IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, WARSAME & MAKHANDIA, JJ.A)

CIVIL APPEAL NO. 364 OF 2017

BETWEEN

TOM MBOYA ODEGE.....APPELLANT

AND

HON. EDICK PETER OMONDI ANYANGA.....1ST RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....2ND RESPONDENT

ORANGE DEMOCRATIC MOVEMENT.....3RD RESPONDENT

(An appeal against the Judgment and Decree of the High Court of Kenya at Nairobi (G. V. Odunga, J) dated 27th *June, 2017* ***in Judicial Review Misc. Appl. No. 304 of 2017)***

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JUDGMENT OF THE COURT

1. This appeal revolves around events that took place during the nomination process for the national elections that took place in Kenya on the 8th August, 2017. It specifically arises from the decision of the High Court **(G. V. Odunga, J.)** made on 27th June, 2017 allowing a Judicial Review application and quashing a decision made earlier by the Dispute Resolution Committee **(DRC)** of the Independent Electoral & Boundaries Commission **(IEBC).** As correctly observed by the trial court, and is indeed common ground, the decision had been largely overtaken by events since, shortly before the trial court's decision, the Court of Appeal had resolved the dispute in a related appeal between the same parties by nullifying the nominations and directing the political party to conduct fresh nominations. This appeal is therefore academic, whichever way it goes.

2. The election in issue was for the position of Member of National Assembly in Nyatike Constituency. The appellant herein **(Odege)** and the 1st respondent **(Anyanga)** were party members of the 3rd respondent **(ODM)** and were contesting the party nomination. In the nominations conducted by ODM on 24th of April 2017, Anyanga emerged the winner and Odege came third but the certificate was awarded to another candidate, one Fredrick Ogenga. Anyanga challenged the decision before the ODM's National Appeals Tribunal **(NAT)** which on 29th April, 2017 nullified the nomination and ordered fresh nominations in accordance with the party's constitution and the nomination rules. ODM failed to comply with that decision and therefore Anyanga complained before the Political Parties Disputes Tribunal **(PPDT)** which on 9th May, 2017 ordered ODM to issue Anyanga with the nomination certificate. It was issued accordingly on 12th May, 2017.

3. That was not the end of the matter. Odege went back to the PPDT and filed an application for review of its decision. He claimed that he had been issued with a direct nomination by ODM and should have been enjoined as a party to the complaint made by Anyanga. But the application was dismissed on 26th May, 2017. Thereafter, he filed **Appeal No. 89 of 2017** in the High Court where **Kimaru, J**. found that his direct nomination by ODM was dishonest since the party was in contempt of the decision of its own NAT. Kimaru, J. nullified the nomination certificate issued to Odege. He also held that the nomination certificate issued to Anyanga was the only genuine one for presentation to IEBC. Odege's appeal was dismissed on 31st May, 2017.

4. Both Odege and ODM were aggrieved by that decision. They separately filed notices of appeal to this Court and sought orders before the High Court for stay of its decision pending the filing and determination of their intended appeals. Odunga, J. granted those orders on 7th June, 2017 in the following terms:

> **"*i.* I hereby grant a stay of execution of the judgment delivered herein on 31*st* May 2017 pending the hearing and**

determination of intended appeal or further orders either of this court or the Court of Appeal on condition that the intended appeal is filed within 2 days excluding the date of delivery of this ruling.

ii. Unless these orders are varied either by this court or the Court of Appeal, the nomination of the Orange Democratic *Movement Party's candidate for Nyatike Constituency will await the decision of the Court of Appeal."*

5. Odege subsequently filed **Civil Appeal No. 166 of 2017** and the expectation was that it would be pursued to the end. But a bizarre turn of events took place. Odege went to the IEBC on 5th June, 2017 and filed a complaint **(No. 100/2017)** before the DRC asserting that he was the rightfully nominated candidate and that the nomination certificate issued to Anyanga and presented to IEBC was a forgery. ODM also filed a complaint **(No. 168/2017)** and both complaints were consolidated. They sought orders from the DRC to remove the name of Anyanga from the list of nominated candidates of ODM. The DRC agreed with them and issued the order on 8th June, 2017. In effect, the decision reversed the findings of the PPDT and the High Court which had upheld the nomination of Anyanga.

6. It was Anyanga's turn to seek the assistance of the court. He obtained leave on 12th June, 2017 and subsequently took out a Judicial Review application seeking, principally, orders of *certiorari* to quash the decision of the DRC, and *prohibition* to stop IEBC from clearing Odege as the ODM candidate. He contended that the DRC acted in excess of jurisdiction in purporting to allow a case that raised the same issues that had been earlier conclusively determined by the PPDT and the High Court; that the DRC decision was substantially at variance with the decision of the PPDT and the High Court; that the matter before the DRC was *res judicata;* and that the decision was reached in breach of the rules of natural justice.

7. Odunga, J. considered the application and formed the view that by the time the appellant lodged the dispute before the DRC, the questions regarding nomination had been extensively litigated before the PPDT and the High Court. He faulted Odege for invoking the jurisdiction of the DRC to seek orders and relief which would effectively nullify the decisions of the PPDT as well as the High Court. The court also faulted IEBC for falling into Odege's trap and considering the dispute when it had already been litigated on. It was clear to the Learned Judge that the actions of Odege and ODM amounted to an abuse of court process. Having subjected themselves to the jurisdiction of the superior courts, Odege and ODM could not purport to invoke the jurisdiction of an inferior tribunal like the DRC to overturn the decision of the courts.

We may quote the learned Judge *verbatim* in his summary:

"*In this case the parties herein had subjected themselves to the* jurisdiction of the Superior Courts. Having done so they had no justification to resort to the jurisdiction of inferior tribunals such as the Respondent's Dispute Resolution Committee in order to in effect undo the decision of a superior court and in effect render proceedings pending before a superior court superfluous. As was held by this court in granting stay, parties who have invited the Court to adjudicate on a matter which they are disputing over ought not to create a situation whereby the decision to be made by the Court would be of no use. A situation where parties take action that destroy the subject matter of pending proceedings or foist upon the court a situation of complete helplessness or render nugatory any judgment or order that may be made therein was frowned upon by the Nigerian Court of Appeal in United Cement Company of Nigeria versus Dangote Industries Ltd & Minister of Solid Mineral Development [CA/A/165/2005]." .....Therefore the interested parties' action of invoking the jurisdiction of the Respondents' Dispute Resolution Committee was clearly in bad taste and was not expected of either a political party of the stature of the 2nd *interested party herein or the 1st interested party who aspires to be a lawmaker. Such conduct must be detested in the strongest terms possible. Similarly, if the Respondent was made aware of this Court's orders and the fact of the pendency of the proceedings before the Court of Appeal and proceeded to entertain the said proceedings, it was clearly violating the national values and principles of governance in Article 10 which bind the Respondent in its decisions and which include the rule of law. Deference to decisions and orders of the Superior Courts by Courts and Tribunals subordinate thereto is one of the tenets of the rule of law."*

8. The application for *certiorari* was granted and the decision of the DRC given on 8th June, 2017 was quashed for reasons of abuse of the due process and want of jurisdiction. It was granted without prejudice to the Court of Appeal decision in the matter which had already been rendered.

9. Apparently, ODM was satisfied with the decision of Odunga, J. as it neither filed an appeal nor made any appearance before us despite service of notices. But Odege is now before us listing four grounds of appeal to challenge it and is supported by IEBC in urging the appeal. He says the learned judge erred in fact and law in:

a. finding that the DRC had no jurisdiction to entertain the complaints laid before it;

b. holding that lodging the complaint amounted to an abuse of the court process notwithstanding the express provisions of **Article 88(4)(e)** of the Constitution as read with **Section 74 (1)** of the Elections Act;

c. allowing the application despite holding that the suit had been overtaken by events;

d. awarding Anyanga the costs of the suit despite the proceedings before the IEBC being constitutionally in order and the matter having a public interest element.

10. Before we consider those grounds, we must dispose of an application filed by Anyanga invoking ***Rule 84*** of the Court's rules contending that the appeal was incompetent for having been filed out of time. Directions were issued that both matters be heard together.

11. Learned counsel for Anyanga, **Mr. P. R. Amuga**, instructed by M/s Amuga & Company, Advocates, contended in written submissions

that the record of appeal was lodged in court on 24th October, 2017 and subsequently served upon his firm on 30th October, 2017. He further observed that the certificate of delay indicated that the typed proceedings were made available to Odege on the 24th of August, 2017 and therefore the appeal should have been lodged within 60 days from that date, that is, by 23rd of October, 2017 at the very latest. But it was lodged on the 24th of October, 2017, one day late and was thus out of time. According to counsel, no explanation was given for the delay and therefore the appeal was incompetent and should be struck out.

12. On the other hand, learned counsel for Odege, Mr. Wathome holding brief **Miss Nyambura** instructed by M/s NOW Advocates, LLP, in written submissions, asserted that the appeal was filed within time. That is because the letter written on 24th of August, 2017 by the registrar confirming that the proceedings were ready for collection was never delivered until 7th of September, 2017. The proceedings were then collected on the same day and the appeal filed timeously. Furthermore, submitted counsel, once the registrar certifies the period taken in preparation of copies necessary for the appeal, **Rule 82** of the rules of this Court applies to exclude that time. In this case, she pointed out, there was a certificate of delay. The cases of ***Ratemo Oira T/A Ratemo Oira & Company Advocates vs Blue Shield Insurance Company Limited (2010) eKLR,*** and ***Rupa Cotton Mills (Epz) Ltd vs Bank of Baroda (K) Ltd (2016) eKLR*** were cited in support of those submissions. In opposing the application, Miss Nyambura was joined by learned counsel **Mr. Kibet** instructed by M/s Murugu Rigoro & Company for IEBC.

13. We have considered the application, the affidavits in support and in opposition, the submissions of counsel and the law. There is no contention that the notice of appeal was filed or served within the prescribed time limits. Ordinarily, the record of appeal ought to be filed within sixty days thereafter, but that is only when the records necessary for the filing of the appeal are available to the appellant. ***Rule 82*** of the Court's rules provides for the eventuality of non availability of the records as follows:

> ***"(1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged—***
>
> > **(a) a memorandum of appeal, in quadruplicate; (b)the record of appeal, in quadruplicate; (c)the prescribed fee; and (d)security for the costs of the appeal:**
>
> **Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.** [Emphasis added].
>
> **2. An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent."**

14. There is no contention that the letter referred to in the proviso was not written or that a copy of it was not given to Anyanga's counsel. **Sub rule (2)** is therefore not applicable. Finally there is no contention that the registrar did not issue a 'Certificate of Delay'. One was indeed issued stating, *inter alia*:

> **" (4) That the time taken to prepare and supply the certified copies of the proceedings and judgment was from 4*th* *July, 2017 to 7th September, 2017 being 64 days.***
>
> **5. That this certificate of delay was prepared and ready for collection this 4*th* *day of October, 2017."***

15. As there is no strong or valid challenge to the Certificate of Delay, we have no reason to go behind it. It supports the contention of the appellant that the appeal was filed within 47 days of collection of the necessary proceedings and therefore was within the time required under the rules of the Court. The application is not meritorious and is hereby dismissed.

16. Adverting now to the main appeal, we discern two issues which are dispositive of it:

> **i. Whether the learned Judge properly exercised his discretion in issuing the judicial review orders sought in the impugned 'judgment'.**
>
> **ii. Whether the learned judge erred in law in awarding costs in favour of Anyanga.**

17. In urging the appeal, both Odege and IEBC contend that the DRC was clothed with jurisdiction granted under ***Article 88(4)(e)*** of the Constitution and ***section 74*** of the **Elections Act (the Act)** to admit, hear and determine the complaint laid before it. ***Article 88*** establishes the IEBC and in **Sub-Article (4)(e)** stipulates as follows:-

> **"4. The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for;-**
>
> **……..**
>
> **e. the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;"**

Section 74 of the Act gives effect to that provision by providing thus:-

> **"74 (1) Pursuant to Article 88 (4) (e) of the Constitution, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.**
>
> **2. An electoral dispute under subsection (1) shall be determined within seven days of the lodging of the dispute with the Commission.**
>
> **3. notwithstanding subsection (2), where a dispute under subsection (1) relates to a prospective nomination or election, the dispute shall be determined before the date of the nomination or election, whichever is applicable"**

18. Explaining the reasons for invoking those provisions, Odege, through his counsel, pointed out that he had been given a certificate of direct nomination by ODM and his name was in the party list submitted to IEBC. Counsel relied on the definition of ***'Nomination'*** under **Section 2** of the Act that it is *"the submission to the Commission of the name of a candidate in accordance with the Constitution and the Act"* and submitted that no one had the power to remove Odege's name after submission. Surprisingly, the name had been removed and replaced with Anyanga's contrary to **Section 13(2)** of the Act which prohibits the change or replacement of a name submitted to the IEBC after party nominations except in specified circumstances, which did not obtain in his case. He termed the process followed in removing Odege's name as *'illegal, fraudulent and without authority'* and branded Anyanga's certificate of nomination which was submitted to and accepted by IEBC as a *'forgery*'.

19. In counsel's view, it did not matter that Anyanga purported to complain through the party machinery or that the decisions made within the party dispute resolution machinery were upheld by the courts. According to counsel, all that happened before *'nomination'* and the cause of action mutated upon the submission of the nomination certificates to IEBC. The jurisdiction of the IEBC to entertain the complaint was thus unaffected as it had Constitutional and statutory underpinning. It was upon the IEBC to resolve a party list submitted to it that appeared to nominate two candidates, contended counsel.

20. IEBC agreed with Odege and relied on the same provisions of the law cited. According to counsel, the political party primaries had ended on 5th June, 2017 and it was open thereafter for IEBC to admit any complaints arising from the nominations, as it did Odege's. The DRC had to decide, as contended by Odege, which of the certificates issued to him and Anyanga was the valid one. In counsel's submission, the jurisdiction to hear and determine all disputes arising from nominations lay with IEBC and the courts had no business interfering. In the circumstances of this case, concluded counsel, the law allowed the filing of the complaint and it cannot be said that the process was in abuse of court process. Reliance was made on the decision of this Court in the case of ***Kyalo Peter Kyuli vs Honourable Wavinya Ndeti & 3 Others (2017) eKLR*** stating thus;-

> **"in determining this application it is important to find out the nature of the exact dispute before the committee since this court being a judicial review court cannot turn itself into an appellate court and reevaluate the evidence presented before the committee and arrive at its decision. This court's duty is simply restricted to examining the decision made by the committee and the basis thereof in order to find out whether it was legal, procedural, and reasonable or tainted with any other recognized impropriety that would render it unsustainable."**

21. For his part, counsel for Anyanga was in no doubt that to the extent that DRC purported to hear and determine a matter that had been determined before a superior court and to make findings that were at variance with those made by the superior court, the DRC acted without jurisdiction and/or flouted the Constitution and established law. In his view, it was in breach of the principle of judicial hierarchy and a recipe for chaos in the administration of justice. In effect the DRC was purporting to sit on appeal or review of the decisions of the PPDT and the High Court, a power which it did not have.

22. Counsel further submitted that IEBC through the DRC knowingly flouted the law in this case because it had previously struck out similar matters on the ground that it did not have jurisdiction where the PPDT and the High Court had expressed themselves. Reference was made to ***Gabriel Bukachi vs Edwin Sifuna***, ***Complaint No. 33 of 2017*** and ***Kingsley Wellington Odida Obonyo vs Joseph Ouma Ndonji & Orange Democratic Movement, Complaint No. 272 of 2017,*** where the DRC expressed itself as follows:

> **"We note that the exclusive jurisdiction to hear disputes arising out of political party primaries is specifically conferred to the Political Parties Disputes Tribunal by statute and in the circumstances this Committee must immediately down its tools."**

The IEBC, concluded counsel, was not only in abuse of the process of the court but also engaging in selective application of the law and/or its powers.

23. We have anxiously considered the first issue. We must remind ourselves on the outset that this appeal arose from a decision of the lower court in exercise of its discretion to grant or not to grant judicial review orders. For this Court to interfere with 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 into account considerations which it should have taken into account or that the court ultimately arrived at a wrong conclusion.

Those principles are now old hat and have been followed for more than 50 years.

See ***Mbogo & Another vs Shah (1968) E A 93***.

24. We have no doubt in our minds that there was a common thread between the matter that, on the one hand, commenced at the level of ODM's NAT, went through the PPDT, the High Court and ended up in the Court of Appeal, and, on the other hand, the matter that was commenced and ended with the DRC of IEBC. The thread was who between Odege and Anyanga was the lawfully nominated party candidate to contest the seat for member of National Assembly in Nyatike constituency. Before close of the party nominations period, there was no clarity on that issue as the parties were still embroiled in litigation and there were subsisting court orders and a pending appeal to this Court. It is argued that the IEBC was squarely within its remit under the Constitution and the Act and it cannot therefore be accused of abuse of court process. With respect, we think in the circumstances of this case, the IEBC acted like a bull in a china shop.

25. There was full disclosure by the parties that the matter had gone through the political party resolution mechanisms and was indeed pending on appeal before a court of law. The retort by IEBC was that the courts had no business interfering with the powers bestowed on it under ***Article 88(4)(e)*** and ***Section 74*** of the Act. In our view, there is no contest about those powers as they are fully protected when the DRC is seized of a matter at first instance. It has been shown in some cases cited before us that IEBC has in the past respected the process of party dispute resolution mechanisms and deferred to decisions made thereunder. It has also been shown that IEBC has in other cases adopted a combative stance in attempting to rubbish some decisions relating to nominations. It did so in the case of ***Kyalo Peter Kyuli vs Honourable Wavinya Ndeti & 3 Others (2017) eKLR; Civil Appeal No. 193 of 2017,*** but this Court was emphatic that:

> **"*In this c*ase, the issues that are being raised in the complaint before the IEBC Committee were in substance similar to the complaint that was raised before the PPDT. Indeed, at paragraph 6 of his affidavit the appellant made it clear that his complaint was brought under Rule 9 of Procedure on Settlement of Disputes that provides for complaints relating to the nomination of a candidate. The matters being raised by the appellant before the IEBC Committee were generally the same issues that the PPDT ought to have addressed. In inviting the IEBC Committee to determine the complaint, the appellant was in effect reopening the issue of Wavinya's nomination. This amounted to inviting the IEBC Committee to sit on appeal or review the decision of PPDT a power that the IEBC Committee did not have. To this extent, the IEBC Committee wrongly exercised its powers."**

26. The **Constitution** in ***Article 162*** and the **Judicature Act,** sets out the hierarchy of Kenyan courts. The architecture of such hierarchy does not envisage an inferior tribunal exercising supervision over superior courts. The DRC, as an inferior tribunal cannot therefore entertain matters that have been canvassed and determined before superior courts, and purport to pronounce findings that directly contradict that of superior courts in the same subject matter.

27. We have carefully examined the basis upon which the trial court exercised its discretion and we have no basis for faulting it as it was judicious. It followed a similar decision by the same court in ***Republic vs Independent Electoral and Boundaries Commission & 3 Others Exparte Wavinya Ndeti [2017] eKLR***, where it stated:

> **"It is now clear that the PPDT deals with disputes arising from party primaries and this is clear from its jurisdiction. The IEBC on the other hand, it is my view, deals with nomination disputes that do not fall within the jurisdiction of the PPDT since appeals from the PPDT do not lie to the IEBC but to the High Court. If it were the position that the IEBC Committee would be free to determine issues which had already been determined by the PPDT without an appeal being preferred to the High Court, that position would amount to elevating the IEBC to an appellate Tribunal over the decisions of the PPDT. That scenario would also imply that even where a decision of the PPDT has been the subject of the High Court's appellate jurisdiction, the IEBC might still be at liberty to entertain such a matter under the guise of resolving a nomination dispute. To my mind that would clearly be contrary to the principle of judicial hierarchy and would be incongruous to the statutory scheme and subversive of the true legislative intent. If it were so, the legislative intent would have been devoid of concept of purpose."**

28. At the appellate level, this Court reinforced that thinking, stating thus:

> **"It is trite that the principle of res judicata does not apply in the exercise of the powers of judicial review. Nevertheless, the High Court could not ignore the fact that PPDT had made a clear pronouncement in its decision in regard to Wavinya's status, nor could the court sit back where it is clear that a quasi-judicial body such as the IEBC Committee is abusing its powers. Contrary to the submissions made by the appellant, the inherent power of the Court is the essence of its judicial authority to ensure that justice is done to all. Moreover, in discharging its duties, the learned judge had the responsibility to ensure that the purpose and principles of the Constitution are protected and promoted without the Court being shackled with undue regard to technicalities; and that the dignity of due process is maintained. Therefore, it was proper for the High Court to exercise its inherent jurisdiction in preventing the apparent abuse of process by the IEBC Committee.**"

29. Abuse of court process was clearly evident in this matter. The remit of IEBC is circumscribed by ***Article 88(5)*** of the Constitution which binds it to **"*.... exercise* its powers and perform its functions in accordance with this Constitution and *national legislation."*** If and when it breaks those bounds, the courts are there to turn it back to the straight and narrow path. The appellant too had no business straddling two dispute resolution mechanisms in the manner of forum shopping. The first ground of appeal fails.

30. The second and last ground is on the order for costs. The parties acknowledge that generally the costs in any litigation lie in the discretion of the court, and that they follow the event unless the court, for good reason otherwise orders. See **Section 27(1) Civil Procedure Act.** The appellant lost the suit before the trial court and the costs followed the event. He now makes the submission that the trial court had made errors in the manner it construed the law in the main suit and should not have awarded costs to the 1st respondent. The cases of ***Supermarine Handline Services Ltd vs Kenya Revenue Authority (2010) eKLR*** and ***Timothy Busienei & 2 Others vs Mechai International Limited (2017) eKLR*** were relied on.

31. It was also submitted that the matter involves public interest where costs are not normally awarded. The public, in the appellant's view,

are the people of Nyatike constituency who were anxious to know their representative in the 12th Parliament. The Supreme Court decisions in ***Jasbir Singh Rai & 3 Others vs Tariochan Singh Rai & 4 Others (2014) eKLR*** and ***Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others (2014) eKLR*** were relied on.

32. IEBC did not make any submissions on the issue of costs.

33. In response, the 1st respondent asserted that he had engaged legal counsel at some considerable cost to pursue his legitimate claims with dispatch. He was successful in that endeavour and there was no reason to interfere with the discretion of the trial court. In his view, a contest between two individuals seeking the nomination of a political party has no legitimate public interest element. In counsel's view, the cases relied on by the appellant support the 1st respondent view.

34. We have considered the matter and, once again, it boils down to interference with the discretion bestowed on the trial court. An appellate court does not simply interfere 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 reason propounded here is that the matter was in the public interest. We are afraid we cannot agree with that proposition. Taken to its logical conclusion, it would mean that no costs of election petitions should be made by any court since they are matters of public interest. The appellant did not assist us with the definition of *'public interest'*, but **Black's Law Dictionary** refers to *"Public Interest Litigation"* as:

> **"a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected".**

35. The best examples are in ***Articles 22(2) (a)*** and ***258*** of the **Constitution** which grant every person the right to move the court in the ***'public interest'*** where there is a claim or alleged contravention or infringement of a right or fundamental freedom, or threat thereto, or a contravention or threat to violate the Constitution**.**

Those are the cases which the Supreme Court referred to in the ***Jasbir Singh Rai case (supra)***, stating:

> **"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..."**

The reason is that in public interest litigation, a litigant usually advances public interest as opposed to personal gain.

36. Mativo, J. further explained the principle in the case of ***Brian Asin & 2 Others vs Wafula W. Chebukati & 9 Others [2017] eKLR*** citing the Indian case of ***Ashok Kumar Pandey vs State of West Bengal*** **AIR 2004 SC 280** where it was held:-

> **"Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. As indicated above, Court must be careful to see that a body of persons or member of public, who approaches the court is acting bona fides and not for personal gain or private motive or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique considerations. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs."**

37. We have come to the conclusion that there was minimal, if any, public interest in the litigation the subject matter of this appeal. It was more actuated by personal gain or political motivation than public interest and, therefore, the contention must be rejected that the winner in the legal contest should be deprived of his costs. It would have been a wrong exercise of the judicial discretion to order a party who was completely successful, and against whom no misconduct was alleged, to pay or deprive him of costs of the litigation. The trial court was right to award costs to the 1st respondent, particularly after making the finding, which we uphold, that the appellant and the 2nd respondent were in abuse of the court process. This ground of appeal also fails.

38. The upshot is that the appeal has no merit in its totality and we order that it be and is hereby dismissed. As it is of academic utility, we make no order as to costs.

Dated and delivered at Nairobi this 11th day of May, 2018.

P. N. WAKI

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR