



REPUBLIC OF KENYA



KENYA LAW
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**Abote v Kawaka & 4 others (Petition 16 (E019) of 2022)
[2022] KESC 69 (KLR) (Civ) (4 November 2022) (Ruling)**

Neutral citation: [2022] KESC 69 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA**

CIVIL

PETITION 16 (E019) OF 2022

PM MWILU, DCJ & VP, SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ

NOVEMBER 4, 2022

BETWEEN

OSCAR OLUOCH OUMA ABOTE PETITIONER

AND

ROSELINE AKOTH AWINO 1ST RESPONDENT

LOICE AKOTH KAWAKA 2ND RESPONDENT

ORANGE DEMOCRATIC MOVEMENT PARTY 3RD RESPONDENT

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 4TH
RESPONDENT**

RETURNING OFFICER NDHIWA CONSTITUENCY 5TH RESPONDENT

(Being an application for withdrawal of the Petition of Appeal and for costs)

Supreme Court declines to award costs against a petitioner seeking to withdraw a petition as bad faith had not been demonstrated on the part of the petitioner

The petitioner filed the instant notice of withdrawal of the petition of appeal in which he sought to withdraw the petition of appeal with no order as to costs. The court held that costs should not be used to punish the losing party but to compensate the successful party for the trouble taken in prosecuting or defending a suit. The court further held that as no bad faith had been demonstrated on the part of the petitioner, the court was not inclined to make any order for costs against him.

Reported by Kakai Toili

Civil Practice and Procedure – costs – orders as to costs in public interest litigation – purpose of issuing orders as to costs - whether in the absence of bad faith in public interest litigation each party should bear its costs - Supreme Court Act, 2011, section 21(2); Supreme Court Rules, rule 3(5).



Brief facts

The petitioner filed the instant notice of withdrawal of the petition of appeal in which he sought to withdraw the petition of appeal with no order as to costs. The only dispute for the court's determination was that of costs upon withdrawal of the petition. The petitioner contended that the notice of withdrawal was filed due to the court's decision on July 25, 2022 dismissing the petitioner's application with no order as to costs. It was the petitioner's argument that; costs followed the event though courts had the ultimate and unfettered discretion with respect to costs; the purpose for an award of costs was to indemnify fully or partially the successful party for the expenses incurred; and that the issues raised were of a constitutional nature and of public interest.

The 4th and 5th respondents prayed for costs upon withdrawal of the petition on grounds that; the matter was not a public interest litigation; the petitioner had abused the judicial process by filing another petition of appeal raising similar issues that had been raised in a prior suit and that they had spent considerable resources in hiring advocates to defend them in the proceedings.

Issues

- i. What was the purpose of issuing orders as to costs?
- ii. Whether in the absence of bad faith in public interest litigation each party should bear its costs?

Held

1. The court had the power under section 21(2) of the and rule 3(5) of the Supreme Court Rules to make any ancillary or interlocutory orders including any orders as to costs that it thought fit to award as it deemed necessary for the ends of justice or prevent abuse of the process of the court. Ordinarily, costs followed the event and costs should not be used to punish the losing party but to compensate the successful party for the trouble taken in prosecuting or defending a suit.
2. In public interest litigation which existed to serve the purpose of protecting the rights of the public at large, in a case that raised constitutional issues which were public in nature, in the absence of bad faith being exhibited, each party should bear its costs.
3. In view of the court's ruling delivered on July 25, 2022, the court could not substantially determine the instant petition in the absence of reasons for the impugned judgment of the appellate court in Civil Appeal No. E168 of 2022 which resulted in the petitioner filing Petition No E024 of 2022 before the instant court upon delivery of the reasons for the judgment by the appellate court.
4. The instant case fell within the domain of public interest litigation surrounding the nomination of a person for the general election that was slated for August 9, 2022 and the defending of such proceedings by the respondents was similarly in exercise of public interest. In addition, the withdrawal of the petition of appeal was largely informed by the court's ruling on July 25, 2022. As no bad faith had been demonstrated on the part of the petitioner, the court was not inclined to make any order for costs against him.

Notice of withdrawal of the petition allowed to the extent that each party would bear its costs.

Citations

Cases

1. Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai & 4 Others ([2014] eKLR) — Explained
2. Kenya Revenue Authority v Export Trading Company Limited (Petition 20 of 2020; [2022] KESC 31 (KLR)) — Explained
3. Raila Odinga & Others vs The Independent Electoral and Boundaries Commission & others (SC Petition No. 5 of 2013, [2013] eKLR) — Explained

Statutes

1. Constitution of Kenya, 2010 — Article 88 — Interpreted
2. Supreme Court Act — Section 21(2) — Interpreted



Advocates

None mentioned

RULING

1. Upon perusing the notice of withdrawal of petition of appeal dated August 2, 2022 and filed on August 3, 2022 in which the petitioner seeks to withdraw the petition of appeal herein dated July 18, 2022 and filed on July 20, 2022 with no order as to costs;
2. Noting that the only dispute for the court's determination is that of costs upon withdrawal of the petition and that the honourable deputy Registrar directed the parties to file submissions limited to the issue of costs;
3. Upon perusing the petitioner's written submissions on the issue of costs dated September 16, 2022 and filed on September 19, 2022 in which the petitioner contends that the notice of withdrawal was filed due to the court's decision on July 25, 2022 dismissing the petitioner's application with no order as to costs. It is the petitioner's argument in that regard that costs follow the event though the award of costs is not cast in stone and courts have the ultimate and unfettered discretion with respect to costs; that the purpose for an award of costs is to indemnify fully or partially the successful party for the expenses incurred; that whereas there was no successful party as the petition was withdrawn before it was heard and determined; and that the issues raised are of a constitutional nature and of public interest affecting the electorate of South Kabuoch/Pala Ward. The petitioner cites authorities including *Raila Odinga & others vs The Independent Electoral and Boundaries Commission & others*, SC Petition No 5 of 2013, [2013] eKLR, where this court ordered each party to bear its own costs on grounds of public interest;
4. Upon perusing the submissions on costs dated September 14, 2022 and filed on September 19, 2022 by the 4th and 5th respondents in which they pray for costs pursuant to section 21(2) of the *Supreme Court Act*, rules 3(5) of and 27 of the Supreme Court Rules 2020 upon withdrawal of the petition on grounds that the matter is not a public interest litigation; that the petitioner has abused the judicial process having filed another petition of appeal raising similar issues being Petition E024 of 2022; and that the 4th and 5th respondents have spent considerable resources in hiring advocates to defend them in the proceedings. They rely on the court's decisions in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 Others* Sup Ct Petition No 4 of 2012; [2014] eKLR and *In the Matter of the Council of Governors; Senate & another (Interested Parties)*[2014] eKLR to buttress their assertions.
5. Taking into consideration the court proceedings that, when this matter was last mentioned before the honourable deputy Registrar of the court on September 23, 2022 to confirm compliance of filing of submissions on costs as earlier directed on September 9, 2022, only the petitioner and the 4th to 5th respondents had complied. Counsel for the 1st to 3rd respondents indicated that they would not be filing any submissions;
6. We reiterate that this court has the power under section 21(2) of the *Supreme Court Act* and rule 3 (5) of the *Supreme Court Rules* to make any ancillary or interlocutory orders including any orders as to costs that it thinks fit to award as it may deem it necessary for the ends of justice or prevent abuse of the process of the court. Further, this court has set out legal principles that guide the grant of costs including in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, (*supra*) where we held that ordinarily, costs follow the event and costs should not be used to punish the losing party,



but to compensate the successful party for the trouble taken in prosecuting or defending a suit. It was our finding that:

“(15) It is clear that there is no prescribed definition of any set of “good reasons” that will justify a court’s departure, in awarding costs, from the general rule, costs-follow-the-event. In the classic common law style, the courts have proceeded on a case-by-case basis, to identify “good reasons” for such a departure. An examination of evolving practices on this question, shows that, as an example, matters in the domain of public-interest litigation tend to be exempted from award of costs.” (Emphasis ours).

7. Considering the nature of the dispute comprised in the petition of appeal and the issues surrounding the determination of election related disputes leading to the elections held on August 9, 2022; this being a matter touching on nomination and registration of candidates where the petitioner pursued the inclusion of his name as the Orange Democratic Movement Party nominee for South Kabuoch/Pala Ward for the election that was slated for August 9, 2022; the 4th respondent being the public institution tasked with the conduct of elections as per the provisions of Article 88 of the *Constitution*; and the finding of this court in the case of *The Kenya Revenue Authority v Export Trading Company Limited* (Petition 20 of 2020) [2022] KESC 31 (KLR) (Civ) (17 June 2022) (Judgment) where we held that in public interest litigation which exists to serve the purpose of protecting the rights of the public at large, in a case that raises constitutional issues which are public in nature, in the absence of bad faith being exhibited, each party should bear its costs; and
8. Further considering that in view of the court’s ruling delivered on July 25, 2022 the court could not substantially determine this petition in the absence of reasons for the impugned judgment of the appellate court in Civil Appeal No E168 of 2022 which resulted in the petitioner filing Petition No E024 of 2022 before this court upon delivery of the reasons for the judgment by the appellate court;
9. We Opine that we are satisfied that this is one such matter that falls within the domain of public interest litigation surrounding the nomination of a person for the general election that was slated for August 9, 2022 and the defending of such proceedings by the respondents was similarly in exercise of public interest. In addition, the withdrawal of the petition of appeal is largely informed by the court’s ruling on July 25, 2022 as already stated. As no bad faith has been demonstrated on the part of the petitioner, we are not inclined to make any order for costs against him.
10. Subsequently, we allow the notice of withdrawal of petition dated August 2, 2022 to the extent that each party shall bear its costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF NOVEMBER 2022.

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P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE

PRESIDENT 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

.....

W. OUKO

JUSTICE OF THE SUPREME

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA

