



**Mbevo v Mati & 2 others (Petition of Appeal 22 of 2019)
[2021] KESC 74 (KLR) (16 July 2021) (Ruling)**

Baridi Felix Mbevo v Musee Mati & 2 others [2021] eKLR

Neutral citation: [2021] KESC 74 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION OF APPEAL 22 OF 2019**

PM MWILU, DCJ & V-P, MK IBRAHIM, SC WANJALA, NS NDUNGU & I LENAOLA, SCJJ

JULY 16, 2021

BETWEEN

BARIDI FELIX MBEVO APPELLANT

AND

MUSEE MATI 1ST RESPONDENT

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 2ND
RESPONDENT**

**THE KITUI WEST CONSTITUENCY RETURNING OFFICER 3RD
RESPONDENT**

*(Being an appeal against the Ruling of the Court of Appeal at Nairobi (Githinji, Waki
& Warsame JJA) delivered in Election Petition No. 28 of 2018 on 24th May 2019)*

Jurisdiction and discretion to decide on whether to award costs in election petition appeals.

The court was to decide on whether to award costs after a petition of appeal was withdrawn before the other parties could file their responses to it. The court decided that each party should bear its costs and it did not interfere with the costs awarded by the other courts in which the parties had litigated the matter.

Reported by Beryl Ikamari

Civil Practice and Procedure - costs - principles that guide the court when deciding on how to award costs - where a petition was withdrawn on grounds that it had been overtaken by events - whether the court would award costs to the respondents after the withdrawal of the petition by the petitioner.

Brief facts

At the Chief Magistrates Court, the 1st respondent challenged the election of the appellant as the Member of County Assembly (MCA) Mutonguni Ward, Kitui West Constituency. The trial court nullified the election



and ordered that a certificate of election be issued by the 2nd and 3rd respondents to the 1st respondent. On appeal, the High Court overturned the trial court's decision and ordered for fresh elections.

When the 1st respondent filed an appeal at the Court of Appeal, the Court of Appeal held that it lacked jurisdiction to hear disputes about the election of a Member of a County Assembly. The 1st respondent withdrew his appeal and the cross appeal was dismissed for want of jurisdiction.

The appellant moved the Supreme Court to challenge the Court of Appeal's decision on the question of jurisdiction. A withdrawal order was issued on October 6, 2020 after the appellant withdrew the petition on September 28, 2020. As the parties were unable to agree on costs, they were directed to file and serve submissions to enable the court to make its determination on costs.

Issues

- i. What were the principles that would guide the court in exercising discretion to award costs?
- ii. How would the court decide on costs when a petition was withdrawn on grounds that it had been overtaken by events?

Held

1. The Supreme Court had inherent jurisdiction to make orders on costs. Costs were an issue of judicial discretion which had to be exercised judicially and in accordance with reason and justice.
2. The principles on costs were that costs followed the event; the effect being that the party who called forth the event by instituting the suit would bear the costs. However, if that party showed legitimate occasion, by succeeding in the suit, then the defendant or respondent would bear the costs. In deciding on the issue of costs, the court would exercise its discretion while accommodating the special circumstances of the case and being guided by the ends of justice. Relevant factors in exercising that discretion included claims of public interest and the motivation and conduct to the parties before, during and after the actual process of litigation.
3. The costs awarded by the Chief Magistrates Court, the High Court and the Court of Appeal were not challenged by the parties and the Supreme Court would not interfere with them.
4. The petition of appeal was withdrawn before the respondents could file any responses or submissions on the substantive issues. At the time of withdrawal, the appeal was not ready for hearing. The petition was withdrawn on grounds that it had been overtaken by events. A by-election had been conducted pursuant to the orders of the High Court and the 1st respondent had emerged the winner of the election. The appeal was therefore frustrated.
5. The appeal did not fail; it was frustrated and strictly speaking, there were no winners or losers after the withdrawal. The inevitable conclusion was that each party was to bear their own costs.

Each party was to bear its costs.

Orders

Each party had to bear its costs of the appeal.

Citations

Statutes

None referred to

Advocates

None mentioned



RULING

A. Introduction

1. On 28th September 2020, the appellant filed a Notice of Withdrawal of petition dated 25th September 2020. Subsequently, on 6th October 2020, the Court (Rtd Chief Justice, David K. Maraga) recorded a Withdrawal Order and directed parties to file and serve written submissions on costs.

B. Background

2. Following the 8th August 2017 General Elections for Member of County Assembly (MCA) Mutonguni Ward, Kitui West Constituency, the 3rd respondent (the returning Officer) declared the appellant (Baridi Felix Mbevo) the duly elected MCA. Dissatisfied with these results, the 1st respondent (Musee Mati) filed before Kitui Chief Magistrates Court, Election Petition No. 1 of 2017. On 31st February 2018, the Chief Magistrates Court (Munguti PM) nullified the election declaration and ordered the 2nd and 3rd respondents to issue a certificate of election to the 1st respondent. The Court further ordered the 2nd and 3rd respondents to bear the appellant's and the 1st respondent's quantified costs.
3. Aggrieved by the said decision, the appellant filed an appeal before the High Court in Petition No 1 of 2018 and in a judgment delivered on 20th June 2018, the Court (Mutende J) overturned the decision of the trial court and made an order for fresh elections. It also ordered the 1st respondent to bear the appellant's costs before both the Chief Magistrates Court and the High Court.
4. Being dissatisfied with the High Court judgment, the 1st respondent filed an appeal before the Court of Appeal, Election Petition Appeal No. 28 of 2018. The appellant similarly filed a cross appeal. However, following the Court of Appeal pronouncement in Petition of Appeal No. 32 of 2018 that it lacks jurisdiction to hear appeals on disputes pertaining the election of a Member of County Assembly, the 1st respondent withdrew his appeal. In contrast, the appellant chose to proceed with his cross appeal. In a judgment delivered on 25th May 2019, the Court of Appeal dismissed the appellant's cross appeal for lack of jurisdiction.
5. Further aggrieved, the appellant moved this Court challenging the Appellate Court's finding on jurisdiction. On 28th September 2020, the appellant withdrew the petition and a Withdrawal Order was issued on 6th October 2020. As the parties could not agree on costs, they were directed to file and serve written submissions and thereafter, the Court would give its determination on the question of costs.

i. Appellant's case

6. The submissions filed on 2nd October 2020 on behalf of the appellant address the single issue before Court. It is submitted that all parties were successful upon the withdrawal of the petition and consequently the principle that costs follow events ought not be used to penalize either of the parties. Relying on this Court's holding in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, SC Petition No 4 of 2012; [2014] eKLR (*Jasbir Singh Rai Case*), the appellant urges that costs must always follow the event unless the court has a good reason to order otherwise. He asks the Court to exercise its discretionary in his favour and find that each party should bear its own costs.
7. In the alternative, he argues that the 1st respondent is the core beneficiary of the withdrawal for reasons that a by-election was held during the pendency of the petition making it to be overtaken by events;



he was barred from participating in the by-election as he was not able to return his nomination papers on time; and the 1st respondent participated in the by-election and won. The appellant adds that he withdrew the petition at the earliest opportunity, in good faith and any costs incurred thereafter were occasioned by the respondents' demand for costs.

8. In conclusion, he submits that the issues raised in the withdrawn petition were constitutional in nature and of public interest affecting the electorates of Mutonguni Ward. He relies on this Court's finding in *Raila Odinga & Others vs The Independent Electoral Boundaries Commission & others*, SC Petition No. 5 of 2013; [2013] eKLR and *Samuel Kamau Macharia & another vs Kenya Commercial Bank & 2 others*, SC Application No. 2 of 2011; [2012] eKLR, to persuade the Court to order each party to bear its own costs on grounds of public interest.

ii. 1st Respondent's case

9. In his submissions dated 4th March 2020, the 1st respondent contends that this Court has inherent powers to issue interlocutory orders, including orders for costs. He relies on this Court's finding in the *Jasbir Singh Rai Case and Council of Governors versus Senate & Another*, Reference No. 1 of 2014; [2014] eKLR (Council of Governors Case).
10. The 1st respondent also urges that an order for withdrawal is subject to an order for costs to the respondent(s) as was the finding of this Court in *Council of Governors Case*. He adds that he is entitled to costs as the appellant's petition and record were voluminous and required considerable time to peruse; further, that the appellant's advocate filed an application to cease acting; and his advocates have been forced to attend Court on numerous occasions incurring travelling expenses and time.

iii. 2nd and 3rd Respondents' case

11. In their submissions dated 31st September 2020, the 2nd and 3rd respondents urge that having duly instructed their advocates to defend the appeal, they were entitled to costs in line with Rule 60 (2) of the Supreme Court Rules, 2020. They rely on the *Jasbir Singh Rai Case and Director of Public prosecution vs Eng. Michael Sistu Mwaura Kamau & 4 others* [2020] eKLR, to urge the Court to apply the guiding principle that costs follow the event.
12. The respondents oppose the appellant's submission that the appeal was in public interest and instead urge that it was filed purely for private gains. They assert that the appellant ought to have withdrawn the appeal upon the Court of Appeal pronouncement on jurisdiction to avoid incurring additional costs before this Court.

C. Issues for Determination

13. From the foregoing, only one issue arises for determination:

Whether costs are payable in this matter, and if so, to which party.

D. Analysis

14. The main contention by the appellant is that each party should bear its own costs before this Court for reasons that all the parties were successful upon the withdrawal of the petition. In the alternative, he contends that the 1st respondent was the sole beneficiary of the withdrawal and any costs incurred in the matter was occasioned by the respondents' demand for costs as a condition for withdrawal. The appellant further invokes a public interest contestation by urging that the issues raised in the withdrawn petition were constitutional in nature affecting the electorates of Mutonguni Ward.



15. The respondents maintain that they are entitled to costs pursuant to Rule 60(2) of the Supreme Court Rules, 2020. The reasons offered are that, costs follow the event; orders for withdrawal are subject to orders for costs to the respondents; and that they have incurred costs by instructing advocates, attending court and other ancillary expenses. The respondents also oppose the appellant's contestation on public interest and strongly contend that the petition was filed purely for private gains.
16. It is trite that we have an inherent jurisdiction to make orders on costs. In the *Jasbir Singh Rai Case* at paragraph 11, this Court established that costs fall under the inherent powers of the Court. Section 21(2) of the Supreme Court Act and Rule 3(5) of the Supreme Court Rules, 2020 are instructive on this issue. Further, the exercise of this jurisdiction is an issue of judicial discretion which must be exercised judicially and in accordance with reason and justice.
17. Moreover, we have considered and laid down the principle on costs in *Jasbir Singh Rai*, which findings we reiterate are properly applicable to the present case. There we stated as follows:
 - (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." [Emphasis added]
18. On discretion, this Court found:
 - "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." [emphasis added]
19. Having so stated, we note that the costs awarded by the Chief Magistrates Court, the High Court and the Court of Appeal are not challenged by the parties. The Court shall therefore refrain from addressing itself on the same. What is in issue is costs before this Court.
20. We have perused the record and note that the petition was withdrawn before the respondents could file any responses or submissions on the substantive issues. The appeal, at the time of withdrawal was not ready for hearing. We have further considered the rival submissions by the parties and are convinced that the petition was withdrawn on grounds that it had been overtaken by events. This was after a by-election, ordered by the High Court, had been conducted and concluded with the 1st respondent emerging the winner. The appeal therefore was frustrated necessitating its withdrawal.
21. Applying the principle in the *Jasbir Singh Rai Case* that costs normally follow the event, the question to ask is whether an event to which costs would follow has materialized. The answer is in the negative. The appellant's appeal did not fail but was frustrated. Strictly speaking, there were no winners or losers following the withdrawal. It is the occurrence of the event which crystalizes costs for the successful



party. In this matter, that event has not crystalized. That said, the inevitable conclusion is that each party shall bear its costs before this Court.

E. Orders

22. In the event, and in the exercise of discretion we order as follows;

1. Each party shall bear its costs of the Appeal.

23. It is accordingly so ordered.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JULY, 2021

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P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

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NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA

