

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT NAIROBI
(Coram: Mwilu; DCJ & VP, Ibrahim, Wanjala, Njoki, & Lenaola, SCJJ)

PETITION OF APPEAL NO. 22 OF 2019

-BETWEEN-

BARIDI FELIX MBEVO.....APPELLANT

-AND-

MUSEE MATI.....1ST RESPONDENT

**THE INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION.....2ND RESPONDENT**

**THE KITUI WEST CONSTITUENCY
RETURNING OFFICER.....3RD RESPONDENT**

(Being an appeal against the Ruling of the Court of Appeal at Nairobi (Githinji, Waki & Warsame JJA) delivered in Election Petition No. 28 of 2018 on 24th May 2019.)

RULING OF THE COURT

A. INTRODUCTION

[1] On 28th September 2020, the appellant filed a Notice of Withdrawal of petition dated 25th September 2020. Subsequently, on 6th October 2020, the Court (*Rtd Chief Justice, David K. Maraga*) recorded a Withdrawal Order and directed parties to file and serve written submissions on costs.

B. BACKGROUND

[2] Following the 8th August 2017 General Elections for Member of County Assembly (MCA) Mutonguni Ward, Kitui West Constituency, the 3rd respondent (*the returning Officer*) declared the appellant (*Baridi Felix Mbevo*) the duly elected MCA. Dissatisfied with these results, the 1st respondent (*Musee Mati*) filed before Kitui Chief Magistrates Court, *Election Petition No. 1 of 2017*. On 31st

February 2018, the Chief Magistrates Court (*Munguti PM*) nullified the election declaration and ordered the 2nd and 3rd respondents to issue a certificate of election to the 1st respondent. The Court further ordered the 2nd and 3rd respondents to bear the appellant's and the 1st respondent's quantified costs.

[3] Aggrieved by the said decision, the appellant filed an appeal before the High Court in *Petition No 1 of 2018* and in a judgment delivered on 20th June 2018, the Court (*Mutende J*) overturned the decision of the trial court and made an order for fresh elections. It also ordered the 1st respondent to bear the appellant's costs before both the Chief Magistrates Court and the High Court.

[4] Being dissatisfied with the High Court judgment, the 1st respondent filed an appeal before the Court of Appeal, *Election Petition Appeal No. 28 of 2018*. The appellant similarly filed a cross appeal. However, following the Court of Appeal pronouncement in *Petition of Appeal No. 32 of 2018* that it lacks jurisdiction to hear appeals on disputes pertaining the election of a Member of County Assembly, the 1st respondent withdrew his appeal. In contrast, the appellant chose to proceed with his cross appeal. In a judgment delivered on 25th May 2019, the Court of Appeal dismissed the appellant's cross appeal for lack of jurisdiction.

[5] Further aggrieved, the appellant moved this Court challenging the Appellate Court's finding on jurisdiction. On 28th September 2020, the appellant withdrew the petition and a Withdrawal Order was issued on 6th October 2020. As the parties could not agree on costs, they were directed to file and serve written submissions and thereafter, the Court would give its determination on the question of costs.

i. Appellant's case

[6] The submissions filed on 2nd October 2020 on behalf of the appellant address the single issue before Court. It is submitted that all parties were successful upon the withdrawal of the petition and consequently the principle that costs follow events ought not be used to penalize either of the parties. Relying on this Court's holding in ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others***,

SC Petition No 4 of 2012; [2014] eKLR (***Jasbir Singh Rai Case***), the appellant urges that costs must always follow the event unless the court has a good reason to order otherwise. He asks the Court to exercise its discretionary in his favour and find that each party should bear its own costs.

[7] In the alternative, he argues that the 1st respondent is the core beneficiary of the withdrawal for reasons that a by-election was held during the pendency of the petition making it to be overtaken by events; he was barred from participating in the by-election as he was not able to return his nomination papers on time; and the 1st respondent participated in the by-election and won. The appellant adds that he withdrew the petition at the earliest opportunity, in good faith and any costs incurred thereafter were occasioned by the respondents' demand for costs.

[8] In conclusion, he submits that the issues raised in the withdrawn petition were constitutional in nature and of public interest affecting the electorates of Mutonguni Ward. He relies on this Court's finding in ***Raila Odinga & Others vs The Independent Electoral 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, to persuade the Court to order each party to bear its own costs on grounds of public interest.

ii. 1st Respondent's case

[9] In his submissions dated 4th March 2020, the 1st respondent contends that this Court has inherent powers to issue interlocutory orders, including orders for costs. He relies on this Court's finding in the ***Jasbir Singh Rai Case*** and ***Council of Governors versus Senate & Another***, Reference No. 1 of 2014; [2014] eKLR (***Council of Governors Case***).

[10] The 1st respondent also urges that an order for withdrawal is subject to an order for costs to the respondent(s) as was the finding of this Court in ***Council of Governors Case***. He adds that he is entitled to costs as the appellant's petition

and record were voluminous and required considerable time to peruse; further, that the appellant's advocate filed an application to cease acting; and his advocates have been forced to attend Court on numerous occasions incurring travelling expenses and time.

iii. 2nd and 3rd Respondents' case

[11] In their submissions dated 31st September 2020, the 2nd and 3rd respondents urge that having duly instructed their advocates to defend the appeal, they were entitled to costs in line with Rule 60 (2) of the Supreme Court Rules, 2020. They rely on the *Jasbir Singh Rai Case* and *Director of Public prosecution vs Eng. Michael Sistu Mwaura Kamau & 4 others* [2020] eKLR, to urge the Court to apply the guiding principle that costs follow the event.

[12] The respondents oppose the appellant's submission that the appeal was in public interest and instead urge that it was filed purely for private gains. They assert that the appellant ought to have withdrawn the appeal upon the Court of Appeal pronouncement on jurisdiction to avoid incurring additional costs before this Court.

C. ISSUES FOR DETERMINATION

[13] From the foregoing, only one issue arises for determination:

Whether costs are payable in this matter, and if so, to which party.

D. ANALYSIS

[14] The main contention by the appellant is that each party should bear its own costs before this Court for reasons that all the parties were successful upon the withdrawal of the petition. In the alternative, he contends that the 1st respondent was the sole beneficiary of the withdrawal and any costs incurred in the matter was occasioned by the respondents' demand for costs as a condition for withdrawal. The appellant further invokes a public interest contestation by urging that the

issues raised in the withdrawn petition were constitutional in nature affecting the electorates of Mutonguni Ward.

[15] The respondents maintain that they are entitled to costs pursuant to Rule 60(2) of the Supreme Court Rules, 2020. The reasons offered are that, costs follow the event; orders for withdrawal are subject to orders for costs to the respondents; and that they have incurred costs by instructing advocates, attending court and other ancillary expenses. The respondents also oppose the appellant's contestation on public interest and strongly contend that the petition was filed purely for private gains.

[16] It is trite that we have an inherent jurisdiction to make orders on costs. In the *Jasbir Singh Rai Case* at paragraph 11, this Court established that costs fall under the inherent powers of the Court. Section 21(2) of the Supreme Court Act and Rule 3(5) of the Supreme Court Rules, 2020 are instructive on this issue. Further, the exercise of this jurisdiction is an issue of judicial discretion which must be exercised judicially and in accordance with reason and justice.

[17] Moreover, we have considered and laid down the principle on costs in *Jasbir Singh Rai*, which findings we reiterate are properly applicable to the present case. There we stated as follows:

“[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]

[18] On discretion, this Court found:

“Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.” [emphasis added]

[19] Having so stated, we note that the costs awarded by the Chief Magistrates Court, the High Court and the Court of Appeal are not challenged by the parties. The Court shall therefore refrain from addressing itself on the same. What is in issue is costs before this Court.

[20] We have perused the record and note that the petition was withdrawn before the respondents could file any responses or submissions on the substantive issues. The appeal, at the time of withdrawal was not ready for hearing. We have further considered the rival submissions by the parties and are convinced that the petition was withdrawn on grounds that it had been overtaken by events. This was after a by-election, ordered by the High Court, had been conducted and concluded with the 1st respondent emerging the winner. The appeal therefore was frustrated necessitating its withdrawal.

[21] Applying the principle in the ***Jasbir Singh Rai Case*** that costs normally follow the event, the question to ask is whether an event to which costs would follow has materialized. The answer is in the negative. The appellant’s appeal did not fail but was frustrated. Strictly speaking, there were no winners or losers

following the withdrawal. It is the occurrence of the event which crystalizes costs for the successful party. In this matter, that event has not crystalized. That said, the inevitable conclusion is that each party shall bear its costs before this Court.

E. ORDERS

[22] In the event, and in the exercise of discretion we order as follows;

1. Each party shall bear its costs of the Appeal.

[23] It is accordingly so ordered.

DATED and DELIVERED at NAIROBI this 16th day of July, 2021.

.....
P. M. MWILU **M. K. IBRAHIM**
DEPUTY CHIEF JUSTICE & VICE **JUSTICE OF THE SUPREME COURT**
PRESIDENT OF THE SUPREME COURT

.....
S. C. WANJALA **NJOKI NDUNGU**
JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA