

# REPUBLIC OF KENYA

## IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Rawal, DCJ & V-P, Ibrahim, Ojwang, Wanjala & Njoki, SCJJ.)

### PETITION NO. 16 OF 2014

**-BETWEEN-**

**LEDAMA OLE KINA.....APPELLANT**

**-AND-**

- |   |   |                    |
|---|---|--------------------|
| 1. SAMUEL KUNTAI TUNAI.....   | } | <b>RESPONDENTS</b> |
| 2. ARUASA EVALYN CHEPKIRUI.....   |   |                    |
| 3. THE INDEPENDENT ELECTORAL AND<br>BOUNDARIES COMMISSION.....              |   |                    |
| 4. DR. MICHAEL K CHERUIYOT<br>(COUNTY RETURNING OFFICER, NAROK COUNTY)..... |   |                    |
| 5. SAMUEL CHACHA (RETURNING OFFICER,<br>EMURUA DIKIR CONSTITUENCY).....     |   |                    |
| 6. JOSHUA TULWO<br>(RETURNING OFFICER, KILGORIS CONSTITUENCY).....          |   |                    |
| 7. JACKTON OKUBASU<br>(RETURNING OFFICER, NAROK WEST CONSTITUENCY)          |   |                    |
| 8. MARTIN MALONZA<br>(RETURNING OFFICER, NAROK SOUTH CONSTITUENCY)          |   |                    |
| 9. MOHAMMED RAKA<br>(RETURNING OFFICER, NAROK NORTH CONSTITUENCY)           |   |                    |
| 10. ISAAC RUTO<br>(RETURNING OFFICER, NAROK EAST CONSTITUENCY)              |   |                    |

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*(Appeal against the Judgment and Order of the Court of Appeal sitting in Nairobi (Waki, Musinga & Gatembu, JJ.A) delivered on 28<sup>th</sup> March, 2014 in Nairobi Civil Appeal No. 286 of 2013)*

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## **JUDGMENT**

### **A. INTRODUCTION AND BACKGROUND**

[1] This appeal is brought pursuant to the provisions of Article 163(4)(a) of the Constitution of Kenya, 2010, Section 15(2) of the Supreme Court Act (Cap 9A of

the Laws of Kenya), and Rules 9 and 33 of the Supreme Court Rules, 2012. It was filed on 12<sup>th</sup> May, 2014, supported with an affidavit sworn by the petitioner, on even date. A supplementary record of appeal was filed on 22<sup>nd</sup> May, 2014.

**[2]** The election petition was filed on 25<sup>th</sup> March, 2013 before the High Court at Nakuru. In the course of litigation, the petitioner filed two applications for scrutiny. One was an application dated 20<sup>th</sup> May, 2013, seeking scrutiny with respect to *Narok South Constituency*. But this was disallowed. On 26<sup>th</sup> June, 2013, the High Court (*Wendoh J.*) made an Order, that there be scrutiny of Forms 35 and 36, with respect to Kilgoris and Narok West Constituencies. The second application was dated 16<sup>th</sup> July, 2013. It led to the Court, on 23<sup>rd</sup> July, 2013, ordering scrutiny and recount of valid votes for *Iladoru Polling Station*, as well as and re-tallying of Forms 35 and 36, to establish how many votes each candidate had garnered. The scrutiny exercise commenced on 29<sup>th</sup> July, 2013 and was finalized on 2<sup>nd</sup> August, 2013. This exercise was conducted by the Deputy Registrar, and the report presented to the Court.

**[3]** Upon considering the report, the High Court found that indeed, some of the Forms 35 had not been signed, but attributed this omission to honest human error. In addition, the Judge found that the petitioner had not demonstrated that the errors were deliberate, or ill-intentioned, nor that they would materially affect the final results of the election. The Court also found that, although evidence of

tampering with ballot boxes had been adduced, this question had not been specifically marked out as an issue for determination. However, the petitioner submitted on this point, that the state of the errors reflected the situation in the entire election; and so he invited the Court to hold, by extrapolation, that the shortfall was a reflection of the position in all the constituencies. The Court, however, declined this invitation.

[4] In a Judgement delivered on 20<sup>th</sup> September, 2013, the High Court held:

***“The Returning Officers, namely DW1 to DW5, DW7 and the County Returning Officer DW6, all explained to this court that there were indeed errors and irregularities that occurred during the election, mostly during the tallying and transposition of results but they were minor, and they owed to the fact that the 3<sup>rd</sup> respondent’s officers had been working for three days without sleep or rest, and were fatigued. This Court cannot also lose sight of the fact that the process was complex in that this was the first election where 6 leaders were being elected at once, and the fact that the 3<sup>rd</sup> respondent had expected to use the electronic transmission system which failed to work midway. They had to resort to manual operations. This is also an exercise that takes place once in five years. The petitioner having withdrawn the allegations of bribery and impropriety, the allegations that remained all relate to transposition of the results from one statutory form to***

*another, and arithmetic errors. Taking into account all these circumstances, an allowance had to be made for such errors. In any event, the requirement that the elections be accurate does not mean that they will be perfect and devoid of genuine human errors or/and mistakes.*

*.....*

*“In the instant case, even with the admitted errors and the results of the scrutiny exercise, the margin between the petitioner and the 1st respondent is large, that is over 80,000 votes. In my view, the petitioner did not establish that any of the errors were intentional, or due to negligence or ulterior motive on the part of the respondents. Because of the large margin between the petitioner and the 1<sup>st</sup> respondent’s votes, I find the errors and irregularities did not affect the outcome of the gubernatorial results of Narok County as to render the election null and void. In the end, I find no substance in any of the grounds of the petition. The election was free, fair and credible, conducted substantially in accordance with the Constitution and the Elections Act in the circumstances. The will of the people of Narok must be upheld. I find and hold that the 1st respondent was validly elected as the Governor of Narok pursuant to Article 81 of the Constitution. I hereby declare that Samuel Kuntai Tunai was validly declared as Governor for Narok and Aruasa Evalyn Chepkirui as the Deputy Governor. The*

***sum effect is that the petition must fail and it is hereby dismissed with costs to the respondents.”***

**[5]** On the issue of costs, the High Court held that:

***“Regulation 36(1)(a)(b) of the Elections (Parliamentary and County Elections) Petition Rules 2013 empowers the Court to determine the costs payable and who should pay costs. In so doing, I take into account the fact that the petition proceeded within the specified period without much interruption. The petitioner made two interlocutory applications. I must mention here that though the 11th respondent was served with all processes and was aware of this petition, there was no appearance at any of the hearings. On 10th September 2013, the 11<sup>th</sup> respondent filed submissions. Having ignored the invitation to take part in these proceedings, I find it unnecessary for the 11th respondent to come into the proceedings so late in the day when the Court has already written its Judgment and even ask for costs. It was not enough to come on record. The 11th respondent is not deserving of any costs. In assessing the costs, I take into account the fact that the petitioner impugned the decision of the 3rd respondent because of the errors that were admittedly made by the 3rd respondent’s officers. I also take into account the fact that the allegations of bribery, bias and impropriety leveled against the respondents were all abandoned after the full hearing. Instead of suing the Commission alone,***

***the petitioner decided to bring into these proceedings all the Returning Officers involved in the exercise. With all the above facts in mind, this Court caps the costs payable to the respondents to a maximum of Kenya Shillings 4.5 million to be shared as follows: 1st and 2nd respondents a maximum of Kshs.1.5 million; 3rd to 10th respondents a maximum of Kshs.3.00 million.”***

**[6]** In a Judgement delivered on 28<sup>th</sup> March, 2014, the Court of Appeal considered the decision of the High Court, and isolated two issues for determination:

***“(i) whether Articles 81 and 86 of the Constitution are the sole basis for determining electoral disputes, and, if so, whether Section 83 of the Elections Act contravenes the Constitution and is therefore rendered otiose;***

***(ii) whether the gubernatorial elections for Narok County was substantially conducted in accordance with the Constitution and the electoral law; if it was conducted in accordance with the law, whether breaches of the rules, and the irregularities vitiated it; or whether the breaches and irregularities materially affected the result of the election.”***

[7] The Court of Appeal followed the precedent in ***Raila Odinga & Others v. Independent Electoral and Boundaries Commission & Others***, S.C. Petition No. 5 of 2013, in answering to the first issue concerning the constitutionality of Section 83 of the Elections Act.

[8] On the second issue, the Court found that the High Court had properly subjected the evidence adduced to the proper qualitative and quantitative evaluation, and had arrived at a proper determination. The Court held that “*there was no error in principle in the approach taken by the High Court in arriving at its conclusion,*” and that “*the gubernatorial election for Narok County was substantially held in accordance with the law and the irregularities committed did not vitiate the election or materially affect the result.*”

[9] On costs, the Court of Appeal specified and restricted the costs at the High Court as follows: 1<sup>st</sup> and 2<sup>nd</sup> respondents – an amount not exceeding Kshs. 1,000,000 each; 3<sup>rd</sup> respondent – an amount not exceeding Kshs. 500,000; and the 4<sup>th</sup>-to-10<sup>th</sup> respondents – an amount not exceeding Kshs. 100,000. It further limited the costs of the proceedings before it as follows: 1<sup>st</sup> and 2<sup>nd</sup> respondents – Kshs. 750,000; 3<sup>rd</sup> respondent – Kshs. 300,000; 4<sup>th</sup>-to-10<sup>th</sup> respondents – Kshs, 50,000.

**[10]** Dissatisfied with the determination of the Court of Appeal, the petitioner filed a petition of appeal, dated 12<sup>th</sup> May, 2014 on the following grounds:

- (i) the Court of Appeal erred in law by concluding that the irregularities committed in the election of Governor (and having been established by the petitioner through the scrutiny exercise, and admitted to by the 3<sup>rd</sup>-10<sup>th</sup> respondents) did not violate the election or materially affect the results of the election, considering the standard set under Articles 81(e)(iv)& (v) and 86 of the Constitution;*
- (ii) the Court of Appeal erred in law, by concluding that the election of the Governor was held substantially in accordance with the law, in particular Articles 81(e)(iv)and (v) and 86 of the Constitution;*
- (iii) the Court of Appeal erred in law by ordering the appellant to pay costs despite the errors committed by the 3<sup>rd</sup>-to-10<sup>th</sup> respondents.*

However, during the hearing of the appeal, on 2<sup>nd</sup> March, 2015, the first two grounds were withdrawn, leaving the third ground as the only issue for determination.



## **B. SUBMISSIONS OF THE PARTIES**

[11] Learned counsel, Mr. Ombati appeared for the petitioner; learned counsel, Mr. Kemboy for the 1<sup>st</sup> respondent; learned counsel, Mr. Havi for the 2<sup>nd</sup> respondent; and learned counsel, Mr. Mungai for the 3<sup>rd</sup>-to-10<sup>th</sup> respondents.

### ***(i) The Petitioner***

[12] Counsel for the petitioner submitted that the Court of Appeal had erred, in condemning him to pay costs, despite the fact that the irregularities and omissions occasioning the filing of the petition were attributable to the 3<sup>rd</sup> –to-10<sup>th</sup> respondents. He urged that, on the returning officer’s admission, certain errors occurred during the filling-in of Form 36. Counsel sought to rely on Rule 34(2)(b) of the Elections (Parliamentary and County Elections) Petition Rules, 2013 which thus provides:

***“When making an Order for costs, the Court should impose the burden of payment on the party who has caused the unnecessary expense, whether such party is successful or not, in order to discourage any such expense.”***

[13] Learned counsel submitted that the High Court had not dealt fully with the issue of costs, and he prayed for an Order varying the determination made by the Court of Appeal, with respect to costs. He urged the Court to direct that the 3<sup>rd</sup>-to-10<sup>th</sup> respondents should bear the costs of litigation.

[14] Counsel submitted that the Appellate Court had deprecated the High Court's failure to limit the costs, on the basis of Rule 36 of the Elections (Parliamentary and County Election) Petition Rules, 2013; and that the said Court had proceeded to fix the costs at Kshs. 1,000,000 for each of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, for the cause in the High Court, and Kshs. 750,000 for each at the Court of Appeal. The Appellate Court also limited the costs of the 3<sup>rd</sup> respondent to Kshs. 500,000 at the High Court; Kshs. 300,000 at the Court of Appeal; Kshs. 100,000 for each of the 4<sup>th</sup>-to-10<sup>th</sup> respondents at the High Court; and Kshs. 50,000 for each at the Court of Appeal.

[15] Counsel submitted that the rationale of the costs-scheme in Rule 36 of the Elections (Parliamentary and County Election) Petition Rules, 2013 was instituted to regulate the expenses of electoral litigation, and to harmonise the costs granted by the Courts. It was urged that the High Court had not addressed itself to the issue of costs in accordance with this Rule, as the initiative of filing the petition rested with the respondents. Counsel, in support of his case, cited the persuasive authority of ***Rally Democracy and Progress and 8 Others v.***

***Electoral Commission of Namibia & 5 Others*** Case No. SA 12/2011, in which the Supreme Court of Namibia thus held (para 143):

***“The administrative mistakes made by the presiding officers who completed the returns in question undoubtedly bears on the checks and balances provided for in part V of the Act. However, when considered against the total number of polling stations and ballots cast in the National Assembly election, those errors, preventable as they were, are not so serious that they detracted from or diminished that or any other of the principles in accordance with which the National Assembly election had to be conducted under Part V of the Act. We are also satisfied—and this follows from our earlier findings of fact—that the first respondent has proven on a balance of probabilities that the result of the National Assembly election was not affected by the mistakes.”***

***(ii) The 1<sup>st</sup> Respondent***

**[16]** The 1<sup>st</sup> respondent perceived in the petitioner’s case four specific issues: the credibility and integrity of election data, as contained in the statutory election forms; alleged obstruction of agents; alleged bribery and other corrupt practices, and election offences, as well as bias on the part of electoral officials; and, allegations that the whole election was not transparent, free or fair, and was a

sham. He relied on the case of ***Gatirau Peter Munya v. Dickson Mwenda Kithinji***, S.C. Petition 2B of 2014 (the ***Munya 2B*** case), as a basis for submitting that the election had been conducted substantially in accordance with the Constitution, and the Elections Act, 2011. He urged that in enacting Section 83 of the Elections Act, 2011 Parliament was alive to the range of errors that could occur during elections, was conscious that the fundamental test in an election was, not the attainment of a 100% accuracy, but rather, the materiality of any irregularities to the validity of election results.

[17] Counsel cited the trial Judge's remarks on the issue of costs:

***“In assessing the costs, I take into account the fact that the petitioner impugned the decision of the 3rd respondent because of the errors that were admittedly made by the 3rd respondent’s officers. I also take into account the fact that the allegations of bribery, bias and impropriety levelled against the respondents were all abandoned after the full hearing. Instead of suing the Commission alone, the petitioner decided to bring into these proceedings all the Returning Officers involved in the exercise. With all the above facts in mind, this court caps the costs payable to the respondents at a maximum of Kenya Shillings 4.5 million to be shared as follows: 1st and 2nd respondents a maximum of Kshs.1.5 million; 3rd to 10th respondents a maximum of Kshs.3.00 million.”***

He submitted that costs was not the only issue addressed by the High Court, and that it was not the primary issue that prompted the filing of the petition. He contested the petitioner's prayer to vacate the Orders of the Appellate Court, in this respect, and urged that if as a result of the High Court and Court of Appeal decisions the Order for costs were to be vacated, the people of Kenya would be bearing the brunt of the costs.

**[18]** Counsel submitted that the transposition error alluded to by the petitioner had been inadvertent, and did not materially affect the results of the election. He urged that such an error had not been a factor in the determination of costs. Counsel urged that, by the terms of Section 86 of the Elections Act, 2011, the Court had a discretion in setting the limit of costs, and thus, could not be reproached for applying that discretion.

**[19]** Counsel took note of the Appellate Court's remark, that costs follow the event, as a general rule. He urged that Section 84 of the Elections Act, 2011 was couched in mandatory terms "*(an election court shall award costs of and incidental to a petition and such costs shall follow the cause)*"; and he urged the Court to disallow the petitioner's prayers for costs, on the basis that the petitioner had not proved his case to the required standard. Counsel submitted that such errors as had occurred in the multiple-ballot election, were neither sufficient to affect the outcome of the election, nor so gross as to attract punitive costs.

***(iii) The 2<sup>nd</sup> Respondent***

**[20]** Learned counsel submitted that in the terms of Section 84 of the Elections Act, 2011, the losing party would bear the burden of costs; and that in line with the provisions of Rule 34(2)(b) of the Elections (Parliamentary and County Elections) Petition Rules, 2013, the burden of costs lay with the party who occasioned unnecessary expense, whether such party was successful or not. He urged that, an unnecessary number of interlocutory applications had been filed and determined, prior to the final Judgement; and that, had the petitioner paid heed to those determinations, certain expenses would have been avoided. Counsel recalled the Ruling of the High Court of 28<sup>th</sup> March, 2013 in which the petitioner was allowed access to all the Forms 35 and 36. It was urged that despite the Order in that Ruling, the petitioner raised no complaint against the entries in any of the forms provided, yet much time was taken to avail him the same. Counsel also recalled the Rulings made with respect to scrutiny and recount, in relation to certain disputed stations. The report of the scrutiny and recount exercise, it was urged, revealed that the allegations of the petitioner were unfounded.

**[21]** Mr. Havi further submitted that the petitioner had also withdrawn some 80% of the allegations previously made in the petition, with respect to bribery, corruption and collusion—despite the fact that the other parties had prepared

themselves to respond to the same. It was submitted that the withdrawal of such allegations took place just before the final submissions, following a trial that had lasted close to two months, and involved several witnesses. Counsel submitted that the petitioner had withdrawn substantial allegations from the petition filed before this Court, preferring to prosecute only the issue of costs. In these circumstances, learned counsel sought the dismissal of an appeal that rested squarely on the issue of costs.

***(iv) The 3<sup>rd</sup>-to-10<sup>th</sup> Respondents***

**[22]** Counsel for the 3<sup>rd</sup>-to-10<sup>th</sup> respondents contested the jurisdiction of this Court in dealing with the single issue of costs, after the withdrawal of other grounds of appeal. Counsel submitted that the question whether the Appellate Court exercised proper discretion in awarding costs, was neither one of interpretation, nor application of the Constitution. He urged that appeals to the Court of Appeal were limited to matters of law only, and in exercise of this limited jurisdiction, that Court had arrived at a proper determination. Counsel submitted that the appeal lodged before this Court was predicated on issues of fact, as opposed to distinct issues of law – and that the matter fell outside the remit of this Court. Finally, it was submitted that both the High Court and the Court of Appeal had made appropriate Orders as to costs.

[23] In the alternative, counsel submitted that the petitioner had not addressed the Court on the question whether the High Court and the Appellate Court had misapplied their discretion, in settling the issue of costs. Counsel urged that the conduct of the petitioner, during trial and on appeal, showed no solicitude for the scarce judicial time and resources.

[24] On the effect of irregularities on electoral process, and the burden falling upon a litigant, counsel cited the **Munya 2B** case (the concurring opinion of Mutunga CJ & P, at para 249), as follows:

***“It is, therefore, time for us to develop our election-petition litigation: we must depart from the current practice in which a petitioner pleads 30 grounds for challenging an election, but only proffers cogent evidence for 3. A candidate, or her agent, cannot abscond duty from a polling station, and then ask the Court to overturn the election because of her failure to sign a statutory form. Every party in an election needs to pull their own weight, to ensure that the ideals in Article 86 are achieved: that we shall once and for all have simple, accurate, verifiable, secure, accountable, transparent elections. The election belongs to everybody, and it is, therefore, in everybody’s collective interest, and in everybody’s collective and solemn duty, to safeguard it.”***



### C. ISSUES FOR DETERMINATION

[25] We have identified the specific issues for determination before this Court as only two; namely:

- (i) *whether this Court has jurisdiction to entertain this petition; and*
- (ii) *whether the superior Courts erred in their decisions on costs.*

### D. ANALYSIS

[26] Does the sole issue of costs engage the jurisdiction of this Court, under Article 163(4)(a) of the Constitution? Matters properly falling to this Court, under Article 163(4)(a), ought to involve the interpretation or application of the Constitution. In the case of ***Peter Oduor Ngoge v. The Hon Francis Ole Kaparo & 5 Others***, Petition No. 2 of 2012, we determined that only weighty issues in litigation fall to this Court, and other orders of issues devolve to the other Courts. In that case we observed (paragraph 29) that this principle has jurisdictional effect –as follows:

***“We draw analogies with the plurality of autonomous structures created by the Constitution of Kenya, 2010, which represents a progressive new trend of governance. The Supreme Court, as the ultimate judicial agency, ought, in our opinion, to exercise its powers strictly within the jurisdictional limits prescribed; and it ought to safeguard the autonomous exercise of the respective***

***jurisdictions of the other Courts and tribunals. In the instant case, it will be perverse for this Court to assume a jurisdiction which, by law, is reposed in the Court of Appeal, and which that Court has duly exercised and exhausted.”***

[27] It must be a prior consideration before this Court, in a matter such as this, whether the issue in question has been canvassed and determined before the superior Courts. This point emerges clearly in our decision in ***Erad Suppliers & General Contractors Limited v. National Cereals & Produce Board*** SC Petition No. 5 of 2012; [2012] eKLR in which we thus held [paragraph 13A]:

***“In our opinion, a question involving the interpretation or application of the Constitution that is integrally linked to the main cause in a superior Court of first instance, is to be resolved at that forum in the first place, before an appeal can be entertained. Where, before such a Court, parties raise a question of interpretation or application of the Constitution that has only a limited bearing on the merits of the main cause, the Court may decline to determine the secondary claim if in its opinion, this will distract its judicious determination of the main cause; and a collateral cause thus declined, generally falls outside the jurisdiction of the Supreme Court.”***

[28] The issue of costs, which has been canvassed before this Court, was not argued before the High Court. The parties, consistently with tradition, left that

question to the discretion of the Court. At the Court of Appeal, the general submission by the respondents was that “costs follow the event.” The petitioner however, questioned the High Court’s determination of costs on the basis that the 3<sup>rd</sup>-to-10<sup>th</sup> respondents ought to have borne the burden of costs, for their role in the election irregularities. One of the grounds of appeal contested the High Court’s award of costs to the 3<sup>rd</sup>-to-10<sup>th</sup> respondents, on the ground that they admitted to numerous mistakes, which gave rise to the petition. The Court of Appeal, even as it upheld the High Court’s determination on costs, went further to place limits upon the same.

**[29]** At the commencement of the hearing of the appeal before this Court, the petitioner withdrew several grounds of appeal, save for the ground on *costs*. A review of the record confirms that the issue of costs was integrally linked to the other grounds of appeal, and specifically to the ground disputing the proper conduct of the election by the 3<sup>rd</sup>-to-10<sup>th</sup> respondents. The general frame of the appeal, drawing from the record and the submissions before us, indicates that the petitioner’s contest of the award of costs was built upon the argument that the petition was occasioned by the actions of the 3<sup>rd</sup>-to-10<sup>th</sup> respondents. The appeal, as conducted on the issue of costs alone, lacks the foundation of issues concerning the electoral process itself.

[30] Section 84 of the Elections Act, 2011 provides that costs shall follow the cause. *What was the cause, in this case?* The term ‘cause’ is thus defined in the ***Black’s Law Dictionary***, 8<sup>th</sup> ed. (2004) [at p.250]: “*something that produces an effect or result.*” The cause in this case was elaborated in the petition, the memorandum of appeal and petition of appeal before this Court. The petitioner sought the invalidation of the election for several reasons, as set out in the grounds outlined in the petition and the memorandum and petition of appeal. The Court’s final determination would mark the end of the cause, *after which costs, in the terms of Section 84, would follow.*

[31] The question to consider must be this: *can an appeal lie before this Court in the absence of the cause, or the contents of the election petition which, in the terms of Section 2 of the Elections Act, 2011, means, an application to the election Court under the Constitution and the Elections Act?* We do not think so.

[32] In ***Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd & Another***, S.C Petition No. 3 of 2012; (2012) eKLR (paragraph 27), this Court thus observed , on the framework of appeal under Article 163(4)(a) of the Constitution:

***“Article 163 (4) (a) must be seen to be laying down the principle that not all intended appeals lie from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or***

***application of the Constitution can be entertained by the Supreme Court.....Towards this end, it is not the mere allegation in pleadings by a party that clothes an appeal with the attributes of constitutional interpretation or application.”***

**[33]** In the ***Nduttu*** case, the Court further observed as follows (paragraph 28):

***“.....the appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163 (4) (a)”*** [emphasis supplied].

**[34]** The award of costs is to be at the discretion of the Court. This Court, therefore, ought to review the determination by the High Court, in order to see whether that discretion was properly exercised, based upon the eventual outcome of the appeal. The Court of Appeal, in ***Seif Mohammed v. Yinus Omar and Anor***, Civil Appeal Number 47 of 1993 [1993] LLR 5159 (CAK), held that when a

trial Court has exercised its discretion on costs, an appellate Court ought not to interfere, unless that discretion was exercised injudiciously, or on wrong principles.

[35] Since costs follow the cause, the onus of proof that the successful party ought to be deprived of costs, lies on the party making that claim. In order to justify a denial of costs to the winning party, it ought to be shown that, that party was guilty of the conduct which induced the filing of the action, and without which conduct, the cause would probably not have been lodged. This principle has been upheld in several cases (see: **Bullock v. London General Omnibus Company** [1907] 1 KB 264; **Sanderson v. Blyth Theatre Company** [1903] 2 KB 533; **Dobi and Company v. United India Insurance Company** [1964] EA 16; **Mayer v. Haarte** [1960] 2 ALL ER 840). In the instant case, the petitioner has not discharged this burden. Consequently, we cannot interfere with the finding of the Court of Appeal.

[36] It is clear to us that the grounds of appeal that were abandoned by the appellant, had brought his case squarely within the four corners of Article 163(4)(a), and, as elaborated in the case of **Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others**, Civil Application No. 5 of 2014, gave this Court a proper basis for considering whether the principles under Articles 81 and 86 of the Constitution, as well as the provisions of the Elections Act, 2011 had been

adhered to. These grounds, as we perceive it, had involved the interpretation and application of the Constitution. However, the single issue of costs, standing all by itself, falls outside the remit of this Court. Consequently, the appeal fails.

#### **E. ORDERS**

[37] Accordingly, we conclude with a set of Orders as follows:

- (a) This Court does not have jurisdiction to consider whether the Court of Appeal properly exercised its discretion, in making the determination on costs.*
- (b) For the avoidance of doubt, the Orders of the Court of Appeal on costs remain undisturbed.*
- (c) The appeal is dismissed.*
- (d) The costs of this appeal shall be borne by the petitioner.*

**DATED** and **DELIVERED** at **NAIROBI** this ..... Day of ..... 2015

.....

**K.H. RAWAL**  
**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**

.....  
**S. N. NJOKI**  
**JUSTICE OF THE SUPREME COURT**

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

**REGISTRAR**  
**SUPREME COURT OF KENYA**