



Kombe v Omar & 2 others

Court of Appeal, at Nairobi March 6, 200

O'Kubasu, Onyango-Otieno & Deverell JJ A

Civil Appeal No 52 of 2006

(Appeal from a judgment and order of the High Court of Kenya at (Khaminwa, J) dated 10r" February, 2006 in HC Election

Petition No 1 of 2003)

Practice and Procedure - res judicata - where a party to previ proceedings failed to raise a claim which ought to have been parties to an election petition filing two separate appeals - one apj stayed as the other proceeded for hearing party seeking to proceed i the stayed appeal after the other appeal had been concluded - api proceeding on the issue of the award of the costs of the litigation whe the issue was res judicata - Civil Procedure Act section7.

On 10th February, the High Court at Mombasa (Khaminwa J) delivf its decision in Election Petition No 1 of 2003. From that decision, concurrent appeals had been filed involving the same parties, i.e. appeal and Civil Appeal 50 of 2006 in which the appellant had been nai as the second respondent. As the latter appeal was the first to be file was agreed that it should proceed to hearing first. After it was hear was agreed by the parties that since both appeals involved more or the same issues, the second appeal (this appeal) would be stayed mentioned on the date of delivery of judgment in the first appeal.

On 27th October, 2006, judgment in the first appeal was delivered anc appeal was dismissed. Among other issues, the Court of Appeal had nt that the High Court had not made a proper decision on the costs of petition. On the question of costs, all the appellant in this case had arg was that he should not be burdened with any costs. He however did make any claim to an award of costs. In its judgment, the Court of App had considered the circumstances of the case and the submissions of parties and ordered that only the appellants to that appeal would pay costs of that appeal and the petition in the High Court.

On the same day, when this appeal was mentioned before a single jug the appellant's counsel stated that he wanted to proceed with his apI Ultimately, the appeal was heard by the same bench that had heard previous appeal. The appellant abandoned nine of his ten ground appeal leaving only the ground that the High Court had erred in I to properly deliver its decision on the question of costs which it N hanging. He urged the Court to find and order that since he was inn in respect of the matters that had given rise to the election petition allowed, he should have been awarded the costs.

The respondents submitted that the question of costs was res judic it had been deliberated upon by the Court in the previous appeal.

In dismissing the appeal after applying Explanation 4 of section the Civil Procedure Act (Cap. 21) on res judicator (that no court sh any suit or issue in which the matter directly and substantially in has been

directly and substantially in issue in a former suit between same parties) that any matter which might and ought to have been 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.

Held:

1. The question of the costs to be awarded to the appellant ought to have been raised at the time of the hearing of the previous appeal where the advocate had the opportunity to do so.
2. The question of costs was covered under the doctrine of res judicata and it was no longer available for the Court to consider.

Cases

No cases referred to. Statutes

1. Court of Appeal Rules (cap 9 Sub Leg) rule 100
2. Civil Procedure Rules (cap 21) section 7 Advocates

Mr Gikandi for the Appellant

Mr Wameyo for the 1st & 2nd Respondents Mr Mutisya for the 3rd Respondent Mr Okello for the 4th Respondent

March 6, 2007, the following Judgment of the Court was delivered: (This appeal before us and Civil Appeal No 50 of 2006 were both allowed from the judgment and order of the High Court of Kenya at Moi (Khaminwa, J) dated and delivered on the 10th February, 2006 in Civil Petition No 1 of 2003 at Mombasa. The appellant in this appeal, Ha Garama Kombe, was the second respondent in Civil Appeal No 2006, whereas the first and second respondents in this appeal, Ali Or and The Electoral Commission of Kenya were the first and second appellants respectively in that appeal. The third respondent here, Jul 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 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 judgment in Civil Appeal No 50 of 2006 would be delivered. It was, accordingly, 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 the 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, the 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 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 5

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 10

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. 15 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 resjudicata and urged 20 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 25 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 30 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 35 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 40 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.