



REPUBLIC OF KENYA



KENYA LAW
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**Abote v Kawaka & 4 others (Petition 21 (E024) of 2022)
[2022] KESC 70 (KLR) (4 November 2022) (Ruling)**

Neutral citation: [2022] KESC 70 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION 21 (E024) 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

LOICE AKOTH KAWAKA 1ST RESPONDENT

ROSELINE AKOTH AWINO 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 costs upon withdrawal of
petition of appeal and Notice of Motion Application)*

RULING

1. Upon perusing the petitioner's notice of withdrawal of application and petition dated 6th October, 2022 and filed on 7th October, 2022 seeking to withdraw the application and the petition both dated 3rd August, 2022; and
2. Noting the court's order of 18th October, 2022 (Lenaola SCJ) wherein the notice of motion dated 3rd August, 2022 was allowed, marking the matter as withdrawn leaving the single issue of costs to be determined by the court;
3. Further noting the court's directions of 11th October, 2022 for parties to file submissions on the issue of costs whereat only the petitioner and the 4th and 5th respondents filed submissions on the issue, counsel for the 3rd respondent having in an earlier appearance before the Honourable Registrar on 8th August



- 2022 indicated that the 3rd respondent would not file any submissions and would abide by the decision of the court; and
4. Upon considering the petitioner's submissions dated and filed on 24th October, 2022, wherein he contends that the court has unfettered discretion in the award of costs, noting, that the same must only be to indemnify fully or partially a successful party. That the petition having been withdrawn before it could be heard, there was no successful party and relying on the case of *British Columbia (Minister of Forests) v Okanagan Indian Band*, [2003] 3 SCR 371, 2003 SCC 71 where the Supreme Court of Canada itemized the characteristics of a regular award of costs to include that costs must await the conclusion of proceedings as the success or entitlement cannot be determined before that time. Noting that the applicant also relies on the case of *Baridi Felix Mbevo vs Musee Mati & 2 others* [2021] eKLR to buttress this argument and further contends that the issues raised in the withdrawn petition were of a public interest nature affecting the electorates of South Kabuoch/Pala Ward. Noting furthermore that he relies on this court's decisions in *Raila Odinga & others vs Independent Electoral and 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 where parties were ordered to bear their own costs on grounds of public interest; and
 5. Upon considering the 4th and 5th respondents' submissions on costs dated and filed on 13th October, 2022 wherein they urge that they ought to be awarded costs having defended the suit from the High Court to the Supreme Court and having filed a notice of preliminary objection in response to the petition and the application dated 3rd August, 2022 and attended court for mention on three occasions being 8th August, 6th October, 2022 and 11th October, 2022. Noting that they also state that they deployed considerable resources in hiring Advocates, research and preparation of responses and submissions towards defending their interests. And noting that they rely on the decision in *Jasbir Singh Rai & 3 others vs Tarlochan Singh & 4 others* [2014] eKLR where it was held that a party is entitled to costs as compensation for the trouble taken in prosecuting the suit. Noting furthermore that they also place reliance on the decision *In the Matter of the Council of Governors; Senate & another (Interested Parties)* [2014] eKLR where this court awarded costs where the applicant was found to have abused the court process in similar circumstances to the present matter because during the pendency of another appeal being Petition No E019 of 2019 Oscar Oluoch Ouma vs Loice Akoth Kawaka & others the petitioner filed the present appeal, and that this appeal not being one filed in the public interest but one to advance personal interests; and
 6. Mindful of the provisions of section 21 (2) of the *Supreme Court Act* and rule 3 (5) of the *Supreme Court Rules* which grants the court inherent power to make such orders, including any orders as to costs that it thinks fit to award as may be necessary for the ends of justice or to prevent abuse of the process of the court and also mindful of rule 27 of the *Supreme Court Rules* 2022 which allows the court to make an order as to costs following withdrawal of proceedings; and
 7. Appreciating this court's decision in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others (supra)* where the legal principles that guide the grant of costs were enunciated where the general rule in awarding costs, is that costs-follow-the-event and 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 and the departure is determined on a case to case basis; and
 8. Taking into account the nature of the dispute and the issues surrounding the determination of election related disputes leading to the elections held on 9th August 2022; the respondents include public bodies instituting or defending proceedings and are performing their function which falls under public interest.



9. We opine that although the applicant was pursuing his own nomination as a candidate for Member of County Assembly for South Kabuoch/Pala Ward, the dispute in the withdrawn petition revolved around the nomination process of the Orange Democratic Party's (ODM) Member of County Assembly candidate for the South Kabuoch Ward in the General Election held on 9th August 2022, which transcends the applicant, rendering it a matter of public interest. Moreover, we bear in mind the circumstances leading to the withdrawal of Supreme Court Petition No 16 (E019) of 2022 which could not be heard on merit in the absence on the reasons from the Court of Appeal and the fact that the dispute is overtaken by events, the General Elections having already been held;
10. Accordingly, we are persuaded that the appeal had not proceeded to its hearing and determination notwithstanding that the 4th and 5th respondents filed a notice of preliminary objection and submissions in support both dated 3rd August, 2022 and filed online only and that the parties attended minimal court proceedings in the nature of mentions before the Honorable Registrar of the Court. We are also satisfied that the appeal raised a matter of public interest and that the respondents stand to suffer no prejudice if no order as to costs is made.
11. Consequently, the appeal having been withdrawn on 18th October, 2022, we make no order as to 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 COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA

