

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA

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

PETITION NO. E018 OF 2022

-BETWEEN-

JIMI RICHARD WANJIGI PETITIONER

VERSUS

WAFULA CHEBUKATI 1ST RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION 2ND RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION DISPUTES COMMITTEE 3RD RESPONDENT

(Being an application for costs upon withdrawal of petition of appeal)

RULING OF THE COURT

[1] UPON perusing the Petitioner's Notice of Motion application dated 29th July 2022, and filed on 1st August 2022, pursuant to Articles 163 (4) of the Constitution of Kenya, Sections 3, 21, 24 of the Supreme Court Act and Rule 27 of the Supreme Court Rules, 2022 and all enabling provisions of the law for leave to withdraw the *Petition No. E018 of 2022* dated 13th July 2022; and

[2] NOTING the Consent Order dated 6th October 2022 by the Court adopting the agreement signed by the parties consenting to the withdrawal of the petition of appeal dated 13th July, 2022 and leaving the issue of costs to be determined by the Court, the parties having been directed by the Hon. Registrar of the Court to file submissions limited to the issue of costs.

[3] UPON considering the grounds on the face of the application, supporting affidavit by the applicant filed on 1st August 2022, together with submissions

dated and filed on 1st August 2022. The material argument in relation to costs is that vide the ruling of this Court issued on 18th July 2022, it was stated that this Court could not hear the petition without the detailed judgment containing reasons from the Court of Appeal which reasons were only issued on 29th July 2022; thus, it became untenable to maintain the petition in its present form. Further, that since the respondents had not filed their responses and submissions to the petition, the application for withdrawal should be allowed with no order as to costs. The applicant relies on this Court's decision in **Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 Others**, SC App. No. 16 of 2014, [2014] where it was held that a party has a right to withdraw a matter and all the Court can do is to make an order as to costs where it deems appropriate; and **Sonko v Clerk, County Assembly of Nairobi City & 12 others (Petition 14 (E021) of 2021) [2022] KESC 17 (KLR) (19 May 2022) (Ruling)** where the Court ordered that each party bear its costs as the petition was withdrawn before the respondents had filed substantive responses or submissions.

[4] UPON considering the 1st and 2nd respondents' submissions on costs dated 3rd August 2022 and filed on 4th August 2022. They submit that this Court in exercising its discretion grants them costs as they have taken considerable steps and deployed resources to ensure the responses were in place and attending court before the Deputy Registrar for directions; that the applicant's actions amount to abuse of the court process; and the latter's pleadings are being informed by the respondent's responses. Based on this Court's decision in **In the Matter of the Council of Governors; Senate & another (Interested Parties)** Reference No. 1 of 2014; [2014] eKLR the 1st and 2nd respondents affirm that the circumstances of the withdrawal demand that the respondents are paid costs as it would be just, fair and equitable considering the petition of appeal is not in public interest but in the petitioner's interests; and

[5] UPON considering the 3rd respondent's submissions dated 12th October 2022, and filed on even date in which the 3rd respondent contends that withdrawal of the appeal by the petitioner implies a failure of the matter instituted in this Court, an event meriting an order of costs in favour of the 3rd respondent given its initial response to the petition. The 3rd respondent relies on the case of *In the Matter of the Council of Governors (supra)* where it was succinctly stated that an order for withdrawal is subject to an order of costs. Furthermore, the 3rd respondent states that in any event, the appeal was not withdrawn at the earliest opportunity hence not in good faith and should attract costs in favour of the 3rd respondent;

[6] BEARING IN MIND the provisions of Section 21 (2) of the Supreme Court Act and Rule 3 (5) of the Supreme Court Rules which grants the Court inherent power to make such orders, including any orders as to costs that it thinks fit to award as may be necessary for the ends of justice or to prevent abuse of the process of the Court and Rule 27 of the Supreme Court Rules 2022 which allows the Court to make an order as to costs following withdrawal of proceedings.

[7] TAKING INTO ACCOUNT the Court's legal principles that guide the grant of costs in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, Sup. Ct. Petition No. 4 of 2012; [2014] eKLR enunciating the general rule that in awarding costs, costs-follow-the-event and 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 and the departure is determined on a case to case basis. The Court is also cognizant of its finding in *Sonko v Clerk, County Assembly of Nairobi City & 12 others (supra)* where we held as follows:

"Having so stated, we note from the record that the petition was withdrawn before the respondents had filed any responses or substantive submissions to the appeal save for the 7th respondent who filed a notice of preliminary objection. The appeal, at the time of

withdrawal was not ripe for hearing. While applying the principle in Jasbir Singh Rai that costs normally follow the event, has an event to which costs would follow materialized? The answer is in the negative. Such an event has not happened. We note that the applicant's appeal did not proceed as the occurrence of the event that would have led to the applicant being successful crystallized as the 11th respondent was sworn in as Governor of Nairobi County. We therefore come to the conclusion that each party shall bear its costs before this court.”; and

[8] WE NOTE that the nature of the dispute and the issues surrounding the determination of election related dispute leading to the elections held on 9th August 2022, the respondents are public bodies and in instituting or defending proceedings are performing their function which falls under public interest. Despite the fact that the applicant was pursuing his own nomination as a presidential candidate in the elections held on 9th August 2022, his appeal was based on the nature and extent of academic qualification which transcends the application, rendering it a matter of public interest. Moreover, the withdrawal of the petition of appeal has been prompted by the Court's ruling on 18th July 2022 in ***Application No. 6 (E012) of 2022***, involving the very parties to the present application.

[9] MINDFUL that though the 1st and 2nd respondents filed a notice of preliminary objection dated 15th July 2022 while the 3rd respondent indicated that he had filed a notice of preliminary objection and grounds of objection to the petition dated 15th July 2022 (*both filed online only*), we note that the said documents filed by the 3rd respondent do not relate to this matter but to ***Petition No. E019 of 2022***. The record nevertheless shows that the 3rd respondent filed submissions and list of authorities on 12th October 2022. The parties attended minimal court proceedings in the nature of mentions before the Honorable Registrar of the Court.

[10] In the premises we are persuaded that the appeal had not materialized, the same raises matters of public interest and the respondents stand to suffer no prejudice if no order as to costs is made as the parties are still engaged in a subsequent petition before the Court arising from the same subject matter where the issue of costs can still be considered and addressed. We thus see no reason to award costs.

[11] **CONSEQUENTLY**, the appeal having been withdrawn by consent vide the order dated 6th October 2022, we make no order as to costs. Orders accordingly.

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

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

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S. C. WANJALA
JUSTICE OF THE SUPREME COURT

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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