

THE REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

PETITION NO. 14 (E021) OF 2021

–BETWEEN–

HON. MIKE MBUVI SONKO.....APPLICANT

–AND–

**THE CLERK,
COUNTY ASSEMBLY OF NAIROBI CITY.....1ST RESPONDENT**

**THE SPEAKER OF NAIROBI
CITY COUNTY ASSEMBLY.....2ND RESPONDENT**

THE NAIROBI CITY COUNTY ASSEMBLY.....3RD RESPONDENT

THE CLERK OF THE SENATE.....4TH RESPONDENT

**THE SPEAKER OF THE
SENATE OF KENYA.....5TH RESPONDENT**

THE SENATE OF KENYA.....6TH RESPONDENT

HON. ATTORNEY GENERAL.....7TH RESPONDENT

**THE INDEPENDENT AND
BOUNDARIES COMMISSION (IEBC).....8TH RESPONDENT**

**THE ASSUMPTION OF THE OFFICE OF THE COUNTY
GOVERNOR COMMITTEE, NAIROBI COUNTY.....9TH RESPONDENT**

**HON. BENSON MUTURA,
THE ACTING GOVERNOR NAIROBI.....10TH RESPONDENT**

**ANN KANUNU MWENDA
THE DEPUTY GOVERNOR.....11TH RESPONDENT**

OKIYA OKOITI OMTATAH.....12TH RESPONDENT

(Being an application by the applicant for withdrawal of the suit with no order as to costs)

RULING OF THE COURT

[1] UPON considering the application by the Applicant to withdraw the appeal on 10th December, 2021 when the matter was mentioned before the Deputy Registrar (Hon. Ole Keiwua) with all parties consenting to the withdrawal and;

[2] UPON noting that that the 11th Respondent was unable to agree on costs with the learned Magistrate directing parties to file submissions limited to the question of whether costs should be paid to the 8th respondent upon the aforesaid withdrawal; and

[3] UPON perusing the applicant's submissions dated 22nd December, 2021 and filed on 14th March, 2022 wherein he submits that the petition of appeal was withdrawn at the earliest opportunity and in good faith and any costs incurred thereafter were occasioned by the respondents' demand for costs; and

[4] UPON considering further arguments by the applicant that Section 21(2) of the Supreme Court Act and Rule 3(5) of the Supreme Court Rules, 2020 provide that costs fall under the inherent powers of the Court as was held in ***Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others***, Sup. Ct. Petition No. 4 of 2012; [2014] eKLR (***Jasbir Singh Rai Case***) and further arguing that the issues raised in the appeal were constitutional in nature and a matter of public interest despite the applicant having filed his appeal in his individual capacity by relying on this Court's finding in ***Raila Odinga & 5 Others v. Independent Electoral and Boundaries Commission & 3 others***, Sup. Ct. Petition Nos.

3, 4 & 5 of 2013; [2013] eKLR persuading the Court to order each party to bear its own costs and;

[5] **FURTHER** considering the submissions by the 8th respondent dated and filed on 17th December, 2021 that the application for withdrawal of the appeal is not opposed but nevertheless contending that under Section 21(2) of the Supreme Court Act and Rule 27 of the Supreme Court Rules, costs follow the event and that an order for withdrawal is subject to an order for costs to the respondent as was the finding by this court in ***Council of Governors v. Senate & Another***, Reference No. 1 of 2014; [2014] eKLR (***Council of Governors Case***); and

[6] **FURTHERMORE**, noting the respondent's further opposition to the applicant's submission that the appeal is a matter of public interest arguing that the applicant filed the appeal in his personal capacity and that the applicant stood to solely benefit from the outcome, hence the applicant ought to shoulder the costs of the 8th respondent;

[7] **WE** now opine as follows:

- i. This Court has inherent jurisdiction to make orders on costs with Section 21(2) of the Supreme Court Act and Rule 3(5) of the Supreme Court Rules, 2020 being instructive on this.
- ii. The guiding principles applicable in costs were as stated in ***Jasbir Singh Rai*** where we stated that costs follow the event with the discretion of the Court exercised judiciously by stating:

“[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. 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.

[8] AND having therefore considered the submissions by the respective parties, we now order that **each party shall bear its costs of the Appeal.**

[9] It is accordingly so ordered.

DATED and DELIVERED AT NAIROBI this 19th day of May, 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