



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WAKI, MWERA & M'INOTI, J.J.A.)**

**CIVIL APPEAL NO.40 OF 2011**

**BETWEEN**

**SIMON MBUGUA.....APPELLANT**

**AND**

**IBRAHIM AHMED.....1<sup>ST</sup> RESPONDENT**

**PRISCYLLAR A. WAMIRU**

**(RETURNING OFFICER KAMUKUNJI CONSTITUENCY).....2<sup>ND</sup> RESPONDENT**

**THE ELECTORAL COMMISSION OF KENYA.....3<sup>RD</sup> RESPONDENT**

**IN THE MATTER OF: THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS ACT CAP 7 PARLIAMENTARY AND PRESIDENTIAL ELECTIONS REGULATIONS AND THE NATIONAL ASSEMBLY ELECTIONS (ELECTION PETITION RULES)**

**AND**

**IN THE MATTER OF: THE ELECTION PETITION FOR KAMUKUNJI CONSTITUENCY**

*(Appeal from the Ruling & Order of the High Court of Kenya at Nairobi (Ang'awa, J.) dated 27<sup>th</sup> January, 2011*

*in*

***ELECTION PETITION NO.35 OF 2008)***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

**Introduction**

1. This appeal was initially filed to challenge the whole of the judgment and orders issued by the High court, Ang'awa J. sitting in Nairobi which was made on 27<sup>th</sup> January 2011 in **Election Petition No 35 of**

**2008.** By that judgment, the High court, sitting as an election court, allowed a petition filed by **Ibrahim Ahmed** (Ahmed) challenging the purported election of **Simon Mbugua** (Mbugua) as the Member of Parliament (MP) for Kamukunji Constituency in the National Assembly elections held on 27<sup>th</sup> December 2007. The major complaint, apart from other irregularities and anomalies which he blamed on the **Electoral Commission of Kenya** (ECK), was that there was no proper tallying of votes for the constituency.

2. Kamukunji constituency had its share of drama in that election. There was reported violence and disruption of vote tallying at the Shauri Moyo tallying centre and the Returning Officer had to flee after announcing some results indicating that Mbugua had won the election, only to re-emerge the following day to announce that there were no results for Kamukunji Constituency. ECK upheld that position, nullified the election, and declared that there would be a repeat election for the Parliamentary candidates. Mbugua objected to that decision and went before the High court seeking Judicial Review orders. The Court upheld him and declared that ECK had no power to postpone/cancel or nullify elections which had taken place. Only an election court could. ECK was compelled to announce the election results, however imperfect they were, and to gazette the winner. Mbugua was subsequently declared the winner and Ibrahim filed the election petition aforesaid.

3. There was further drama at the hearing of the petition which saw two Judges disqualify themselves from proceeding with the hearing on account of perceived threats to their lives. The third Judge Ang'awa J completed the process and in the end found that the method used by ECK in arriving at the figures announcing the winner on 11<sup>th</sup> August 2008 was unreliable as it was compromised to such extent that it was wanting and lacked integrity. The election was therefore not free and fair and was declared null and void. On the prayer by Ahmed that Mbugua should be declared to have committed an election offence by interfering with Form 16A and using it to influence his election, the court found no election offence had been proved.

4. The following order on costs was then made:-

***“(i) There will be costs to the petitioner to be paid jointly and severally by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents respectively.***

***(ii) Any expenses incurred under rules 34(b) of the Act is to be borne by the 1<sup>st</sup> respondent.”***

In making that order, the court gave the following reasons:-

***“I noted that there were 32 applications (oral or otherwise) that had been raised before this court during the hearing of this petition. There were 5 to 6 applications, including a two judge bench on a Constitution Reference matter brought and filed by the 1<sup>st</sup> respondent and one oral application by the petitioner, so raised before Rawal J. There were 5 applications brought and filed by the 1<sup>st</sup> respondent before Ochieng J.***

***Some of the applications raised before the two other judges may have had little to do with the petition. No list of objections in recriminatory case was filed (Regulation 8).***

***I hereby award costs to the petitioner.***

***I find that the 2 & 3 respondent on taking the stand that they acted according to the court orders to announce the winner, should have relied on rule 33 (1) and countermanded that they had no intention to oppose the petition. This being in line with their affidavit before the Judicial Review bench in case Misc application 13/08.***

***They stood by the 1<sup>st</sup> respondent and even declined to call two of their returning officers (2<sup>nd</sup> respondent and the assistant returning officer).***

***I find that there will be costs against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents jointly and severally, unless otherwise stated in my 32 ruling of whom of the respondents, would specifically pay the cost. Where it is in the Cause, the three respondents are to pay the costs as stated.***

***Any expenses, under Rule 34(b) would be borne by the 1<sup>st</sup> respondent.”***

## **The Appeal**

5. As stated earlier, this appeal was filed by Mbugua who is represented before us, as he was in the High court, by Mr. Kibe Mungai instructed by M/s Kinoti & Kibe Co Advocates. Ahmed, the 1<sup>st</sup> Respondent, is represented by Mr S. O. Owino, instructed by S.O. Owino & Associates, Advocates; while the Returning Officer and ECK, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents respectively, are represented by Mr. S.R. Adere of Adere & Company, Advocates.

6. The Memorandum of Appeal listed 44 grounds. At the hearing of the appeal on 24<sup>th</sup> February 2014, however, learned counsel Mr. Wachira who held brief for Mr. Kibe Mungai, informed the court that the appellant was seeking leave to withdraw all the grounds of appeal except those relating to costs. The reason was that the matter had been overtaken by events since the country had held other general elections under the new Constitution and there was a new MP for Kamukunji Constituency who was validly elected. As there was no objection from counsel for the respondents, leave was granted as sought and the appeal was withdrawn with no order as to costs, save for two grounds of appeal.

7. The remaining grounds of appeal state as follows:-

***“42. Whereas none of the allegations made against the Appellant were proved, the learned judge ordered that the Petitioner’s costs be paid jointly and severally by the Appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein.***

***43. In manifest vindictiveness against the Appellant, the learned judge ordered that any expenses incurred under, Rule 34(b) of the Act to be borne by the appellant.”***

## **Submissions of counsel**

8. Mr. Wachira submitted that Mbugua should not have been ordered to pay any costs, and should in fact be paid costs, because there was no finding made by the election court to blame him for nullification of his election or for any election offence. The allegations in the petition which were leveled against Mbugua were also not proved against him. In his view, it was the Returning Officer and the ECK who were blamed and who ought to bear the costs of the petitioner as well as Mbugua’s, both of whom were innocent and were dragged into the petition because of the actions and omissions of the two respondents. As for the order under **Rule 34 (b) of the National assembly Elections (Election Petition) Rules, 1993**, ( the Rules) that such costs be borne by Mbugua alone, Mr. Wachira submitted that this was vindictive since there was no evidence that Mbugua had caused unnecessary costs.

9. Mr. Owino for Ahmed had little to say as it did not matter to him who paid Ahmed’s costs in full. He only asked us to note the reasons given by the learned Judge for deciding the way she did.

10. Mr. Adere was however emphatic in defending the Returning Officer and ECK. He took the position that the two were neutral throughout in the High court and in the appeal. That is because it was ECK which in the first place declared that the election was not proper and ordered a repeat only to be compelled at the instance of Mbugua, to announce the results. The election petition that inevitably followed was thus forced on them. In his submission, where a party is merely obeying a court order, no order for costs should be made against it. It was clear in this matter that Mbugua was the cause of the election petition and since he lost in the petition, the costs should follow the event and be borne by him alone.

11. Adverting to **Rule 31 and 33** of the Rules, Mr. Adere contended that Rule 33(1) is subject to Rule 31 and the reference to the respondent who should issue a non-contest notice is a living person. That would have been Mbugua and not ECK which is an institution. Since Mbugua did not file the notice of non-contest, he should bear the costs of the petition. Mr. Adere further submitted that it was appropriate for the court to make an order for costs under **Rule 34** which is tailored to discourage vexatious litigation. In this matter, he contended, Mbugua's conduct was vexatious and caused much delay in the finalization of the petition. It went beyond normal litigation since numerous, unnecessary and unreasonable objections were raised along the way.

12. In response, Mr. Wachira reiterated that it was speculative to assert that Mbugua was vexatious in the manner he conducted himself in the litigation since there was no finding of the court to that effect. He conceded that the matter of costs was discretionary but submitted that the exercise of that power must be fair and judicious. In his view, the Returning Officer and ECK were never neutral in the matter since they were the cause of the war between Mbugua and Ahmed even if they did not support either of them. It was their duty, not Mbugua's, to conduct a credible, free and fair election and they did not. Mbugua could not therefore issue a notice of no contest since he had to defend allegations made against him. He was innocent and is entitled to costs to be paid by ECK.

### **Analysis and determination.**

13. We have considered the two remaining grounds of appeal and have formed the following view of them:

The orders made by the High court on costs and the reasons therefor are neither elegant nor crystal clear. But there can be no mistake that the High court intended that the costs of the Petition which was allowed shall be borne by Mbugua, the Returning Officer and ECK jointly and severally. Only such costs as were incurred under **Rule 34** would be paid by Mbugua alone.

14. **Rule 34**, which was relevant at the time provided as follows:

***“34. All costs of and incidental to the presentation of a petition and to the proceedings consequent thereon shall be defrayed by the parties to the petition in such manner and in such proportions as the election court may determine, regard being had to:***

- a. ***the disallowance of any costs which may, in the opinion of the election court, have been caused by vexatious conduct, unfounded allegations or unfounded objections on the part either of the petitioner or the respondent; and***
- b. ***the discouragement of any needless expense by throwing the burden of defraying it on the parties by whom it has been caused,***

***whether such parties are or are not on the whole successful.”***

**Sub- rules (a) and (b)** have the conjunctive “**and**” and should therefore be read together. In effect, they confer a duty on the court to identify vexatious conduct, unfounded allegations or unfounded objections and to discourage such conduct by ordering that the costs incurred thereby be borne by the party responsible.

15. In this case, the order made for costs under **Rule 34(b)** says nothing about any of the matters listed under **sub rule (a)** and to that extent the order is not only inchoate but vague and unenforceable. We would allow the appeal on **ground 43** and set aside the order on costs, which we now do.

16. As for **ground 42** which challenges the general order on costs, it is common ground that costs of any litigation including election petitions are in the discretion of the court. As correctly submitted by Mr. Wachira, however, the court must exercise such discretion judicially, not on whim or caprice. It is also a general principle on costs that they shall follow the event, unless, for reasons to be recorded, the court

decides otherwise.

**The National Assembly and Presidential Elections Act, Cap 7** (the Elections Act) in **Section 29** expressly gave the discretion to the court to decide on costs as follows:-

***“29. An election court may, in its discretion, award against the petitioner the costs of and incidental to a petition which is dismissed or rejected.”***

This discretion is augmented by **Rule 34** (supra).

17. So that, for as long as the election court gives cogent reasons for the exercise of its discretion under the statute and rules, this court will have no reason to interfere. The usual reasons for interference with the exercise of judicial discretion were given by this court in the case of **MBOGO & ANOTHER V. SHAH [1968] EA 93** at page 96, thus:

***“...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”***

18. In this case, the election court made an order that costs be paid by Mbugua, the Returning Officer and ECK. Those were the parties who lost to the petitioner in the litigation and costs followed that event. There was no error in principle in making such an order. It was not necessary for the court to give reasons for so doing unless it was departing from the established principle. But the court gave reasons and we think this was done *ex abundanti cautella*. The court noted the numerous applications that were filed in the matter. As those applications were disposed of, there must have been corresponding orders on costs and this will be identified and determined by the Registrar during taxation. The court also gave reasons for deciding against the ECK which did not file the notice envisaged under **Rule 33**, if it was going to escape payment of costs.

19. **Rule 33**, as relevant, stated as follows:-

***“33. (1) After receiving the.....notice of the respondent’s intention not to oppose..... the petition..... if the notice is received after notice of trial has been given and before the trial has commenced, the Registrar shall forthwith countermand the notice of trial.***

***(2) The countermand shall be given in the same manner, as nearly as practicable, as the notice of trial.”***

For completion, we think **Rules 31** and **32** are also applicable and we reproduce them in relevant parts:-

***“31. (1) If before the trial of an election petition a respondent..... gives notice in writing to the Registrar that he does not intend to oppose the petition, the petition shall not be abated but shall continue, whether or not any person applies to be admitted as respondent as hereinafter provided.***

***(2) Notice of the fact that a respondent..... has given notice in writing that he does not intend to oppose the petition, shall be published in the Gazette by the Registrar.***

***(3) .....***

***(4) The manner and time of the respondent’s giving notice to the Registrar that he does not intend to oppose the petition, shall be by leaving notice thereof in writing at the office of the Registrar, signed by the respondent not less than six days before the day appointed for trial, exclusive of the day of leaving the notice.***

**32. A respondent who has given notice of his intention not to oppose a petition shall not be allowed to appear or act as party against the petition in any proceedings thereon.”**

20. It was contended by Mr. Adere that the Rules above do not envisage that the notice referred to therein be filed by ECK which is not a living person. With respect, we find no substance in that submission.

The term ‘**Respondent**’ was defined under the Rules as follows:-

**“respondent”, in relation to an election petition, means the person whose election is complained of, or if the petition complains of the conduct of the returning officer or any person under him, that officer and includes any other person whose conduct is complained of in relation to the election.”**

ECK was defined in the Elections Act as **“the Electoral Commission established by Section 41(1) of the Constitution”**. The Constitution itself conferred on ECK full independence in **Section 41(9)**, thus:

**“(9) In the exercise of its functions under this Constitution the Commission shall not be subject to the direction of any other person or authority.”**

We are in no doubt that ECK had the power to perform its functions, including the power to sue or be sued in its corporate personality and was properly enjoined as a respondent in the petition before the High court. As a respondent, it could have, but did not, take the advantage of the provisions of **Rules 31, 32 and 33** above, if it did not wish to participate in the litigation. The Returning Officer, who was properly defined and joined as a respondent under the Rules, did nothing either. It cannot, therefore, lie in the mouth of the Returning officer and ECK to contend that they were not the respondents referred to under those rules. We dismiss that argument.

21. We are satisfied that the contention made in the petition that ECK ran an improper election for Kamukunji constituency was properly established by the election court. ECK and its officers in that election must therefore bear the consequences. The proposal that the election be repeated without the necessity of an election petition was resisted by Mbugua. He must also bear the consequences. In sum, we find no reason to interfere with the discretion of the election court and we dismiss the appeal on ground 42.

22. The upshot is that the appeal is dismissed save to the extent stated above. As the appellant has been partially successful, we order that each party shall bear its own costs of the appeal.

Orders accordingly.

**Dated and Delivered at Nairobi this 2<sup>nd</sup> day of May, 2014**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**J. W. MWERA**

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**JUDGE OF APPEAL**

**K. M’INOTI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**