

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

*(Coram: Maraga, CJ & P, Mwilu, DCJ & V-P, Ibrahim, Ojwang, Wanjala & Njoki,
SCJJ)*

PETITION (APPLICATION) NO. 5 OF 2018

HON. ANNE WAIGURU.....1ST APPELLANT

HON. PETER NDAMBIRI.....2ND APPELLANT

–VERSUS–

HON. MARTHA WANGARI KARUA.....1ST RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (IEBC).....2ND RESPONDENT

MR. SEKI LEMPAKA.....3RD RESPONDENT

*(Being an application to set aside the Orders of the Supreme Court Deputy Registrar (D. Ole Keiuwa) and the subsequent adoption Order by **Justice Lenaola SCJ**, made on 6th July, 2018, pursuant to Article 50 and 150 of the Constitution, Section 3, 14 & 24 of the Supreme Court Act, Rule 3 of the Supreme Court Rules 2012).*

RULING OF THE COURT

A. INTRODUCTION

[1] Before the Court is an Application by way of Notice of Motion dated 5th September, 2018 and filed by the 1st Respondent (Applicant herein) on 6th September, 2018 in Petition No 5 of 2018. The Application is brought under Articles 50 and 159 of the

Constitution, Section 3, 14 & 24 Supreme Court Act and Rules 3 of the Supreme Court Rules, 2012 and all other applicable provisions of the law.

[2] The application seeks to set aside the orders of the Deputy Registrar of 6th July, 2018 and the subsequent order by a one-judge Bench of this Court (*Justice (Isaac Lenaola, SCJ)*) delivered in ***Petition No. 5 of 2018 Anne Waiguru & Another v. Martha Wangari Karua & Others***, which by consent, withdrew the appellants' Petition. The Application also seeks directions from this Court on the Notice of Preliminary Objection by the 1st Respondent dated 25th June 2018.

B. BACKGROUND

[3] The Appellants first moved this Court via Petition No. 5 of 2018, dated 29th March 2018 against the Court of Appeal Judgment in ***Nyeri Election Appeal No. 1 of 2017*** delivered on 2nd March, 2018. The Appellate Court had allowed the 1st Respondent's appeal against a High Court judgment, which had struck out her Petition challenging the election of the 1st Appellant. The Court of Appeal had remitted the Petition to the High Court and ordered the latter to hear it *de novo*.

[4] Aggrieved by the Court of Appeal's judgment and consequent orders, the Appellants moved to this Court via Petition No. 5 of 2018. The Appellants also sought an Order Staying the judgment of the Appellate Court pending the determination of their Petition. In support of their application for Stay, the Appellants argued that the High lacked jurisdiction to hear the Petition *de novo* in view of the express provisions of Section 75

(2) of the Election Act as read with Article 87 (1) of the Constitution. The 1st Respondent raised a Preliminary Objection to the Petition arguing that the Appellants had lost interest in prosecuting the Petition, having failed to comply with the directions of the Deputy Registrar. The 1st Respondent also argued that the Appeal would be in vain as the dispute had already been remitted to High Court for hearing.

[5] In a Ruling delivered on 28th March, 2018 and on the basis of the reasons stated therein, this Court dismissed the Application for Stay with no orders as to costs as the same were to abide the Cause.

[6] As per the Record, the Parties to this Application attended court for mentions to determine compliance, before the Hon Deputy Registrar of this Court on 30th April 2018, 4th July 2018, and 6th July, 2018. On 6th July 2018, the Parties 'by Consent' agreed to withdraw the Petition of Appeal No. 5 of 2018. The Consent to withdraw was recorded by the Deputy Registrar and subsequently adopted as this Court's Judgment by *Justice Isaac Lenaola (SCJ)*.

[7] It is this Consent of withdrawal as adopted by this Court that the 1st Respondent (Applicant herein) now seeks to set aside.

(a) *The 1st Respondent's/Applicant's case*

[8] The application is supported by a complaint on oath dated 16th August, 2018 and an affidavit sworn on even date by *Mr. Gitobu Imanyara* (Counsel on record for the 1st Respondent). The main grievance as highlighted in the 1st Respondent's grounds in support of the application, the averments in the supporting affidavit, and the complaint

on oath, is that on the 6th July, 2018, when the disputed consent of withdrawal was allegedly entered into, the 1st Respondent's counsel was not in attendance; that the said counsel was not notified of the scheduled mention date, notwithstanding the fact that, neither he nor his client were in attendance on 4th June 2018 when the mention date of 6th July, 2018 was taken; that on the said date (6th July, 2018), *Mr. Joe Kathungu* counsel on record for the 2nd and 3rd respondents and *Mr. Barasa*, appearing for the appellants, misrepresented to Court that they were holding brief for the 1st respondent's counsel without any instructions from the latter while being well aware of the 1st respondent's Notice of Preliminary Objection dated 25th June, 2018 on record; that the consent was therefore fraudulent, dishonourable and unprofessionally recorded.

(b) Responses to the Application

[9] The Appellants filed their grounds of opposition dated 10th September, 2018 in response to the application. The Appellants argue that the orders sought in the 1st respondent's Motion of 5th September, 2018 are ineffectual in respect of the Orders of this Court of 6th July, 2018; that the Court is under no obligation to make an order that the 1st respondent has not sought and that the application is an abuse of the court process, and consequently, the same should be struck out.

[10] In response to the application, the 2nd and 3rd respondents filed a replying affidavit sworn by *Mr. Joe Kathungu*, on 10th September, 2018. Counsel contends that when the Petition came up for mention on 6th July 2018, he erroneously indicated that he was on record for the 1st respondent; that the same was purely a human error, as he had no

instructions to hold brief for counsel for the applicants; that the consent is not fraudulent or unprofessional as it is clear from the record that one party was not represented; and that the applicants should have checked the court record to ascertain the scheduled mention date, having failed to attend court on the 4th June, 2018.

C. ISSUES FOR DETERMINATION

[11] Three issues arise for determination, namely:

- (i) Whether a case has been made to justify the setting aside of the Orders of 6th July, 2018,*
- (ii) What is the effect (if any) of the Notice of Preliminary Objection?*
- (ii) What provision should be made for Costs?*

D. DETERMINATION

- (i) Whether a case has been made to justify the setting aside of the Consent Judgment***

[12] At the outset, we take cognizance of the fact that Mr Kathungu for the appellants has unequivocally admitted that he had no instructions to hold brief for Mr Gitobu Imanyara, counsel for the 1st Respondent (the Applicant herein). Mr. Kathungu states that he indeed informed the Deputy Registrar that he was on record for the 1st Respondent but states that, this statement was in error. The 1st Respondent on the other hand contends that the consent judgment was procured by fraudulent misrepresentation perpetrated by counsel for the appellants, and condoned by the latter.

[13] In view of the admission by counsel for the Appellants to the effect that, he had no instructions to hold brief for Mr. Imanyara, and in view of his averment that his statement was occasioned by human error, it is clear to us that there could not have been any consent without the participation and acknowledgment of the 1st Respondent or her Advocate. Had these facts been brought to the attention of the learned Judge (*Lenaola SCJ*), we have no doubt that he would not have adopted the ‘*Non-Consent*’ as a judgment of the Court. Had counsel for the 1st Respondent attended Court on 6th July 2018, he would definitely have objected to the said consent. We are not however in a position to determine whether the consent was procured fraudulently. There is not much on record to aid us in arriving at such a determination with the potential, of very grave consequences for counsel. In the circumstances, we have no difficulty in setting aside the consent judgment as prayed by the 1st Respondent.

(ii) *What is the effect of the Notice of Preliminary Objection?*

[14] By a Ruling of this Court, the application for stay of the Court of Appeal’s judgment was dismissed. As a consequence of the dismissal, the matter was heard afresh by the High Court as ordered by the Appellate Court. The Appellants never prosecuted their Petition of Appeal in the Supreme Court, but instead went through the motions of litigation occasioned by the Court of Appeal’s judgment. They would later urge their case before this Court, but this time, not as Appellants but Respondents. The rest of what transpired is on record. The Preliminary Objection was never determined in view of the fact that, it had been triggered by Petition of Appeal No. 5, which itself as already noted,

was never prosecuted. In reality therefore, Petition No. 5 of 2018 was abandoned thus rendering the Preliminary Objection spent.

(iii) *What Orders are to be made with regard to costs?*

[15] It is a trite principle that Costs follow the event. However, this Court has on a number of occasions had to exercise its discretion so as not to be rigidly fettered by this principle. In this matter, the consent judgment which we have concluded must be set aside, was occasioned by the acts and omissions of Counsel for the Appellants. Although the said acts and omissions may not have been fraudulent, they are inexcusable. As a consequence, the Appellants must be condemned in Costs.

E. ORDERS

- (i) *The Notice of Motion dated 5th September, 2018 is hereby allowed.***
- (ii) *For the avoidance of doubt, the Consent Judgment of 6th July 2018 is hereby set aside.***
- (iii) *The Notice of Preliminary Objection dated 25th June, 2018 is hereby spent.***
- (vi) *The Costs of this Application shall be borne by the Appellants in Petition of Appeal No.5 of 2018.***

Orders accordingly.

DATED and DELIVERED at NAIROBI this 17th Day of December, 2019.

.....
D. K. MARAGA
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

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

.....
M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
J. B. OJWANG
JUSTICE OF THE SUPREME COURT

.....
S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy
of the original

REGISTRAR

SUPREME COURT OF KENYA