



**Kunguta & 3 others v Ndisya & 4 others (Environment & Land Petition
3 of 2019) [2023] KEELC 16913 (KLR) (19 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16913 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND PETITION 3 OF 2019**

TW MURIGI, J

APRIL 19, 2023

**IN THE MATTER OF PETITION UNDER ARTICLE 21(1), (3), 22(1), (3), 25(A)
(D), (F), 30(2), 40, 49(1) (A) (I) & 159 OF THE CONSTITUTION OF KENYA 2010.**

AND

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS
OF THE INDIVIDUAL UNDER THE CONSTITUTION OF KENYA 2010 AND THE
PROVISIONS AND POWERS OF THE CHIEF'S ACT CAP128 LAWS OF KENYA.**

BETWEEN

**MUSEMBI KUNGUTA 1ST PETITIONER
ELIZABETH MUTAVE KINGUTA 2ND PETITIONER
JOSEPH MUTUNE NDISYA 3RD PETITIONER
NZOU KINGUTA 4TH PETITIONER**

AND

**HENRY KAVOLU NDISYA 1ST RESPONDENT
RICHARD NZOU NDISYA, CHIEF KITUNDU LOCATION 2ND RESPONDENT
THE INSPECTOR GENERAL OF POLICE 3RD RESPONDENT
THE PRINCIPAL SECRETARY, MINISTRY OF INTERIOR &
COORDINATION OF NATIONAL GOVERNMENT 4TH RESPONDENT
THE HON. ATTORNEY GENERAL 5TH RESPONDENT**



RULING

1. Before me is a Notice of Motion dated June 10, 2022 brought pursuant to the provisions of Rule 27(1) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013* and all other enabling provisions of the law, in which the Applicants are seeing for leave of this Honourable Court to withdraw the Petition herein with no orders as to costs.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Musembi Kunguta sworn on his own behalf and on behalf of the 2nd, 3rd and 4th Applicants on even date.

The Applicants Case

3. The Petitioners averred that they instituted the present Petition with a view to resolve the land dispute between themselves and the Respondents herein. They further averred that they have established that the Petition will not serve any purpose since it cannot resolve the dispute between the parties herein. They argued that it is in the interest of justice that the Petition is withdrawn since it has not been set down for hearing.
4. They argued that the Respondents will not suffer any prejudice if the Petition herein is withdrawn.

The 1st and 2nd Respondents Case

5. The application was opposed by the 1st and 2nd Respondent vide a replying affidavit sworn by the 2nd Respondent on July 18, 2022, on his own behalf and that of the 1st Respondent.
6. They averred that the Petitioners lost interest in this matter after the Court declined to issue conservatory orders. They further averred that the Petition is strenuously opposed and it is only fair that this matter proceeds for hearing. The Respondents urged the Court to allow the Counter Claim with costs. They argued that they will suffer substantial loss if the Petition is withdrawn as the Petitioners have trespassed on the 1st Respondent's land where they have constructed structures and have remained on his land illegally.

The Response

7. The Applicants vide a supplementary affidavit sworn by Musembi Kunguta reiterated that the present Petition will not serve any purpose as it is incapable of resolving the land dispute between the parties herein. The Petitioners argued that they should be allowed to withdraw the Petition because the Respondents recourse lies in costs.
8. It was further averred that the issues raised in the Cross Petition can be determined in other forums or in the alternative the Applicants can be allowed to defend the Cross Petition in the event the Court finds that the same does not die with the withdrawal of the Petition.
9. On the issue of trespass, the Applicant averred that contrary to the allegations, the 1st and 2nd Respondents have trespassed onto the Applicants property. The Applicants argued that the dispute between the parties revolves around a boundary/trespass dispute which does not warrant a Constitutional Petition.
10. The parties were directed to canvass the application by way of written submissions.



The Applicants Submission

11. The Applicants submissions were filed in Court on October 4, 2022.
12. Counsel submitted that the Applicants have met the threshold for withdrawal of the Petition as set out in the case of *Peter Makau Musyoka & 19 Others v Permanent Secretary Ministry of Energy & 14 Others 2014 eKLR*.
13. Counsel submitted that the Petition herein does not involve any public interest as the dispute between the parties stems from a land dispute with respect to land parcel No Makueni/Kitundu/4957. It was submitted that the Petition herein is incapable of resolving the land dispute between the parties herein.
14. It was further submitted that the Respondents have not demonstrated that the Applicants had an ulterior motive in filing and/or withdrawing the Petition. Counsel contended that though the Petition is opposed, it will be absurd to force the Petitioners to proceed with the hearing of the Petition as the same will not serve any purpose.
15. Finally, Counsel argued that it is in the interest of justice that the Petitioners be granted leave to withdraw the Petition so that they can seek reprieve in the most suitable forum.
16. To buttress his submissions, Counsel relied on the list and bundle of authorities dated October 4, 2022.

The 1st and 2nd Respondents Submissions

17. The 1st and 2nd Respondents submissions were filed in Court on November 11, 2022.
18. Counsel for the 1st and 2nd Respondents identified the following issues for the Court's determination:-
 - i. Whether the Court should grant leave to the Applicants/Petitioners to withdraw the Petition with no orders as to costs.
 - ii. Whether the Court should hear the Counter Claim dated July 22, 2019 filed by the 1st and 2nd Respondents.
19. On the issue of whether the Court should grant leave to the Petitioners to withdraw the Petition with no orders as to costs, Counsel submitted that it is a cardinal principle of law that costs should follow the event. Counsel submitted that they were not opposed to the application to withdraw the Petition subject to payment of costs.
20. Counsel submitted that the 1st and 2nd Respondents are entitled to costs as they incurred expenses in preparing pleadings, attending Court and defending the Petition. It was further submitted that the 1st and 2nd Respondents are entitled to costs because the Petition herein is an abuse of the Court process as the Petitioners have admitted that the Petition is incapable of determining the dispute between the parties herein.
21. In addition, Counsel submitted that the Petitioners did not make prior attempts to resolve the dispute through alternative dispute resolution mechanisms to avoid parties incurring costs.
22. To buttress her arguments, Counsel cited the case of *Jasbir Sing Rai & 3 Others v Tarlchan Singh Rai Estate and 4 Others [2013]* and Order 25 Rule 1 and 2 of the *Civil Procedure Rules*.
23. Finally, Counsel urged the Court to allow the 1st and 2nd Respondents to prosecute their Counter claim to its logical end.



The 3rd, 4th and 5th Respondents Submissions

24. The 3rd, 4th and 5th Respondents submissions were filed in Court on November 8, 2022. The Attorney General relied on Section 27 of the [Civil Procedure Act](#) to submit on costs. On withdrawal of the Petition, the Hon Attorney General placed reliance on Order 25 of the Civil Procedure Rules. The Attorney General submitted that the 3rd - 5th Respondents are entitled to costs as the dispute relates to private property. It was submitted that the Petition was filed for private gain and not on the grounds of public interest.

Analysis and Determination

25. Having considered the application, affidavits and the rival submissions, the following issues arise for determination:-
- i. Whether the Applicants can be granted leave to withdraw the Petition with no order as to costs.
 - ii. Whether the Respondents Cross Petition should be heard and determined.

Whether The Applicants Can Be Granted Leave To Withdraw The Petition With No Orders As To Costs

26. Costs of litigation are in the discretion of the Court. The general principle in civil proceedings is that costs should follow the event (See Section 27 of the [Civil Procedure Act](#)).
27. The [Constitution](#) of Kenya (Protection of rights and fundamental freedoms) Practice and Procedure Rules provides for guidance in matters of costs in Constitutional Petitions.
28. Rule 26 provides as follows:-
- 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.
29. The instant application is premised on Rule 27(1) which gives the Court powers to withdraw a Petition and provides as follows:-
- The Petitioner may-
- a) On notice to court and the Respondent, apply to withdraw the petition or;
 - b) With leave of the court discontinue the proceedings.
30. The Petitioners averred that the Petition herein will not serve any purpose as it is incapable of resolving the land dispute between the parties herein. They urged the Court to grant them leave to withdraw the Petition. The 1st and 2nd Respondents vehemently opposed the application on the grounds that they have filed their response and Counter Claim to the Petition.
31. They argued that they have incurred expenses in the preparation of the response and in attending Court. They submitted that they are not opposed to the withdrawal of the Petition subject to payment of costs incurred in defending the Petition.



32. The Petitioners herein instituted this Petition dated May 2, 2019 simultaneously with a Notice of Motion of even date and sought the following orders :-

- a) A declaration that the 2nd Respondent's acts are ultra vires by his wrongful
 - i. Arrest and confinement of the 1st and 4th Petitioners.
 - ii. Subjection of the 1st, 4th and 2nd Petitioners to psychological and physical torture.
 - iii. Depriving the 3rd Petitioner of the care of her family.
 - iv. Threatening the Petitioners with dire consequences in default of vacating LR NO Makueni/Kitundu/4957 contravened the Petitioners fundamental rights and freedoms guaranteed by the Constitution of Kenya 2010.
- b) General damages.
- c) An order of permanent prohibition against the Respondents jointly and severally prohibiting them from harassing, arresting and/or in any other manner interfering with the Petitioners personal liberty and the 3rd Petitioner's proprietorship of LR NO Makueni/Kitundu/4957.
- d) The Petitioners to be awarded costs of this Petition.
- e) The Honourable Court be pleased to make orders or Directions within its jurisdiction.

33. In tracing the steps taken by the parties in this Petition, I note from the record that upon service, the 1st and 2nd Respondents filed a Notice of Appointment of Advocates on the May 7, 2019 through the firm of M/s Kamende DC & Co Advocates.

34. The 1st and 2nd Respondents filed a response and Counter Claim to the Petition, a replying affidavit and submissions to the application dated May 2, 2019.

35. The 5th Respondent on the other hand filed grounds of opposition on October 19, 2019. The Court finds that the filing of the Notice of Appointment of Advocate, response to the Petition, replying affidavit, submissions and grounds of opposition is an event within the phrase 'costs follow the event'.

36. The Petitioners contended that the Petition herein is incapable of resolving the dispute as it stems from a land/boundary dispute between the parties herein. The 1st and 2nd Respondents argued that the Petition is an abuse of the Court's process as the Petitioners have admitted that it revolves around a land dispute between the parties herein.

37. In order to address the issue of costs, this Court is called upon to determine whether the Petition herein was filed in public interest.

38. The Blacks Law Dictionary 10th Edition defines public interest litigation as follows:-

' Public interest litigation means a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or the class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affect.'



39. In the case of *Kenya Anti-Corruption Commission V Deepak Chamanlal Kamni and 4 Others [2014] eKLR* the court held that:-

' A matter of public interest must be a matter in which the whole society has a stake, anything affecting the legal rights or liability of the public at large.'

40. The Petitioners submitted that the Petition is not brought in public interest as the legal action is purely for the determination of the land dispute between the parties herein. The 3rd-5th Respondent contended that the Petition was not instituted on the grounds of public interest but for private gain as the dispute relates to private land. The Petitioners having admitted that the Petition revolves around a boundary/land dispute between the parties herein, it is crystal clear that the Petition herein is not in public or general interest in which the whole society has a stake or which their rights and liabilities are affected.

41. Having found that the Petition is not in public interest, the Petitioners cannot be exempted from paying costs incurred by the Respondents in defending the same. The Respondents incurred costs in carrying out the above exercises and are therefore entitled to costs. The Petitioners have not given any sufficient reason why the Respondents should not be awarded costs. This Court will therefore in exercise of its discretion award the Respondents costs for the withdrawal of the Petition.

42. The 1st and 2nd Respondents urged this Court to allow them to prosecute their Counter Claim as it will be rendered res judicata upon withdrawal of the Petition. The 1st and 2nd Respondents filed a response to the Petition and Counter Claim dated July 22, 2019. In the Counter Claim the 1st and 2nd Respondents are seeking the following orders:-

1. A declaration that the 1st Respondent is the sole and registered owner of land parcel number LR No Makueni/Kitundu/5291.
2. A declaration that the Petitioners have jointly and severally trespassed onto the 1st Respondent's land parcel number LR No Makueni/Kitundu/5291.
3. An order directed at the 3rd Respondent to demolish any structures he has erected on the 1st Respondent's piece of land namely LR No Makueni/Kitundu/5291 and to reinstitute the land in its original form before the said construction.
4. A permanent injunction order to issue to restrain the Petitioners their agents and or servants from interfering, constructing, alienating or otherwise howsoever dealing or transferring the 1st Respondent's land namely LR No Makueni/Kitundu/5291.
5. Costs and interest.
6. Any other relief this Honourable Court deems fit to grant.

43. A Counter Claim has its own life and so does a Cross Petition. The Respondents are desirous to prosecute the Counter Claim. This Court finds and holds that the Respondents are at liberty to prosecute the Cross Petition even if the Petitioners withdraw their Petition.

44. In the end the application dated June 10, 2022 is allowed in the following terms;

- 1) The Petitioners Petition is withdrawn as prayed.
- 2) The Petitioners to pay costs of the Petition to be agreed upon by the parties or the taxing master of this Court.
- 3) The 1st and 2nd Respondents are at liberty to prosecute their cross Petition.



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HON. T. MURIGI

JUDGE

**RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 19TH DAY OF
APRIL, 2023.**

IN THE PRESENCE OF: -

Court Assistant – Mr. Mohammed

Ms Kamende for the 1st and 2nd Respondents.

