



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MARAGA, MWERA & MWILU, JJ.A)

CIVIL APPEAL NO 294 OF 2013

BETWEEN

ABDINASIR YASIN AHMED.....1ST APPELLANT

UBAH ABDULLAHI SANEI.....2ND APPELLANT

YUSUF SULEIMAN AHMED.....3RD APPELLANT

AND

AHMED IBRAHIM ABASS.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

GEORGE CHEGE.....3RD RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya

at Nairobi by the Honourable Justice A. Mabeya dated 25th September 2013

in

Garissa High Court Election Petition No. 9 of 2013)

RULING OF THE COURT

1. The appellants in this appeal were the petitioners in Garissa High Court Election Petition No. 9 of 2013 in which they sought the nullification of the election of the 1st respondent as the Member of Parliament for Ijara Constituency. After hearing the petition, the High court (Mabeya J) dismissed it for lack of credible evidence. The appellants have now appealed to this court against that decision.

2. On 22nd November 2013, the 1st respondent filed a Notice of Motion under **Rules 42, 47 and 107(3)** of the **Court of Appeal Rules** and sought an order for provision by the appellant of further security for the costs of this appeal including security for the past costs of the petition giving rise to this appeal suggesting an aggregate sum of Kshs.6 million or such sum as this court may deem reasonable in the circumstances of this case. Pending provision of that further security for the costs this court may order, the 1st Respondent further prayed that the hearing of this appeal be stayed. He further prayed that in default of provision of the security this court may deem fit to grant, this appeal should be struck out with costs.

3. When this appeal came up for hearing before us on 28th November 2013, Mr. Kanjama, learned counsel for the 1st respondent, urged us to hear the application prior to hearing the appeal. Though Mr. Issa, learned counsel for the appellants, had not had enough time to file a replying affidavit, he said that he was ready to oppose the application. We therefore adjourned the hearing of the appeal and heard the application.

4. Presenting the application, Mr. Kanjama submitted that an applicant for an order for further security for costs does not have to prove the other side's inability to pay the costs that may eventually be ordered against him. All the applicant needs to do is to lay a basis for his application. In this case, he said, the 1st respondent has stated in his affidavit in support of the application that he knows the appellants as they come from the same area. They have no identifiable assets. That, on a balance of probabilities, in his view, suffices and the burden shifts to the appellants to demonstrate that they have the means to pay the costs of this appeal if the same is dismissed.

5. Mr. Kanjama further submitted that in the light of the appellants' concession that they sat down and decided who should file the petition, it is clear that the appellants are proxies of Sophia Abdi Noor, the 1st respondent's closest challenger for the Ijara seat who testified in the petition as PW1. The High Court granted the costs of the petition to the respondents but capped the 1st respondent's costs at Kshs.2.5 million and those of the 2nd and 3rd respondents at Kshs.1.5 million. He contended that the filing of the petition and this appeal is a stratagem by the said Sophia Abdi Noor to avoid paying the respondents' costs knowing that the appellants are impecunious and any attempt to recover costs from them will be an exercise in futility.

6. Ms Ombele, learned counsel for the 2nd and 3rd respondents supported the 1st respondent's application and prayed that any order this court may issue should cover the 2nd and 3rd respondent's costs as well.

7. Mr. Issa, learned counsel for the appellants, vehemently opposed this application. He submitted that the rationale for security of costs is to keep busybodies away from election petitions which are important disputes, which should be disposed of expeditiously, and applications like this should not be entertained. The requirement for security for costs relates only to the costs of the petitions. If Parliament intended it to also cover appeals, nothing would have been easier than providing for that. He dismissed the 1st respondent's contention that the appellants are impecunious as contemptuous as the appellants made the required deposits of Kshs.500,000/= in the High Court and Shs.2,000/= in this Court. At any rate, counsel further argued, as was held in the cases of **Marco Tool & Explosives Ltd v Mamujee Brothers Ltd [1986-89] EA 337** and **Messina & Another v Stallion Insurance co. Ltd, [2005] EA 264** inability to pay the anticipated costs is not a basis for an order of security. Counsel also dismissed the respondents' contention that the appellants are abusing the court process as the High Court did not summarily dismiss their petition. As a matter of fact, it upheld some of the appellants' grievances although it eventually dismissed their petition. He saw this application as a roadblock the 1st respondent is trying to erect to prevent the appellants from exercising their constitutional right of appeal and urged us to dismiss it as baseless.

8. We have considered the matter. **Rule 107(3)** of the **Court of Appeal Rules** provides that:

“The court may at any time if it thinks fit, direct that further security for costs be given and

may direct that security be given for the payment of past costs relating to the matter in question in the appeal.”

9. It is clear from this provision that the court has a wide and unfettered discretion to grant or dismiss an application for security of further costs. However, like in any other situation, this discretion has to be exercised judicially.

10. Megany VC propounded the provisions of **Section 401** of the English Companies Act in the case of **Pearson v. Naydler [1977] 3 All ER 531 at 535** as the general principle that should govern applications for security of costs. That section provided:

“Where a limited company is a plaintiff in any suit or other legal proceedings any judge having jurisdiction in the matter may if it appears by credible testimony that there is reason to believe the company will be unable to pay the costs of the defendant, if successful in his defence require sufficient security to be given for the costs and may stay the proceedings until the security is given.”

Section 401 of the Kenyan Companies Act is a word for word reproduction of this provision.

11. That principle, however, applies to limited liability companies or artificial persons and was applied in the **Marco Tool Explosives and Messina cases** (supra). As regards individual natural persons, a different principle applies. It was stated by the predecessor of this court in **Noormohamed Abdulla v Patel [1962] EA 447 at 453**:

“It is right that a litigant, however poor, should be permitted to bring his proceedings without hindrance and have his case decided.”

This principle had been stated in the earlier case of **Siri Ram Kaura v Morgan [1961] EA 462**. It is the principle applicable in this matter as the appellants are natural persons and not limited liability companies.

12. This is indeed a laudable principle. Roadblocks should not be erected to prevent poor people, who unfortunately are the majority in our country, from urging their causes. An application for security should not even be entertained if the respondent’s poverty has been occasioned or contributed to by the act of the applicant.

13. In our view, however, poverty is just but one criterion that should be considered in applications for security for costs. The other criteria include the types and bona fides of the litigants and the nature and merits of their cases. Known vexatious litigants should be required to deposit security for costs before their cases are heard. On the merits of the suit or appeal, clear frivolity will attract orders for security for costs. Each case should, however, be decided on its own merits care always being taken to ensure that the grounds upon which such applications are based are proved to the required standard.

14. The nature of the dispute in this case is an election dispute. Election disputes are a class of their own which attract additional considerations. Elections world over are competitive features. Presidents in many parts of the world, and especially in Africa, wield a lot of power. The influence that comes with the office makes its very attractive. That influence cascades down through all elective positions to the lowest. Candidates and political parties often do anything to be elected. Incumbent presidents who are eligible for re-election marshal state power and all means at their disposal to get re-elected. Besides the candidates, the electorate themselves, hoping for an improved standard of living, get equally excited. All these factors make elections at every level extremely high-pressure events.

15. Election disputes are therefore not ordinary disputes which concern only the parties to it. They are important disputes *in rem* the outcomes of which are the concerns of constituents and sometimes an entire nation. It is for this reason that we think the law permits not only the contestants in any particular election but also voters to institute election petitions.

16. While election disputes pend in court, the election mood is perpetuated in the constituencies concerned and sometimes, as already stated, in the entire nation. That engenders acts of thuggery and other crimes and therefore raises security concerns. That is why **Articles 105 and 140** of our Constitution and **Sections 85 and 85A** of the **Elections Act** set timelines within which they should be disposed off so that people can go on with their lives. So as the courts hear election petitions, they should not look only at the parties before them, but should always have at the back of their minds the bigger picture and the ramifications of their decisions and that the costs of staging them are astronomical.

17. While courts should endeavour to expeditiously dispose of election related disputes they should never lose sight of the fact that justice cuts both ways and the respondents should also be accorded a reasonable opportunity to present their cases. They should also remember that because of the high stakes politicians place on elective positions as stated above, election related disputes are expensive litigation. While every opportunity should be accorded to petitioners to be heard, respondents should not be made to needlessly suffer astronomical costs they will have no chance of recovering. Besides keeping busybodies away from election disputes, contentions like the one in this case that the appellants are proxies of the losers in the election should not be dismissed off hand either. Where there is proof they should seriously be considered. This is also the rationale behind the requirement for deposit for costs.

18. The courts therefore have a delicate balancing act to deal with in election related disputes. And as we have said, court decisions in such disputes may have grave ramifications on the security of the region concerned or the entire nation. In this unenviable position, courts should always be guided by the high sense of justice in each election dispute.

19. How do these principles play out in this application? As stated, this application is premised on the ground that the appellants have no identifiable assets. While, as we have observed, poverty should not be permitted to be a hindrance to the bringing and determination of suits (including election related disputes) on merits, justice cuts both ways and respondents should not be made to suffer costs they have no hope of recovering. In this matter, the appellants lost their petition with costs to the respondents, capped at Kshs.4 million. Although they have not been taxed, as we have stated election disputes are an expensive litigation. The taxed costs in the High Court could therefore be close to the capped figure.

20. The 1st respondent also alleged that the appellants are proxies of his closest challenger, Sophia Abdi Noor (Noor), in a stratagem intended to enable Noor avoid being held liable for the costs of the petition and this appeal. In support of this contention, Mr. Kanjama submitted that the appellants sat down with other people, agreed on who should file the petition and contributed money which they used as the requisite deposit in the petition.

21. In an application like this for security for costs, the burden is upon the applicant to establish his case. We do not agree with Mr. Kanjama that in that respect all the applicant needs to do is to assert, even without proof, the impecuniosity of the petitioner. He has to prove the basis and the allegations in support of his case.

22. In this case a perusal of the record of this appeal shows that the appellants were the major campaign agents of Noor. We therefore find that the appellants may very well be Noor's proxies as alleged.

23. In an application like this the respondents are the ones who know what they own. Except for physical assets in the local homes of the respondents, the applicant has no means of knowing the respondents' assets like bank deposits or shares in companies. In the circumstances, where a respondent is faced with an allegation like the one raised by the applicant in this application that he comes from the same area as the appellants and knows for a fact that they have no identifiable assets, in our respective view, pursuant to **Section 112** of the **Evidence Act** the burden shifts to the appellants to show that they have means of settling the costs, if any, that may be awarded against them. Other than asserting that they were able to pay the deposits required for the petition and this appeal, the appellants have not placed any evidence before us that they have means of settling any order of costs that may be made against them. We therefore find that this application has merit and we accordingly allow it.

24. The remaining issues to be determined are the quantum of costs to be secured and whether or not the hearing of this appeal should be stayed until the required security is provided.

25. As was stated in the cases of **Noormohamed and Marco Tool Enterprises** (supra), the quantum of the costs to be secured should be reasonable and modest. Once again the balancing act springs up. While the 1st respondent's likely costs should be secured, the figure determined by the court should not be prohibitive and thus block the appellants from pursuing their appeal. Taking into consideration these and the earlier stated points to be borne in mind in such an application, we find a sum of Kshs. 2 million a reasonable figure to be secured as the 1st respondent's costs in this appeal. In the circumstances we direct that the appellants shall within fifteen days of the date hereof deposit in court a further sum of Kshs.2 million or a bank guarantee for that sum. The 1st respondent's costs in the High Court having not been taxed we have no figure to secure.

26. Once a court has granted such an application, in our view, an order of stay of further proceedings is imperative otherwise the order of security will be defeated if the proceedings are allowed to go on and the matter is determined. Consequently, we order that until the above stated security is provided, the hearing of this appeal is hereby stayed. At the moment we do not wish to make any default order but the appellants should remember the legal requirement that election disputes should be disposed off as soon as possible and at any rate before the deadline of six months set by **Section 85A** of the Elections Act. The 1st respondent shall have the costs of this application.

Dated and delivered at Nairobi this 28th day of February, 2014.

D. K. MARAGA

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JUDGE OF APPEAL

J.M. MWERA

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JUDGE OF APPEAL

P.M. MWILU

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JUDGE OF APPEAL

I certify that this is A true copy of the original

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