REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

PETITION NO.8 OF 2013

MAJOR RTD. GODFREY MASABA …….…. PETITIONER

VERSUS

IEBC ……..... 1ST RESPONDENT

MADAHANA MBAYA ……..…… 2ND RESPONDENT

REGINALDA NAKHUMICHA …….. 3RD RESPONDENT

RULING

1. On 30th August, 2013 this court delivered a ruling in respect of costs in this petition. A ceiling was placed on total costs payable to all the respondents at Kshs. 700,000. With respect to the entitlement of the respective parties, it ordered as follows:-

> **"Out of this amount the 3rd respondent shall receive a maximum of Kshs.400,000/= while the 1st and 2nd respondents shall have a maximum of Kshs.200,000/=. The interested parties, namely Catherine Wambiliangah and Moses Wetangula shall have their costs of defending the application for costs capped at Kshs.50,000/= each."**

2. As can be deciphered from paragraph 48 of this court's ruling the variance between the costs payable to the 3rd respondent and the 1st and 2nd respondent was premised on the court's finding that the 1st and 2nd respondent had not filed a response to the petition as at the time the petition was dismissed. In its ruling the court observed:-

> **"Save that the petition herein is in respect of a County Woman Member of National Assembly, and the fact that no response was filed by the 1st and 2nd respondent and further that there were protracted hearings on the issue of costs, there are no major differences between this petition and the Machakos High Court Petition... Doing the best I can, I cap the total costs payable to the respondents at Kshs.700,000/=."**

3. Aggrieved by the court's finding that the 1st and 2nd respondent had not filed a response to the petition, the 1st and 2nd respondent has brought the motion dated 6th September, 2013 praying:-

1. That this court be pleased to review its finding and orders issued on 30-08-2013 with regard to the 1st and 2nd defendant with regard to filing of a response and quantum of costs payable to them and set aside and substitute appropriate orders.

2. That in the alternative this court be pleased to grant such other or further orders as it shall deem fit and just for the preservation of justice regarding the nature and circumstances of this case.

3. That costs of this application be provided for.

4. The application is brought under **Article 159(1), 159(2) (d)** of the Constitution, **Section 80(1)(d)** of the **Elections Act**, Rule 4(1) of the Elections (Parliamentary and County Elections) Petition Rules 2013 the Inherent Powers of the court. It is premised on the grounds that the 1st and 2nd respondents (hereinafter called "the applicants") on 13.05.2013 (way before the petition was dismissed); that the finding of this court that the applicants did not file a response is an error apparent on the face of the record and in respect of which this court ought to act *suo moto* to review in the interest of fairness and justice. Further that this court has inherent powers to grant the orders sought to preserve the ends of justice; that the material before court is sufficient to warrant review of this court's adverse orders and that there has been no delay in bringing this application.

5. The application is supported by the affidavit of Wenslas Madahana Mbayah where he has deposed that his advocate, Richard Stephen Malebe, has informed him that his firm, Wekesa Simiyu and Company Advocates, had filed a response to the petition as well as a replying affidavit before the petition was dismissed. Annexed to the affidavit is a copy of the response and the replying affidavit (Annexture WMM-2). He has also annexed to the affidavit of Alfred Rono, the Returning Officer Tongaren Constituency sworn on 4th June, 2013 (Annexture WMM-3.)

6. The petitioner swore an affidavit in which he contends that the decision of this court to cap costs at Kshs. 700,000/= was informed by the fact that the issues involved in the petition were fairly simple; that no complex issues have been raised in this application to warrant increase in the maximum amount awarded to the respondents and that an increase in the maximum amount capped by the court would be punitive to him.

7. Applicant's counsel cited **Article 159** which obligates the court to administer justice without undue regard to procedural technicalities; **Section 80(1) (d)** of the **Election Act, 2011** which allows an Election court to decide all matters before it and **Section 83** thereof which allows the court to decide all interlocutory matters. He also cited Section 2 of the Election Act which defines an Election Court and gives it jurisdiction similar to those given to it in civil and criminal cases.

8. Counsel reiterated that his firm had filed a response to the petition, as early as on 13th May, 2013.

9. He submitted that the court's finding to the effect that the 1st and 2nd respondent did not file a response is an error apparent on the face of the record. That the finding by the court negatively impacts on the Firm of Wekesa and Simiyu & Company Advocates as they will be seen as not properly discharging their duties. Further that the award of costs to the 1st and 2nd respondent was affected by the said finding as the court would have apportioned costs on 50:50 basis among the respondents or even awarded the 1st and 2nd respondent more for defending two respondents.

10. This court is urged to review its orders to set the record straight.

11. It is also submitted that the award of costs awarded to the respondents is insufficient to cover their expenses. He argues that the court capped the costs without according the respondents an opportunity to be heard on the quantum of costs and that capping costs without giving the respondents an opportunity to be heard on the costs was in breach of their rights. Reference was made to **Pashito Holding Ltd & another** v. **Paul Nderitu Ndungu & 2 Others** Civil Appeal No. 138 of 1997 where the Court of Appeal held:-

> **"It is an indispensable requirement of justice that the party who had to decide shall hear both sides, giving each an opportunity of hearing what is urged against him."**

12. It is further submitted that an Election court can on its own motion invoke the Civil Procedure Rules.

13. On being asked by court to produce a receipt to prove filing of the responses on the alleged dates counsel stated:-

> **"I seem to have misplaced the receipts, but given time, I can avail, at least by tomorrow morning".**

14. And as regards the original assessed document which would have the assessment done by the Court officer receiving he stated:-

> **"I am sorry I don't I do not have it here, but I can avail it tomorrow."**

15. Counsel for the petitioner, Miss Wakoli, reiterated the averments contained in the petitioner's replying affidavit. She submitted that the court must strike a balance so that the order does not appear punitive, that an amount above the figure capped by the court would be punitive to the petitioner.

16. With regard to the submission by applicant's counsel that parties ought to have been given opportunity to submit on quantum before the court capped them, she submitted that under Rule 34 of the Election (Parliamentary and County Election) Petition Rules this court has jurisdiction to determine the maximum sum of costs payable. That the court evaluated the work before capping the costs at Kshs. 700,000/=.

17. Counsel further submitted that it was upon the applicants to satisfy the court that they filed the response and that production of a receipt would be proof. She observed that the court issues two receipts, one to the party paying and another is filed as part of the record; and that if no receipt is available that raises eyebrows.

18. The issues for determination are:-

i. Whether an election court has power to review its orders? If so,

ii. On what grounds or circumstances can an election court review its orders?

iii. Whether the applicant's have established a case for review of the orders hereto?

iv. What is the order as to costs?

Whether an election court has power to review its orders?

19. The applicant submits that under Order 45 of the Civil Procedure Rules a court has power to review its own orders. The Section provides:-

“(45) (1) Any person considering himself aggrieved-

a. **by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**

b. **by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time**

when the decree was passed or the order made or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay."

20. This legal position flows from Section 80 of the Civil Procedure Act which gives a Court power to review its own order where an appeal has not been preferred against its order for sufficient cause.

21. Having read both the Elections Act, 2011 and the Elections (Parliamentary and County Elections) Petition Rules 2013 I can confirm that they make no provision for review of an Election court's orders.

Secondly the Election (Parliamentary and County) Petition Rules are complete and the only instances that the Civil Procedure Rules are invoked are as provided under Rule 15 (7) of the Election (Parliamentary and County) Rules.

22. The question which arises is whether the failure to expressly provide for review of the courts orders negates the application of this remedy in the appropriate circumstances?

23. Article 35(2) of the Constitution guarantees every person the right to correction or deletion of untrue or misleading information that affects the person. Article 20(3)(a) on the other hand, enjoins a court when applying a provision of the Bill of Rights, to develop the law to the extent that it does not give effect to a right or fundamental freedom.

24. By failing to make provision for the court to review its orders in the appropriate circumstances, especially where there is a mistake or error apparent on the face of its record that needs to be corrected or deleted in order to set the record straight, it would appear that the Elections Act, 2011 and the Rules made thereunder offends the spirit and letter of Article 20(3)(a) as read with Article 35(2) of the Constitution.

25. For this reason notwithstanding lack of any express provisions for review in the Election Act and the Rules made thereunder, I hold the view that an election court would, in the appropriate circumstances, review its orders if in so doing, it would give effect to a right or fundamental freedom that the law in question had failed to recognize or give effect to.

26. There are decisions to the effect that an election court has power, in exercise of its inherent power, to review its orders. For instance in **Mohamed Ali Mursal** v.**Saadia Mohamed & 2 others** (2013) e KLR S.N Mutuku J., conceded that An Election Court has power to review its orders and invoked Order 45 of the Civil Procedure Rules in resolving the matter before her. Similarly, in Nuh Nassir Abdi v. Ali Wario & 2 others (2013) e KLR EP No.6 of 2013 G.V. Odunga J., observed:-

> **"A decision whether or not to vary, set aside or review earlier orders was an exercise of judicial discretion and the court could only exercise such discretion if so to do would serve useful purpose..."**

27. It is apparent that an election court has power to review its order if doing so would serve a useful purpose in the just determination of the issue before it.

On what grounds or circumstances can an election court review its orders?

28. Although Order 45(1) of the Civil Procedure Rules is not one of the portions applicable to Election Petitions under the Elections (Parliamentary and County Elections) Petitions Rules, 2013, the conditions set therein give rational parameters for review of an order of an election court.

29.Owing to the special nature of election disputes not all the tests under Order 45(1) may be applicable in an application for review of the orders of an Election Court, I hold the view that an Election court should readily review its orders on account of some mistake or error apparent on the face of the record. The court would fail in its mandate of administering justice to parties, if, because the Rules of Procedure don't clothe it with power to correct its mistake or error, it allows wrong or misleading record to stand.

30. Having found that an election court can in the appropriate circumstances review its orders, I turn to question (iii) which is:-

Whether the applicants have established a case for review of the orders hereto?

31. In the instant application the applicants seek review of this court's order for costs on the ground that there is an error apparent on the face of its record and which error is prejudicial to them and their advocates.

32. The applicants, as a matter of right and in the spirit and letter of Article 35(2) are entitled to correction or deletion of untrue or misleading information. The key words here are untrue or misleading information.

33. Is there an error apparent on the face of the record? Did the court err by making a finding that the 1st and 2nd respondent did not file a response to the petition?

34. This question needs to be answered carefully because the court can only be faulted if by the time it wrote the ruling, the 1st and the 2nd respondents' response formed part of the court's record. If it did not, it must be demonstrated that the court or its agents were responsible for the non availability of the response in the court file.

35. It is significant that although the applicants contend that they had filed their response way before the court wrote its ruling and within the time ordered by the court, the said response was not in the court record when this court wrote its ruling. In fact it's because the applicants response was conspicuously missing in the court file that this court awarded them lesser costs compared to the 3rd respondent.

36. There are only two possible explanations to the question of availability or otherwise of the response as at the time this court was writing the ruling

I. That through a mistake of the court's staff, the response was not placed on the court file when the response was filed; or

II. That the response was filed after the ruling was delivered in reaction to the court's order for costs;

37. Regarding the first possibility, the only reasonable explanation for availability of the response in the court file is that it was placed in the court file after the delivery of the ruling. For this to have happened, the applicants must have either complained about the finding of the court at the registry, prompting some officer at the registry to trace and place it in the file. Unfortunately, there is no evidence to prove this happened.

38. Regarding the 2nd scenario, it is possible that the response was filed after the ruling was delivered in reaction to what are termed as the court's adverse orders. Although the response bears a seal of the court imposed on 13.05.2013, the response is neither assessed by an officer of this court as is the case with all other documents filed in court nor is there evidence of payment of filing fee. The promises to send original receipts to the Deputy Registrar never materialised I entertain doubt whether the response was filed on the indicated date or whether the right procedure was used in filing of the response.

39. The receipt and document counsel relies on is dated 14/05/2013, yet the document is stamped as received on 13/05/2013. No explanation is given for this variance. A careful perusal of the receipt shows that it is in respect of filing fees for an application made by respondents for dismissal of the petition, not filing fees for response.

40.As to whether the court ought to have given the parties an opportunity to submit on costs awardable to them before making a decision on the maximum amount payable to the parties; I hold the view that ordinarily a court should do that. Where a court has made its decision without giving the parties an opportunity to be heard on the quantum of costs that would not automatically constitute a good reason for review of its order on costs. The applicants must demonstrate by way of evidence that the court estimate on the maximum costs payable to the parties was erroneous or too low to enable them recoup their expenses and make a return on their investment.

41. In the instant application it is submitted that the amount of costs awarded to the 1st and 2nd respondent is too low to cover the costs incurred in defending the petition. Counsel for the applicants suggested Kshs. 800,000/=. It is not clear whether the suggested figure of Kshs. 800,000/= should cover the total costs or the costs of the 1st and 2nd respondent only.

42. He also submitted that ordinarily costs are apportioned on 50:50 basis upon the respondent or the 1st and 2nd respondent gets more for representing more than one respondent.

43. To resolve the question of the costs payable to the respondents and its apportionment, this court took into consideration the special circumstances of the petition before capping the costs. I also took into consideration the trend in award of costs in similar situations. Although the parties did not address this court on the issue of costs before it capped them, I am not

persuaded that the maximum amount awarded by the court is so low as to amount to an erroneous estimate; which in any event is subject to taxation by the Deputy Registrar

44. The court was duty bound to distinguish the costs payable amongst the respondents as the record showed that the work done by the parties in defending the petition was not the same. The 3rd respondent, in addition to preparing and filing a response to the petition, was obviously entitled to more costs than the applicants who according to the record had not filed any response to the petition.

45. With the greatest respect to applicant's counsel, my view is the response was placed in the court file after the ruling either following a complaint by the applicants (this observation is premised on assumption that it was lying somewhere in the registry owing to a mistake on the part of an officer of this court) or there was foul play between the officers at the registry to the effect that.

46. The upshot to that there is no evidence or information presented to this court to warrant a review of the orders made. The application is dismissed with costs to the petitioner being borne by 1st and 2nd respondents.

Delivered and dated this 25th day of September 2013 at Bungoma.

H.A. OMONDI

JUDGE