

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

PETITION NO. 16 (E019) OF 2022

-BETWEEN-

OSCAR OLUOCH OUMA ABOTE PETITIONER

VERSUS

LOICE AKOTH KAWAKA 1ST RESPONDENT

ROSELINE AKOTH AWINO 2ND RESPONDENT

ORANGE DEMOCRATIC MOVEMENT PARTY..... 3RD RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION 4TH RESPONDENT

RETURNING OFFICER NDHIWA CONSTITUENCY..... 5THRESPONDENT

(Being an application for withdrawal of the Petition of Appeal and for costs)

RULING OF THE COURT

[1] UPON perusing the Notice of Withdrawal of Petition of Appeal dated 2nd August, 2022 and filed on 3rd August, 2022 in which the Petitioner seeks to withdraw the Petition of Appeal herein dated 18th July 2022 and filed on 20th July, 2022 with no order as to costs;

[2] NOTING that the only dispute for the Court’s determination is that of costs upon withdrawal of the petition and that the Honourable Deputy Registrar directed the parties to file submissions limited to the issue of costs;

[3] UPON perusing the petitioner's written submissions on the issue of costs dated 16th September, 2022 and filed on 19th September, 2022 in which the petitioner contends that the Notice of Withdrawal was filed due to the Court's decision on 25th July, 2022 dismissing the petitioner's application with no order as to costs. It is the petitioner's argument in that regard that costs follow the event though the award of costs is not cast in stone and courts have the ultimate and unfettered discretion with respect to costs; that the purpose for an award of costs is to indemnify fully or partially the successful party for the expenses incurred; that whereas there was no successful party as the petition was withdrawn before it was heard and determined; and that the issues raised are of a constitutional nature and of public interest affecting the electorate of South Kabuoch/Pala Ward. The petitioner cites authorities including ***Raila Odinga & Others vs The Independent Electoral and Boundaries Commission & others***, SC Petition No. 5 of 2013, [2013] eKLR, where this Court ordered each party to bear its own costs on grounds of public interest;

[4] UPON perusing the submissions on costs dated 14th September, 2022 and filed on 19th September, 2022 by the 4th and 5th respondents in which they pray for costs pursuant to Section 21 (2) of the Supreme Court Act, Rules 3(5) of and 27 of the Supreme Court Rules 2020 upon withdrawal of the petition on grounds that the matter is not a public interest litigation; that the petitioner has abused the judicial process having filed another petition of appeal raising similar issues being *Petition E024 of 2022*; and that the 4th and 5th respondents have spent considerable resources in hiring advocates to defend them in the proceedings. They rely on the Court's decisions in ***Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai & 4 Others*** Sup. Ct. Petition No. 4 of 2012; [2014] eKLR and ***In the Matter of the Council of Governors; Senate & another (Interested Parties)*** [2014] eKLR to buttress their assertions.

[5] **TAKING INTO CONSIDERATION** the Court proceedings that, when this matter was last mentioned before the Honourable Deputy Registrar of the Court on 23rd September, 2022 to confirm compliance of filing of submissions on costs as earlier directed on 9th September 2022, only the petitioner and the 4th to 5th respondents had complied. Counsel for the 1st to 3rd respondents indicated that they would not be filing any submissions;

[6] **WE REITERATE** that this Court has the power under section 21 (2) of the Supreme Court Act and Rule 3 (5) of the Supreme Court Rules to make any ancillary or interlocutory orders including any orders as to costs that it thinks fit to award as it may deem it necessary for the ends of justice or prevent abuse of the process of the Court. Further, this Court has set out legal principles that guide the grant of costs including in the case of ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others***, (*supra*) where we held that ordinarily, costs follow the event and costs should not be used to punish the losing party, but to compensate the successful party for the trouble taken in prosecuting or defending a suit. It was our finding that:

*“[15] It is clear that there is **no prescribed definition** of any set of “good reasons” that will justify a Court’s departure, in awarding costs, from the general rule, costs-follow-the-event. In the classic **common law style**, the Courts have proceeded on a **case-by-case basis**, to identify “good reasons” for such a departure. An examination of evolving practices on this question, shows that, as an example, **matters in the domain of public-interest litigation tend to be exempted from award of costs.**” (Emphasis ours).*

[7] **CONSIDERING** the nature of the dispute comprised in the petition of appeal and the issues surrounding the determination of election related disputes leading to the elections held on 9th August, 2022; this being a matter touching on

nomination and registration of candidates where the petitioner pursued the inclusion of his name as the Orange Democratic Movement Party nominee for South Kabuoch/Pala Ward for the election that was slated for 9th August 2022; the 4th respondent being the public institution tasked with the conduct of elections as per the provisions of Article 88 of the Constitution; and the finding of this Court in the case of *The Kenya Revenue Authority v Export Trading Company Limited (Petition 20 of 2020) [2022] KESC 31 (KLR) (Civ) (17 June 2022) (Judgment)* where we held that in public interest litigation which exists to serve the purpose of protecting the rights of the public at large, in a case that raises constitutional issues which are public in nature, in the absence of bad faith being exhibited, each party should bear its costs; and

[8] FURTHER CONSIDERING that in view of the Court's ruling delivered on 25th July, 2022 the Court could not substantially determine this petition in the absence of reasons for the impugned judgment of the appellate court in *Civil Appeal No. E168 of 2022* which resulted in the petitioner filing *Petition No E024 of 2022* before this Court upon delivery of the reasons for the judgment by the appellate court;

[9] WE OPINE that we are satisfied that this is one such matter that falls within the domain of public interest litigation surrounding the nomination of a person for the general election that was slated for 9th August, 2022 and the defending of such proceedings by the respondents was similarly in exercise of public interest. In addition, the withdrawal of the petition of appeal is largely informed by the Court's ruling on 25th July 2022 as already stated. As no bad faith has been demonstrated on the part of the petitioner, we are not inclined to make any order for costs against him.

[10] SUBSEQUENTLY, we allow the Notice of Withdrawal of Petition dated 2nd August 2022 to the extent that each party shall bear its costs.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 4th day of November 2022.

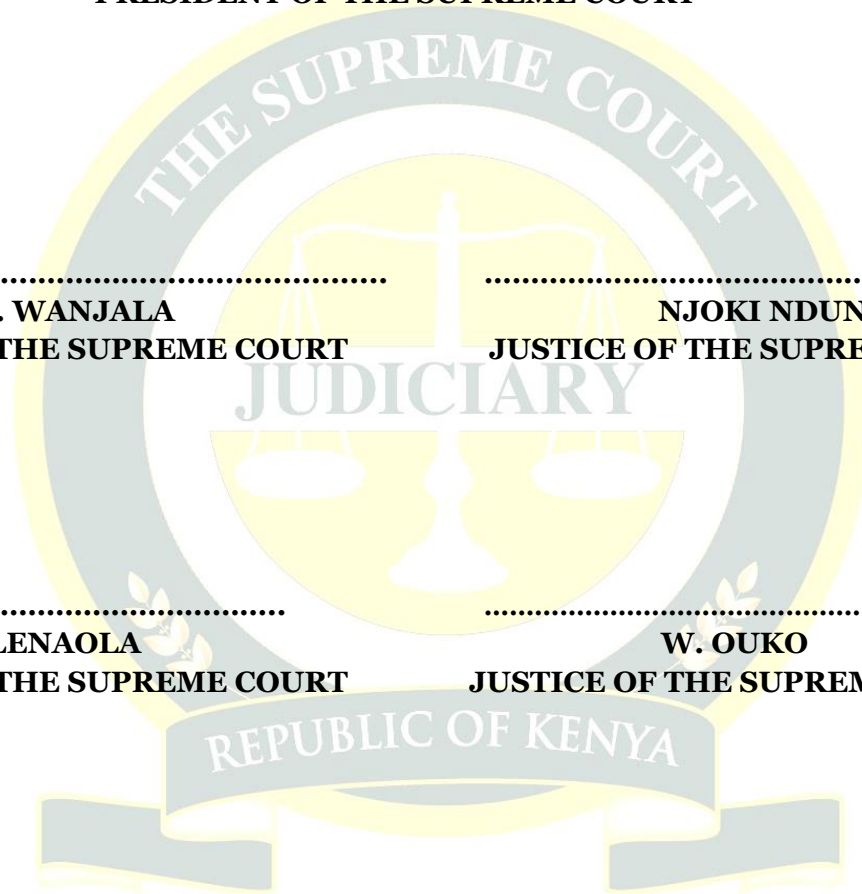
.....
P. M. MWILU
DEPUTY CHIEF JUSTICE & VICE
PRESIDENT OF THE SUPREME COURT

.....
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