IN THE COURT OF APPEAL

AT NAKURU

[CORAM: NAMBUYE, SICHALE & KANTAI,JJA]

CIVIL APPEAL NO. 55 OF 2017

BETWEEN

HOSEA SITIENEI…….……...APPELLANT

VERSUS

UNIVERSITY OF ELDORET…….....1ST RESPONDENT

THE VICE CHANCELLOR,

UNIVERSITY OF ELDORET…….…..2ND RESPONDENT

ATTORNEY GENERAL..……...3RD RESPONDENT

(Being an appeal against the Judgment and order of the Employment and Labour Relations Court of Kenya at Kericho (Hon. D.K.N. Marete, J,) dated 14th November, 2016

in

E.L.R.C. Petition No. 10 of 2016

****

BETWEEN

HOSEA SITIENEI…….….PETITIONER

VERSUS

UNIVERSITY OF ELDORET & 2 OTHERS……....RESPONDENT

AS

CONSOLIDATED WITH NAKURU CIVIL APPEAL NO. 58 OF 2017

BETWEEN

PROFESSOR EZEKIEL KIPROP……...…….APPELLANT

VERSUS

THE UNIVERSITY OF ELDORET…….….1ST RESPONDENT

THE VICE CHANCELLOR,

UNIVERSITY OF ELDORET……..…..2ND RESPONDENT

THE CABINET SECRETARY FOR EDUCATION,

SCIENCE & TECHNOLOGY……..……....3RD RESPONDENT

(Being an appeal against the Judgment and order of the Employment and Labour Relations Court of Kenya at Kericho (Hon. D.K.N. Marete, J) dated 14th November, 2016

In

Kericho ELRC Petition No. 11 of 2016)

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JUDGMENT OF THE COURT

This Judgment is in respect of two appeals namely, appeal numbers 55 & 58 of 2017, consolidated by consent on the 16th day of April, 2018. Both appeals arose from separate Judgments of the Hon. **Mr. Justice D.K. Njagi Marete, J**, in Petition numbers 10 and 11 of 2016, separately signed, dated and delivered on the 14th day of November, 2016.

The background to the appeals is that both appellants were employees of the 1st respondent. The 2ndrespondent was the 1st respondent's Chief Executive Officer (C.E.O) (the respondents).The appellant in Civil Appeal number 55 of 2017, **Hosea Sitienei** (**Hosea)** was a Finance Officer, while the appellant in Civil Appeal number 58 of 2017, **Professor Ezekiel Kiprop (Ezekiel)** was the Deputy Vice Chancellor, Finance and Administration.

On the 17th day of July, 2015, both appellants were separately suspended from duty pending investigations. They filed Nakuru ELRC case number 8 of 2015, seeking to block the 1st respondent's investigations against them. In a ruling dated the 6th day of November, 2015, **Radido Stephen, J**, declined to halt the investigations but directed that they be served with investigations results reports before any disciplinary action could be taken against them.

In utter disregard of the above directions, the respondents commenced disciplinary proceedings against the appellants prompting **Hosea** to file Nakuru ELRC Petition Number 2 of 2016, while **Ezekiel** filed Nakuru ELRC Petition Number 1 of 2016,seeking various but almost similarly worded reliefs. Both Petitions were opposed by the respondents. They were also heard separately resulting in separate but almost similar judgments by **Radido Stephen, J**, signed, dated, and delivered separately on the 3rd day of July, 2016, in which the Judge ruled that he had jurisdiction to entertain the petitions, but declined to interfere with the disciplinary process then initiated by the respondents against the appellants, citing existence of adequate constitutional and statutory safeguards and remedies in the event any allegation of unfair administrative action or unlawful termination of employment arising. The respondents carried through the disciplinary proceedings against the appellants to finality and dismissed the appellants from their respective employments with the 1st respondent.

