



Mutuma & another v National Government Affirmative Action Fund Board & another; Principal Secretary, State Department for Gender (Interested Party); National Assembly (Proposed Respondent) (Petition E022 of 2022) [2023] KEHC 21959 (KLR) (30 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21959 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
PETITION E022 OF 2022
EM MURIITHI, J
AUGUST 30, 2023**

BETWEEN

THURANIRA SALESIO MUTUMA 1ST PETITIONER

JOHN WANGAI 2ND PETITIONER

AND

**NATIONAL GOVERNMENT AFFIRMATIVE ACTION FUND
BOARD 1ST RESPONDENT**

**CABINET SECRETARY, NATIONAL TREASURY & PLANNING 2ND
RESPONDENT**

AND

**PRINCIPAL SECRETARY, STATE DEPARTMENT FOR
GENDER INTERESTED PARTY**

AND

NATIONAL ASSEMBLY PROPOSED RESPONDENT

RULING

1. The Petitioners filed a Notice of Withdrawal of the Petition herein by letter dated 30/5/2023, to which the Respondents did not object but Counsel for the respondents sought an order for costs.
2. At the time of the proposed withdrawal the counsel for the Respondents had filed Grounds of Opposition dated 13/3/2023 made of 11 paragraphs on 3 pages and a Replying Affidavit running together with annexures to 103 pages sworn on the same day and both filed on March 16, 2023.



3. There was on record also a pending application dated 6/6/2023 by the National Assembly seeking joinder as a 3rd Respondent. Counsel for the proposed 3rd Respondent did not seek costs.
4. In resisting an order for costs, the 2nd Petitioner prayed that the court makes no order as to costs as their petition was in public interest and they had withdrawn to allow the National Assembly proceed with its relevant committee work.
5. Legal Notice No. 117 The [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules, 2013](#) (The Mutunga Rules) makes provision for costs in constitutional litigation as follows:

“Costs. 26. (1) The award of costs is at the discretion of the Court.

- (2) In exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms.

6. A perusal of the petition discloses the capacity of the petitioners as “who have brought this petition in the public interest pursuant to Articles 258, 3(1) and 165 (3) (d) of the [Constitution](#) private citizens; seeks a declaration that the “[Public Finance Management Act, 2012](#) (National Government Affirmative Action Fund) Regulations 2016 are inconsistent with the [Constitution](#)” and prays for specific reliefs sought as follows:

“G. Prayers and Reliefsought

In view of the foregoing the petitioners humbly pray for:

- a) This Honourable court be pleased to issue conservatory order to restrain County Members of Parliament (Women Representatives) by themselves, officers, servants, agents or anyone acting on their behalf from undertaking any further fiduciary activities on matters related the National Government Affirmative Action fund.
- b) A declaration be and is hereby issued that having County Members of Parliament (Women Representatives) as Patrons of the National Gender Affirmative Action Fund is an illegality, irregularity, unconstitutional, null, void ab initio.
- c) The [Public Finance Management Act, 2012](#) (National Government Affirmative Action Fund), Regulations 2016 enacted by the 2nd respondent be declared unconstitutional.
- d) A declaration be and is hereby issued compelling the 1st respondent to use the appropriate structure of county committees as outlined in the [Public Finance Management Act, 2012](#) (National Government Affirmative Action Fund), Regulations 2016 pending the hearing and final determination of this matter.
- e) An injunctive order to be issued restraining the disbursement of funds by the interested party to the 1st respondent until full compliance.
- f) The Honourable Court do make any such other or further Orders as it may deem just and expedient in the circumstances to remedy the violation aforesaid.



g) costs of this petition be granted to the Petitioners.”

7. In addition, apart from the filing of the grounds of opposition and the replying affidavit, although bulky, setting out the case of the respondents the petition has not proceeded to hearing as the parties had not filed written submissions as directed by the Court, and it had come before the court on four occasions only between filing October 25, 2022 and 16/3/2023 when diverse directions as to the hearing were given before the withdrawal on 30/5/2023. Moreover, there is no demonstrated personal interest of the petitioners in the cause of action, other than in public interest in enforcing the rule of law. Finally, it matters not that an arguable case disclosed in the pleadings must eventually succeed.
8. That the Respondent sought to respond to the petitioner’s case at great length as demonstrated by the extensive grounds of opposition and bulky affidavit in response is testimony that the petitioner’s case was not a frivolous and unarguable one. It was an arguable case which raised serious questions for consideration by the court in the public interest. Indeed, in apparent concession of some merit in the petition, the Respondents in their grounds of opposition paragraph 9 significantly urge the court as follows:

“9. That if this honourable court do find the Finance Management Act 2012 () National Government Affirmative Action Fund) Regulations 2016 unconstitutional, the Respondents humbly pray that they do not be dismissed completely but alternatively the ministry of Public Services gender and Affirmative Action be granted twenty four (24) months to take appropriate steps to amend the NGAAF Regulations to align with the Constitution. This will preserve the economic and social rights of citizens as envisaged in Article 43.”

9. An order for costs in this case might unduly curtail the ability and deter private citizens from pursuing their rights under the Bill of Rights or seeking, as here the interpretation by the Court of various constitutional issues as they are entitled to do by Articles 22 and 258 of the Constitution. This eventuality would be a direct affront to the principle of access to justice under Article 48 of the Constitution which provides as follows:

“48. Access to justice

The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”

Orders

10. Accordingly, for the reasons set out above, although the general principle in ordinary civil litigation, under section 27 (2) of the Civil Procedure Act, is that costs follow the event, the Court finds justification in the nature of the constitutional application herein to deny costs to the successful respondents following the withdrawal of the petition by the Petitioner in terms of rule 26 (2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules).
11. There shall therefore be no order as to costs.
- Order accordingly.

DATED AND DELIVERED ON THIS 30TH DAY OF AUGUST, 2023.



EDWARD M. MURIITHI

JUDGE

Appearances:

The Petitioners in person.

Mr. Wachira Nguyo, Snr. Principal State Counsel for the Respondents.

Ms. Nganyi Advocate for the Proposed 3rd respondent.

