In re Council of Governors (Reference 1 of 2014)
[2014] KESC 54 (KLR) (8 December 2014) (Ruling)

In the Matter of the Council of Governors; Senate & another (Interested Parties) [2014] eKLR

Neutral citation: [2014] KESC 54 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

REFERENCE 1 OF 2014

WM MUTUNGA, CJ & P & MK IBRAHIM, SCJ

DECEMBER 8, 2014

IN THE MATTER OF THE APPLICATION BY THE COUNCIL OF GOVERNORS FOR AN ADVISORY OPINION UNDER ARTICLE 163(6) OF THE CONSTITUTION OF KENYA

BETWEEN

COUNCIL OF GOVERNORS ..... APPLICANT

AND

THE SENATE ..... 1ST INTERESTED PARTY

COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION ..... 2ND INTERESTED PARTY

Supreme Court allows withdrawal of the application by Council of Governors that sought to bar the Senate from summoning their members

The applicant filed a reference seeking an advisory opinion on various issues including the question as to whether the Senate could summon a governor to answer questions on county public financial management. As a result of favourable orders in the High Court, the applicant sat back and waited until the 1st interested party filed a preliminary objection. During the intended hearing of the preliminary objection, the applicant made an application orally for withdrawal of the reference. The interested parties did not object to such withdrawal, but prayed for costs. The Supreme Court allowed the withdrawal of the application and ordered the applicant to bear the costs of the interested parties in the reference, which costs were to be agreed upon or taxed by the taxing master of the court.

Reported by Phoebe Ayaya & Kipkemoi Sang

Jurisdiction *- jurisdiction of the Supreme Court - prima facie jurisdiction of the Supreme Court - discretionary power of the court to make an order for costs - whether, the court caould make an order for costs upon withdrawal of a matter before it - whether the Supreme Court could make an order for costs upon withdrawal of a matter before*

it at any time after the appeal had been lodged and further steps taken - Supreme Court Act (cap 9B), section 2(1); Supreme Court Rules 2012, rule 3(5).

***Civil Practice and Procedure** – suits - withdrawal of suits – withdrawal of suits as a matter of right – where the applicant sought to withdraw a suit filed in the Supreme Court – where the withdrawal was on the basis of allowing the suit to progress through the legal system from the High Court upwards – where the respondent claimed that the application for withdrawal was made in bad faith – where the respondent sought costs of the suit – whether the Supreme Court could order for costs against the applicant – Supreme Court Act (cap 9B), section 21(1); Supreme Court Rules, 2012, rule 3(5).*

Brief facts

The applicant, filed a reference seeking an advisory opinion on various issues including the question as to whether the Senate could summon a Governor to personally appear before the Senate or a Committee of the Senate to answer questions on county public financial management

Subsequently, the applicant made an application for leave to amend the reference. Leave was granted but the amendment was not done. An oral application for stay of proceedings was then made, pending the judgment of the High Court in a matter that was canvassing a similar issue as the one before the Supreme Court. The applicant was ordered to formally apply for stay but the applicant did not.

As a result of favourable orders in the High Court, the applicant then sat back and waited until the 1st interested party filed a preliminary objection, and the matter was listed for hearing before a two-judge bench. During the intended hearing of the preliminary objection, the applicant made an application orally for withdrawal of the reference. The interested parties did not object to such withdrawal, but prayed for costs.

Issues

i. Whether, the applicants could withdraw the matter as a consequence of an incidental order from the High Court.

ii. Whether Supreme Court could make an order for costs upon withdrawal of a matter before it at any time after the appeal had been lodged and further steps taken.

Relevant provisions of the Law

Supreme Court Act (cap 9B)

Section 21 - General powers

(1) On an appeal in proceedings heard in any court or tribunal, the Supreme Court may make any order, or grant any relief, that could have been made or granted by that court or tribunal.

Supreme Court Rules, 2012

Rule 3

(5) Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders or give such directions as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

Held

1. The law allowed a party who had approached the court to withdraw a matter if he deemed fit to do so. Barring parties from withdrawing matters once filed in courts of law would be contrary to the constitutional principle of alternative dispute resolution under article 159(2) which provided that; alternative forums of dispute resolution which included mediation, arbitration and traditional dispute resolution mechanisms ought to be promoted.
2. The court had the discretionary power to make an order for costs as mandated under the Supreme Court Act and Rules, 2012. Section 2(1) of the Supreme Court Act, gave an option to the Supreme Court to make any ancillary or interlocutory orders, including any orders as to costs as it thought fit to award. Rule 3(5) of the Supreme Court Rules 2012, provided that nothing could otherwise affect the inherent powers of the court to make orders or give directions as would be necessary for the end of

justice or to prevent abuse of the process of the court. A party who moved the court to seek an order for costs had the obligation to lay a firm basis by giving sufficient reasons why he had to be awarded cost.

3. The award for cost ought to be guided by the principle that, cost followed the event; the effect was that the party, who called forth the event by instituting suit, bore the costs if the suit failed, but if a party showed legitimate occasion by successful suit, then the defendant or respondent bore the costs. The vital factor in setting the preference was a judiciously-exercised discretion of the court, accommodating the special circumstances of the case, while being guided by the ends of justice. *(Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others, Petition No. 4 of 2012)*
4. The claim of public interest would be relevant factor in exercise of such discretion as would also be motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation *(supra Jasbir)*
5. An advocate had a duty to aid the court reach a legitimate determination founded on sound law. Hence, he had to abreast with the law and keep pace with the various developments in the applicant's reference before the court and his advocate's conduct amounted to abuse of court process (*Nicholas Kiptoo Arap Korir Salat v. Independent Election and Boundaries Commission & 7 others, Application No. 16 of 2014)*

The applicant was ordered to bear the costs of the interested parties in the reference, which costs were to be agreed upon or taxed by the taxing master of the court.

Citations

Cases

1. International Legal Consultancy Group v the Senate and another, on the same issues. It was submitted that the petitioner in Petition No. 8 of 2014

Statutes

1. Civil Procedure Act
2. Constitution of Kenya, 2010
3. Supreme Court Act

Advocates

None mentioned

RULING

Background

1. The applicant, the Council of Governors, filed a Reference to this Court on 14th February, 2014 seeking an advisory opinion on various issues including the question as to whether the Senate can summon a Governor to personally appear before the Senate or a Committee of the Senate to answer questions on county public financial management.

2. On 28th August, 2014, the Reference was mentioned before this Honourable Court whereupon the applicant through its learned counsel Mr. Wanyama indicated its intention to withdraw the matter under Rule 19(2) of the Supreme Court Rules, 2012.

3. The Interested Parties expressed their reservations to the applicant's application. Learned counsel, Mr. Njoroge for the Senate argued that what was coming up for hearing that morning was a Preliminary Objection that they had filed, hence he termed the applicant's move as abuse of court process. Counsel contended that while the Reference was still pending before this Court, the applicant had filed another cause of action in the High Court. Hence, he submitted that if the matter was to be withdrawn, then it should be on conditional terms as to costs. Ms. Stella Muraguri, learned counsel for the Commission

for the Implementation of *the Constitution* (CIC) also urged that the withdrawal application be subject to costs and described the applicant's behavior as amounting to forum shopping.

4. Since there was no opposition to the oral application for withdrawal of the Reference, the only issue being the question of costs, the Court marked the Reference as withdrawn but reserved its ruling on the issue of costs. Parties were directed to file brief written submissions on this issue within fourteen (14) days whereupon the Court would make its Ruling.

Summissions

The Applicant's submissions

5. The applicant filed its submissions on 5th September, 2014 opposing the grant of costs to the two interested parties. It argued that both the Senate and CIC were enjoined to this matter as interested parties and as such there was no basis for grant of costs to interested parties. It contended that they had not filed any documents in Court hence had not conceivably incurred any costs at all.

6. The applicant also submitted that the Senate was represented in Court by Mr. Anthony Njoroge, a legal officer of Parliament. His salary and remuneration is paid from the public coffers. Hence, the applicant opined that his attendance of court proceedings cannot conceivably attract costs. It was further urged that the applicant is a public entity funded from the public coffers just like the Senate and CIC.

7. It was submitted that there was no adversarial dispute between them to warrant payment of costs as this was a request for an advisory opinion and the two institutions only applied to be enjoined as interested parties. Hence it was urged that there was no basis for a claim of costs and if at all the Court is inclined to award costs, it was urged that the same should be absolutely nominal.

8. As regards abuse of Court, the applicant argued that it moved this Honourable Court genuinely to seek an Advisory Opinion at the time when the issue of summoning of governors was being contested and had attracted a lot of public debate. Counsel submitted that separate proceedings were filed by various parties in the High Court touching on this issue. It cited the County Government of Embu and Governor Martin Nyaga Wambora in, Martin Nyaga Wambora & 3 others v. The Senate and 3 others: Civil Appeal No. 21 of 2014; and International Legal Consultancy Group in High Court of Kenya Kerugoya, Constitutional Petition No. 74 of 2014, International Legal Consultancy Group v. The Senate and the Clerk of the Senate. It was submitted that the applicant was not a party to the proceedings and was enjoined as an interested party and hence could not file an appeal over the judgement of the High Court.

9. The applicant conceded that it had now filed Constitutional Petition No. 413 of 2014: The Council of County Governors v. The Senate, which is pending before the High Court. It submitted that it had withdrawn the Reference to allow the issues to cascade to the Supreme Court in the normal appellate system, if need be. Hence, it was opined that this was not an abuse of court process and that the withdrawal was made in absolute good faith.

1st Interested Party's submissions

10. The Senate filed its submissions on 8th September, 2014 urging that the applicant bears the costs in the Reference. It gave a chronological account of events subsequent to the filing of the Reference on 14th February, 2014. That on 17th February, 2014, there was filed a Constitutional Petition No. 8 of 2014: *International Legal Consultancy Group v the Senate and another, on the same issues. It was submitted that the petitioner in Petition No. 8 of 2014* filed it primarily on behalf of the governors who were

aggrieved by the summons issued by the Senate and that the advocates for the petitioner are the same advocates on record for the applicant herein.

11. The Senate averred further that on 21st March, 2014, the applicant orally applied for stay of proceedings in this Reference pending the judgement of the High Court in Petition No. 8 of 2014. It was ordered to file a formal application for stay of proceedings but no formal application was subsequently filed and an explanation has never been forthcoming. However, the Senate further contended that on 27th March, 2014 the applicant made an application to amend the reference, and leave to amend within 14 days was granted. Again no amendments were made and served and no explanation has been forthcoming from the applicant.

12 Subsequently, it was the Senate's submissions that, on 16th April, 2014 the High Court gave its judgement in Petition No. 8 of 2014, which judgement inter alia held that the Senate acted within its constitutional mandate under Articles 96(3) and 125 when it summoned the governors. In the 1st Interested Party's opinion, this judgement aggrieved the applicant herein who then filed Nairobi High Court Constitutional Petition No. 413 of 2014, Council of Governors v. The Senate of Kenya & others. The Petition raises substantially the same issues as those in the Reference. In this High Court petition, Justice Lenaola gave interim orders, restraining the Senate from summoning the governors until the matter is determined on 25th August, 2014. Having secured these favourable orders, it was submitted that the applicant now moved to withdraw the Reference before this Honourable Court. This conduct, it was urged, is a gross abuse of the judicial process and amounts to improper legal practice and forum shopping.

13 With regard to the counsel representing the Senate being a legal officer of Parliament and being remunerated from the public coffers, it was submitted that all public institutions including Parliament and the CIC are bound by *the Constitution* under article 201(e) that provides that public money shall be used in a prudent and responsible way. It was submitted that the applicant's conduct of endless litigation over the same subject matter is in no way prudent or responsible use of public money. The Senate contended that it had expended its resources in preparing documents for filing in Court, preparing to attend Court and preparing for the hearing of the Reference. Likewise it was urged that the applicant had also wasted this Honourable Court's time and resources and it is only fair that the costs be met by it. That the costs would be part of the Senate's appropriation in aid (AIA) and would send a message to litigants not to abuse the court process. It annexed a Preliminary Objection filed in opposition to this Reference as proof of its preparatory work in the Reference.

14. The Senate Cited section 27 of the *Civil Procedure Act*, (Cap. 21) Laws of Kenya in urging that costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order. It also cited several cases in urging for grant of costs so as to avoid abuse of court process: Civil Case No. 655 of 2003 Nalin Khimji Vora & 2 Others v City Council of Nairobi [2014] eKLR; High Court of Kenya Miscellaneous No. 752 of 2006 Magnate Ventures Limited & another v City council of Nairobi & another [2008] eKLR; James Kuria Maina & 2 others v Kaigua Mbogo & 4 Others [2010] eKLR; and National Bank of Kenya v Roseline Mary Kahumbu [2007] eKLR.

15. It urged that it was important that litigants come to the Supreme Court with respect and that the applicant's conduct before the Court had been casual. Hence an award of costs shall send a message to advocates and litigants to approach the Supreme Court with seriousness and respect and conduct litigation without abusing the court process.

2nd Interested Party Submissions

16. CIC, the 2nd Interested Party, filed its submissions on 10th September, 2014 urging for the withdrawal of the Reference subject to costs. It reiterated its establishment under the provisions of section 5(1) of the 6th schedule to *the Constitution* with a mandate to monitor the implementation of *the Constitution* and the implementation of the devolved system of Government under section 15(d) of the 6th schedule to *the Constitution*. Hence, it submitted that it had an identifiable, direct and legitimate interest in the matter and was justified in making an application for enjoinment.

17. Upon the lodgment of the Reference by the applicant, CIC filed an application on 21st March, 2014 seeking to be enjoined in the proceedings as an interested party. On 26th March, 2014 it filed its List and Bundle of Authorities on the matter and on the 27th March, 2014, by consent it was enjoined as an interested party. The CIC in its submissions buttressed the sentiments of the 1st interested party on the several applications made by the applicant and directions given by the Court which the applicant did not honor.

18. CIC also submitted that civil matters are generally governed by the *Civil Procedure Act*, section 27(1) which emphasizes the discretion of the court or judge, and the court or judge to determine whom and out of what property and to what extent such costs are paid and are to be paid, with emphasis that costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order. It however acknowledged that this provision was not binding but persuasive to this Court.

19. The Commission cited the *Supreme Court Act*, Section 21(1) and rule 3(5) of the Supreme Court Rules, 2012 in arguing its case. It also referred to this Court's decision in Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai 7 4 others [2014] eKLR, where the Court recognized the costs follow event principle thus:

> " So the basic rule on attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the Suit."

20. CIC submitted that the applicant having filed the Reference without any justifiable reason and subsequently withdrawn it, it ought to bear the costs of the 2nd Interested Party. It urged that ignorance of the law is no defence and the applicant had full knowledge that it was not a qualified legal person to seek an advisory opinion as it was not qualified under Article 163(6) of *the Constitution*.

21. Further, it was urged that having filed the Reference and proceeded to file High Court Petition No. 413 of 2014 on the 19th August, 2014 raising substantially the same issues, amounted to abuse of court process, waste of judicial time in deciding multiple related cases and, exposed the Supreme Court to unprecedented risk of embarrassment in the event of concurrent conflicting judicial determinations. It amounted to forum shopping; a practice expressly barred by law and is certainly not in the public interest. It cited Constitutional Application No. 2 of 2011 to buttress this in which the Court held thus:

> " The court will be hesitant to exercise its discretion to render an Advisory opinion where the matter in respect of which the reference has been made is subject of proceedings in a lower court."

22. It was urged that prior to the withdrawal of the reference, CIC had made substantial research and preparations on the matter. It had filed a List of Authorities on the 26th March, 2014. Hence it prayed for costs of Ksh. 400, 000 as it contended that the circumstances favoured award of costs for reimbursement especially considering the conduct of the applicant

3.0 Analysis and Determination

23. The sole issue before the Court is whether costs should be ordered against the applicant or not.

24. The applicant has withdrawn its matter before the Court. The two interested parties did not object to the withdrawal. However, they both urged the Court that the applicant should be ordered to pay them costs. In a nutshell, they sum up the applicant's conduct since filing the matter before the Court as amounting to abuse of court process, forum shopping and waste of judicial time. On its part, the applicant disagrees that it should be condemned to bear costs. It argues that it came to Court with a legitimate Reference as there was a genuine concern on summoning of the governors by the Senate.

25. The issue whether the Court can Order for costs upon withdrawal of a matter before it was settled in the John O. Ochanda v. Telkom Kenya limited, Motion Application No. 25 of 2014 in which Ibrahim, SCJ held:

> " do hold the view that a prospective appellant is at liberty to withdrawal a Notice of appeal at any time before the Appeal has been lodged and any further steps taken. No proceedings have commenced strictly. I am also of the view that just like under the Civil Procedure Rules or Court of Appeal Rules, the right to withdrawal or discontinue proceedings or withdraw a notice of Appeal respectively ought to be allowed as a matter of right subject to any issue of costs which can be claimed by the respondents if any."(Emphasis provided)

26. Suffices it to say that indeed a party's liberty to withdraw a matter cannot be taken away. Courts have to facilitate pursuance of other means of dispute resolution. Hence, it is only in order that the law allows a party who has approached the Court to withdraw such a matter if he deems so fit to do. Barring parties from withdrawing matters once filed in courts of law will be contrary to the constitutional principle of alternative dispute resolution as provided in Article 159 of *the Constitution* thus:

159(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles -

...

(c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3).

27. From the Ochanda case above, the Court observed that indeed an order for withdrawal of a matter could be made, subject to an order for costs to the respondent(s) as the Court may deem fit. Hence the Court has the discretionary power to make an order for costs. We agree with the 2nd interested party in its submissions as regards the rules of the Court. The Court's mandate to make an order for costs is founded in the Act and Rules. Section 21(1) of the *Supreme Court Act*, 2011 provides:

> In any proceedings, the Supreme Court may make any ancillary or interlocutory orders, including any orders as to costs as it thinks fit to award.

Rule 3(5) of the Supreme Court Rules, 2012 provides:

Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders or give such directions as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

28. Hence, by rule 3(5) Court's rules, the Court may even make an order for costs suo motto in the interest of justice. Since it is a discretionary power, what matters is that the same has to be exercised judicially and not whimsically. A party who moves the Court to make such an order for costs has an obligation to lay a firm basis by giving sufficient reasons why he should be awarded costs.

29. The Court has already pronounced itself as regards how it approaches the question of costs. In Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others, Petition No. 4 of 2012, the Court captured this discretionary power in statute and rules thus [paragraph 9]:

> " From the foregoing provisions, it is clear that the Supreme Court, much like the other superior Courts, has an open-ended mandate of application of discretion to ensure ends of justice. This element of the judicial mandate is to be found in other law as well. Thus the *Civil Procedure Act* (Cap. 21, Laws of Kenya), the primary law of judicial procedure in civil matters, thus stipulates (Section 27(1)):
>
> > "Subject to such conditions and limitations' as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction shall be no bar to the exercise of those powers:
> >
> > Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order."

30. The Court examined in depth the question of costs in the Jasbir case and concluded thus:[paragraph 18]

> " (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."

31. The upshot is that, whether this Court has the power to award costs in this matter is not an issue. The question is whether it should exercise its discretion and award costs.

32. The Court has reviewed its record since the time the Reference was filed until it was withdrawn. We agree with the chronological account given by the Senate. It is true that the applicant made an application for leave to amend the Reference. The same leave was given but the amendment was not done. An oral stay of proceedings application was again made. Directions were given, but again they

were not heeded. The applicant then sat back and waited until the 1st Interested Party filed a Preliminary Objection and the matter was listed for hearing before a two judge bench. During the intended hearing of the Preliminary objection, the applicant then makes an application orally for withdrawal of the Reference. This conduct leaves a lot of questions to be asked by this Court on the real intent of the applicant.

33. Counsel for the applicant submitted that they had now filed a Constitutional Application in the High Court and want this subject matter to cascade to the Supreme Court through the normal judicial hierarchy. The Supreme Court and all other courts should be approached with the dignity and honor they deserve. From the onset, counsel should have known if there is indeed another forum for presenting his client's case other than coming to the Supreme court, clogging its system and taking its precious judicial time only for him to withdraw the matter after numerous mentions and applications. We are disappointed by counsel's conduct in this matter. In Yusuf Gitau Abdalla v. The Building Centre (K) Ltd & 4 others, Petition No. 27 of 2014, a single judge of this court stated the importance of judicial time thus [paragraph 24]:

> " Finally, this matter has brought to the fore the glaring lacuna in the *Supreme Court Act* and Rules. Judicial time is very precious and should not be wasted by a judge or judges of the Court sitting at the preliminary stage to determine whether a matter has met the prima facie jurisdiction threshold to be admitted to the Supreme Court ... The wheels of justice at the Supreme Court should not be clogged by matters that should not have been admitted in the first place."(Emphasis provided)

34. Secondly counsel for the applicant submitted that as regards the other matters filed in the High Court, its client (the applicant herein) was only an interested party and could not appeal. It was however urged by the 2nd Interested Party that the counsel for the applicant also represented the applicants in Petition No.8 of 2014 hence should have known that the same issue he presented before this honourable Court were before the High Court. This court has had the occasion to restate the role of an advocate as an officer of the court which role a paramount one. In Nicholas Kiptoo Arap Korir Salat v. The Independence Election and Boundaries commission & 7 others, Application No. 16 of 2014, it was observed:

> " An advocate is an officer of the Court and has a duty to aid the Court reach a legitimate determination founded on sound law. Hence, an advocate has to be abreast with the law and keep pace with the various developments."

35. Hence, while counsel is right to argue that parties in the two matters were different, we reiterate that as an officer of the Court charged with helping the courts and the judicial system work seamlessly, he cannot in championing his client's interests disregard his professional call as an officer of the court which is a classical paramount role. Counsel should have advised his client that the same question(s) they want to bring before the Court are potentially live before the High Court and they should await the outcome.

36. Consequently, we agree that the applicant's Reference before this Court and his advocate's conduct amounted to abuse of court process. The applicant argued that as a public entity, it should not be ordered to pay costs. We do not agree. A public entity should expend public resources accountably. Accountable utilisation of public funds also encompasses use of public funds for causes well founded in law. Further, whether the applicant is a public entity is debatable as questions have been cast on its locus standi: whether it is a body competent to request for an advisory opinion. Since this is a substantive question, it does not fall for determination now that the Reference has been withdrawn.

37. The applicant also argued that the Senate cannot be awarded costs since their counsel on record, Mr. Njoroge draws his remuneration from the public coffers as he is from the legal office of Parliament. It is our view that this is a matter which falls under the Taxing Master's mandate and discretion, that is, what costs are payable in this case and in particular whether Mr. Njoroge is entitled to instruction fees as the counsel for the Senate etc.

38. Consequently, this Court is inclined to award costs as against the applicant. The 2nd interested party asked for Four hundred thousand Kenya shillings (Ksh. 400, 000). The applicant did not respond on this aspect.

4.0 Orders

39. The upshot of the foregoing is that we make the following Orders:

    (a) the applicant shall bear the costs of the interested parties in this Reference

    (b) costs of the 1st interested party and the 2nd interested party to be agreed upon or taxed by the Taxing Master of the Court.

    Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF DECEMBER 2014.

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W.M. MUTUNGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT COURT

M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

Registrar Supreme Court of Kenya