Both appellants were aggrieved by the outcome of those disciplinary proceedings, and separately filed the above petitions resulting in the now consolidated appeals. In summary, the appellants challenged the terminations contending that the said terminations were unlawful, irregular and illegal, first on account of breach of constitutional provision and lack of mandate in the 1st respondent's council to execute that function and second, breach of the Constitutional and statutory provisions specified in the respective petitions.

The particulars of specific violations of the appellant's rights were given *inter alia* as disobedience to the orders issued by the court on the 6th day of November, 2015; failing to avail the appellants with documentary exhibits and thereof denied them a fair, open, transparent and accountable termination process; subjecting the appellants to a choreographed process, based on mutating complaints, caprice, whimsical reasons unknown to law, only motivated by personal interests and malice.

On the totality of the above, the appellants sought declarations that:-

(a) The terminations of the appellants' employment vide the letters dated the 18th January, 2016 violated Articles 41, 47 and 50 of the Constitution of Kenya, 2010, hence null and void.

(b) The termination of the employment of Hosea was contrary to section 41, 43, 45 and 47 of the Employment Act, hence illegal.

(c) That within the intent of Articles 10, 41, 47 and 73 of the Constitution of Kenya 2010, the respondents were escapists and had abdicated their duties to respect and uphold the Constitution of Kenya in the discharge of their administrative actions.

(d) An order that the appellants be reinstated back to their respective positions of employment with the first respondent and be allowed to resume their duties.

(e) In the alternative that the respondent be compelled to pay to Hosea six (6) months' salary in lieu of notice, twelve (12) months' salary for unfair termination and leave days not taken; retirement benefits and other benefits due to him and such other compensation as the Court deems fit for violation of his rights as indicated above, while Ezekiel on the other hand

sought compensation by way of damages being not less than twelve (12) months' salary for violation of his rights as indicated above. Alternatively, Ezekiel to be paid his remuneration/salary for the remainder of his contract as the Deputy Vice Chancellor Finance, twelve (12) months' salary and 6 months' notice.

(f) The respondent to pay the costs of both petitions.

The Petitions were separately opposed by replying affidavits deposed by Professor **Teresa O. Akenga** on the 24th day of May, 2016 contending *inter alia* that the petitions were *res judicata;* that the appellants petitions basically touching on personal and private law matters have been disguised and laced with Constitutional allegations and were therefore in the circumstances misconceived; further that, the appellants were subjected to a fair, just, expeditious and transparent disciplinary processes; and that the 1st respondent's council members were validly in office. The disciplinary process undertaken by the said council against the appellants was lawful, regular and therefore valid.

The trial Judge, the Honourable **Mr. Justice D.K. Njagi Marete, J**, separately assessed and analyzed the records in both petitions and separately dismissed them on account of being *res judicata.*

The appellants filed their respective appeals against the above decisions raising eight (8) grounds of appeal in each, subsequently compressed into three main issues at the hearing. It is the appellants' complaints that the trial Judge erred both in law and in fact:-

(1) When he held that the appellants' respective petitions were *res judicata*.

(2) When he disregarded the appellants' submissions on the invalidity of the 1st respondent's council.

(3) When he failed to set out in the impugned Judgments the points for determination and the reasons for the determination of each point.

In support of ground 1 the appellants submitted that the doctrine of *res judicata* which as provided for in section **7** of the Civil Procedure Act (CPA), Cap 21 laws of Kenya implies that for a matter to be *res judicata*, the matter in issue must be similar to those which were previously in dispute as between the same parties or others through whom they claim; and that the same were determined on merits by a court of competent Jurisdiction.

In light of the above threshold, it is the appellants' contention that the initiation of the investigation which was the substratum in Nakuru ELRC Petition number 8/2015; the suspension from duty which was the substratum of Nakuru ELRC Petition number 1 & 2 /2016; and the conduct/legality of the disciplinary proceedings and the termination of the appellants respective employments with the 1st respondents, vide a letter dated the 18th day of January, 2016, which was the substratum of Kericho Petition numbers 10 & 11 of 2016, were three completely distinct events, which the appellants chose and pursued as three distinct causes of action giving rise to different sets of outcomes as already highlighted above. On that account, the appellants urged us to fault the findings of the trial Judge for misapprehending not only the facts but also for misapplying the doctrine of *res judicata* to those facts.

To buttress the above submission, the appellants relied on the provision of section **7** of the CPA together with the attendant explanatory notes; the case of **Njue Ngai versus Ephantus Njiru Ngai & another [2016] eKLR**, in which the Court approved the prerequisites for *res judicata* as enunciated by the Court in **Uhuru Highway Development Limited versus Central Bank of Kenya & 2 others [1996] eKLR**, namely that, in order for a party to rely on a defence of *res judicata*, there must be:

(i) A previous suit in which the matter was in issue;

(ii) The parties were the same or litigating under the same title;

(iii) Competent court heard the matter in issue;

(iv) The issue has been raised once again in a fresh suit.

The appellants also cited **DOO versus JAO** [2015] eKLR, in support of their submissions that since the pleadings in Nakuru Petition numbers 8/2015, 1/2016 and 2/2016 were not placed before the trial Judge, there was no way the trial Judge could have ascertained that the issues in the previous petitions were similar to those in the petitions that he was seized of so as to invoke and apply the doctrine of *res judicata* to those petitions.

In support of ground 2, the appellants submitted that, the process that led to the termination of the appellants respective employments with the 1st respondent stood vitiated and therefore an illegality which should not have been sustained by the trial court for the reason that the 1st respondents' council that purported to execute the impugned disciplinary and termination processes was illegally in office for the 1st respondent's failure to comply with sections 36(1) (d) of the University Act, 2012, in the recruitment exercise of the affected council members.

The appellants continued to urge that they annexed to their respective supporting affidavits, a notice for the dissolution of the 1st respondent's council by the Cabinet Secretary for Education, Science and Technology, which the respondents never controverted and which in the appellants' view, demonstrated that there was no subsequent advertisement, short listing and interviews conducted by the 1st respondent for the appointment of the council members who conducted the disciplinary proceedings against the appellants following the dissolution of the immediate previous council. The recruitment exercise was therefore not open and transparent as constitutionally required.

On the totality of the above submissions, the appellants urged us to find that the trial court should not have sanctioned the actions of the 1st respondent's illegitimate council which purported to arrogate to itself disciplinary powers and in the process of doing so, illegally and unprocedurally terminated the appellants' employment with the 1st respondent.

To buttress the above submissions, the appellants cited section **36(1) (d)** of the Universities Act 2012, which stipulates that the council of a public University shall consist of nine persons appointed by the Cabinet Secretary for the time being for Education, Science & Technology through an open process; and the case of **Joseph Mutura Mbarire & another versus Cabinet Secretary for Education, Science and Technology & 2 others [2014] Eklr**, for the criteria for the appointment of any Public University council members.

Turning to the last ground, the appellants submitted that both Judgments as separately delivered by the trial court contravened the provisions of order **21** rule **4** of the Civil Procedure Rules (CPR), which provides that judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reason(s) for such decision. The appellants also relied on Rule **28(2)** of the ELRC Procedure Rules 2016, which makes provision that a decision of that court should be in writing and shall, contain a concise statement of the facts and the reason(s) for the decision.

On account of the above submissions, the appellant urged us to find that the reasons on the basis of which the Judge arrived at the conclusion that the appellants' respective petitions were *res judicata* were never set out by the trial Judge. Neither did the Judge give an indication as to the particular proceedings in which the appellants had challenged the 1st respondent's termination of their employments with the 1st respondent and a decision thereof given on merit.

To buttress the above submissions, the appellants cited the case of **Cosmas Maweliwe Wapukhulu versus Sameer Africa Limited** (previously known as **Firestone East Africa [1969] Limited**) **[2018] eKLR,** for the holding *inter alia* that failure of a trial Judge to give an answer to each of the issues framed for determination vitiates a Judgment.

In opposition to the appeals, the respondents submitted that the trial Court properly invoked and applied the doctrine of *res judicata* which is a statutory principle that has been adopted in the judicial process to guard against abuse of the judicial process; that as embodied in section **7** of the CPA, the principle of *res judicata* applies to bar subsequent proceedings when there has been adjudication by a court of competent and concurrent jurisdiction which conclusively determined the rights of the parties with regard to the latter matters in controversy as between the disputing parties.

The respondent *inter alia* relied on the case of **DSV versus the Owners of Sennar**[1985] **2 ALLER 104**,as approved in **Benard Mugo Ndegwa versus James Nderitu Githae and 2 others** [2010] eKLR, for the tests for *res judicata,* namely: That a party alleging *res judicata* must show that (a) the matter in issue is identical in both suits, (b) that the parties in the suits are substantially the same, (c) that there is a concurrence of jurisdiction of the court, (d) that the subject matter is the same and finally, (e) that there was a final determination as far as the previous decision is concerned.

Applying the above threshold to the record, the respondents contended that the impugned Judgments met all the five (5) tests on *res judicata,* because petitions number 10 & 11/2016 were a copy and paste of the issues that fell for determination in Nakuru ELRC Petitions Number 8/2015 and Number 2 of 2016. Secondly, the parties in both sets of the petitions were the same. Thirdly, that the Honourable Mr. Justice **Radido Stephen, J**, who heard and determined petitions 8/2015 and 1 & 2 of 2016, and the trial Judge who heard petitions numbers 10 & 11 of 2016, had a similar and equal jurisdiction, hence there was concurrence of jurisdiction. Fourthly, that the subject matter of both sets of petitions were the same namely the disciplinary proceedings initiated by the 1st respondent against the appellants, and lastly, that the Judgments in Petitions 8/2015 and 1 & 2 of 2016 met the 5th test.

To buttress the above submissions, the respondent cited the case of **E.T. Versus Attorney General & Another** [2012] eKLR, for the holding *inter alia* that, courts of law must always be vigilant to guard against litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the court; and the case of **Omondi versus National Bank of Kenya Limited and others** [2001] EA 177, for the holding *inter alia* that, parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit.

It was further the respondents submission that the trial Judge properly appreciated and addressed all the issues in controversy as between the parties and arrived at the correct conclusion that the appellants were given an opportunity to defend themselves but ignored that opportunity; and second that the appellants were subjected to a fair, just, expeditious and transparent disciplinary processes before their employments with the 1st respondent were terminated. The respondent also submitted that the constitutional petitions were rightly rejected by the trial Court, as the appellants failed to demonstrate how the constitutional provisions cited by them had been breached with regard to the disciplinary proceedings conducted against them. Secondly, that the appellants' complaints fell into the private law realm and were therefore not justiciable as constitutional issues.

On the appointment of the 1st respondent's council, the respondents simply conceded that this was regulated by the Universities Act 2012.

To buttress the above submission, the respondents cited the case of **Anarita Karimi Njeru versus the Republic** [1976-1980] KLR 1272, for the holding *inter alia* that, a party seeking redress for alleged constitutional violations against his/her rights has the duty to set out with a reasonable degree of precision, the alleged breaches as well as the constitutional provisions alleged to have been infringed and the manner in which such infringement had been occasioned. The case of **Northern Nomadic Disabled Persons Organization (Nandos) versus the Governor County Government of Garissa & another** [2013] Eklr, wherein a constitutional petition was vitiated for the failure to meet the threshold in the **Anarita Karimi Njeru** case (supra). Also cited was the case of The **Management Committee of Makondo Primary School and another versus Uganda National Examination Board,** HC Civil Misc Application No. 18 of 2010; and the case of **Amraphael Mbogholi Msagha versus Chief Justice & 7 others** Nairobi [2006] 2KLR 553, both for the holding *inter alia* that, a decision arrived at in breach of the rules of natural justice is null and void for all intents and purposes.

With regard to the trial Court's Judgments, the respondents submitted that both impugned Judgments met the threshold for the drafting of Judgments under order 21, rule 4 CPR as the trial Judge gave reasons that the appellants had failed to demonstrate a denial of the substantive and procedural fairness stipulated in sections**41, 42** and **43** of the Employment Act, 2007, and Article **41, 47** and **50** of the Constitution of Kenya 2010. Secondly, that the petitions offended the rule on *res judicata,* which in the respondents' view were sufficient reasons to sustain the impugned judgment.

This is a first appeal. In the case of **Selle & Another versus Associated Motor Board Company Ltd and Others [1968] 1 EA 123,** the Court of Appeal for Eastern Africa set out the principles to be considered when determining an appeal from the High Court as follows:-

> **"An appeal from the high Court is by way of retrial and the Court of Appeal is not bound to follow the trial Judge's findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inhabited with the evidence generally."**

We have considered the record in light of the above mandate, the rival submissions and principles of law relied upon by the parties in support of their opposing positions. In our view, the issues that fall for our determination are the following:

> ***1. Whether Kericho ELRC Petition numbers 10 & 11 of 2016 were res judicata.***
>
> ***2. Whether the trial Judge disregarded the appellants' submission in the determination of Kericho ELRC Petition numbers 10 & 11/2016 with regard to the legality or otherwise of the 1st respondent's council that conducted disciplinary proceedings against the appellants.***
>
> ***3. Whether the impugned Judgments met the threshold in order 2 rule 4 of the CPR and Rule 28(2) of the ELRC procedure Rules.***

With regard to issue number 1, the doctrine of *res judicata* in Kenyan civil l aw is enshrined in Section 7 of the CPA. It provides that:

> ***"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."***
>
> ***Explanation (1) – the expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it. Explanation (2) – For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to right of appeal from the decision of that Court.***
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> ***Explanation (3) - The matter above referred to must in the former suit have been alleged by one party and either denied or admitted expressly or impliedly, by the other.***
>
> ***Explanation (4) – Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.***
>
> ***Explanation (5) – Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.***
>
> ***Explanation (6) – Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall for the purposes of this section, be deemed to claim under the persons so litigating.***

In **Black's Law Dictionary**, ninth Edition *res judicata* is defined as:

> **"(i)*an issue that has been definitively settled by judicial decision;***
>
> ***(ii) An affirmative defence barring the same claim or any other claim arising from the same transaction, or series of transactions and that could have been- but was not-raised in the first suit".***

In **Henderson –vs- Henderson (1843-60) ALL E.R. 378**, the following observation was made:

> ***"…where a given matter becomes the subject of litigation in, and of adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time".***

See also **Uhuru Highway Development Limited –versus Central Bank of Kenya & 2 others** (supra).

From the above analysis, it is our finding that the ingredients for *res judicata* are firstly, that the issue in dispute in the former suit must be directly or substantially in dispute between the parties in the latter suit where the doctrine of *res judicata* is pleaded as a bar. Secondly, that the former suit should be between the same parties, or parties under whom they or any of them claim, litigating under the same title; and, lastly that the Court or tribunal before which the former suit was litigated was competent and determined the suit finally.

In our view, the import of the above threshold is that the doctrine of *res judicata* seeks to ensure conclusiveness in legal proceedings, in that it bars further legal proceedings based on the same issues(s) over the same subject matter between the same parties or their proxies. In bringing to an end the litigation, the doctrine ensures that a party is not vexed twice or forced to fight the same battle twice over the same cause. In this regard, it is therefore our reiteration that Section 7 of the CPA therefore entrenches the prerequisites to be met before a defence of *res judicata* can be sustained.

Applying the above threshold to the rival submissions in this appeal, it is our finding that although it is not disputed that the appellants and the respondents herein were litigating in opposing positions in Nakuru ELRC petition number 8/2015, and 1 & 2 of 2016, the subject matter and the conclusions reached in each set were not one and the same to the extent that such conclusions as reached in the said petitions would invite the application of the doctrine of *res judicata* to vitiate ELRC Kericho petitions numbers 10 and 11 of 2016.

Our reasons for finding so are because the unsuccessful proceedings in ELRC petition No.8 of 2015 and numbers 1 & 2/2016 sought the Court's intervention to halt the investigations then initiated by the 1st respondent against the appellants which proceedings were the precursor to the disciplinary proceedings the appellants intended to halt but ran full throttle, resulting in the termination of the appellants' employment with the 1strespondent, forming the basis for the appellants complaints in petitions numbers 10 and 11 of 2016. On the totality of the above reasoning, we hold that the doctrine of *res judicata* was inapplicable in the circumstances giving rise to the consolidated appeals as the causes of action in the three sets of petitions were distinct and were rightly pursued as such.

With regard to the second issue, the totality of the appellants' uncontroverted complaint is that the 1st respondent's council members who undertook the disciplinary proceedings against them were neither appointed, nor recruited to that office in accordance with Section 36 (1) (d) of the Universities Act 2012. All that the respondents put forth in rebuttal of the above appellants' assertions was simply that allowing the reliefs appellants sought against the affected council members would not only amount to an infringement of the cardinal principle of natural justice that a party should never be condemned unheard, considering that the affected council members had not been enjoined to the litigation. Second that Article 50 of the Constitution of Kenya 2010 which guarantees fair hearing would also be infringed. Thirdly, that matters raised against the council fell into private law realm and were therefore not justiciable as constitutional law issues.

Our take on the above opposing positions is that if at all the 1st respondent had complied with the statutory threshold in section 36(1)(d) of the Universities Act 2012, in the recruitment exercise that brought on board the council members who conducted the disciplinary proceedings against the appellants, nothing prevented them from simply exhibiting such proof. In default, the only plausible inference to be drawn from that default is that no such compliance with the said statutory prerequisite as stipulated in section 36 (1) (d) of the University Act 2012, was ever undertaken by the 1st respondent in the recruitment of the affected council members. It therefore follows that the affected council members had no mandate to undertake the conduct of the disciplinary proceedings against the appellants as it purportedly did. The termination of the appellants from their respective employments with the 1st respondent therefore stood vitiated, an illegality, which the trial court should not have sanctioned and which this Court should neither countenance nor allow to stand.

Turning to the last issue, the approach the trial Judge took to determine the respective petitions was to give a brief background of the petitions with regard to the complaints raised in the reliefs sought by the appellants in each petition, reproduced selected paragraphs of the respondents' responses to the appellants' complaints in those petitions, followed by observations on those responses, set out the decisions in ELRC Nakuru petitions number 8/2015 and ELRC Nakuru petition numbers 1&2/2016, and then drew out conclusions that the two petitions were *res judicata,* and dismissed them accordingly.

We find nothing in the above sequence of the approach that the trial Judge took in determining the two subject petitions that could demonstrate compliance with the prerequisites in order 21 rules 4 of the CPR and Rule 28(2) of the ELRC procedure rules which in our view accounts for the misapplication of the doctrine of *res judicata* on the one hand, and the failure to arrive at the only plausible inescapable conclusion that lack of demonstration of compliance with section 36(1) (d) of the Universities Act 2012, on the part of the 1 st respondent with regard to the appointment to office of the 1st respondent's council members who conducted the disciplinary proceedings against the appellants rendered their action null and void *ab initio* as the said council members were in essence illegally in office.

As for costs, the substantive provision on costs is section 27 of the CPA. It provides:

> **Sec.27(1)"Subject to such conditions and limitations as may be prescribed , and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by who and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:**
>
> **Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.**
>
> **(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such"**

In the High Court case of the **Party of Independent Candidates of Kenya versus Mutula Kilonzo & 2 others, HC EP No. 6 of 2013**, the High Court had this to say on the issue of costs:-

> **"It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place, the award of costs is a matter in which the trial judge is given discretion …. But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, is a rule which should not be departed from without the demonstration of good grounds for doing so."**

In **Richard Kuloba, Judicial Hints on Civil Procedure, 2nd Edition, page at page 101,** the author authoritatively states as follows:-

> **"The law of costs as it is understood by Courts in Kenya, is this, that where a plaintiff comes to enforce a legal right and there has been no misconduct on his part-no omission or neglect, and no vexatious or oppressive conduct is attributed to him, which would induce the Court to deprive him of his costs- the Court has no discretion and cannot take away the plaintiff's right of costs. If the defendant, however innocently, has infringed a legal right of the plaintiff, the plaintiff is entitled to enforce his legal right and in the absence of any reason such as misconduct, is entitled to the costs of the suit as a matter of course".**

The jurisdiction of this Court to intervene and interfere or otherwise with an award of costs made by the Court appealed from is donated by Rule 31 of the rules of the Court. It provides:

> ***"31. On any appeal the Court shall have power, so far as its jurisdiction permits, to confirm, reverse or vary the decision of the superior court, or to remit the proceedings, to the superior Court with such directions as may be appropriate, or to order a new trial, and to make any necessary incidental or consequential orders, including orders as to costs".***

In ***Devram Dattan versus Dawda [1949] EACA 35,*** the predecessor of the Court held *inter alia* that it is trite law that the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case and which discretion, being a judicial discretion must be exercised judiciously and on facts. That the question of the sufficiency or otherwise of those grounds for purpose of determining whether to grant or withhold an order for costs is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with the exercise of discretion under those circumstances except within the limits permitted by law.

In ***Supermarine Handling Services Ltd versus Kenya Revenue Authority [2010] eKLR),*** the Court provided guidelines that 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; that, where a trial Court has exercised its discretion on costs, an appellate Court should not interfere unless the discretion is shown to have been exercised injudiciously or on wrong principles. For example, where the trial Court gives no reason for its decision; or alternatively where the reasons given do not constitute "good reason" within the meaning of the rule.

In ***James Koskei Chirchir versus Chairman Board of Governors Eldoret Polytechnic [2011] eKLR,*** the Court reiterated that an award of costs is generally a matter within the discretion of the Court save that where costs are withheld from a successful party, the Court ought to give an explanation as to the reason for withholding such costs. Where no explanation has been given, the appellate Court has jurisdiction to inquire into the surrounding circumstances and intervene as deemed appropriate.

In ***John Kamunya & another versus John Ngunyi Muchiri & 3 others [2015] eKLR***, the Court stated that as a general rule, an award of costs follows the event and a successful litigant will be awarded costs so as to recoup the costs he has undergone in the litigation on.

In ***Robric Limited & another versus Kobil Petroleum Ltd & another, Nairobi CA No. 109 of 2015,*** the Court added that the court may not only consider the conduct of the parties in that actual litigation giving rise to the award of costs, but also the contribution of the parties' conduct towards the causation of the matters triggering the litigation by the party in whose favour the order of costs was declined.

Applying the above distilled principles to the rival submissions on this issue, it is our finding that in this appeal, the award of costs will follow the event – that is the outcome of the appeals.

The upshot of the above assessment is that we find merit in the consolidated appeals. They are accordingly allowed. The impugned Judgments in Kericho ELRC petition numbers 10 & 11/2016 respectively are accordingly set aside and substituted thereto with an order of a declaration that:

(1) The purported termination of the appellants' respective employment with the 1st respondent was null and void.

(2) The matter is remitted back to the E.L.R.C Kericho for assessment of appropriate remedies attendant thereto by a Judge other than the Hon. Mr. Justice **D.K.N Marete.**

(3) Costs of the appeals to the appellants.

Dated and delivered at Nakuru this 18th Day of October, 2018.

R. N. NAMBUYE

JUDGE OF APPEAL

F. SICHALE

JUDGE OF APPEAL

S. ole KANTAI

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR