

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Mutunga, CJ & P; Rawal, DCJ & V-P; Tunoi, Ibrahim, Ojwang, Wanjala, Ndungu, SCJJ)

PETITION NO. 4 OF 2012

-BETWEEN-

1. JASBIR SINGH RAI 2. IQBAL SINGH RAI 3. DALJIT KAUR HANS 4. SARJIT KAUR RAI	}	PETITIONERS
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-AND-

1. TARLOCHAN SINGH RAI, <i>ESTATE OF</i> 2. JASWANT SINGH RAI 3. SARBJIT SINGH RAI 4. RAI PLYWOODS (KENYA) LIMITED 5. SATJIT SINGH & RAM SINGH, <i>ESTATE OF</i>	}	RESPONDENTS
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(An application for settlement of the costs-question following the Supreme Court's decision of 20 August 2013, disallowing a petition contesting a matter finally determined by the Court of Appeal as the apex Court ahead of the promulgation of the Constitution of Kenya 2010 which established the Supreme Court)

RULING

A. BACKGROUND FACTS

[1] The applicants herein were the respondents in Petition No. 4 of 2012 which, in effect, was disallowed by this Court. Consequent upon our decision, learned counsel, Mr. Oraro has moved this Court by Notice of Motion dated 3 October 2013, seeking a determination of the costs-question. The grounds of the

application are thus set out:

(i) the Court sitting as a full Bench gave its Ruling on a preliminary objection incidental to the petition;

(ii) by the Ruling, the Court held that it lacked jurisdiction to entertain the petition, and disallowed the petitioners' application which sought the reversal of the Court's precedent established in an earlier matter.

[2] On the basis of the Court's holding on the jurisdictional question, the respondents have made two prayers in their Notice of Motion:

(i) that the petition be struck out, as its substratum has already been determined by the Court, by the Ruling of 20 August 2013; and

(ii) that the costs of the instant application be determined by this Court.

B. SUBMISSIONS OF COUNSEL

[3] Learned counsel, Mr. Nyamodi who held brief for Senior Counsel, Mr. Nowrojee on the occasion of hearing, indicated that the petitioners had not found it necessary to file responses to the applicants' papers. But Mr. Oraro submitted that the application's premise was that the Supreme Court had ruled that it lacked jurisdiction to entertain the petition – and this had an implication that was left open: the Court did not consider the inevitable consequence of its decision. That consequence, learned counsel urged, followed the event of the

Court's finding that it lacked jurisdiction. The essential point, counsel urged, was that the petition had failed at the very beginning; and so, in accordance with the general position in litigation-practice, the petitioners were the losers, and so must bear the *costs*.

[4] Mr. Nyamodi, for the petitioners/respondents submitted that the Court should regard the petition as having been based entirely upon a *legitimate cause* of action when it was filed; for at the time, such a petition had been contemplated under Section 14 of the Supreme Court Act, 2011 (Act No. 7 of 2011) (subsequently declared unconstitutional in Samuel ***Kamau Macharia & Another v. Kenya Commercial Bank Limited & Two Others***, Sup. Ct. Application No. 2 of 2011; [2012] eKLR). Counsel, furthermore, urged that no instance of commission or omission on the part of the petitioners had motivated the lodgement of the petition – and that the petitioners stood not to blame for any censurable discrepancy between Constitution and Statute Law. Remarking the fact that the said discrepancy was found in a *cause other than the petition*, learned counsel urged that the petitioners had by no means abused Court process – and thus they did not merit penalty by way of *costs*.

[5] To these submissions, Mr. Oraro sought to portray “costs” as a typical juristic concept, and to evaluate the basis for awarding or denying the same. He urged that costs are not a *penalty*, but rather, a *consequence*; and so, to award costs

imputes no blameworthiness on the part of the one who must pay-up; it is but a value-neutral follow-up to the court's determination, one way or the other.

[6] However, learned counsel attributed an *element of default* to the petitioners: the petitioners had been dilatory; on many occasions the petition-subject had come up for mention before the Court of Appeal, where the prospects of alternative relief-paths had received attention; indeed, the Court of Appeal had directed the parties to resort to *arbitration*. As such a course had not been pursued notwithstanding its relevance and desirability, Mr. Oraro submitted, there is no basis for any perception that the petitioners would necessarily be burdened or prejudiced by an order to pay costs. Such is an apt situation, learned counsel submitted, in which the rule of costs-following-the-event should apply, especially in view of the year-long pendency of the matter in Court.

C. ANALYSIS

[7] The Supreme Court, by declining the jurisdiction to entertain the petition, quite clearly, *determined the substrate of the cause*: no hearing would begin; and the petitioners were the losers while the respondents were, in effect, the winners. Does this position require the Court to apply the general rule of judicial practice in the superior Courts – that “costs follow the event”? The applicants herein urge so, but not the respondents, who contend that their case was free of fault, and should not be visited with costs.

[8] The law does not *require* the Supreme Court to adhere to the costs-follow-the-event principle. This is clear from certain provisions of Statute Law. The Supreme Court Act, 2011 (Act No. 7 of 2011), by Section 21(2) thus provides:

“In any proceedings, the Supreme Court may make any ancillary or interlocutory orders, including any orders as to costs as it thinks fit to award.”

And, consistent with that prescription, is Rule 3(5) of the Supreme Court Rules, 2012:

“Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders or give such directions as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

[9] From the foregoing provisions, it is clear that the Supreme Court, much like the other superior Courts, has an open-ended mandate of application of *discretion* to ensure *ends of justice*. This element of the judicial mandate is to be found in other law as well. Thus the Civil Procedure Act (Cap. 21, Laws of Kenya), the primary law of judicial procedure in civil matters, thus stipulates (Section 27(1)):

“Subject to such conditions and limitations’ as may be prescribed, and to the provisions of any law for the time being in force, the costs of and

incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction shall be no bar to the exercise of those powers:

*Provided that the **costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order***” [emphases supplied].

[10] The foregoing provision of the Civil Procedure Act has featured in judicial deliberations; and in ***Joseph Oduor Anode v. Kenya Red Cross Society***, Nairobi High Court Civil Suit No. 66 of 2009; [2012] eKLR Odunga, J. thus observed:

*“...whereas this Court has the discretion when awarding costs, that discretion must, as usual, be exercised judicially. The first point of reference, with respect to the exercise of discretion is the guiding principles provided under the law. In matters of costs, the general rule as adumbrated in the aforesaid statute [the Civil Procedure Act] is that costs follow the event unless the court is satisfied otherwise. That satisfaction must, however, be patent on record. In other words, **where the Court decides not to follow the general principle, the Court is***

enjoined to give reasons for not doing so. In my view it is the failure to follow the general principle without reasons that would amount to arbitrary exercise of discretion ...” [emphasis supplied].

[11] It emerges clearly that, whether in this Court or any other superior Court, costs are awarded *at the discretion of the Court or Judge*. Indeed, as for the Supreme Court, Rule 3(5) of the Supreme Court Rules is the most pertinent, especially as it constitutes the governing framework for costs – and costs fall under the “inherent powers of the Court.”

[12] Such a principle applies in other countries as well, as we learn from the comparative lesson. We draw, in this respect, from ***Halsbury’s Laws of England***, 4th ed Re-Issue (2010), Vol. 10, para. 16:

*“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not award them. This discretion must be exercised judicially; **it must not be exercised arbitrarily but in accordance with reason and justice**” [emphasis supplied].*

[13] To the same intent Mr. Justice (Rtd.) Kuloba thus writes in his work, *Judicial Hints on Civil Procedure*, 2nd ed. (Nairobi: LawAfrica, 2011), p. 94:

“Costs are [awarded at] the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise: ***Chamilabs v. Lalji Bhimji and Shamji Jinabhai Patel***, High Court of Kenya, Civil Case No. 1062 of 1973.”

[14] So the *basic rule* on attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to *penalize the losing party*; rather, it is for *compensating the successful party* for the trouble taken in prosecuting or defending the suit. In Justice Kuloba’s words [*Judicial Hints on Civil Procedure*, at p.94]:

“[T]he object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure...Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action.”

[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. In ***Amoni Thomas Amfry and Another v. The Minister for Lands and Another***, Nairobi High Court Petition No. 6 of 2013, Majanja, J concurred with the decision in ***Harun Mwau and Others v. Attorney-General and Others***, Nairobi High Court Petition No. 65 of 2011, [2012] eKLR, in which it was held [para.180]:

“In matters concerning public-interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed. Costs should therefore not be imposed on a party who has brought a case against the State but lost. Equally, there is no reason why the State should not be ordered to pay costs to a successful litigant.”

[16] Another example is the landmark Presidential election petition Ruling in ***Raila Odinga and Others v. The Independent Electoral and Boundaries Commission and Others***, Sup. Court Petition No. 5 of 2013, in which the parties were required to bear their own respective costs; the Court’s reasoning being given as follows [paras. 309, 310]:

“Yet we have to take into account certain important considerations. It is already clear that the nature of the matters considered in a Presidential-election petition is unique. Although the petitions are filed by individuals who claim to have moved the Court in their own right, the constitutional issues are of a public nature – since such an election is of the greatest importance to the entire nation.

*“Besides, this is a unique case, coming at a crucial historical moment in the life of the new Kenyan State defined by a new Constitution, over which the Supreme Court has a vital oversight role. Indeed this Court should be appreciative of those who chose to come before us at this moment, affording us an opportunity to pronounce ourselves on constitutional questions of special moment. **Accordingly, we do not see this instance as just another opportunity for the regular professional-business undertaking of counsel**”* [emphasis supplied].

[17] Falling well within the cast of the foregoing reasoning, which this Court sustains, a kindred set of fact-manifestations has in another case, ***Samuel Kamau Macharia and Another v. Kenya Commercial Bank and Two Others***, Sup. Ct. Application No. 2 of 2011 [2012] eKLR, led to this Court ordering that each party bear their own costs. This particular case is notable for the fact that it arose from the fact that a provision of statute law stood in conflict

with that of the Constitution – and *action to resolve the discord was not perceived by this Court as a proper occasion for awarding costs against the losing party.*

D. CONCLUSION

[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.

[19] It is on the basis of such principles, that the instant matter is to be resolved. It is clear that learned counsel, Mr. Oraro has focused his case on the basic principle: costs should follow the event. But he has gone further – urging (and this is not a subject of doubt) that the matter in contest has been pending for some time, and that *bona fide* circumstances warranting alternative dispute-

settlement had been scoped-out in the Court of Appeal, but the petitioners missed-out on the opportunity.

[20] Learned counsel, Mr. Nyamodi's response, for the petitioners, is that the suit at the time of filing, was founded upon a legitimate cause of action invoking the (extant) terms of Section 14 of the Supreme Court Act, 2011 (Act No. 7 of 2011); and that the destiny of the case arose from the conflict between that provision and the terms of the Constitution, rather than from any omission or commission attributable to the petitioners. The petitioners, it was urged, had not, in any respect, acted in abuse of Court process and, indeed, the legal position predetermining their cause to fail arose from a different matter, the ***Macharia*** case – a matter subsequent in time.

[21] Mr. Nyamodi's initiative was, clearly, attended with the perception that costs in litigation, bore a *penal element*; a view contested by Mr. Oraro who urged that costs, instead, evince a neutral face – just a *logical consequence* of legal proceedings initiated or prosecuted.

[22] 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. The relevant question in this particular matter must be, *whether or not the circumstances merit an award of costs to the applicant.*

[23] How ought this Court to perceive the fact that the respondents had not pursued the Court of Appeal's directions in favour of arbitration, but had instead moved the Supreme Court for relief, and their cause had then succumbed to a juridical handicap?

[24] It is plain to us that, at the time the petition was lodged in the Supreme Court, it was, in every respect, a *valid* cause of action; and thus, no blame attaches to the act of filing. By Article 50(1) of the Constitution of Kenya, 2010 –

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court....”

It is to be concluded that the petitioners, indeed, had a *constitutional right* to submit themselves to the judicial process before the Supreme Court.

[25] It follows that even though the petitioners could have adhered to directions for arbitration while they were before the Court of Appeal, their *rights to judicial resolution of conflict* were unaffected; and consequently, they had quite properly moved the Supreme Court. The petitioners' "loss" before the Supreme Court was not for want of due diligence, nor did it flow from any exceptional forensic

industry on the part of the applicants. Rather, the “loss” was directly occasioned by a purely fortuitous event: this Court, in an unrelated case *of later timing*, annulling the provision of the Supreme Court Act which had founded the petitioners’ case.

[26] Both sides, therefore, have their cases resting at a common baseline. What is the judicious position to take on costs?

[27] Just as in the Presidential election case, ***Raila Odinga and Others v. The Independent Electoral and Boundaries Commission and Others***, Sup. Court Petition No. 5 of 2013, this matter provides for the Court a suitable occasion to consider further the subject of *costs*, which will continually feature in its regular decision-making. The *public interest* of constructing *essential paths of jurisprudence*, thus, has been served; and on this account, we would attach to neither party a diagnosis such as supports an award of costs.

E. ORDERS

[28] Responding to the applicants’ prayers, we will make Orders as follows:

(a) The petition is hereby struck out, its substratum having been determined by this Court’s Ruling of 20 August 2013.

(b) The parties shall bear their own respective costs.

DATED and DELIVERED at NAIROBI this 4th day of March, 2014.

.....
W.M. MUTUNGA
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

.....
K.H. RAWAL
DEPUTY CHIEF JUSTICE &
VICE-PRESIDENT OF
THE SUPREME COURT

.....
P.K. TUNOI
JUSTICE 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

.....
N.S. NDUNGU
JUSTICE OF THE SUPREME COURT

**I certify that this is a true
copy of the original**

**REGISTRAR
SUPREME COURT OF KENYA**