

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION (APPLICATION) NO. 5 OF 2018

(Coram: Mwilu, DCJ & VP, Ibrahim, Wanjala, Njoki & Lenaola, SCJJ)

HON. ANN WAIGURU.....1ST APPELLANT/APPLICANT

HON. PETER NDAMBIRI.....2ND APPELLANT/APPLICANT

VERSUS

HON. MARTHA WANGARI KARUA.....1ST RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

MR. SEKI LEMPAKA.....3RD RESPONDENT

(Being an application for a declaration that the issues in the petition of appeal herein were already determined by the Court in Hon. Martha Wangari Karua & another vs. Independent Electoral and Boundaries Commission & 3 others, Sc. Petition No. 3 of 2019: and for directions as to costs)

RULING

A. INTRODUCTION

[1] The Notice of Motion before the Court is dated 4th December 2020 and filed on 14th December 2020 under Section 24 of the Supreme Court Act and Rule 23 of the Supreme Court Rules, 2012 (*now repealed*). It seeks the following substantive orders:

- i. A declaration that the issues raised in Petition No. 5 of 2018: Hon. Anne Mumbi Waiguru & another vs. Hon. Martha Wangari Karua & 2 others were fully determined by this Honourable Court in its judgment delivered on 6th August 2019 in Petition No. 3 of 2019: Hon. Martha*

Wangari Karua vs. Independent Electoral and Boundaries Commission & 30thers.

- ii. *That parties be directed to bear their own costs in this matter and the proceedings at the Court of Appeal.*

[2] The application is supported by an affidavit sworn on 4th December 2020 by **Paul Nyamodi**, advocate for the applicants. Opposing the application, the 1st respondent filed a replying affidavit sworn by **Martha Wangari Karua** on 18th December 2020 as well as Grounds of Opposition dated 18th December 2020.

B. BACKGROUND

[3] On 29th March 2018, the applicants moved to this Court via ***Petition No. 5 of 2018***, dated 28th March 2018 to challenge the Court of Appeal's judgment in ***Nyeri Election Appeal No. 1 of 2017*** delivered on 2nd March 2018. The appellate court had allowed the 1st Respondent's appeal against a High Court judgment, which struck out her petition challenging the election of the 1st applicant. The Court of Appeal remitted the petition to the High Court and ordered the High Court to hear it on merit.

[4] The applicants filed a Notice of Motion dated 9th March 2018 in this Court seeking a stay of execution of the Court of Appeal's Order of 2nd March 2018 allowing the respondents' appeal and remitting the petition to the High Court for hearing and determination. In support of their application for stay, the applicants argued that the High Court lacked jurisdiction to hear the Petition *de novo* given the express provisions of Section 75 (2) of the Election Act as read with Article 87 (1) of the Constitution. The 1st respondent raised a Preliminary Objection of 25th June 2018 to the petition arguing that the applicants had lost interest in prosecuting the petition, having failed to comply with the directions of the Deputy

Registrar. The 1st respondent also argued that the appeal would be in vain as the dispute had already been remitted to the High Court for hearing.

[5] This Court, in a Ruling delivered on 28th March 2018 dismissed the application for stay with no orders as to costs as the question before it was awaiting determination by the High Court.

[6] The parties to this application attended Court for mentions before the Deputy Registrar to determine compliance on 30th April 2018, 4th July 2018, and 6th July 2018. On 6th July 2018, the parties ‘*by Consent*’ agreed to withdraw the ***Petition of Appeal No. 5 of 2018***. The Consent to withdraw was recorded by the Deputy Registrar and subsequently adopted as this Court’s Judgment (*Justice Isaac Lenaola (SCJ)*).

[7] Subsequently, the 1st respondent challenged the Consent withdrawing the petition vide a Notice of Motion Application dated 5th September 2018 and filed on 6th September 2018. On 17th December 2019, this Court set aside the consent orders. Regarding the status of the 1st respondent’s Preliminary Objection, the Court found that the same was spent and the applicants were condemned to pay costs.

[8] Later, the parties herein attended Court for a mention before the Deputy Registrar on 3rd November 2020 where Mr. Nyamodi and Mr. Baraza were present for the applicants, Ms. Martha Karua holding brief for Mr. Imanyara for the 1st respondent and Ms. Njeri Machage holding brief for Mr. Kathungu for the 2nd and 3rd respondents. Mr. Nyamodi indicated to the Court that the Petition had been reinstated. In response, Ms. Martha Karua indicated that she had no objection with the withdrawal of the petition but needed costs. On the other hand, Njeri Machage confirmed that the 2nd and 3rd respondents had no objection with the withdrawal of the petition. Counsel for the applicants opposed the 1st respondent’s claim for costs. Ultimately, the Deputy Registrar directed the applicants to file written submissions on costs and a formal notice of withdrawal.

[9] On 4th December 2020, the Court received a letter from the 2nd and 3rd respondents' advocates stating that they would leave it to the Court to determine the issue of costs.

a. The applicants' case

[10] The applicants' main argument is that the issues raised in the instant appeal were fully determined by this Court in its judgment delivered on 6th August 2019 in ***Petition No. 3 of 2019: Hon Martha Wangari Karua vs. Independent and Electoral Boundaries Commission & 3 others*** (hereinafter referred to as *Petition No. 3 of 2019*). According to the applicants, the main issue for determination is whether the High Court had jurisdiction to hear and determine the 1st respondent's Election Petition after the lapse of the six months prescribed by Article 87(1) of the Constitution and Section 75(2) of the Elections Act. The applicants urge that this issue was determined by the High Court in its ruling delivered on 6th April 2018. Further, that the same issue was determined by the Court of Appeal on 20th December 2018 and finally by this Court on 6th August 2019 in *Petition No. 3 of 2019*.

[11] The applicants submit that the issues raised herein were the same as those raised in ***Petition No. 3 of 2019*** and were fully determined in this Court's ruling delivered on 2nd March 2018, which Ruling advised parties to follow the normal appellate mechanism in addressing their grievances. They maintain that the 1st respondent cannot claim any success in the matter to justify an award of costs and that each party should bear its costs.

b. The 1st respondent's case

[12] The 1st respondent urges that the application is bad in law (as the Rules cited in the notice of motion are not applicable); lacks merit; is an abuse of court process; that the applicants are guilty of material non-disclosure; and that the application is brought in bad faith.

[13] In response to the applicants' submissions, the 1st respondent submits that although there is a similarity in some of the issues, an appeal cannot be determined by way of an interlocutory application unless such an application contests its competency which is not the case here. In her opinion, the instant appeal has to be canvassed and determined by the Court in the usual manner for the Court to issue final orders including orders as to costs. More so, this Court cannot apply orders in a different appeal to the present appeal without a full hearing.

[14] It is also submitted that this Court is not bound by its decisions and upon persuasion, or on its motion, can develop the law and revisit and vary its own decisions. Placing reliance on the decision of the East African Court of Justice in ***Martha Wangari Karua vs. The Attorney General of the Republic of Kenya & 2 others***, Reference No. 20 of 2019, the 1st respondent urges that she is eager for an opportunity to canvass her position and have the same dismissed.

[15] The 1st respondent also submits that a contested appeal cannot be disposed of by way of an interlocutory application and that it ought to proceed to a full hearing. She concludes her submissions by urging this Court to dismiss the application with costs and if the applicants are no longer interested to prosecute it, she can have an opportunity to apply for its dismissal with costs for want of prosecution.

C. ISSUES FOR DETERMINATION

[16] Against this background, we identify the following two issues for determination:

- i. *Whether the issues herein were fully determined in petition No. 3 of 2019? In other words, whether the issues herein are res judicata?*
- ii. *If the answer to (i) is in the affirmative, who should bear the costs herein?*

D. ANALYSIS

i. *whether the issues herein are res judicata?*

[17] Counsel for the applicants urge us that the main issue for determination herein, on whether the High Court has jurisdiction to hear and determine the 1st Respondent's Election Petition after the lapse of the six months prescribed by Article 87(1) of the Constitution and Section 75(2) of the Elections Act, was determined in ***Petition No. 3 of 2019***. On the contrary, the 1st respondent submits that although there is similarity in some of the issues, an appeal cannot be determined by way of an interlocutory application. The 1st respondent, on one occasion, seeks an opportunity to have the appeal fully determined despite an admission that some issues have been determined in ***Petition 3 of 2019***. On another occasion, she seeks an opportunity to apply for the dismissal of the petition for want of prosecution.

[18] From the petition of appeal, it is not in doubt that the following questions are placed before this Court for determination: whether there exists a relationship between Article 87(2) of the Constitution and Rule 8(1) of the Election Petition Rules which relationship goes to the jurisdiction to hear and determine an election petition; whether non-compliance with Rule 8(1)(c) and (d) of the Election Petition Rules is a mere technicality curable under Article 159(2) (b) of the Constitution; Does the direction of the Court of Appeal violate the provisions of Section 75(2) of the Elections Act as read with Article 87(1) of the Constitution; and was it lawful for the Court of Appeal to disturb the discretionary award of costs in the High Court?

[19] In ***Petition No. 3 of 2019***, this Court deduced the following issues for determination: whether the 1st respondent had properly invoked this Court's jurisdiction under Article 163(4)(a) of the Constitution; whether the proceedings before the High Court were a nullity, and if so, what were the consequences thereof? whether the 1st respondent's right to fair hearing and trial was violated by

the respective findings of the Trial Court and the Court of Appeal; which party bore the burden of proof; whether the Court of Appeal properly re-evaluated the evidence before it; whether the Trial Court was biased against the 1st respondent; what relief should issue; and who should bear the costs of those proceedings?

[20] From this Court's proceedings before the Deputy Registrar, it is obvious to us that the applicants have for a long time intended to withdraw the appeal before us and that the 1st respondent has had no issue with the withdrawal save for costs. The 2nd and 3rd respondents are on record leaving the issue of costs for the Court to determine. It is also not disputed from the 1st respondent's submissions that there is a similarity of issues in this appeal and the issues in ***Petition No. 3 of 2019***. The 1st respondent has not highlighted an issue in the present appeal which, in her opinion, ought to proceed to full determination. From the 1st respondent's arguments, her only problem seems to be the procedure for terminating the present appeal and the attendant costs. It was not clear what aspect of the appeal remained pending for canvassing before this Court for determination.

[21] The applicants premised their application on Rule 23 of the repealed Supreme Court Rules, 2012. The said Rule made provision for filing of interlocutory applications. Should the applicants' application be struck out for relying on a repealed Rule? We do not think so because, other than Rule 23 of the Supreme Court Rules, 2012, the applicants also relied on Section 24 of the Supreme Court Act which is in force. Counsel for the applicants has not bothered to explain why they relied on repealed rules. The foregoing notwithstanding, we are cognizant of the unique circumstances of this case, that is, the long time and judicial processes the parties have engaged themselves in, Article 159(2)(d) of the Constitution, and this Court's decision in ***Raila Odinga & 5 Others v. Independent Electoral & Boundaries Commission*** SC Petition No. 5 of 2013; [2013] eKLR, in which we explained the flexibility of Article 159(2)(d) of the Constitution and the need to determine each case on its own merits while taking into account the unique

circumstances of a case. We find therefore that reliance on Rule 23 of the repealed Rules does not in itself make the application fatal. However, we must warn counsel to continuously keep themselves updated with legal developments to avoid recurrence of similar situations in the future.

[22] Despite indicating severally before the Honourable Deputy Registrar, that they sought to withdraw the petition, the applicants did not prefer the procedure provided for under Section 18 of the Supreme Court Act and Rule 27 of the Supreme Court Rules, 2020. Be it as it may, we are satisfied that the issues in the ***Petition No. 5 of 2018*** were determined in ***Petition No. 3 of 2019***.

[23] Assuming that there was an issue in this petition that was not addressed by *Petition No. 3 of 2019*, should the applicants be compelled to pursue the same? Does the Applicant have the liberty to withdraw or discontinue proceedings before us? Section 18 of the Supreme Court Act provides that a party may at any time before judgment, with leave of Court, withdraw any proceedings and the application for leave may be made orally. Rule 27 also gives a party the liberty to withdraw proceedings at any stage before judgment subject to any orders as to costs following such withdrawal of proceedings.

[24] Further, in ***John Ochanda v. Telkom Kenya Ltd***, SC App. No. 25 of 2014, *Ibrahim SCJ*, while considering an application for leave to withdraw a notice of appeal found that a prospective appellant is at liberty to withdraw a notice of appeal at any time before the appeal has been lodged and any further steps are taken. He also observed that the right to withdraw 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. If in the applicants' view, this Court fully addressed their concerns in ***Petition No. 3 of 2019***, we cannot compel them to engage in a process they are not willing to.

[25] Having found that the issues in this ***Petition No. 5 of 2018*** were determined in ***Petition No. 3 of 2019***, what is the consequence of this

declaration? Even though the applicants did not seek further orders, we deem it fit, premised on our mandate under Section 21 of the Supreme Court Act which empowers this Court to issue ancillary orders, to order that this petition of appeal be deemed to have been dispensed with. This determination will bring an end to litigation, protect the parties from repetitive litigation over the same issues, save this Court's time, promote stability of judgments by reducing the possibility of inconsistency in judgments, promote confidence and predictability as persuaded by the Court of Appeal in ***John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others***, Civil Appeal No. 42 of 2014; [2015] eKLR where it demystified the rationale for *res judicata*.

ii. who should bear the costs herein?

[26] According to this Court's finding in ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others***, Sc. Petition No. 4 of 2012; [2014] eKLR, 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. This Court also observed that 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*.

[27] Concerning costs in ***Petition No. 3 of 2019***, we found as follows:

"[58] We also take note of the long time and the judicial processes that the parties have engaged themselves in. Equally, it is expected that huge financial resources have been spent in prosecuting and defending this matter. Yet, while the general rule is that the successful party ought to be paid costs by the unsuccessful one, where proceedings are declared to be a nullity, no party can claim success – see Paul Chen-Young v. Ajax

Investments Ltd & Others, Jamaica Supreme Court Civil Appeal No.39 of 2006, Paras 205 and 206. *Each party should therefore bear their costs in the proceedings before all the Courts.”*

[28] Since the parties in the present appeal are the same as were in ***Petition No. 3 of 2019*** and considering our finding that the issues herein were determined in ***Petition No. 3 of 2019***, we see no reason to depart from our finding on costs in ***Petition No. 3 of 2019***, our reasoning and finding therein apply *mutatis mutandis*. Consequently, each party bears its costs.

E. ORDERS

[29] Ultimately, we order as follows:

- a. The Applicants’ Notice of Motion dated 4th December 2020 be and is hereby allowed.***
- b. A declaration be and is hereby issued that the issues raised in Petition No. 5 of 2018: Hon. Anne Mumbi Waiguru & another vs. Hon. Martha Wangari Karua & 2others were fully determined by this Honourable Court in its judgment delivered on 6th August 2019 in Petition No. 3 of 2019: Hon. Martha Wangari Karua vs. Independent Electoral and Boundaries Commission & 3others.***
- c. The petition of appeal dated 28th March 2018 and filed on 29th March 2018 be and is hereby ordered dispensed with.***
- d. Each party shall bear its own costs in this matter and the proceedings at the Court of Appeal.***

[30] Orders accordingly.

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

.....
M. K. IBRAHIM
JUSTICE 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

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REGISTRAR,
SUPREME COURT OF KENYA

I certify that this is a true copy of the original

**REGISTRAR,
SUPREME COURT OF KENYA**

