IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK, JJ.A)

CIVIL APPEAL NO. 250 OF 2014

BETWEEN

LIMURU COUNTRY CLUB...1ST APPELLANT

YASSIN AWALE...2ND APPELLANT

ROBERT BARUA...3RD APPELLANT

PETER MUNGAI ....4TH APPELLANT

VICTOR GICHURU ....5TH APPELLANT

ANTHONY WANGARI ....6TH APPELLANT

TOM WAIHARO ....7TH APPELLANT

AND

ROSE WANGUI MAMBO ....1ST RESPONDENT

MARTHA WANJIRU VINCENT...2ND RESPONDENT

CAROLINE WANGARI NGUGI..3RD RESPONDENT

ERICK KIMURI..4TH RESPONDENT

KAGOCHI MUTERO...5TH RESPONDENT

ALFRED KARIUKI...6TH RESPONDENT

FRANCIS OKWARO..7TH RESPONDENT

PETER WARUI ....8TH RESPONDENT

(SUED ON BEHALF OF THE KENYA GOLD UNION).....................9TH RESPONDENT

DORCAS MBALANYA...10TH RESPONDENT

ANASTACIA CHUBI..11TH RESPONDENT

JOYCE WAFULA ....12TH RESPONDENT

(SUED ON BEHALF OF THE KENYA LADIES GOLF UNION) ...13TH RESPONDENT

THE NATIONAL GENDER AND EQUALITY COMMISSION......14TH RESPONDENT

FEDERATION OF WOMEN LAWYERS ....15TH RESPONDENT

LAW SOCIETY OF KENYA...16TH RESPONDENT

(Being an Appeal against the Judgment and decree of the High Court of Kenya at Nairobi (I. Lenaola, M. Ngugi & D.S. Majanja, J.) dated 12th *March, 2014* in **Petition No. 160 of 2013)**

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JUDGMENT OF THE COURT

The 1st, 2nd and 3rd respondents, *"the respondents"* sued the appellants and 8 others in **Nairobi Constitutional Petition No. 160 of 2013.** The primary complaint in the petition was the alleged violation of the respondents' right to equality and freedom from discrimination. The appellants and the 4th and 5th respondents had on 18th December, 2012 purported to pass a by-law to exclude all lady golf members of the 1st appellant from voting during the 1st appellant's annual general golf meetings. The petition was opposed but following a full hearing it was allowed. The appellants as well as the 4th and 5th respondents were, however, condemned personally to pay costs of the petition to the respondents.

Dissatisfied with the judgment, the appellants filed the present appeal in which they raised 16 grounds. However, when the appeal came up for hearing most of the grounds raised had been overtaken by events and the appellants therefore opted to narrow the appeal down to one simple issue, costs of the suit. It should be remembered that in allowing the petition by the respondents the learned Judges **(Lenaola, J**. *(as he then was),* **Mumbi Ngugi and Majanja, JJJ)** ordered that the 2nd to 7th appellants together with 4th and 5th respondents pay the costs of the petition personally to the respondents and without recourse to the 1st appellant's funds.

At the plenary hearing of the appeal, **Mr. Kihara,** learned counsel appeared for the appellants; **Mr. Ouma,** learned counsel held brief for **Mr. Murgor,** counsel for the respondents; whereas **Ms. Mwasao,** learned counsel appeared for the 10th respondent. Counsel relied on their written submissions that they had filed which they briefly highlighted.

Mr. Kihara contended that the respondents did not substantially succeed in their petition. That the petition was expressed to have been filed in public interest and therefore courts should be cautious in awarding costs in such matters. Counsel further submitted that costs are awarded at the discretion of the court and that the appellants did nothing wrong outside the law to warrant the award of costs against them personally. Counsel submitted further that the trial court misdirected itself and the order for costs was made without jurisdiction as it was not in accordance with pleadings or framed issues for determination. The order for costs according to counsel also failed to adhere to the spirit of access to justice and fair hearing. He therefore urged us to allow the appeal on costs.

Opposing the appeal, Mr. Ouma submitted that it is trite law that costs follow the event and the petition having been successful, it followed that the respondents were entitled to costs. That costs are awarded at the discretion of the court and the High Court was exercising its discretion in awarding costs to the respondents. The court gave reasons for awarding costs personally against the appellants. Unless there was misdirection, this Court has no jurisdiction to interfere with the costs as awarded. Counsel maintained that there was no misdirection at all on the part of the learned judges.

Ms. Mwasao did not submit on costs but rather informed us that the 10th respondent was neither keen to pursue nor interested in costs.

As previously stated, the single issue for our determination is whether the trial court properly exercised its discretion in awarding costs of the suit to the respondents and that the same be borne by the 2nd -7th appellants personally as opposed to the 1st appellant.

Rule 26 of the Constitution of Kenya *(Protection of Rights and Fundamental Freedoms)* Practice and Procedure Rules, 2013 provides that; **"The award of costs is at the discretion of the court; and that in exercising its discretion to award costs, the court shall take appropriate measures to ensure every person has access to the court to determine their rights and fundamental freedoms."**

Correspondingly, Section 27 (1) of the Civil Procedure Act provides that:

> "**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 give all the necessary directions for the purposes aforesaid; and the fact that the court 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 direct."**

While addressing the effect of the equivalent section to our section 27 above, the Supreme Court of Uganda in **Impressa Ing Fortunato**

Federice v Nabwire [2001] 2 EA 383 rendered itself thus:

> **"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 judge exercises such discretion depends on the facts of each case. If there were mathematical formula, it would no longer 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, 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…"***

In the instant case, we remind ourselves at the outset that this appeal arose from a decision of the trial court when exercising judicial discretion. Costs are awarded at the unfettered and absolute discretion of the court. However, the discretion has to be exercised judicially and not arbitrarily. In **Farah Awad Gullet v CMC Motors Group Ltd (2017) eKLR** this Court held:

> **"…it is our finding that the position in law is that costs are at the discretion of the Court seized of the matter with the usual caveat being that such discretion should be exercised judiciously, meaning, without caprice or whim and on sound reasoning."**

For this Court to interfere with the exercise of such discretion, it must be shown to its satisfaction that the trial court was clearly wrong, misdirected itself or acted on matters it ought not to have acted upon, or failed to take some matters into consideration and in doing so arrived at a wrong conclusion. See **Mbogo & Another v Shah (1968) EA 93**).

In **Devram Manji Daltani v Danda [1949] 16 EACA 35** the Court held that costs are awarded to compensate a successful litigant and not to punish an unsuccessful party. Such successful litigant can only be deprived of his costs where his conduct has led to litigation which might have been averted.

In the present appeal, and from the judgment of the High Court it is obvious and apparent, just like the learned Judges held, that the conduct of the appellants was reprehensible, wanting and led to litigation which could have been avoided had they followed due process and saved the respondents all the trouble of going through an arduous litigation.

This is how the learned Judges delivered themselves on the issue:-

> **"In the circumstances of this case, we take into account the fact that the 2nd – 9th respondents were acting in their official capacities as directors of the 1st respondent. They nevertheless individually and collectively as a Board flouted the 1st respondent's very constitution by passing the unconstitutional by-law despite legal opinions and other interventions advising otherwise. Indeed, this matter would not have taken the turn that it did had it not been for their recalcitrance in insisting on flouting not only the club's constitution but also going against express provisions in the Constitution of Kenya, 2010. In the circumstances, we take the view that the 2nd to 9th respondents should shoulder the petitioners' costs without recourse to the Club's funds."**

We do not discern any misdirection in the above statement. The Judges properly took into account the conduct of the appellants before and during the proceedings which was a relevant consideration. Further, and as stated by the Supreme Court in **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others (2014) eKLR:**

> **"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."**
> **"[22] Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the applicant**."

Also in the case of **Party of Independent Candidate of Kenya & Another v Mutula Kilonzo & 2 Others HCEP No. 6 of 2013**, it was held:

> **"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 (Fripp vs 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."**

As has been constantly stated, an appellate court does not simply interfere with discretion exercised by the trial court because it would have decided differently if it was sitting in the trial court's chair. There must be a good reason to interfere and the only reasons propounded here by the appellants is that the matter was in pursued public interest, the respondents did not substantially win the suit and that the appellants did

not act outside the law to warrant the order of costs against them. These submissions cannot possibly be correct. Protagonists were members of a private club. How can it then be said that the petition was filed in public interest? Further the petition was decided in their favour. Accordingly, they won the battle contrary to the submissions of the appellants. Finally, here was a case where the circumstances leading to the institution of the proceedings and the conduct of the appellants went to show that they deliberately chose to pursue the wrong path despite the advice of their lawyers. Had they followed due process, avoided their recalcitrance and accepted the legal opinions proffered to them by their legal advisers, the suit would have been averted. We do not therefore see any misdirection in the award of costs nor do we see an abuse of discretion bestowed on the said Judges when making the order of costs with the above considerations in mind.

Upon our own analysis of the foregoing, we find no reason to justifiably fault the reasoning of the learned Judges on costs and shall not interfere with the said finding.

The upshot then is that the appeal lacks merit and is accordingly dismissed with costs.

Dated and delivered at Nairobi this 22nd day of November, 2019.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR