IN THE COURT OF APPEAL

AT NAIROBI

CORAM: WAKI, KARANJA & MUSINGA, JJ.A.

CIVIL APPEAL NO. 328 OF 2013

BETWEEN

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION…....1ST APPELLANT

MADAHANA MBAYAH…….....…….....2ND APPELLANT

AND

MAJOR (RTD) GODFREY MASABA…….....…….…..1ST RESPONDENT

REGINALDA NAKHUMICHA WANYONYI….....…….……..2ND RESPONDENT

(An Appeal from the Ruling and Orders of the High Court of Kenya at Bungoma (A. Omondi, J.) dated 25th September, 2013

in

ELECTION PETITION NO. 8 OF 2013)

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JUDGMENT OF THE COURT

Major (Rtd) Godfrey Masaba (1st respondent) was the petitioner in **Election Petition No. 8 of 2013** before the High Court sitting in Bungoma. In the petition, he indicated that he filed the same in his dual capacity as a registered member of Ford-Kenya, a political party duly registered under the Political Parties Act, and also as a registered voter in Bungoma County. He had not himself contested for any political seat in Bungoma County.

The petition was against the **Independent Electoral and Boundaries Commission (IEBC),** 1st respondent, **Madahana Mbayah**, the County Returning Officer for Bungoma County in the 4th of March, 2013 Elections (2nd respondent) and **Reginalda Nakhumicha Wanyonyi,** the candidate who was declared as duly elected as County Women Representative for Bungoma County (3rd respondent).

He challenged the election of the 3rd respondent on the basis that the elections were not free and fair citing several alleged election offences, irregularities and malpractices. When the petition was mentioned before the Honourable Judge on 3rd May 2013, it transpired that the petitioner had not

deposited the mandatory Kshs. 500,000/= in court as required under **Section 78 (2)** of the **Elections Act** and Rule **11** of the **Elections (Parliamentary and County Election) Petition Rules 2013.**

The respondents also informed the Court that they had not been served with the petition. The Court granted the petitioner leave to effect service out of time. It was at this session that it became apparent that the petitioner was actually not suing for himself but as a proxy for the Ford –K party and one Catherine Nanjala Wambilianga who had lost the election for the seat of Bungoma women representative to the 3rd respondent.

The petitioner also expressed difficulties in raising the mandatory deposit but intimated that his party had agreed to pay the same. His counsel therefore asked for an extension of time to deposit the money and the Court directed that the money be deposited in Court before the pre-trial meeting which was scheduled for 9th May 2013. The parties appeared in Court on that day but the deposit had still not been paid and the responses to the petition had also not been filed. The Court ordered that the responses be filed and served by 14th May 2013 and further that any application for striking out the petition be filed by the same date.

The application for striking out was filed as directed, was heard and allowed with the result that the election petition was struck out on 25th May2013, but the order on costs was reserved pending submissions by counsel the following day.

After hearing the parties on the issue of costs, the learned Judge awarded costs to the respondents which she capped at Kshs 700,000/=. She further ordered that out of that amount, the 3rd respondent was to receive a maximum of Kshs. 400,000/=, and the 1st and 2nd respondents were to receive a maximum of Kshs. 200,000/=. There were other parties the learned Judge referred to as 'interested parties' who were awarded Kshs. 50,000/= each.

In her ruling, the learned Judge stated as follows:-

"I also wish to point out that only 3rd respondent had filed a response at the time the petition was dismissed."

This finding by the learned Judge appears to have influenced her decision on the apportionment of costs. The pronouncement is the genesis of this appeal.

According to learned counsel for the 1st and 2nd respondent, they had filed the necessary responses to the petition and so they ought not to have been treated differently. That, in learned counsel's view, was an error on the face of the record and amounted to misdirection on the part of the learned Judge. Consequently, learned counsel filed the application dated 6th September 2013 primarily seeking review of the said orders.

According to counsel, they had filed the response on 13th May, 2013 as well as a replying affidavit to the application for striking out the petition. At the hearing of the said application, Mr. Malebe asked the court for time to produce the receipt which was in his office in Nairobi. The same were scanned and e-mailed to the deputy registrar. He also referred the court to page 2 of the record where a copy of the receipt and the assessment was.

In a reserved ruling rendered on 25th September 2013, the learned Judge made the following finding which we quote in *extenso*:-

"It is significant that although the applicants contend that they had filed their response way before the court wrote its ruling and within the time ordered by the court, the said response was not in the court record when this Court wrote its ruling. In fact it is because the applicant's response was conspicuously missing in the court file that this court awarded them lesser costs compared to the 3rd respondent.

There are only two possible explanations to the question of availability or otherwise of the response as at the time this court was writing the ruling.

> *i. That through a mistake of the court's staff, the response was not placed on the court file when the response was filed;*
>
> *or*
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> *ii. That the response was filed after the ruling was delivered in reaction to the court's order for costs.*

Regarding the first possibility, the only reasonable explanation for availability of the response in the court file is that it was placed in the court file after the delivery of the ruling. For this to have happened, the applicants must have either complained about the finding of the court at the registry, prompting some officer at the registry to trace and place it in the file. Unfortunately, there is no evidence to prove this happened.

Regarding the 2nd scenario, it is possible that the response was filed after the ruling was delivered in reaction to what are termed as the court's adverse orders. Although, the response bears a seal of the court imposed on 13th May 2013, the response is neither assessed by an officer of this court as is the case with all other documents filed in court nor is there evidence of payment of filing fee. The promises to send original receipts to the Deputy Registrar never materialized, I entertain doubt whether the response was filed on the indicated date or whether the right procedure was used in filing of the response.

The receipt and document counsel relies on is dated 14th May 2013, yet the document is stamped as received on 13th May 2013. No explanation is given for this variance. A careful perusal of the receipt shows that it is in respect of filing fees for an application made by respondents for dismissal of the petition, not filing fees for response."

She consequently dismissed the said receipt and the entire application.

Aggrieved by these pronouncements and ruling, the appellants filed this appeal in which they proffered ten grounds of appeal. All these grounds revolve around the issue as to whether there was a response to the petition filed by the appellants as at the time the learned Judge prepared her ruling on costs. The appellants faulted the learned Judge for failing to establish the authenticity of the receipt exhibited by the appellants by counter-checking the court's internal records, or seeking an explanation from the registry as to when the documents were filed. They urge that it was a misdirection on the part of the learned Judge to find that there was no evidence or information presented to the court to warrant a review of her previous orders.

Learned counsel was also unhappy with the learned Judge's ruling because according to him, it was an impeachment on his integrity, credibility and professionalism as an advocate. This was so because the learned Judge had imputed dishonesty and collusion in the manner in which in her view, the response to petition and the receipt had found their way into the Court record.

In their written submissions in support of the appeal filed on 27th January 2014, learned counsel expounded on the said grounds of appeal and reiterated that the response to the petition was in the court file contrary to the findings of the learned Judge. He has also urged that the Kshs. 200,000/= awarded to the appellants was inordinately low and that this Court would be justified to interfere with the same. He urged the court to take judicial notice of the fact that sometimes documents are misfiled at the registry just to reappear later and so the court should not have dismissed his claim in haste. He also urged that the parties ought to have been heard before the award on costs was made. He asked for an enhancement of the appellants' costs to Kshs. 800,000/=.

In his response to the appellants' submissions, Mr. Natwati, learned counsel for the 1st respondent (petitioner in the petition) urged us to dismiss this appeal. He maintained that the appellants had failed to prove that the response to petition and the receipt were in the court file before the learned Judge of the High Court prepared her ruling. His argument was that it was the appellants' burden to prove that the receipt was there and not that of the court, as it was not the court's place to fish for evidence in support of a party's case. He urged us to dismiss the appeal with costs to the 1st respondent.

We have considered carefully the record of appeal, the grounds of appeal, the submissions of both counsel along with the legal authorities presented to us by learned counsel for the appellants. We have recited the contentious findings of the learned Judge earlier on. We note that all the parties, including the learned Judge seemed to accept that the receipt in question was a genuine receipt bearing the seal of the court. The only contentious issue is whether the same was in the court file – together with the response as at the time the learned Judge made her ruling on costs.

According to the learned Judge, it was not in the court file. She advanced her theories on the same – which we have referred to earlier on. The 1st respondent's argument is that it was upon the appellants to establish that the receipt was in the file and was genuine and not for the court to do so, as in counsel's view, such would have been a waste of valuable judicial time.

On the issue of the receipt, a cursory look at the same shows that there were payments for not less than six documents – what were these documents? Who was the best placed person to explain the receipt which the court acknowledged was a genuine court receipt? We shall revert to this issue later on.

The other aspect of the appeal is that the parties were not heard before the capping of costs was done; and that the costs awarded to the 1st and 2nd respondent were inordinately low.

On the first issue, we have analysed the basis of the learned Judge's decision to award the 1st and 2nd respondents lower costs as compared to the 3rd respondent. Her reasoning was basically that they had not filed a response to the petition. On being shown the receipt, whose authenticity she did not doubt, she proffered the two theories we have outlined above.

In our view, having accepted that the receipt in question was indeed an official court receipt, the learned Judge if in doubt as to when and the circumstances under which it was issued ought to have made a further enquiry from the registry staff. The originator of the receipt was an officer under her supervision; the master receipt book which she referred to was in the custody of the court registry and not under the control of the 1st and 2nd respondents. It was for the learned Judge to ask her staff to explain how the receipt was issued a day after the documents had been stamped. With respect to the learned Judge, shifting that burden to the 1st and 2nd respondent was improper. Additionally even assuming that the documents had been misplaced at the registry just to reappear after her ruling, the said 'misplacement' could only be attributed to the court registry and the 1st and 2nd respondents should not have been penalised for it.

We also note that on 18th September 2013, just before the learned Judge reserved her ruling on the application for review, Mr. Malebe, learned counsel appearing for the 1st and 2nd respondents, after going through the court file did inform the learned Judge that he had seen the receipt and assessment at page 2 of the record. He also informed the court that his office in Nairobi was sending the Deputy Registrar of the court the scanned original receipt by e-mail. The e-mail sending the scanned receipt to the Deputy Registrar on 19th September 2013 is at page 488 of the Record of Appeal. Had the learned Judge properly addressed her mind to all these issues, she would not have come to the conclusion that the 1st and 2nd respondents had not filed the response to petition and penalised them by way of reducing their costs. We do find that the learned Judge misdirected herself on that issue as a result of which she arrived at an erroneous decision. Having found that the 1st and 2nd respondents had actually filed their response to the petition, then the awarded costs ought to have been shared equally among the three respondents.

On the second issue, we do agree that it is prudent for a Judge before capping costs to hear the parties on the issue of costs. This will foster justice and fairness and also enable the court to arrive at an informed decision and forestall a situation where the court may be accused of arbitrarily making inordinately low or high awards on costs.

Having said so, we now turn to the issue of the quantum of the costs awarded. Should we interfere with the same? Costs are awarded and assessed at the discretion of the court. Like in any other function that is exercised at the discretion of the court, this has to be done judicially and judiciously. The court has to take account of all the circumstances surrounding the case before making the decision.

This court will be slow to interfere with the exercise of that discretion unless it is demonstrated that the said award is inordinately low or manifestly high. This Court would also interfere if there is sufficient evidence to show that the learned Judge considered some extraneous matters in arriving at the said decision, or conversely, that the Judge failed to consider some relevant matters that would have influenced such a decision.

In determining the amount of costs to award, the learned Judge noted that the matter was 'fairly simple'. Although, she appears to have taken into account the erroneous view that no response to the petition had been filed, our view is that her award of Kshs 700,000/= was not so inordinately low as to warrant the intervention of this court.

Costs are not meant to be punitive or such as to fetter or otherwise dishearten genuinely aggrieved litigants from seeking redress from the courts. Nor are they meant to reward or enrich or even fully compensate the party in whose favour they are awarded. They are meant to reasonably mitigate expenses suffered by a party who the court finds unjustifiably dragged to court by another.

In this case, we find that the costs of Kshs 700,000/= in favour of the respondent, whether there was a response from all the respondents or not was reasonable in the circumstances of the case. We find no justification to interfere with the said sum. We therefore decline the prayer to enhance the said costs and retain the award in favour of all respondents at Kshs 700,000/=.

Having found that the response by the 1st and 2nd respondents had been filed, we are of the view that the said costs ought to have been apportioned equally. In the circumstances, we set aside the order on apportionment of the costs and order that they be apportioned equally as between 1st and 2nd respondents on one hand and the 3rd respondent on the other.

We also note that the so called 'interested parties' were not parties in the election petition. If anything, their names came into the case after the petitioner claimed that they were behind his filing the appeal and was only acting as their gun for hire. They were only summoned to clarify the issue and that did not make them interested parties. In any event, in an Election Petition there can only be petitioners and respondents. It was misdirection on the part of the learned Judge to award them costs.

In order to correct that misdirection on a point of law by the learned Judge, we set aside that order and in lieu order that the Kshs. 100,000/= awarded to them should be awarded to the respondents.

In the circumstances, this appeal succeeds in part. We allow the same to the extent that the award of costs to the interested parties is hereby set aside. The award of Kshs 700,000/= to the respondents in the petition is upheld but apportioned to the effect that 1st and 2nd appellants are awarded Kshs 350,000/= and the 3rd respondent is awarded Kshs 350,000/=. We make no orders on costs of this appeal as the same was not occasioned by any form of default on the part of any of the respondents herein.

Dated and delivered at Nairobi this 13th day of June, 2014.

P. N. WAKI

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR