2nd respondent of section 14 (10) of the Trade Disputes Act is the correct judicial interpretation of what was enacted by Parliament the said section violated sections 71, 73, 74, 75, 77, 80 and 82 of the Constitution (repealed) and to that extent by operation of section 3 of the Constitution (repealed) the rights of the petitioners prevailed and the award is rendered null and void.

13. A declaration that the petitioners are entitled to an order setting aside the purported award in Cause No. 106 of 2006 dated 16th November 2007.

14. An order to bring to the High Court the purported 2nd respondent's award made on 16th November 2007 and to quash the same.

15. An order declaring Gazette Notice No.12302 of 14th December 2007 null and void.

16. An order quashing Gazette Notice No.12302 of 14th December 2007.

17. An order directed to the 2nd respondent, the 3rd respondent and the Ministry of Labour through the 1st respondent restraining them from executing the award in Cause No. 106 of 2006 dated 16th November 2006.

18. An order that the 1st, 2nd and 3rd respondents pay the costs of this petition jointly and severally."

Following the directions of the Hon. Chief Justice J. E. Gicheru (as he was then) the matter was placed before J. Gacheche and G. Dulu, JJ who heard and determined the petition. The learned Judges came to the conclusion that the petitioners had not made out a case of violation of the Constitution and as such dismissed prayers 1 to 13 and 15 of their petition. The petition partly succeeded as the court found that the Industrial Court's decision to delegate its powers of making awards to third parties was an error of law. Resultantly, the last paragraph of the award was quashed which reads:

> ***"In the circumstances, the court awards that the respondent to calculate and pay their unionisable employees their benefit under general wage increment and house allowance which they are entitled due to this award which grants them an increase of 25% for general wage and 12% for house allowed for the period from 1st October 2005 up to 30th September 2007. These payments should be made within six months. The claimant union is to make the calculations and deliver them to the respondent within 30 days and if the latter disputes them, the head of the economic planning division or a representative appointed by him to make the calculations. The calculations once served upon the respondent are to be part and parcel of this award, and the dues to be paid as said within six months."***

Accordingly, the Gazette Notice No. 12302 dated 14th December, 2007 was quashed and the 1st respondent was condemned to costs.

Once again aggrieved by the said decision the appellant, now on its own, has lodged this appeal on 12 grounds as enumerated in its memorandum of appeal. During the hearing of this appeal, the appellant abandoned grounds 1, 3, 6 and 7 of its memorandum of appeal, the remainder of the grounds were consolidated into 3 issues canvassed in their submissions as follows: whether the learned Judge erred in holding that the appellant did not bring itself within the provision of **Section 77(9)** of the repealed Constitution; whether the learned Judge erred by holding that the appellant did not bring itself within the provision of **Section 73(1**), **73(1)** and **75** of the repealed Constitution.

In a bid to demonstrate that the appeal is successful, learned counsel for the appellant, Mr. Obura, submitted that the award of the Industrial Court violated the constitutional rights of the appellant under **Sections 73(1), 77** and **75** of the repealed Constitution given that the 2nd respondent did not follow the guidelines by the Minister of Finance as mandated under section **14(10)** of the Trade Disputes Act. According to counsel, the expert opinion through the Economic Planning Division Report dated 28th June, 2007 was intended to assist the learned Judge of the tribunal to comprehend the guidelines issued by the Minister of Finance and the report clearly stated that the appellant could not meet any salary increment yet the High Court did not give a fair hearing to the appellant.

On the right to property, counsel submitted that the award would be a violation of the appellant's right to property given that the award would have to be satisfied by way of payment of money which was an asset. Counsel cited the High court case of ***Mecol Limited vs. Attorney General & 7 Others***, ***Misc Civil Application 1784 of 2004,*** where it was held that the Industrial Court violated property rights of the applicant in the matter when it made an award asking the applicant to pay undefined amounts as compensation.

Mr. Onyiso learned Counsel for the 1st and 2nd respondent, who opposed the appeal submitted that the Economic Development Report cited does not categorically state that the appellant was unable to pay salaries. Counsel took issue with the fact that the 1st respondent was found liable to pay costs yet it was dragged into the suit by virtue of appearing on behalf of the 2nd respondent. Counsel urged this Court to reverse this decision with respect to the issue of costs and find that it is the 3rd respondent which should have been condemned to pay costs.

Learned counsel for the 3rd respondent, Ms. Guserwa, who equally opposed the appeal submitted that an award or decision of the Industrial Court was final under **Section 17** of the Trade Disputes Act (repealed) and that the decisions were not subject to appeal or review citing ***Maureen Odero vs. Kenya Pipeline Company Limited***, ***Civil Appeal No. 105 of 2013*** and ***The Director Kenya Medical Research Institute vs. Agnes Muthoni & 35 Others***, Civil Appeal No 15 of 2011. Counsel further stated that the appellant had not shown what rights were violated by the two learned Judges.

In a brief rejoinder, counsel for the appellant emphasized that the guidelines by the Minister of Finance were to be strictly followed by virtue of **Section 14(10)** of the Trade Disputes Act which was couched in mandatory terms.

This being a first appeal, we are reminded of our primary role as a first appellate to re-evaluate, re-assess and re-analyse the evidence on record and determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See: ***Kenya Ports Authority vs. Kuston (Kenya) Limited (2009) 2EA 212*** where this Court held as follows:

> ***"On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."***

Upon perusal of the record of appeal and submissions by the parties, there are two issues for determination: whether the constitutional rights of the appellant were violated and if so the remedies available to it and the issue of costs before the High court.

However, before determining these issues learned counsel for the 3rd respondent, Ms. Guserwa, submitted that an award or decision of the Industrial Court was final under **Section 17** of the Trade Disputes Act (repealed) and that the decisions were not subject to appeal or review. To put this issue to rest, it is worth noting that the appellant invoked the jurisdiction of the High Court as a constitutional court under **Sections 60** and **80** of the repealed Constitution which clothes the High court with jurisdiction to determine questions of violations of fundamental rights or freedoms. The appellant did not approach the High court to review the award of the Industrial Court and neither did it approach the High court on appeal of the same award. The appellant in its submissions also acknowledged this fact by stating that it could not appeal against the award of the Industrial Court in light of **Section 17** of the Trade Disputes Act which provided that the decision of the Industrial Court would be final. We are of the view that this issue of review or appeal from the decision of the Industrial Court is a non-issue as what was before the High court was a constitutional petition which is now the subject of the proceedings before us.

Moving to the first issue of whether the appellant's proved that their rights were violated, the appellant alleges that its rights under **Sections 77(9)**, **73(1)** and **75** of the repealed Constitution were violated. A close scrutiny of the aforesaid sections is necessary to determine whether the appellant made out a case for violation of its rights under these provisions.

First, **Section 77(9)** of the repealed Constitution provides as follows:

> ***"A court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time."***

The thrust of the appellant's submission on this violation is that the 2nd respondent failed to adhere to the Guidelines issued by the Minister of Finance dated 23rd November, 2005 as mandated by **Section 14(10)** of the Trade Disputes Act and by ignoring evidence of the appellant's inability to pay it subjected the appellant to unfair hearing.

Section 77(9) lays down two requirements for a fair trial; first, that the court must be impartial and independent and secondly, that the court must give the case a fair hearing. It is fundamental to fair procedure that both sides should be heard - *audi alteram partem*, this principle is considered broad enough to include the rule against bias given that a fair hearing must be an unbiased hearing.

To our minds, a fair hearing demands that at the very least, that a court considers the material facts before it and that there be a balance between the evidence presented and the outcome.

In its determination the Court concluded as follows:

> ***"There is sufficient evidence that the cost of living for Nairobi Lower Income Group of workers for the period under review that is from 1st October 2005 up to 30th September 2007 rose by 25.6%. According to the Wage Guidelines, the workers are entitled to 100% compensation for loss of purchasing power. The Guidelines are mandatory and their provisions are binding on this Court. It is granted that the financial performance of the respondent is not impressive, but this cannot be attributed to the workers. Indeed, the analysis indicates that the deficits in the financial performance have been decreasing from the year 2003 up to 2006. The demand for 30% increase for the 1st year and 40% increase for the 2nd year of the General Wage increase is not supported by credible financial analysis and is rejected."***

It is evident that the Industrial Court, in its decision considered the various Guidelines under the Revised Guidelines for the determination of wage awards dated 23rd November, 2005. This included Guideline 2(a) (i) which allowed the lower wage earners up to 100% compensation measured by the Nairobi lower income group Consumer Price Index since the most recent revision of wages. And as emphasized by the appellant, Guideline 7 which states that the financial ability to pay higher wages should be a factor in determining the level and timing of wage awards. We further note that the Court under the guidelines was mandated to give emphasis to the guidelines in the order in which they were set out.

We therefore find that the rights of the appellant under **Section 77 (9)** of the repealed Constitution were not violated as it was granted a right to fair hearing. We however disagree with the High Court's reasoning in finding that the Petitioners have not brought themselves within purview of **Section 77**. The Court stated as follows:

> ***"Section 77 of the Constitution deals with fair hearing in criminal cases within a reasonable time by an independent and impartial court, as well as punishment. Again the complaints in the Petition have nothing to do with criminal charges. They relate to wages payable by employers to employees and their increase or otherwise. The Petitioners have therefore not brought themselves within the provisions of Section 77 of the Constitution."***

The appellant did not aver that its rights were violated under **Section 77** of the repealed Constitution generally but rather was specific that its rights were violated under **Section 77(9)**. In the case of ***Otieno Clifford Richard vs. Republic***, ***Misc. Civil Suit 720 of 2005*** which we cite with approval, the High Court (J. Lesiit, R. V. Wendoh and M. J. A. Emukule, JJ.) expressed as follows on **Section 77(9)** of the repealed Constitution:

> ***"It is quite clear to us that this subsection was meant to give direction to the court or tribunal set up to determine the existence or***

extent of a right or obligation in civil proceedings by providing for the manner and speed in which the proceedings should be conducted. It gives constitutional safeguard for a fair hearing and for the determination of the civil matter within a reasonable time. In our view the phrase, "civil right" or "obligation" must be read disjunctively as the court or adjudicating authority under Section 77(9) of the Constitution is to determine, firstly, the existence of a civil right, or obligation and secondly the extent of that civil right or obligation. This provision cannot be imported into the criminal proceedings and has certainly no application in this case." *(Emphasis Ours).*

In light of the foregoing we are of the considered view that a simple and literal reading of **Section 77(9)** of the repealed Constitution indicates that a court prescribed by law to determine the existence or extent of a civil right or obligation falls within the purview of **Section 77(9)**. We find that this provision does not only relate to criminal proceedings and as such the High Court made an apparent error in law. This notwithstanding, to rehash, the appellants did not demonstrate that their right to fair hearing was violated and as such we find that this ground of appeal must fail.

Secondly, **Section 73(1)** of the repealed Constitution reads as follows: **"No person shall be held in slavery or servitude".** The appellants' contention is that the violation resulted from the High Court's failure to appreciate that the 2nd respondent's decision to grant salary increases to its employees yet it could not afford such increases created a state of bondage and servitude. In our view, the concept of slavery and servitude connotes a lack of absolute freedom to cease contracting or providing one's services with a person/persons or an entity like the appellant.

The High court expressed itself as follows in determining the issue of servitude:

"We now turn to section 73 of the Constitution which deals with slavery. The 2nd respondent's award imposes a wages increase that the petitioners claim they will not be able to honour. The petitioners' counsel has cited the case of *Sammy Muhia & 2 others vs. Kenya Power & Lighting Co. Ltd [2004] eKLR* ***in which Ibrahim J, as he then was, stated that forcing an employee on an employer would amount to servitude. Counsel also relies on the case of*** *Republic vs. Kadhi Kisumu – Ex Parte Nazreen [1973] EA153* ***in which the court held that an order compelling a citizen to do something not backed by law amounted to subjecting a person to bondage and servitude.***

We find that in both the above cases the complaint was about forcing a relationship between persons. In the present case, the 2nd respondent has not purported to force the petitioners to have any relationship with their workers. The 2nd respondent merely tried to improve the terms of an existing contract of service in favour of the employees in accordance with the labour laws of this country. Whether the decision of 2nd respondent is right or wrong, it does not amount slavery or bondage as nobody has been forced to have a labour relationship with another. In our view, the petitioners have not brought themselves within the provisions of section 73 of the Constitution."

According to John Bouvier, in his book ***"A Law Dictionary, Adapted to the Constitution and Laws of the United States of America, and of the several states of the American Union; with references to the civil and other systems of foreign law."*** 2nd Edition Volume 2, 1839 he states that:

"The subjection of one person to another is a purely personal servitude; if it exists in the right of property which a person exercises over another, it is slavery. When the subjection of one person to another is not slavery, it consists simply in the right of requiring of another what he is bound to do, or not to do; this right arises from all kinds of contracts or quasi contracts."

By virtue of guidelines issued by the Minister of Finance and the CBA which was due for review every two years, the High Court was justified in finding that the decision of the Industrial Court did not amount to slavery or bondage as nobody had been forced to have a labour relation with another. This finding by the High Court was proper and this ground too fails.

Thirdly, **Section 75(1)** of the repealed Constitution states:

"No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied—

(a) the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote the public benefit; and

(b) the necessity therefore is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and

(c) Provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation."

The High Court expressed itself as follows on this allegation:

"Section 75 of the Constitution deals with compulsory acquisition of property or interests in or rights over property. The complaints herein are with regard to increased wages. Nobody has taken the assets of the petitioners or threatened to take those assets. Nobody has taken or threatened to take the rights over property of the petitioners. The complaints herein do not bring the petitioners within the protections provided under section 75 of the Constitution. We find no basis for the allegation that the

Constitutional rights of the petitioners under section 75 of the Constitution have been violated."

In our view, this section outlines the conditions necessary in the compulsory acquisition of a person's property by the state. The nature of the exceptions outlined above clearly affirm that any claim grounded on this particular section would have to be exercised against the government. The matter before us is an industrial dispute and does not involve matters affecting the compulsory acquisition of land by the government. The state was not a party to the suit and there is no proof that the appellant's property has been acquired. We therefore find that this argument is a non-starter and agree with the High court's determination. This ground too fails.

We find that in the circumstances, the appellant failed to discharge their burden of proof and to substantiate its claims to the required standard as such were not entitled to the reliefs sought as it did not make out a case for constitutional violations. The learned Judges properly discharged their discretion which cannot be faulted and there is no need for this Court to interfere with the findings as the court arrived at the correct conclusion.

The second issue of costs was highly contested by the 1st respondent which was aggrieved with the fact that it was found liable to pay costs yet it was dragged into the suit by virtue of appearing on behalf of the 2nd respondent. Counsel for the 1st respondent urged this Court to reverse this decision with respect to the issue of costs and find that it is the 3rd respondent which should have been condemned to pay costs.

The issue of costs is discretionary. This Court is therefore being invited to interfere with this discretionary exercise of the powers of the High Court. In the case of ***Mbogo & Another vs. Shah*** (1968) EA 93 at 96, it was stated that an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the Judge misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters which he should have taken into consideration and in doing so, arrived at a wrong conclusion.

The High Court in making a determination on the issue of costs expressed itself as follows:

> ***"In the result, therefore, we quash the award of the Industrial Court made on the 16th November 2007 with regard to the final paragraph which starts with the words "In the circumstances ….." by way of certiorari, and the same is hereby quashed. We also quash Gazette Notice No. 12302 of 14th December 2007, and the same is hereby quashed. The Attorney General who is the 1st respondent will pay the costs of these proceedings."***

It is well settled that costs follow the event. In this regard, **Section 27** of the Civil Procedure Act, states 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 of 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."*** *(Emphasis ours)*

In the case of ***Supermarine Handling Services Ltd vs. Kenya Revenue Authority***, ***Civil Appeal No. 85 of 2006*** this Court 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".***
>
> *(Emphasis ours)*

It is not in dispute that the appellant lost its case in the High court except for prayers 14 and 16 which related to the quashing of the award of the Industrial Court in terms of the last paragraph and the Gazette Notice No. 12302 of 14th December, 2007 that were successful. The learned Judges condemned the 1strespondent to pay costs. We have observed that the 1st respondent was not guilty of any conduct that led to litigation. We find no basis or explanation for imposing the said costs.

For these reasons, this Court is justified to interfere with this discretion as the High Court acted on wrong principles. This appeal therefore succeeds on the ground of costs.

In conclusion we dismiss the appeal and order that each party shall bear its costs in the High court. Costs of this appeal shall be borne by the appellant.

Dated and delivered at Nairobi this 6th day of August, 2019.

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M. KOOME

JUDGE OF APPEAL

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M. WARSAME

JUDGE OF APPEAL

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P. O. KIAGE

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR