IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ,A)

CIVIL APPEAL NO. 147 OF 2015

BETWEEN

KENYA HUMAN RIGHTS COMMISSION.....1ST APPELLANT

THE KENYA CHAPTER OF THE

INTERNATIONAL COMMISSION OF JURISTS.....2ND APPELLANT

AND

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....2ND RESPONDENT

UHURU MUIGAI KENYATTA.....3RD RESPONDENT

WILLIAM SAMOEI RUTO.....4TH RESPONDENT

JAMES ONDICHO GESAMI.....5TH RESPONDENT

INTERNATIONAL CENTRE FOR

POLICY & CONFLICT.....6TH RESPONDENT

HENRY NYAKUNDI NYANG'AYA.....7TH RESPONDENT

(Appeal from the judgment and decree of the High Court at Nairobi (Msagha Mbogholi, Kimaru, Omondi, Nyamweya and Kimondo, JJ.) delivered on 15th February 2013

in

Petition No. 552 of 2012

(as Consolidated with

Petitions Nos. 554 of 2012, 573 of 2012 and 579 of 2012)

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JUDGMENT OF THE COURT

In this appeal ***the appellants, the Kenya Human Rights Commission*** and ***the Kenya Chapter of the International Commission of Jurists,***

are dissatisfied with the decision of the High Court (*Msagha Mbogholi, Kimaru, Omondi, Nyamweya and Kimondo, JJ.*) which condemned them to pay the costs of a petition they instituted seeking various declarations pertaining, *inter alia,* to violations of the Constitution on account of the nomination of the 3rd and 4th respondents to contest the offices of President and Deputy President of the Republic of Kenya whilst they faced charges pertaining to their alleged conduct following the 2007 General Election, at the International Criminal Court (ICC) at the Hague.

A brief background to the appeal is of necessity. Following the 2007 General Election, widespread violence broke out across Kenya. The violence, which then came to be referred to as the Post-Election Violence (PEV), and attributed to contested election results, was to become the subject of an inquiry that was chaired by the Hon. Mr. Justice P.N. Waki, resulted in a report of the Commission of Inquiry into the Post-Election Violence (CIPEV), commonly referred to as the Waki Report. The report recommended, *inter alia,* that a Special Tribunal be created to prosecute the perpetrators. It also recommended that, in the event a local tribunal was not established, the ICC, as established under the Rome Statute would institute the prosecutions instead. Since no appropriate action was taken locally, following investigations into the violence, the ICC commenced prosecutions and preferred charges against several people, among them the 3rd and 4th respondents. In so doing, the trial chamber of the ICC committed them to full trial, having satisfied itself that they were either contributors or indirect co-perpetrators to the crimes against humanity that were committed after the election. At the time, the 3rd and 4th respondents were holding the State offices of Deputy Prime Minister and member of Parliament respectively.

It was the confirmation of the charges preferred against the 3rd and 4th respondents at the ICC that prompted the appellants and the 1st, 2nd, 3rd, 4th and 5th petitioners to institute the petitions against them, amongst other respondents.

The 1st petitioner was the International Centre for Policy and Conflict. Its *Petition No. 552 of 2012* was dated 30th November 2012 and sought the following orders;

> **a)** *"**A declaration that the confirmation of charges against the 3rd and 4th respondents both of whom hold public offices notwithstanding the confirmation of charges against them at the ICC or indeed any other person charged with such similar serious offences under Kenyan or international law would be a threat to the Constitution.***
>
> ***b) A declaration that the presumption of innocence in favour of the two persons committed to trial before the ICC does not override or outweigh the overwhelming public interest to ensure protection and uphold tenets and principles of the Constitution set out under Articles 10 and 73 of the Constitution.***
>
> ***c) A declaration that this court has the jurisdiction to issue an advisory opinion or interpretation on a matter of overwhelming public interest outside of an adversarial or real dispute namely Chapter Six, Articles 73,75 and 80 read together with Article 10 of the Constitution.***
>
> ***d) A declaration that the 3rd and 4th respondents committed to trial before the ICC or any other person charged on such similar terms to hold a public or State office would be a recipe for anarchy and perpetuate the culture of impunity.***
>
> ***e) A declaration that subject to any person/candidate for the position of President, Deputy President, Governor, Senator, Member of Parliament or any other elective State office exhausting their right to appeal under Article 99 (3) of the Constitution, a person is disqualified from being elected to any office established under the Constitution within the Republic of Kenya if the person is subject to a sentence of imprisonment of at least 6 months as at the date of registration or the date of election."***

The second petition was *Petition No. 554 of 2012* which was brought by Charles Ndung'u Mwangi and Public Corruption Ethics and Governance Watch, the 2nd and 3rd petitioners. Their case was that the Elections Act and the Constitution precluded the 3rd and 4th respondents from being cleared to contest elections in Kenya until the indiscretions demonstrated while serving in the public office are addressed. They in turn sought the following orders;

> ***a) An order compelling the State through the 1st respondent to hand over to the Court and to the appellants, the list of names in the said envelope verified by an affidavit from Justice Philip Waki.***
>
> ***b) A declaration that the International Criminal Court is a court subordinate to the High Court of Kenya.***
>
> ***c) A declaration that the appellants are entitled to have access to, be supplied with and use information, documents and other evidence held by the State in respect of all the matters raised herein against the 3rd and 4th respondents of such other matters as may come to light or be relevant during the hearing of the petition.***
>
> ***d) A declaration that the candidature of the 3rd and 4th respondents are contrary to the tenure, ideals and spirit of the Constitution of Kenya especially Chapter Six and are prohibited in the circumstances.***
>
> ***e) A declaration that a person is not eligible to run for any State office if he or she is or has been in breach or would be in breach of any code of integrity set out pursuant to Articles 73,75,76,77,78 and 80 of the Constitution.***
>
> ***f) An order of injunction permanently restraining the 2nd respondent from accepting now or in the future, nomination for elections from the 3rd and 4th respondents for allegedly engaging in acts of violence, other crimes and civil strife contrary to the spirit and tenor of the Constitution of Kenya."***

The third petition was *Petition No. 573 of 2012* filed by Henry Nyakundi Nyang'aya, the 7th respondent, against the 2nd and 5th respondents in this appeal. The petition was against the 5th respondent who was running for the position of member of Parliament for West Mugirango Constituency. It was alleged that he had been engaged in corrupt activities and misuse of office after he transferred Kshs. 1,050,000 from the Constituency Development Fund (CDF) to his personal account, and had since been compelled by a mandamus writ from the High Court to refund and transfer the monies back to the CDF account, which amount had since been refunded; that as a consequence, the 5th respondent's actions constituted a breach of trust which necessitated his disqualification from vying for elective position or being in a State office. The following orders were sought;

> ***a) "A declaration that the conduct of the 5th respondent of fraudulently transferring public funds amounting to Kshs. 1,050,000/- to his personal account violates the national values and principles of governance as provided for by Article 10 (2) of the Constitution.***
>
> ***b) A declaration that the conduct of the 5th respondent of fraudulently transferring public funds amounting to Kshs. 1,050,000 to his personal account amounts to violation of Chapter Six provisions on leadership and integrity.***
>
> ***c) A declaration that the 5th respondent by virtue of his conduct in relation to the Kshs. 1,050,000 transferred to his account from the CDF account, should be disqualified from vying for any elective posts on or before the general elections.***
>
> ***d) A declaration that the 2nd respondent should not register the 5th Respondent to participate in any elections on or before the general elections.***
>
> ***e) A declaration that the 5th respondent by virtue of his conduct in transferring Kshs. 1,050,000 to his account from the CDF account is ineligible to hold public office.***
>
> ***f) An order that the costs consequent upon the petition be borne by the 5th respondent.***
>
> ***g) All such other orders as the court shall deem just in the circumstances."***

The fourth petition was *Petition No. 579 of 2012* filed by the 1st and 2nd appellants. Their concern was that following the confirmation of charges brought against the 3rd and 4th respondents in the ICC, their trials were due to commence in April 2013 and they would be required to attend the trial court hearings at the Hague; that with the ICC trial due to commence barely a month after the general election, should a run off take place, the President and Deputy President would not have been sworn into office by the time of commencement of the trial; that the absence of the President and Deputy President from Kenya for extended periods of time would result in violations of the Constitution, since they would be unable to perform their key functions which would be an affront to the sovereignty of the Kenyan people, the integrity of the Constitution and the stability of the nation. The following declarations were sought;

> ***a) "A declaration that the continued occupation and/or holding of the State offices of the Deputy Prime Minister and Member of Parliament by the 3rd and 4th respondent respectively, while their charges have been confirmed by the ICC and they have not been acquitted and/or otherwise discharged, is in violation of Chapter Six of the Constitution on the requisite integrity and leadership standards for State Officers and in particular Articles 2,3,10, 73 and 75.***
>
> ***b) A declaration that the nomination of the 3rd and 4th respondents to contest for the offices of the President or Deputy President as the case may be will be a violation of the Constitution since if elected, they will be unable to uphold, protect or defend the Constitution on account of the charges against them at the ICC.***
>
> ***c) A declaration that the nomination of the 3rd and 4th respondents to contest for the offices of president and Deputy President or to any other State office as the case may be will be a violation of the Constitution since if elected, they will be unable to perform the duties of the two offices required by the Constitution.***
>
> ***d) A declaration that the trial process of the ICC up to the confirmation of charges is sufficiently equivalent to meet the necessary legal threshold required to bar a person from being nominated to or assume state Office.***
>
> ***e) A declaration that the nomination of the 3rd and 4th respondents to contest for the offices of the President and Deputy President as the case may be will be a violation of the Constitution's principles on leadership and integrity and specifically the provisions of Articles 10,73 and 75 of the Constitution."***

The Attorney General as the 1st respondent and ***the Independent Electoral and Boundaries Commission as the 2nd respondent*** were also joined in the petitions. On 24th January 2013 the High Court consolidated the four petitions with an order that the file relating to *Petition No. 552 of 2012* would be the lead file. As such the four petitions were heard and determined together.

In its judgment, the trial court determined various issues. The first concerned the candidature of the 3rd and 4th respondents to contest for the offices of President and Deputy President in view of the confirmation of the charges preferred against them by the ICC for crimes against humanity following the 2007 post election violence. The court found that it did not have jurisdiction to determine questions governing the election of the President and the Deputy President as these were matters limited to the exclusive jurisdiction of the Supreme Court which had the sole jurisdiction to determine them. The second issue concerned the High Court's jurisdiction to deal with matters of leadership and integrity under Chapter 6 of the Constitution when other mechanisms prescribed by the Constitution or the statutes existed for the determination of such issues. In this regard the court concluded that, ***the Independent Electoral and Boundaries Commission, the 2nd***

respondent and other statutory bodies were sufficiently mandated to deal with integrity and eligibility matters, effectively ousting the High Court's jurisdiction in the first instance.

Third, on the charges the 3rd and 4th respondents faced at the ICC, the court took the view that under ***Article 50 (2)*** of the ***Constitution***, the Bill of Rights, and the fundamental rights and freedoms presumed the 3rd and 4th respondents to be innocent until proved otherwise. Regarding the 5th respondent, the court observed that since he had been acquitted of the criminal charges, he was entitled to exercise his constitutional rights to seek political office.

On the remaining prayers and declarations sought, the court did not render a decision, having found them to be either speculative, or overtaken by events. Having so found, the court dismissed the petition and awarded costs to the respondents.

The appellants were aggrieved by the High Court's decision and filed this appeal on grounds that the court was wrong in condemning them to pay the costs of the suit without considering that the petition was brought in the public's interest and for the purpose of ensuring that the principles of integrity as espoused by the Constitution were upheld in the case of both elective and appointive positions in the public service of the Republic; that the High Court ordered the appellants to pay costs after dismissing the suit for reasons that it did not have jurisdiction to hear the suit, yet it was a matter of great public significance as it concerned the interpretation of the Constitution within the context of the first general election to be held following the promulgation of the 2010 Constitution; that the court failed to appreciate that the appellants obtained no financial gain from the outcome of the suit. The appellants further complained that the learned judges misdirected themselves in ordering them to pay costs for having instituted multiple petitions, when this was not in fact the case, and in failing to appreciate that no finding was reached that the suit was driven by malice or personal interest, or that it was frivolous, vexatious or an abuse of the court process. Finally, that the learned judges failed to take into account that imposing costs on the appellants would be a deterrent to public interest litigation in Kenya.

Learned Senior counsel, ***Mr. Nzamba Kitonga***, and Learned Counsel ***Mr. M. Nderitu*** appeared for the 1st and 2nd appellants, learned counsel ***Mr. N. Malonza*** and ***Mr. K. Wilson*** appeared for the 2nd respondent and ***Mr. E. Monari*** appeared for the 3rd respondent, and also held brief for ***Mr. Katwa*** for the 4th respondent. All parties filed written submissions including the 1st respondent, the Attorney General, who apparently did not attend Court despite having been served.

In their submissions on costs, the appellants' complaint was that their petition was brought in public interest to enforce compliance with the leadership and integrity requirements of Chapter Six of the Constitution, particularly in the context of the elective positions of President and Deputy President in the first General Election under the 2010 Constitution; that it was also aimed at compelling the 1st and 2nd respondents to undertake their constitutional duty to ensure that only those persons who satisfied those requirements contested for public office; that it also sought to obtain clarity on the constitutional elective prerequisites necessary for persons running for State office, which was the reason for including the 3rd and 4th respondents in the petition.

It was further submitted that their petition was brought in good faith, and without personal or private gain to them. The case of ***John Harun Mwau and Others vs the Attorney General and Others [2012] eKLR*** was cited for the proposition that courts should yield to unhindered access to justice and support legitimate efforts to protect public interest litigation which played an important role in providing a proper understanding of the law; that the High Court acknowledged that the petition was filed in public interest, but still went ahead to order the appellants to pay the costs. It was argued that the principles on costs in respect of public interest litigation as developed by courts since promulgation of the Constitution were settled and should be applied in this case; that the court was wrong to conclude that the respondents had to defend many petitions as the appellants had filed only one petition that was of public interest in nature; and further, that no finding was made that the petition was frivolous or an abuse of the court process; that in point of fact, the petition had raised invaluable constitutional questions which the High Court had found worthy of consideration and determination. In this regard, the appellants cited the case of ***Feisal Hassan vs Public Service board of Marsabit County and Another [2016] eKLR*** for the proposition that, *"…in constitutional litigation, the principle of access to the court must, consistently with the public importance and interest in the observance and enforcement of the Bill of Rights in the Constitution, override the general principle that costs follow the event, unless it can be shown that the petition was wholly frivolous…"*. In addition, it was their submission that it was not also demonstrated that the petition was brought with malice or intended to bring the 3rd and 4th respondent names into disrepute.

The appellants urged that we take into account that they are civil society organizations that are wholly dependent on limited donor funding for their operations to promote constitutionalism and the rule of law; that they regularly bring public interest litigation in defence of human rights and the Constitution and would be precluded from continuing to do so if unsuccessful public interest litigation attracted costs.

The 1st respondent, who as stated had filed written submission but did not appear, opposed the appeal. It was stated that there was no reason to depart from the general rule that costs follow the event; that the respondents had defended the appellants' petition and by so doing, had incurred costs; that since the appellant was unsuccessful, the court had rightfully awarded costs to the respondents in accordance with ***section 27 (1)*** of the ***Civil Procedure Act (Cap 21)***.

The 2nd respondent also opposed the appeal and submitted that, costs follow the event and are awarded at the discretion of the court; that whereas the court found that the petition was filed in public interest, it was not the general rule that once a finding of public interest is reached the court's discretion is fettered. It was further argued that an award of costs to a successful party is not meant to penalize the unsuccessful party, but rather, to compensate the successful party for the costs of defending the suit. See ***Jasbir Singh Rai and 3 others vs Tarlochan Singh Rai and 4 others [2014] eKLR.*** The 2nd respondent further argued that the court gave valid reasons for awarding costs, which was that multiple petitions were filed against the named respondents, and that since the learned judges properly exercised their discretion in awarding costs, this Court lacked jurisdiction to interfere with that exercise of discretion.

Mr. Monari also opposed the appeal. Counsel submitted that the 3rd respondent is now the President of the Republic of Kenya, and that despite the previous proceedings having taken place before he was sworn into office, this appeal was instituted after the 3rd respondent had

assumed the office of President. It was counsel's submissions that since the Notice of appeal was filed on 22nd June 2015, the appeal fell within the remit of ***Article 143 (2)*** of the ***Constitution*** which clearly states that civil proceedings shall not be instituted against the President or the person performing the functions of that office during their tenure in office.

Counsel argued that the connotation of the word "anything" in ***Article 143 (2)*** expressly excluded all the 3rd respondent's acts (whether private or otherwise) from legal proceedings; that the purport of ***Article 143 (2)*** was to enable the President carry out his duties as Head of State without distraction from civil or criminal suits. The cases of ***Republic vs The Honourable The Chief Justice of Kenya & Others Ex Parte Moijo Mataiya Ole Keiwua [2010] eKLR*** and ***Abacha vs Fawehinmi (1996) 6 NWLR (pt 660) 228*** were cited to support this proposition. It was further contended in the case of ***Tinubu vs IMB Securities PLC SC 32/2001***, that civil litigation also included appeals against decisions of the High Court. As a consequence, Counsel asserted, the 3rd respondent ought not to be a party to the appeal and his name should be removed from these proceedings; that this Court lacked jurisdiction to hear an appeal which included the 3rd respondent.

In counsel's opinion, the appeal should be stayed until the 3rd respondent's term in office comes to an end; that in the event of such an order, no prejudice would be occasioned to the parties since pursuant to ***Article 143 (3)*** of the ***Constitution*** the intervening period would be factored when computing time for filing of proceedings. It was further argued that in the decision on ***Abdul Karim Hassanally vs Westco Kenya Limited [2003] eKLR,***

Githinji, J. (as he then was) struck out the President's name from the proceedings without prejudice to the plaintiff's rights to institute the suit after the President's term of office had lapsed; that therefore nothing precluded this Court from staying the appeal. Counsel pointed out that in any event it was the 3rd respondent, and not the appellants who stood to suffer, since a stay of the appeal estopped him from enjoying the benefits of the costs awarded to him by the trial court.

Counsel concluded by asserting that, the aforegoing notwithstanding, owing to the stay of execution orders granted by this Court, no further steps could possibly be taken by any of the parties to execute the trial court's orders while the appeal was pending determination.

In reply to the 3rd respondent's submissions on ***Article 143 (2***), Mr. Kitonga argued that the 3rd respondent does not enjoy immunity or protection in respect of this appeal because ***Article 143 (2)*** limited the acts or omissions complained of to anything done while the person was in office; that the immunity was afforded to the office and not to the individual. With regard to the prior conduct complained of, it was argued, the conduct occurred prior to assumption of office and therefore the President could be sued as a private citizen, that the authorities cited were inapplicable to the circumstances of this case, as they were anchored on the absolute immunity provisions of *section 14 (2)* of the repealed Constitution which differed from ***Article 143 (2)*** of the ***Constitution of Kenya, 2010***.

On the rationale behind immunity of office, the appellants went on to cite the US Supreme Court case of ***Clinton vs Jones 520 US 681 (1997)***, where the court held that *"the President, like all other government officials, is subject to the same laws that apply to all other members of society…"* and that *"…the rationale for official immunity is inapposite where only personal, private conduct by a President is at issue"*, so that *"…litigation of questions that relate entirely to unofficial conduct of the individual who happens to be the President possesses no perceptible risk of misallocation of either judicial or executive power…"*.

Further, it was asserted that the proceedings were part of an ongoing litigation where the trial court had issued orders against which this appeal was filed, and the appellants were apprehensive that the 3rd respondent could proceed to execute against them. Counsel urged that the appellants' appeal be considered in the context of right to fair trial and access to justice, and they should not be driven away from seeking justice from this Court.

We have considered the appeal and the parties' submissions. And whereas it is appreciated that the initial question before us was whether the trial court properly exercised its discretion in condemning the appellants to pay costs, following counsel for the 3rd respondent's submissions that this Court lacks jurisdiction to entertain this appeal by virtue of the immunity donated to the 3rd respondent as President of the Republic of Kenya under ***Article 143 (2)*** of the Constitution, we consider it of paramount importance that we begin by addressing this challenge to our jurisdiction. This is because as pronounced in the oft cited case of ***The Owners of Motor Vessel "Lillian S" vs Caltex Oil Kenya Ltd [1989] KLR 1,*** this Court stated;

> ***"Jurisdiction is everything. Without it a court has no power to make one step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."***

And similarly by the Supreme Court in the case of ***Samuel Kamau Macharia & Another vs Kenya Commercial Bank & 2 others, Application No. 2 of 2011 [2012] eKLR*** where it stated;

> ***"A court's jurisdiction flows from the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law."***

Seemingly, at the core of the jurisdictional question before us is the interpretation and application of ***Article 143 (2)*** of the ***Constitution*** to acts of the 3rd respondent alleged to have taken place prior to his assumption of the office of the President of the Republic of Kenya. In interpreting the provisions of the Constitution, courts are called upon to apply the principles aptly set out in the case of ***Kigula & others vs Attorney General [2005] 1 E.A. 132*** **at** ***page 133*** in the following terms;

> ***"The principles applicable in the interpretation of the Constitution include the widest construction possible in its context, should be given according to the ordinary meaning of the words used, the entire Constitution has to be read as an integrated whole and***

no one particular provision destroying the other, all provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument, the Constitution should be given a generous and purposive interpretation to realize the full benefit of the guaranteed rights, the Constitution of Uganda enjoins Courts in the country to exercise judicial power in conformity with law and with the values, norms and aspirations of the people."

In the case of ***Cusack vs Harrow London Borough Council [2013] 4 ALL ER 97*** it was held that;

> ***"Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim and purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved."***

Bearing these cannons of interpretation in mind, we turn to consider ***Article 143*** of the ***Constitution*** on the President's immunity in so far as it relates to criminal and civil proceedings. ***Article 143 (1)*** relates to criminal proceeding, and it stipulates that;

> ***"Criminal proceedings shall not be instituted or continued in any court against the president or a person performing the functions of that office during their tenure in office."***

Article 143 (4) is also concerned with criminal prosecution and provides that the President's immunity does not extend to crime under any treaty to which Kenya is a party and which prohibits such immunity. Therefor, as concerns criminal proceedings, the Constitution precludes the institution and continuation of such proceedings whilst the President is in office, with the reservation that, the immunity does not extend to crimes prescribed under any treaty to which Kenya is a party.

On the other hand, ***Article 143 (2)*** regarding civil proceedings specifies that;

> ***"Civil proceedings shall not be instituted in any court against the President or the person performing the functions of that office during their tenure of office in respect of anything done or not done in the exercise of their power under this Constitution".*** (emphasis ours)

In effect, a plain and ordinary interpretation of ***Article 143 (2)*** would infer that, the President's immunity is limited; (i) to proceedings instituted during his or her term in office and (ii) to anything done or not done in exercise of the President's powers under the Constitution. Put differently, the immunity does not extend to acts or omissions that have resulted in civil proceedings commenced prior to assumption of the office of the President or that were not in exercise of the President's powers.

The aforegoing makes it clear that it was the intention of the framers of the Constitution to limit the extent of the President's immunity in civil proceedings to only those instituted while he or she was in office. This intent is evident from the difference in construction between ***Article 143 (1)*** and ***Article 143 (2).*** Whereas ***Article 143 (1)*** expressly prohibits institution or continuance of criminal proceedings once the President assumes office, under ***Article 143 (2)*** the immunity in civil proceedings is limited to only those suits instituted against the President during the term of office in respect of anything done or not done in the exercise of power as the President of Kenya. Acts or omissions that gave rise to civil proceedings instituted prior to assuming office are not covered by the prescribed immunity.

The framers' intent is further evinced by the stark distinction that emerges when ***Article 143 (2)*** is compared with *section 14 (2)* of the retired Constitution that addressed a similar immunity. The repealed provision provided that;

> ***"no civil proceedings in which relief is claimed in respect of anything done or omitted to be done shall be instituted or continued against the President while he holds office or against any person while he is exercising the functions of the Office of President".*** (emphasis ours)

The construction of *section 14 (2)* accorded civil proceedings with absolute immunity before and during the period in office in the same way as ***Article 143 (1)*** spells out the immunity specified for criminal proceedings, whether or not the cause of action was done or omitted to be done in exercise of the functions of office of the President. More importantly, *section 14 (2)* expressly prohibited continuation of civil proceedings against the President whilst he or she was in the office.

This is not the case with ***Article 143 (2).*** The words *"or continuing"* are clearly absent, meaning that it was never intended that immunity would extend to civil litigation that preceded the assumption of office. So that without inclusion of the words *"or continuing"*, the provision effectively allowed proceedings instituted prior to assumption of office to continue even while the President is in office.

Further, the interpretation of the phrase *"…the President or the person performing the functions of that office during their tenure of office..."*, is instructive. It would infer that immunity was limited to the *"…functions of that office…"* as well as *"…during their tenure of office…"*. So that, to be covered by the immunity under ***Article 143 (2)***, firstly, the person should have been in office, and secondly, the impugned actions should have taken place during the tenure of office. Immunity would not therefore extend to acts or omissions not connected to the office or carried out before or after the term of office.

The interpretation of the extent of the immunity specified by ***Article 143 (2)*** can be likened to the US Supreme Court's observations as to the type of acts capable of being covered by the immunity as seen in the case of ***Nixon vs Fitzgerald (1983)***, where the court stated thus;

> ***"Here a former President asserts his immunity from civil damage. He stands named as a defendant in a direct action under the Constitution and two statutory actions….***

Applying the principles of our cases to claims of this kind, we hold that the petitioner as former President of the United States is entitled to absolute immunity from damages liability predicated on his official acts."

Similarly, in the case of ***Clinton vs Jones (supra)***, the same court distinguishing between the official duties and unofficial actions of former President Clinton while he was Governor of the State of Arkansas, and limited the President's immunity to official public responsibilities, so that private conduct was excluded from immunity.

In the instant case, when the criteria described above is applied to the impugned acts which took place after the 2007 General Election and before the 3rd respondent assumed the office of President, they were clearly outside the purview of ***Article 143 (2),*** and consequently, the immunity provided thereunder did not extend to those acts. And we so find.

We would add that to the extent that the authorities cited in support of the 3rd respondent's submissions, are with reference to *section 14 (2)* of the repealed constitution, they are distinguishable, and cannot be applied in this case. So much so that in relation to ***Article 143 (2),*** we would agree with the observations of the court in ***Clinton vs Jones (supra)*** thus;

"…indeed, if the Framers of the Constitution had thought it necessary to protect the President from the burdens of private litigation, we think it far more likely that they would have adopted a categorical rule than a rule that required the President to litigate the question whether a specific case belonged in the "exceptional case" category…" and furthermore, "If Congress deems it appropriate to afford the President stronger protection, it may respond with appropriate legislation".

That said, would an appeal brought during the President's term constitute civil proceedings 'instituted' against the President or the person performing the functions of that office during their tenure of office? We dare say that by virtue of ***rule 82*** of the ***Court of Appeal Rules***, the appeal having been instituted on 22nd June 2014 could be construed as proceedings instituted whilst the President was in office. But, we would hasten to observe that, since the appeal is concerned with alleged actions that did not fall within the 3rd respondent's term in office, then, once again, we find that they were not covered by the immunity specified by ***Article 143 (2)***. Such that, in so far as the actions complained of did not relate to the exercise of presidential powers whilst in office, and were acts that took place prior to presumption of office, we are satisfied that this appeal is excluded from the Presidential immunity donated by ***Article 143 (2).***

Having so found, we need not go into the question of whether a stay of the appeal until the 3rd respondent's term ends would be prejudicial, save to capture the sentiments of the court in ***Clinton vs Jones (supra),*** which had this to say on the issue;

"…we are persuaded that it was an abuse of discretion for the District Court to defer trial until after the President leaves office. Such a lengthy and categorical stay takes no account whatever of the respondent's interests in bringing the case to trial…and delaying trial would increase the danger of prejudice..."

Accordingly, we have found that owing to the circumstances of the case, ***Article 143 (2)*** has not ousted this Court's jurisdiction, and we find the challenge to be unfounded. We now proceed to determine the question of whether the trial court properly exercised its discretion when it condemned the appellants to pay the costs of the petition. As was espoused in the established case of ***Mbogo & Another vs Shah, [1968] EA, p.15***;

"An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice."

On the question of costs, the appellants have submitted that the reason that they ought not to pay costs as ordered is because the petition was brought in the interest of the public.

We have already summarized the key conclusions of the judgment above, but in relation to the costs, the trial court pronounced itself thus;

"Costs follow the event, and are also at the discretion of the court. The petitions that have been brought were on a matter of public interest. However the Respondents have had to defend several petitions, and we hold they are entitled to costs. We award the 1st, 2nd, 3rd, and 4th Respondents costs of the Petitions brought against them to be paid by the 1st, 2nd, 3rd, 4th, 5th, and 6th Petitioners jointly and severally. We also award the 5th Respondent costs to be paid by the 4th Petitioner. As regards the Interested Party we make no orders as to costs."

The general rule on costs is set out in ***section 27*** of the ***Civil Procedure Act*** which specifies 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 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."

Therefore it is trite that though costs follow the event they are awarded at the discretion of the court. In the case of ***Supermarine Handling Services Ltd vs Kenya Revenue Authority, Civil Appeal No. 85 of 2006,*** this Court explained the circumstances that would lead an appellate court to interfere with the trial court's exercise of discretion 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...".***

But the above notwithstanding, ***Article 22 (2)*** and ***Article 258*** of the ***Constitution*** allows every person the right to institute court proceedings in *'public interest'* where a claim or contravention or infringement of a right or fundamental freedom, or threat thereto, or a contravention or threat to violate the Constitution is alleged.

Black's Law Dictionary, 9th Edition defines ***'public interest'*** as;

> ***"…the general welfare of the public that warrants recognition and protection, something in which the public as a whole has stakes, especially that justifies Governmental regulation". In litigating on matters of "general public importance", an understanding of what amounts to 'public' or 'public interest' is necessary. "Public" is thus defined: concerning all members of the community; relating to or concerning people as a whole; or all members of a community; of the state; relating to or involving government and governmental agencies; rather than private corporations or industry; belonging to the community as a whole, and administered through its representatives in government, e.g. public land."***

In the case of ***Mumo Matemu vs Trusted Society of Human Rights Alliance and 5 others [2014] eKLR*** the Supreme Court explained the essence of public interest litigation thus;

> ***"Public Interest Litigation plays a transformative role in society. It allows various issues affecting the various spheres of society to be presented for litigation. This was the Constitution's aim in enlarging locus standi in human rights and constitutional litigation. Locus standi has a close nexus to the right of access to justice. In instances where claims in the interest of the public are threatened by administrative action to the detriment of constitutional interpretation and application, the Court has discretion on a case by case basis, to evaluate the terms and public nature of the matter vis a vis the status of the parties before it. This discretion is drawn from the command of Article 259 (1), to interpret the Constitution in a manner that promotes its values and purposes, advances the rule of law, human rights and fundamental freedoms, permits the development of the law and contributes to good governance".***

And embracing those sentiments, the same court in the case of ***Jasbir Singh Rai case (supra)***, had this to say on the question of costs where public interest litigation was concerned;

> ***"…in the classic common law style, the courts have to proceed on a case by case basis, to identify "good reasons" for such a departure. An examination of evolving practices on this question shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs..."*** (emphasis ours)

It is therefore clear that in suits involving genuine public interests litigation, courts are slow to award costs. In this case the subject matter of the suit was in the nature of a public interest where the concern was more particularly, on the threat to the office of the President and Deputy President of the Republic with both the 3rd and 4th respondents facing criminal proceedings in the ICC. It is not disputed that the trial court was satisfied that the suit was in the nature of public interest litigation, but despite this concession, nevertheless did not take this into account when it exercised its discretion to order the appellants to pay the costs.

Public interest litigation, in most cases, is for the benefit of the public and not the persons or entities that institute the proceedings. Condemning an unsuccessful party to pay costs in genuine public interest litigation can become a deterrent. More likely than not, many a party would hesitate to institute suits in defence of the Bill of Rights and the Constitution for fear of being condemned to pay costs.

We do not agree with the trial court's reasoning that the appellants should pay costs because *"… the Respondents have had to defend several petitions…"*. The record clearly shows that the appellants filed one petition— that is *Petition No. 579 of 2012.* And though it was consolidated with other petitions filed by the other petitioners in their own right and for their own reasons, lumping the petitions together and ordering the payment of costs for that reason without due consideration of the public interest nature of the appellants' petition, was in our view a misdirection, and it is necessary to interfere with the court's exercise of discretion on costs.

In sum, we set aside the order of costs to the appellants and petitioners in the consolidated judgment of 15th February 2013, and substitute it therefor with an order that each party in ***Petitions Nos. 552 of 2012, 554 of 2012, 573 of 2012 and 579 of 2012*** to bear its own costs in the High Court as well as in this Court.

It is so ordered.

Dated and delivered at Nairobi this 8th day of November,2019.

D. K. MUSINGA

...…….

JUDGE OF APPEAL

S. GATEMBU KAIRU (FCIArb)

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JUDGE OF APPEAL

A. K. MURGOR

……..……...

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR