REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appeal 52 of 2006

HARRISON GARAMA KOMBE ……...……. APPELLANT

AND

ALI OMAR ……...…….. 1ST RESPONDENT

THE ELECTORAL COMMISSION OF KENYA ……...….. 2ND RESPONDENT

JULIUS DARAKA MBUZI ……..…. 3RD RESPONDENT

(Appeal from a judgment and order of the High Court of Kenya at Mombasa (Khaminwa, J) dated 10th February, 2006

in

H.C. Election Petition No. 1 of 2003)

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JUDGMENT OF THE COURT

This appeal before us and Civil Appeal No. 50 of 2006 were both appeals from the judgment and order of the High Court of Kenya at Mombasa (Khaminwa, J) dated and delivered on the 10th February, 2006 in Election Petition No. 1 of 2003 at Mombasa. The appellant in this appeal, **Harrison Garama Kombe**, was the second respondent in Civil Appeal No. 50 of 2006, whereas the first and second respondents in this appeal, **Ali Omar** and **The Electoral Commission of Kenya** were the first and second appellants respectively in that appeal. The third respondent here, **Julius Daraka Mbuzi**, was the first respondent. Both appeals were placed before us for hearing on 26th July 2006. Civil Appeal No. 50 of 2006 proceeded to hearing first and that was, in our view, proper as it was the first of the two appeals to be filed in this Court. The record shows that after Civil Appeal No. 50 of 2006 was heard, Mr. Gikandi, the learned counsel for the appellant in this appeal, proposed and it was accepted by all parties that as Civil Appeal No. 50 of 2006 involving more or less the same issues had been heard, the hearing of Civil Appeal No. 52 of 2006 (this appeal) be stayed and be mentioned on 27th October 2006 in Nairobi when the judgment in Civil Appeal No. 50 of 2006 would be delivered. It was to be mentioned after the delivery of the judgment in Civil Appeal No. 50 of 2006 to enable the parties to consider further their position as regards the future of Civil Appeal No. 52 of 2006. That position was accepted by the Court as it was in consonance with the provisions of **rule 100** of this Court's Rules which states:

"**100. The Court may for sufficient reason order any two or more appeals to be consolidated on**

such terms as it thinks just or may order them to be heard at the same time or one immediately after the other or may order any of them to be stayed until after determination of any other of them."

On 27th October, 2006, judgment in Civil Appeal No. 50 of 2006 was delivered and that appeal was dismissed. In dismissing that appeal, this Court stated:

"**We have, on our own as we must do, analyzed the evidence on record afresh in details and having done so, we have come to our own independent conclusion that the petition that was before the superior court was properly allowed. We have no alternative but to dismiss this appeal. It is dismissed. On costs, we observe that all the grounds that were brought in the petition before the superior court against the second respondent were dismissed. The court nonetheless did not specify as to who was to pay costs of the petition which was allowed. All that the superior court ordered was "*The costs of this petition to the petitioner to be taxed*". Mr. Gikandi now asks us to relieve the second respondent of the burden of paying costs. Mr. Mutisya, however, urges us not to interfere with the decision of the superior court on grounds that even though the petition was allowed on grounds that were all against the appellants, nonetheless the second respondent, knowing that the elections were flawed, willingly participated in the same. Mr. Mutisya's view is that the second respondent should have withdrawn from the same elections. Only if he had done so, argues Mr. Mutisya, would he not be burdened with costs. In our considered view, even if the second respondent was minded to withdraw because of the irregularities mentioned, he too would have been caught up by the provisions of Regulation 19 of the National Assembly and Presidential Elections Act and his withdrawal from candidacy would have been of no consequence as he had been validly nominated as a candidate. We think, the superior court, having allowed the petition on grounds that were against the appellants only, it should have made a specific order as to who was to meet the costs of the petition and, we think, the second respondent having been cleared of any ills on his side, should not have been required to meet the costs of the petition.**

In view of the foregoing, we order that only the appellants will pay the costs of this appeal and the costs of the petition in the superior court."

That judgment was delivered as we have stated on 27th October 2006. On the same day, this appeal was mentioned before a single Judge and Mr. Mutiso who was holding brief for Mr. Gikandi informed the Court that the appellant in this appeal wanted to proceed with his appeal. The matter was then placed before the full Court and after an application which was disposed of yesterday had been finalised, this appeal came up for hearing before a full Court (differently constituted) yesterday for hearing.

The appeal is premised on ten grounds. However, before hearing proper could proceed yesterday, Mr. Gikandi, the learned counsel for the appellant, informed the Court that he would abandon the first nine grounds of appeal and continue the appeal only on one ground and that was ground number 10. The Court then adjourned the appeal to today and made an order that it be placed before us being the same bench that heard and decided Civil Appeal No. 50 of 2006.

The only ground of this appeal is ground No. 10 as all other grounds had been abandoned and in our view, properly so. That ground states as follows:

"**10. That the trial Judge erred in failing to properly deliver the verdict of the Court on the question of costs which was left hanging in the air."**

Mr. Gikandi, in arguing that ground of appeal, referred us to the judgment of this Court in Civil Appeal No. 50 of 2006 and urged us to accept that as this Court had found, like the superior court, that the appellant was innocent in respect of the matters that gave rise to the petition being allowed, he should have been awarded costs as costs followed the events. He thus urged us to allow the appeal on costs and to order costs to be paid to the appellant.

Mr. Wameyo, the learned counsel for the first and second respondents, urged us to find that the question

of costs had been deliberated upon by this Court in its judgment in Civil Appeal No. 50 of 2006 and was no longer available to the Court. He invoked the doctrine of *res judicata* and urged us to accept that that doctrine did apply to the question of costs in this appeal as indeed to the rest of the appeal.

Mr. Mutisya, the learned counsel for the third respondent, confined his submission to seeking costs of this appeal only, while Mr. Okello supported the sentiments of Mr. Wameyo.

We have anxiously considered the appeal. In our view, it cannot be denied that, as stated in our judgment in Civil Appeal No. 50 of 2006, the question of who was to pay costs of the petition in the superior court was considered at length by this Court in its judgment in Civil Appeal No. 50 of 2006. That appeal, like this appeal, was arising from the same judgment of the superior court (Khaminwa, J) in the Election Petition No. 1 of 2003. The parties were the same though playing different roles. The matters directly and substantially in issue were the same namely the decision of the superior court on the election petition that was before it and the question of the award of costs. **Section 7** of the Civil Procedure Code states:

"**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 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 No. 4 of the same section states:

"**Any matter which might and ought to have been made a 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."**

Mr. Gikandi addressed us fully in Civil Appeal No. 50 of 2006. All his complaint on costs was, as we have reproduced above, that his client should not have been burdened with costs. He asked that his client be relieved of costs as he was not found with any offence regarding the Parliamentary election of 27th December 2002 in Magarini Constituency. We agreed with him and relieved the appellant of any costs. He had the opportunity at that time in accordance with **explanation 4 of section 7** of the Civil Procedure Code to raise the question of costs to be awarded to his client. He did not find it fit to do so for reasons known to him. We consider that as a matter that ought to have been raised at the time Mr. Gikandi argued his case in Civil Appeal No. 50 of 2006. Thus, in our considered view, the question of costs is clearly covered under the doctrine of *res judicata* and we agree with Mr. Wameyo on that point. It is no longer available for us to consider as to do so would be sitting on appeal on our own decision.

Before we dismiss this appeal as we must do, we deprecate the activities resulting into the delay in finalizing this matter which for all intents and purposes ended with our decision in Civil Appeal No. 50 of 2006. The consequence of such a delay as happened here are clearly unfair to the country, this being an election matter.

This appeal is dismissed. The appellant shall pay costs of this appeal to the first, second and third respondents. Judgment accordingly.

Dated and delivered at Nairobi this 6th day of March, 2007.

E.O. O'KUBASU

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR