

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

PETITION NO. 1 (E026/2021) OF 2022

— BETWEEN —

PARLIAMENTARY SERVICE COMMISSION.....1ST PETITIONER
THE CLERK OF THE SENATE.....2ND PETITIONER
THE CLERK OF THE NATIONAL ASSEMBLY.....3RD PETITIONER
PARLIAMENT.....4TH PETITIONER
MEMBERS OF PARLIAMENT.....5TH PETITIONER

-AND-

SALARIES AND REMUNERATION COMMISSION.....1ST RESPONDENT
OKIYA OMTATA OKOITI.....2ND RESPONDENT
THE CONTROLLER OF BUDGET.....3RD RESPONDENT
THE CABINET SECRETARY,
NATIONAL TREASURY.....4TH RESPONDENT
THE HON. ATTORNEY GENERAL.....5TH RESPONDENT
TRANSPARENCY INTERNATIONAL KENYA.....6TH RESPONDENT
KATIBA INSTITUTE.....7TH RESPONDENT
LAW SOCIETY OF KENYA.....8TH RESPONDENT

*(Being an appeal from the Ruling and Order of the Court of Appeal at Nairobi
(Karanja, Gatembu & J. Mohammed, JJ.A.) delivered on 3rd December,
2021 in Civil Appeal No. Nai E.409 of 2020)*

RULING OF THE COURT

[1] UPON considering the Notice of Withdrawal taken out by the 1st to 5th Petitioners in which they evinced their intention to withdraw the appeal on 20th June, 2022; and

[2] UPON considering that when the matter was mentioned before the Deputy Registrar (Hon. Bernard Kasavuli), all the parties consented to the withdrawal with the 1st and 7th Respondents insisting on costs; and

[3] UPON considering that the appeal was placed before a single Judge and marked as withdrawn with the question of costs being referred to a full bench.

[4] UPON considering the 1st Respondent's submissions dated 4th August, 2022 concerning costs to the effect that this Court, by the provisions of Section 21(2) of the Supreme Court Act and Rule 3(5) of the Supreme Court Rules 2020 has inherent power to award costs; that the filing of the appeal was unnecessary because, having been aggrieved by the decision of the High Court, the Petitioners lodged an appeal to the Court of Appeal, Civil Appeal No. E017 of 2021, simultaneously with an application for stay of the High Court's decision; that after the application was dismissed, and while their appeal was still pending before the Court of Appeal, the Petitioners filed the instant appeal together with an application for stay of execution when it was clearly premature to do so as there was no substantive judgment of the Court of Appeal from which an appeal could arise; and that due to this fact, this Court struck out the application and therefore it was inevitable for the Petitioners to withdraw the appeal; and

[5] CONSIDERING, furthermore, the 1st Respondent's argument that, though the Petitioners were aware that it was premature to move to this Court without a judgment of the Court of Appeal, they nonetheless proceeded to do so, wasting judicial and other parties' time and resources; and for that reason, ought to be condemned to pay the 1st Respondent's costs of preparing court pleadings and attending court.

[6] NOTING that the Petitioners have not responded to these averments:

WE NOW OPINE as follows:

- i. This Court, by the cited provisions of Section 21(2) of the Supreme Court Act and Rule 3(5) of the Supreme Court Rules, 2020, has inherent jurisdiction to make orders as to costs.

- ii. The guiding principles applicable in the exercise of that discretion was enunciated in ***Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others***, SC Petition No. 4 of 2012; [2014] eKLR, in the words reproduced in the passage below:

“[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....

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.”

- iii. Applying these principles, we hold the view that, at the point of the withdrawal of the appeal, only some parties had peripherally participated in the filing of pleadings. For example, only the 1st and 7th Respondents had filed separate Notices of Preliminary Objection together with submissions in

support thereof. In addition, only the 7th Respondent had filed submissions in opposition to the appeal. The rest of the Respondents never filed any responses or submissions. That perhaps explains why these Respondents have not pressed for costs. We further note that though the 7th Respondent prays for costs, it did not file submissions on the issue, but instead only asked the Court to exercise its discretion.

- iv. Further, while it ought to have been obvious to all that the appeal was stillborn for want of jurisdiction, we are cognizant of the fact that the Petitioners and 1st Respondent are public institutions and the matter in dispute involved allowances for Members of Parliament, who are themselves holders of a public office. Considering that the dispute is one in the public sphere, attracting public interest, we think an order of costs against any of the parties would not, in those circumstances, be a fair exercise of discretion.

[7] In the event, we order that each party shall bear its own costs.

[8] **ACCORDINGLY**, we Order that:

Parties shall bear their respective costs.

It is so ordered.

DATED and DELIVERED at NAIROBI this 28th Day of October, 2022.

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

.....
M.K. IBRAHIM
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