



REPUBLIC OF KENYA



KENYA LAW
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**Sonko v Clerk, County Assembly of Nairobi City & 12 others (Petition
14 (E021) of 2021) [2022] KESC 17 (KLR) (19 May 2022) (Ruling)**

Neutral citation: [2022] KESC 17 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION 14 (E021) OF 2021
PM MWILU, SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ
MAY 19, 2022**

BETWEEN

MIKE MBUVI SONKO APPLICANT

AND

CLERK, COUNTY ASSEMBLY OF NAIROBI CITY 1ST RESPONDENT

SPEAKER OF NAIROBI CITY COUNTY ASSEMBLY 2ND RESPONDENT

CITY COUNTY ASSEMBLY 3RD RESPONDENT

NAIROBI CITY COUNTY ASSEMBLY 4TH RESPONDENT

CLERK OF THE SENATE 5TH RESPONDENT

SPEAKER OF THE SENATE OF KENYA 6TH RESPONDENT

SENATE OF KENYA 7TH RESPONDENT

ATTORNEY GENERAL 8TH RESPONDENT

**INDEPENDENT AND BOUNDARIES COMMISSION (IEBC) 9TH
RESPONDENT**

ASSUMPTION OF THE OFFICE OF THE COUNTY GOVERNOR

COMMITTEE, NAIROBI COUNTY 10TH RESPONDENT

BENSON MUTURA, ACTING GOVERNOR NAIROBI 11TH RESPONDENT

ANN KANUNU MWENDA, THE DEPUTY GOVERNOR ... 12TH RESPONDENT

OKIYA OKOITI OMTATAH 13TH RESPONDENT

(Being an application by the applicant for withdrawal of the suit with no order as to costs)



The guiding principles applicable in awarding costs at the Supreme Court.

Reported by Kakai Toili

Civil Practice and Procedure – costs - awarding of costs at the Supreme Court - guiding principles applicable in awarding of costs – what was the nature of the principle that costs followed the event - Supreme Court Act, 2011, section 21(2); Supreme Court Rules, 2020, rule 3(5).

Brief facts

The applicant filed an application to withdraw the appeal and all the parties consented to the withdrawal. The 11th respondent was unable to agree on costs which led to parties being directed to file submissions limited to the question of whether costs should be paid to the 8th respondent upon the withdrawal. The applicant submitted that the petition of appeal was withdrawn at the earliest opportunity and in good faith and any costs incurred thereafter were occasioned by the respondents' demand for costs.

The applicant submitted that costs fell under the inherent powers of the court and that the issues raised in the appeal were constitutional in nature and a matter of public interest despite having filed it in his individual capacity thus he sought orders that each party bears its own costs. The 8th respondent contended that costs follow the event and that an order for withdrawal was subject to an order for costs to the respondent. The respondent further contended that the applicant filed the appeal in his personal capacity and that he stood to solely benefit from the outcome, hence he ought to shoulder the costs of the 8th respondent;

Issues

- i. What were the guiding principles applicable in awarding of costs?
- ii. What was the nature of the principle that costs followed the event?

Held

1. The court had inherent jurisdiction to make orders on costs, with section 21(2) of the Supreme Court Act and rule 3(5) of the Supreme Court Rules, 2020 being instructive on that. The award of costs would normally be guided by the principle that costs followed the event: the effect being that the party who called forth the event by instituting suit, would bear the costs if the suit failed; but if that party showed legitimate occasion, by successful suit, then the defendant or respondent would bear the costs.
2. The vital factor in setting the preference was the judiciously-exercised discretion of the court, accommodating the special circumstances of the case while being guided by the ends of justice. The claims of the public interest would be a relevant factor, in the exercise of such discretion, as would also the motivations and conduct of the parties, prior to, during, and subsequent to the actual process of litigation.
3. Although there was eminent good sense in the basic rule of costs that costs followed the event, it was not an invariable rule and, indeed, the ultimate factor on award or non-award of costs was the judicial discretion. Therefore, costs did not, in law, constitute an unchanging consequence of legal proceedings.
4. From the record, the petition was withdrawn before the respondents had filed any responses or substantive submissions to the appeal save for the 7th respondent who filed a notice of preliminary objection. The appeal, at the time of withdrawal, was not ripe for hearing. While applying the principle that costs normally followed the event, the event to which costs would follow had not materialized. The applicant's appeal did not proceed as the occurrence of the event that would have led to the applicant being successful crystallized as the 11th respondent was sworn in as Governor of Nairobi County.

Application allowed.

Orders

Each party to bear its costs of the appeal.



Citations

Cases

1. Council of Governors v. Senate & Another ([2014] eKLR) — Mentioned
2. In the Matter of the Council of Governors; Senate & another (Interested Parties) (Reference No 1 of 2014; [2014] eKLR) — Explained
3. Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others (Sup. Ct. Petition No. 4 of 2012; [2014] eKLR) — Explained
4. Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, Sup. Ct. Petition No. 4 of 2012 ([2014] eKLR) — Mentioned
5. Odinga, Raila & 5 others v Independent Electoral & Boundaries Commission & 3 others (Petition No 5, 4 & 3 of 2013 (Consolidated); [2013] eKLR) — Explained

Statutes

1. Supreme Court Act (No 7 of 2011) — section 21(2) — Interpreted
2. Supreme Court Rules, 2020 (No 7 of 2011 Sub Leg) — Rule 3(5), 27

Advocates

None mentioned

RULING

1. Upon considering the application by the applicant to withdraw the appeal on December 10, 2021 when the matter was mentioned before the Deputy Registrar (Hon Ole Keiwua) with all parties consenting to the withdrawal and;
2. Upon noting that that the 11th respondent was unable to agree on costs with the learned Magistrate directing parties to file submissions limited to the question of whether costs should be paid to the 8th respondent upon the aforesaid withdrawal; and
3. Upon perusing the applicant's submissions dated December 22, 2021 and filed on March 14, 2022 wherein he submits that the petition of appeal was withdrawn at the earliest opportunity and in good faith and any costs incurred thereafter were occasioned by the respondents' demand for costs; and
4. Upon considering further arguments by the applicant that section 21(2) of the *Supreme Court Act* and rule 3(5) of the *Supreme Court Rules, 2020* provide that costs fall under the inherent powers of the court as was held in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, Sup Ct Petition No 4 of 2012; [2014] eKLR (*Jasbir Singh Rai* case) and further arguing that the issues raised in the appeal were constitutional in nature and a matter of public interest despite the applicant having filed his appeal in his individual capacity by relying on this court's finding in *Raila Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others*, Sup. Ct. Petition Nos 3, 4 & 5 of 2013; [2013] eKLR persuading the court to order each party to bear its own costs and;
5. Further considering the submissions by the 8th respondent dated and filed on December 17, 2021 that the application for withdrawal of the appeal is not opposed but nevertheless contending that under section 21(2) of the *Supreme Court Act* and rule 27 of the *Supreme Court Rules*, costs follow the event and that an order for withdrawal is subject to an order for costs to the respondent as was the finding by this court in *Council of Governors v Senate & another*, Reference No 1 of 2014; [2014] eKLR (*Council of Governors* case); and
6. Furthermore, noting the respondent's further opposition to the applicant's submission that the appeal is a matter of public interest arguing that the applicant filed the appeal in his personal capacity and



that the applicant stood to solely benefit from the outcome, hence the applicant ought to shoulder the costs of the 8th respondent;

7. We now opine as follows:

- i. This court has inherent jurisdiction to make orders on costs with section 21(2) of the Supreme Court Act and rule 3(5) of the Supreme Court Rules, 2020 being instructive on this.
- ii. The guiding principles applicable in costs were as stated in Jasbir Singh Rai where we stated that costs follow the event with the discretion of the court exercised judiciously by stating:

“ [18] It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation....

Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this court in other cases.”

- iii. Having so stated, we note from the record that the petition was withdrawn before the respondents had filed any responses or substantive submissions to the appeal save for the 7th respondent who filed a notice of preliminary objection. The appeal, at the time of withdrawal was not ripe for hearing. While applying the principle in Jasbir Singh Rai that costs normally follow the event, has an event to which costs would follow materialized? The answer is in the negative. Such an event has not happened. We note that the applicant’s appeal did not proceed as the occurrence of the event that would have led to the applicant being successful crystallized as the 11th respondent was sworn in as Governor of Nairobi County. We therefore come to the conclusion that each party shall bear its costs before this court.

8. And having therefore considered the submissions by the respective parties, we now order that each party shall bear its costs of the appeal.

8. It is accordingly so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MAY, 2022.

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P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE

PRESIDENT OF THE SUPREME COURT

.....
S. C. WANJALA



JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

.....

W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA

