



THE REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

PETITION (APPLICATION) NO. 2 (E002) OF 2021

OKIYA OMTATAH OKOITI..... 1ST PETITIONER

ANTHONY OTIENDE OTIENDE.....2ND PETITIONER

KATIBA INSTITUTE (KI).....3RD PETITIONER/APPLICANT

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT & 14 OTHERS

(Being an application for review of the Ruling and Orders of a Single Judge of the Supreme Court (Mwilu, DCJ & VP) delivered on 17th February 2023 on the issue of costs

Representation

Mr. Dudley Ochiel for the Applicant

(Katiba Institute (KI))

Respondents did not appear and were not represented

RULING OF THE COURT

[1] UPON perusing the Notice of Motion by Katiba Institute, the applicant, dated 28th February 2023 brought pursuant to Section 23(3C) (*sic*) for review and to vacate the Order on costs against the applicant in the Ruling delivered by a single judge of this court (*Mwilu DCJ & VP*) on 17th February 2023 and an order that there be no costs whatever the outcome of this application; and

[2] UPON considering the grounds in support of the application and the supporting affidavit of Christine Nkonge, the Executive Director of the applicant, wherein the applicant claims that:

i) the applicant understands that a single judge's determination of an application seeking review of a decision made by the Registrar- under Rule 6(3) of this Court's Rules is final but that the applicant is only aggrieved with the order on costs and not the substantive decision;

ii) the single judge awarded costs against the applicant purely on the 'costs follow the event rule' and without any finding of bad faith, ill motive, misconduct or frivolity on its part;

iii) the single judge's determination on costs is infirm because the Judge failed to consider all relevant factors necessary to the determination of costs payable by a losing party and failed/and or improperly exercised her discretion by failing to take into account relevant past judicial determinations on costs;

iv) that the single judge awarded costs to the 13th and 14th respondent who had, through their advocates, Messrs Nderitu & Partners, decided not to participate in the proceedings and instead left the matter entirely in the hands of the court; and

[3] ALSO NOTING the applicant's submissions dated 28th February 2023 and filed on 1st March 2023 wherein it is contended that this Court can review its

decision under Section 23(3C) of the Supreme Court Act irrespective of the finality clause in Rule 6(3) of the Supreme Court Rules; its submission that the single judge's decision is one for review as the decision on costs was exercised improperly; further, that this Court has in past decisions, found that though costs follow the event, public interest matters are exempted from the rule with reliance placed on ***Jasbir Singh Rai v Tarlochan Singh Rai***, SC Petition 4 of 2012 [2014] eKLR (***the Rai Case***) as well as ***Mumo Matemu v Trusted Human Rights Alliance & 5 Others***, SC Civil Application No. 29 of 2014 [2014] eKLR and ***Kenya Revenue Authority v Export Trading Company Ltd***, SC Petition 20 of 2022 [2022] to buttress that point and lastly; that the applicant has argued that the matter was filed in the public interest, presented a momentous issue and that awarding costs against a *bona fide* public interest litigant without evidence of bad faith on its part is also inconsistent with this Court's stated policy and practice.

[5] In the above context, **WE NOW OPINE** as follows:

- i) The sole issue before this Court is whether the single judge exercised her discretion judiciously in finding that the applicant should bear the costs of the 1st, 2nd, 3rd, 13th, 14th and 15th respondents and that the said decision should be reviewed. We note in that regard that this Court has jurisdiction under Section 23(2C) of the Supreme Court Act, 2011 to review the decision of a Single Judge. Section 23(2C) reads in part:

“A party aggrieved by the decision of a Single Judge or two judges may apply for review of the decision by five or more judges of the court.”

- ii) We are also alive to Rule 6(3) of the Supreme Court Rules, 2020 which provides that:

“A determination by the single judge on the decision of the Registrar shall be final.”

iii) In *Parliamentary Service Commission v Martin Nyaga Wambora & others*, SC Application No. 8 of 2017 [2018] eKLR we came up with guiding principles for application (s) for review of a decision of the Court made in exercise of discretion with one of the principles listed to be:

“The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise (sic) discretion and:

(a) as a result a wrong decision was arrived at; or

(b) it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.”

iv) In the *Rai Case* we addressed the issue of award of costs and specifically in public interest matters in the following terms:

“[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 ours]

- v) *Njoki SCJ's finding in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others**, SC Application No. 29 of 2014 [2014] eKLR is also relevant to the determination of the present application as she explained the essence of public interest litigation by stating:*

“Public Interest Litigation plays a transformative role in society. It allows various issues affecting the various spheres of society to be presented for litigation...In instances where claims in the interest of the public are threatened by administrative action to the detriment of constitutional interpretation and application, the Court has discretion on a case by case basis, to evaluate the terms and public nature of the matter vis a vis the status of the parties before it...”

- vi) The Constitutional Court of South Africa in ***Biowatch Trust v Registrar Genetic Resources and Others*** (CCT 80/08) [2009] ZACC 14 in addressing costs in matters filed in the public interest and alleging constitutional violations was of the view-and we agree-that:

“Equal protection under the law requires that costs awards not be dependent on whether the parties are acting in their own interests or in the public interest. Nor should they be determined by whether the parties are financially well-endowed or indigent... The primary consideration in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice.”

- vii) Public interest litigation aims to address genuine public wrongs where legal action is initiated for the enforcement and advancement of constitutional justice and public interest. While doing so, public interest litigants must not

themselves fall into the temptation of seeking for costs should they succeed in the litigation because by doing so, self-interest, and not public interest, will be apparent and they would in such situations be amenable to an adverse order on costs should they not succeed. Again, as we have stated above and reiterated the finding by the Constitutional Court of South Africa in ***Biowatch***, the primary consideration in public interest constitutional litigation should always be seen to be the need to promote access to justice and not self-interest *per se*.

- viii) Turning to the present application, we have to address Section 23(2C) as well as Rule 6(3) aforesaid as the application in which costs were awarded against the applicant arose from a decision by the Registrar and under Rule 6(3) the decision of the single judge ought to be final. Would Section 23(2C) be applicable in the circumstances? Two issues have been raised by the applicant as the basis for review of the single judge decision; the public interest litigation issue and the apparent erroneous grant of costs to the 13th and 14th respondents.
- ix) The grant of an order of costs to the 13th and 14th respondents portends no difficulty as it is obvious to us that they did not participate in any meaningful way and which would entitle them to costs. Costs are not awarded to a party that has not spent time or resources in prosecuting or defending a matter and the '*costs follow the event*' principle would in the circumstances not be applicable. We are in the circumstances satisfied that, under Section 23(2C) we have the jurisdiction to overturn the exercise of discretion by the single judge.
- x) On the award of costs to the remaining respondents, and whether the public interest litigation argument can be sustained, we have read the record as well as the single judge Ruling. The nature of the litigation between the parties did not feature at all as the substance of the Ruling was the timeline for filing

of a notice of appeal to this court. The single judge found that the applicant had failed to adhere to that timeline without a plausible explanation. In the present application, it is argued that the intended appeal as well as proceedings before the superior courts below related to a public interest matter and so costs should not follow the event as ordered by the single judge. What was the public interest matter? The appointment of members of the National Land Commission and whether the Constitution was followed in that process. Furthermore, the Court of Appeal also directed the parties to bear their own costs and it would therefore be unjust for this Court to penalize the applicant in any proceedings before us.

- xii) We are satisfied that the principle in the ***Rai Case*** is applicable to the present application-that where an injustice is apparent in the single judge decision, a larger Bench can undo the injustice and the finality clause in Rule 6(3) would not be a bar to a review of that decision more so on the narrow issue of costs. The public interest element in the case before the superior courts below is obvious and so the *costs follow the event* order was made in error by the single judge. In stating so, we are not in any way invalidating that Rule because it serves a useful purpose in proceedings before this court.
- xii) In the circumstances, we are in agreement with the applicant that the proper order to have been made by the single judge is that there would not have been reason to order the applicant to pay costs to the respondents, and in the present application, the applicant is also not to benefit from an award of costs.

[6] **ACCORDINGLY**, we make the following Orders:

- a) The Notice of Motion dated 28th February 2023 is hereby allowed.***
- b) There shall be no order as to costs.***

[7] It is so ordered.

DATED and DELIVERED AT NAIROBI this 21st day of April 2023

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M.K. IBRAHIM
JUSTICE OF THE SUPREME COURT

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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