



REPUBLIC OF KENYA

COURT OF APPEAL OF KENYA

AT NAIROBI

**CIVIL APPEAL 219 OF 2008**

S.K. NJUGUNA.....1<sup>ST</sup> APPELLANT  
ELECTORAL COMMISSION OF KENYA.....2<sup>ND</sup> APPELLANT

AND

JOHN KIARIE WAWERU.....1<sup>ST</sup> RESPONDENT  
BETH WAMBUI MUGO.....2<sup>ND</sup> RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Milimani Commercial Courts, Nairobi (Kimaru, J)  
dated 12th September, 2008*

In

**H.C. Election Petition No. 13 of 2008)**

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**JUDGMENT OF THE COURT**

This appeal arises from the judgment of the superior court (Kimaru, J) delivered at Nairobi on 12<sup>th</sup> September, 2008 in which the learned Judge dismissed the Election Petition No. 13 of 2008 in which he ordered the 2<sup>nd</sup> and 3<sup>rd</sup> respondents (in the election petition) to pay the costs of the 1<sup>st</sup> respondent. This appeal is against the order for costs.

In the superior court JOHN KIARIE WAWERU was the petitioner while BETH WAMBUI MUGO was the 1<sup>st</sup> respondent, S.K. NJUGUNA the 2<sup>nd</sup> respondent and Electoral Commission of Kenya the 3<sup>rd</sup> respondent. After the General Elections conducted on 27<sup>th</sup> December, 2007 Beth Mugo (2<sup>nd</sup> respondent in this appeal) was declared the duly elected member of Parliament for Dagoretti Constituency. The results were announced by S.K. Njuguna who was the Returning Officer appointed by the defunct Electoral Commission of Kenya. John Kiarie Waweru (1<sup>st</sup> respondent in this appeal) was one of the candidates for Dagoretti Constituency but was one of the losers in that election. He was aggrieved by the declaration of Beth Mugo as the duly elected Member of Parliament for Dagoretti Constituency. He therefore filed the Election Petition No. 13 of 2008. That Election Petition was placed before Kimaru, J for hearing and final determination. The learned Judge considered all that was urged before him and in the end dismissed the petition. In concluding his judgment the learned Judge rendered himself thus:-

*“In the premises therefore, it is clear from the foregoing that the petition herein is for dismissal. It is hereby dismissed. The petitioner has failed to establish to the required standard of proof, that the election of the 1<sup>st</sup> respondent as the duly elected member of parliament of Dagoretti constituency was voided by electoral malpractices and therefore amenable to be nullified. The petitioner further failed to establish any basis for this court to order the scrutiny of the ballots in respect of the parliamentary elections of Dagoretti constituency. As regard costs, since it was the 2<sup>nd</sup> respondent’s dereliction of duty at the tallying centre that gave the petitioner justification for impeaching the said elections, I hereby exercise my discretion and decline to award costs to any of the respondents as against the petitioner. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents shall however pay the costs of the*

**1<sup>st</sup> respondent.”**

It is the foregoing that triggered this appeal which came up for hearing on 10<sup>th</sup> November, 2009. Mr. Kyalo Mbobu appeared for the appellants while Mr. Macharia Ngaru appeared for the 1<sup>st</sup> respondent and Mr. E. Wetangula appeared for the 2<sup>nd</sup> respondent.

In his submissions before us, Mr. Kyalo complained that while the superior court ordered that the petition was for dismissing it went on to order that the two appellants herein do pay the costs to the 2<sup>nd</sup> respondent. Mr. Kyalo then proceeded to address us in a bid to persuade us to interfere with the learned Judge’s discretion on the award of costs. Mr. Kyalo submitted that the complaints in the petition were against the sitting Member of Parliament and that since the petition was dismissed then the respondents herein were successful parties in which case they should not have been ordered to pay costs to another successful party.

On his part Mr. Ngaru submitted that the award of costs was in the discretion of the Judge and the learned Judge found that the 1<sup>st</sup> appellant was incompetent in the conduct of the election. He went on to point to us the reasons given by the learned Judge in condemning the 1<sup>st</sup> appellant to pay the costs.

Mr. Wetangula associated himself with the submissions of Mr. Ngaru. He emphasized that matters of costs were in the discretion of the court.

In this appeal we are dealing with the issue of costs only. This was an election petition filed by one of the unsuccessful candidates in the Dagoretti Parliamentary Election in Nairobi. The petitioner (1<sup>st</sup> respondent herein) complained of various irregularities against the Electoral Commission of Kenya, the Returning Officer and the sitting Member of Parliament who emerged victorious in the said election. The learned Judge considered all these complaints and while he found that some of the complaints against the Electoral Commission of Kenya and the Returning Officer were justified he nevertheless found that they did not have a direct effect on the actual results.

Counsel appearing before us agreed that the issue of costs is in the discretion of the Court. In **MBOGO AND ANOTHER V. SHAH [1968] E.A 93**, Sir Charles Newbold P. said:-

***“We come now to the second matter which arises on this appeal, and that is the circumstances in which this court should upset the exercise of discretion of a trial judge where his discretion, as in this case, was completely unfettered. There are different ways of enunciating the principles which have been followed in this court, although I think they all more or less arrive at the same ultimate result. For myself I like to put it in the words that 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.”***

Can it be said that the learned Judge exercised his discretion wrongly in this matter? But as we consider the issue of discretion it may be useful to consider the findings of the learned Judge as regards the conduct of election in Dagoretti Constituency. In the course of his judgment the learned Judge stated:-

***“I do hold that the petitioner failed to establish to the required standard of proof that the irregularities evident during the conduct of the elections were of such a nature as to render the said elections not to be a true reflection of the expression of the will of the voters of Dagoretti Constituency.”***

As regards the conduct of the Returning Officer, Mr. S.K. Njuguna who was the 2<sup>nd</sup> respondent in the Election Petition the learned Judge said:-

***“It was clear that due to the contested nature of the elections at Dagoretti constituency, and in view of the close presidential elections, the 2<sup>nd</sup> respondent’s failure to announce the tallied results from each polling centre immediately the said results were handed over to him at the tallying centre largely contributed to the anxiety and tension at the tallying centre. It contributed to the events that later unfolded at the tallying centre for two days following the election day.”***

On the issue of handling of Forms 16A and Forms 17A by both the Returning Officer and the Electoral Commission of Kenya the learned Judge said:-

***“Further, the 2<sup>nd</sup> respondent (sic) action in filling in new Form 16As and the Form 17A after he had certified the results that were officially announced by the 3<sup>rd</sup> respondent as the true and correct results, was evidence of the 2<sup>nd</sup> respondent’s incompetence in presiding over elections of such importance and magnitude.”***

And finally the learned Judge said:-

***“There was no justification for the 2<sup>nd</sup> respondent’s failure to tally and announce the results immediately he received them from the various polling centres. It is the view of this court that if the 2<sup>nd</sup> respondent had abided by the requirements of the law, and particularly Regulation 40 of the Presidential and Parliamentary Elections Regulations, may be the mayhem that was witnessed at the tallying centre would not have occurred.”***

Taking into account the various remarks and comments by the learned Judge on the conduct of the Returning Officer Mr. S.K. Njuguna (the 1<sup>st</sup> appellant) we are of the view that there was justification in condemning both appellants to pay the costs as ordered. We reiterate that the issue of costs is in the discretion of the court and in this appeal we are satisfied that there were justifiable reasons why the appellants herein were ordered to pay the costs although the Election Petition against them was dismissed.

That being our view of the matter we find no merit in this appeal and we order that the same be and is hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi this 11<sup>th</sup> day of December, 2009

**S.E.O. BOSIRE**  
.....  
**JUDGE OF APPEAL**

**E.O. O’KUBASU**  
.....  
**JUDGE OF APPEAL**

**ALNASHIR VISRAM**  
.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**