

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Koome; CJ & P, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

APPLICATION NO. 5 OF 2019

-BETWEEN-

AHMED ABDULLAHI MOHAMED 1ST APPLICANT

AHMED MUHUMUD ABDI 2ND APPLICANT

-AND-

MOHAMED ABDI MOHAMED 1ST RESPONDENT

GICHOHI GATUMA PATRICK 2ND RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION 3RD RESPONDENT

AHMED ALI MUKTAR 4TH RESPONDENT

*(Being an application for review of the Judgment (majority) of the Supreme Court
(Maraga; CJ & P, Ibrahim, Ojwang, Wanjala, Ndung'u & Lenaola, SCJJ)
delivered on 15th February, 2019 in SC Petition No. 7 of 2018*

RULING OF THE COURT

A. INTRODUCTION

[1] On 1st July, 2021 Ahmed Abdullahi Mohamed (1st applicant) filed a Notice dated 28th June, 2021 seeking leave to withdraw an application dated 18th February, 2021, which he had lodged together with Ahmed Muhumud Abdi (2nd applicant). In the said application, both applicants had sought an order to review this Court's judgment (majority) delivered on 15th February, 2019 in *SC Petition No. 7 of 2018*.

In the said Notice to Withdraw the application, the 1st applicant urged us not to award costs.

B. BACKGROUND

[2] Following the general election held on 8th August, 2017 the 1st respondent was declared the duly elected Governor of Wajir County. Dissatisfied with the outcome, the applicants lodged before the High Court, *Election Petition No. 14 of 2017* contesting the said results. By a Judgment dated 12th January, 2018 the High Court (*Mabeya, J.*) nullified the 1st respondent's election on grounds inter alia; that he lacked the requisite academic qualifications to vie for the gubernatorial seat; and that the irregularities and illegalities by the 3rd & 4th respondents not only affected the credibility of the election but also the results thereof.

[3] Aggrieved by that decision, the 1st respondent filed an appeal in the Court of Appeal, *Election Petition Appeal No. 2 of 2018*, which was dismissed on 20th April, 2018. Unrelenting, the 1st respondent filed a second appeal in this Court, *SC Petition No. 7 of 2018*, which was allowed vide a majority Judgment (*Ibrahim, Ojwang, Wanjala & Njoki, SCJJ*) delivered on 15th February, 2019. In particular, the Court of Appeal Judgment was set aside and the declaration in favour of the 1st respondent as the duly elected Governor of Wajir County upheld.

[4] Subsequently, the applicants filed an application for review (which now they seek to withdraw). However, before the application could be prosecuted the 2nd applicant filed yet another application dated 16th April, 2019 seeking leave to withdraw and to strike out his name from the application for review. He deposed that he was no longer interested in pursuing the application.

[5] Initially, the 1st applicant opposed the 2nd applicant's application for withdrawal vide grounds of objection filed before this Court on 25th April, 2019. It seems that the 1st applicant had a change of heart as evinced by the notice of withdrawal.

C. ANALYSIS

[6] The notice of withdrawal was placed before a single Judge of this Court on 5th July, 2021 who, upon noting that the notice was not by consent of the parties, directed that the matter be mentioned before the Deputy Registrar. This was to enable the other parties to indicate their respective positions with regard to the said withdrawal and whether they would be pursuing the issue of costs.

[7] Towards that end, the matter was mentioned before the Deputy Registrar on several occasions, that is, 9th July, 2012, 5th August, 2021 and 10th September, 2021. On all occasions the parties' advocates were served with mention notices. Moreover, the parties were directed to file written submissions with respect to the intended withdrawal and costs, which to date none of the parties have complied.

[8] Although the notice of withdrawal is indicated to have been filed pursuant to Rule 19 of the Supreme Court Rules, the applicable provision is Rule 27 of the Supreme Court Rules, 2020. Nonetheless, taking into account the conduct of the parties beginning with both applicants' intimation of their unwillingness to proceed with application, coupled with the absence of any response by the other parties, we come to the irresistible conclusion that none of the parties has an interest in the review application. In the circumstances, we allow the withdrawal sought.

[9] As for the issue of costs, we are clothed with inherent jurisdiction by dint of Section 21(2) of the Supreme Court Act and Rule 3(5) of the Supreme Court Rules, 2020 to issue such orders as to cost as we deem fit. In addition, it is trite that the issue of costs is at the discretion of the Court which discretion must be exercised judiciously.

[10] Ideally, costs ought to follow the event. However, there are circumstances under which this rule is exempted. This Court in *Jasbir Singh Jasbir Singh*

Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR in discussing such circumstances expressed-

“[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]

[11] Applying the above principles to the matter at hand, we are convinced that we should not make any orders as to costs. More so, in light of the parties conduct with respect to the notice of withdrawal.

D. ORDERS

[12] In the event, and in exercise of our discretion we order as follows: -

- (i) The application dated 18th February, 2019 and filed on 20th February, 2019 is hereby withdrawn with no orders as to costs.***

It is accordingly so ordered.

DATED and DELIVERED at NAIROBI this 8th Day of October, 2021.

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M. K. KOOME
CHIEF JUSTICE & 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

