



REPUBLIC OF KENYA



**Kayuga & another v Kioko & 2 others (Petition E017 of 2022)
[2022] KEHC 10703 (KLR) (24 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 10703 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION E017 OF 2022**

**JM MATIVO, J
MAY 24, 2022**

BETWEEN

NDORO KAYUGA 1ST PETITIONER

GEORGE ODHIAMBO 2ND PETITIONER

AND

MIKE SONKO MBUVI GIDEON KIOKO 1ST RESPONDENT

WIPER DEMOCRATIC MOVEMENT 2ND RESPONDENT

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 3RD
RESPONDENT**

RULING

1. In order to put the 1st Petitioner's application dated 27th April 2022 the subject of this ruling into a proper perspective, it is helpful to highlight, albeit briefly, the facts which triggered this Petition, only, to the extent necessary to address the application, not the Petition. For starters, the Petition was instituted by two Petitioners, namely, Ngoro Kayuga and George Odhiambo, the 1st and 2nd Petitioners respectively.
2. The relevant background to the application is that the 1st Respondent, Mike Sonko Mbuvi Gideon Kioko was elected as Governor of the Nairobi City County on 8th August 2017 for a term of 5 years. On 17th December 2020, he was removed from office by way of impeachment. He unsuccessfully challenged the impeachment in Petition No. E425 of 2020 at the High Court. His appeal to the Court of Appeal against the dismissal was also unsuccessful.
3. On 21st April 2022, the 2nd Respondent nominated him as its candidate to vie for the office of Mombasa County Governor in the forthcoming general elections scheduled for August this year. On 25th April 2022, the Petitioners instituted this Petition challenging his candidature. Their contestation is that the



- 1st Respondent is disqualified from holding a State Office by Article 75 (3) of *the Constitution* claiming he was found unsuitable to hold office. They contend that he is unsuitable to hold the office of the Governor of Mombasa.
4. The affidavit in support of the Petition was sworn by the 1st Petitioner. At paragraph 1 of the affidavit, he averred that he was duly authorized by the 2nd Petitioner to swear the affidavit on his behalf. At paragraph 2 of the affidavit, he averred that he was swearing the affidavit on his own behalf and on behalf of the 2nd Petitioner.
 5. On 27th April 2022, with leave of this court, an amended Petition was filed. The prayers sought are:-
 - a. A declaration that Mike Sonko Mbuvi Gideon Kioko having been removed from office of the County Governor of Nairobi City County by way of impeachment is disqualified from holding any other State Office as defined in Article 160 of *the Constitution* including the office of the county Government of Mombasa.
 - b. A declaration that any county governor or any other person including the 1st Respondent who has been removed from office by way of impeachment or through other disciplinary procedure is disqualified from holding, being elected, appointed and/or employed into any other State office including but not limited to the office of a county governor, county deputy governor, Member of Parliament, member of County assembly, member of the executive committee of a county government and or any other State Office as defined by Article 260 of *the Constitution*.
 - c. A declaration that the 3rd Respondent is mandated and obligated to consider, use and apply the judgment and decree of this court while receiving and processing the nominations of various persons seeking to be elected into respective State Offices in the general elections scheduled for 9th August 2022 or any other election.
 - d. Costs of this Petition be paid by the 1st and 2nd Respondents jointly and severally.
 - e. Any other order this court shall deem just to grant.
 6. On 28th April 2022, the firm of Kirui Kamwibua & company advocates filed a Notice of Change of Advocates coming on record as acting for the 1st Petitioner in place of the firm of Oluga & co advocates who were hitherto on record for both Petitioners. Concurrent with the Notice of Change of Advocates, the said firm filed a Notice of Motion of even date which is the subject of this ruling. The application is expressed under Rule 27 (1) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure) Rules, 2013 and the inherent powers of the court. The 1st Petitioner seeks leave of this court to withdraw this Petition against the Respondents. Also, prays that costs be in the cause.
 7. The grounds in support of the application are that he is no longer interested in pursuing the Petition because he has since realized that the removal of the 1st Respondent as the Governor of Nairobi was more political than legal, and, it is in the interests of justice that the application be allowed to save precious judicial time.
 8. The 2nd Petitioner filed grounds of opposition dated 6th May 2022 stating: -
 - a. That the application is fatally defective because it is supported by a defective affidavit whose jurat is hanging on its own page contrary to the law.
 - b. That 2nd Petitioner has not withdrawn the Petition and is keen to proceed with the same and therefore the 1st Petitioner cannot withdraw the entire Petition.



- c. That the 1st Petitioner swore the supporting affidavit on behalf of the 2nd Petitioner and he cannot therefore withdraw the same without authority, consent and approval of the 2nd Petitioner.
 - d. That the 1st Petitioner is at liberty to withdraw from the Petition but he should let the 2nd Petitioner proceed with the same, so this court should not sanction the withdrawal of the entire Petition.
 - e. That the reasons cited in support of the application are baseless.
 - f. That this suit is a public interest litigation and that the issues raised in the Petition are matters of general public importance and therefore the Petition cannot be withdrawn in a whimsical manner in the fashion sought by the 1st Petitioner.
9. The 2nd Petitioner also filed a Replying affidavit dated 9th May 2022 in opposition to the application essentially replicating the above grounds. It will add no utilitarian value to rehash the same here.
 10. The 1st Petitioner filed a supplementary affidavit dated 17th May 2022 without this courts leave. The substance of the affidavit is that he swore the affidavit in support of the Petition on behalf of himself and the 2nd Petitioner but no authority to swear was annexed, and if the Petitioner desires to proceed with the Petition, he should file a supporting affidavit. He also deposed that the 1st Respondent has a pending appeal before the Supreme Court. He conceded that the suit is a public interest litigation but argued that it cannot be determined before the Supreme Court determines the pending appeal filed by the 1st Respondent on the same impeachment.
 11. In his submissions, the applicant’s counsel essentially rehashed the grounds highlighted in the application, the supporting affidavit and the supplementary affidavit and urged the court to allow the application. He submitted that since there is a pending appeal in the Supreme Court, this dispute is not ripe for determination. He submitted that if the 1st Petitioner is allowed to withdraw the Petition, then the supporting affidavit stands withdrawn and with it goes the Petition and relied on *Bernard Kibor Kitur v Alfre Keter*.¹
 12. The 1st Respondent’s counsel did not oppose the application. He confirmed the existence of an appeal before the Supreme Court being SC E 008 of 2022 which directly flows from the impeachment, the subject of this Petition. He argued that the Petitioner owns the Petition, so, he should be allowed to withdraw the Petition.
 13. Counsel for the 2nd Respondent did not participate in the application. Earlier in the proceedings, counsel holding brief to the 2nd Respondent’s advocate sought an adjournment claiming that they were not served with the application. However, the 1st Petitioner’s counsel was emphatic that he served via e-mail. In a brief ruling, I recalled the earlier directions, the constitutional dictate at Article 159 (2) of *the Constitution* requiring courts to expeditiously determine cases, the objectives of the Rules and the nature of the application under consideration, the nature of the substantive dispute and the rigid time frames regulating the electoral calendar and declined the adjournment.
 14. The 2nd Petitioner’s counsel opposed the application. His submissions essentially replicated the grounds of opposition and the Replying affidavit, so, it will not add value to rehash them here. It will suffice to mention that he referred to the 1st Petitioner’s averment in the supporting affidavit deposing that he was swearing the affidavit on his behalf and on behalf of the 2nd Petitioner and argued that he cannot unilaterally withdraw the Petition nor was it necessary to provide a written authority. He

¹ [2018] eKLR.



submitted that under Rule 27, the court has the discretion to allow the Petitioner to withdraw a Petition and relied on *Isiolo County Assembly & another v Mohamed Tibi, Isiolo County Assembly and 2 others*² which held that the 3rd Petitioner in the said case had sworn the affidavit on behalf of the other Petitioners and his decision to withdraw the Petition was not binding on the other Petitioners and even after the withdrawal is allowed, the Petition can proceed for hearing.

15. Counsel distinguished the decision cited by the 1st Petitioner's counsel on grounds that the issue at hand was a personal affidavit filed in an election Petition while before this court is a constitutional Petition. He relied on *John Juma & 2 others v Patrick Libanda & another; Zedekiah Orera & 4 others (Interested Parties)*³ in which the court while dismissing an application to withdraw a Petition cited *Harry John Paul Arigi & 2 others v Board, Kenya Ports Authority & 2 others*⁴ which held that the court has inherent jurisdiction to stop withdrawal of a Petition if the proposed withdrawal constitutes abuse of court process.
16. The 2nd Petitioners counsel also cited *Peter Makau Musyoka & 19 others (Suing on their own behalf and on behalf of the Mui Coal Basin Local Community) v Permanent Secretary, Ministry of Energy & 14 others*⁵ which held that a party can withdraw a Petition with the leave of the court but the court has to consider the juridical effects of the withdrawal.
17. Further, counsel submitted that a reading of Rule 11 shows that the requirement of an affidavit is not mandatory. He urged the court should it allow the withdrawal to release the 1st Petitioner and allow the 2nd Petition to proceed with the Petition. Alternatively, he urged the court if it finds that the affidavit is necessary, to allow the 2nd Petitioner to file an affidavit. Lastly, he said the amended Petition is supported by an affidavit.
18. The 3rd Respondent did not take a position in the application.
19. As the outset, it is important to bear in mind that before me is a constitutional Petition premised on Article 165 (3) (d), (ii) of *the Constitution*. Constitutional Petitions are governed by *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.
20. The overriding objective of the rules as provided under Rule 3 is to facilitate access to justice for all persons as required under Article 48 of *the Constitution*. Rule 3 (3) provides that the Rules must be interpreted in accordance with Article 259 (1) of *the Constitution* and shall be applied with a view to advancing and realizing the- (a) rights and fundamental freedoms enshrined in the Bill of Rights; and (b) values and principles in *the Constitution*. Rule 27 provides for withdrawal or discontinuance of Petitions in the following words: -

27.

- (1) The petitioner may—
 - (a) on notice to the court and to the respondent, apply to withdraw the petition; or
 - (b) with the leave of the court, discontinue the proceedings.

² [2015] eKLR

³ [2019] eKLR.

⁴ [2016] eKLR

⁵ [2014] eKLR.



- (2) The Court shall, after hearing the parties to the proceedings, decide on the matter and determine the juridical effects of that decision.
- (3) Despite sub rule (2), the Court may, for reasons to be recorded, proceed with the hearing of a case petition in spite of the wish of the petitioner to withdraw or discontinue the proceedings.

21. As was held in *Harry John Paul Arigi & 2 others v Board, Kenya Ports Authority & 2 others*⁶ Rule 27(1)(a) allows a Petitioner who wishes to withdraw a Petition to apply to withdraw the same after giving notice of his intention to both the court and the respondent. However, the court was emphatic that under the above provision, the withdrawal of the Petition is not automatic and is not achieved merely by notice. It stated that under Rule 27(1)(b) the Petitioner can discontinue the proceedings, but after obtaining the leave of the court. The court emphasized that under Rule 27(1), the leave of the court is required before a constitutional Petition may be withdrawn, and, under Rule 27(2) the court decides the matter “after hearing the parties to the proceedings.”⁷ The role of the court in the withdrawal of a constitutional Petition is reinforced by Rule 27(3), whose effect is that notwithstanding the Petitioner’s wish to withdraw the Petition or to discontinue the proceedings, the court may for reasons to be recorded, still proceed to hear and determine the Petition.
22. Undeniably, a lucid exposition of the law and the applicable tests in applications of this nature is to be found in *Peter Makau Musyoka & 19 others (Suing on their own behalf and on behalf of the Mui Coal Basin Local Community) v Permanent Secretary, Ministry of Energy & 14 others*⁸ cited by the 2nd Petitioner’s counsel in which a Bench of 3 High court stated: -

“The Rule applicable is straightforward: a party can withdraw proceedings with the leave of the Court and the Court shall consider the juridical effects of the withdrawal in permitting or withholding such leave. One obvious rendering of this rule, urged by Mr. Waikwa, is that the Court shall not permit the withdrawal where such withdrawal would have adverse juridical effects on the public interests involved in the matter.

The considerations which a court should take into account when asked to permit a petitioner in a Public Interest Litigation to withdraw were succinctly expressed by the Supreme Court in the Indian Case of *S.P. Anand v H.D. Deve Gowda* (1996) 6SCC 734 thus:

Here we must mention that in PIL cases, the petitioner is not entitled to withdraw his petition at his sweet will unless the court sees reason to permit withdrawal. In granting the permission the Court would be guided by considerations of public interest and would also ensure that it does not result in abuse of the process of law. Courts must guard against possibilities of such litigants settling the matters out of the court to their advantage and then seeking withdrawal of the case. There are umpteen ways in which the process can be abused and the courts must be aware of the same before permitting withdrawal of the petition.

It is clear that our Rule 27(3) cited above is a crystallization of the reasoning in this case, which we now adopt. The test requires a court to only permit a withdrawal of a Petition

⁶ [2016] eKLR.

⁷ Ibid.

⁸ [2014] eKLR.



where the court is satisfied that the juridical effects of the withdrawal will not be adverse to the public interest or the interests of any individuals involved. Differently put, the test is simply that a court will only permit a petitioner to withdraw a Public Interest Litigation matter upon being satisfied that none of the following conditions, which our Rules call “juridical effects”, are present: -

- a. That the public interest initially presented in the case will not suffer as a result of the withdrawal. Differently put, the question to ask here is whether the public interest concerns which were to be addressed in the case will suffer adverse effects resulting from the withdrawal of the suit. If the public interest would be compromised or diminished in any way or if the withdrawal of the suit would make it strategically, technically or procedurally more arduous to establish, articulate or consider the public considerations in the case, it follows that public considerations would counsel against leave to withdraw the petition.
- b. That there is no abuse of the process of the law. Here the court will look to see if the party seeking to withdraw acted in good faith both at the time of filing the suit and at the time she seeks to withdraw. In particular, acutely conscious of the role of Public Interest Litigation, the Court will test to see if there is any inkling that the party seeking to withdraw does so in order to personally benefit from the case, or its publicity. This is to ensure that, in the words of the Supreme Court of India in *Sheela Barse v Union of India* AIR 1988 SC 2211 and cited to us by Mr. Waikwa, “a person or body of persons cannot approach the Court with ulterior motive or design to wrench some personal benefit by putting another within the clutches of law and using the court for a device only to that end but not interested with the result of the petition.”
- c. That the case at hand is not an exercise in futility. If the case has been overtaken by events or the points pressed by the petitioners are moot, it would be absurd to insist that the case proceeds even if initially it was dripping with public interest.”

23. I stand guided by the above exposition of the law. As the Supreme Court of India in *Sheela Barse v Union of India*⁹ stated, the “rights of those who bring the action on behalf of the others must necessarily be subordinate to the “interests” of those for whose benefit the action is brought.” In a public interest litigation, unlike traditional dispute resolution-mechanism, there is no determination or adjudication of individual rights. While in the ordinary conventional adjudications the party-structure is merely bipolar and the controversy pertains to the determination of the legal-consequences of past events and the remedy is essentially linked to and limited by the logic of the array of the parties, in a public interest action the proceedings cut across and transcend these traditional forms and inhibitions.¹⁰

24. According to Black's Law Dictionary¹¹ “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 class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected.

⁹ AIR 1988 SC 2211.

¹⁰ Ibid.

¹¹ Sixth Edition



25. In Public Interest Litigation, unlike traditional dispute resolution mechanism, there is no determination or adjudication of individual rights. The proceedings in a Public Interest Litigation are intended to vindicate and effectuate the public interest by prevention of violation of the rights, constitutional or statutory or sizeable segments of the society while owing to poverty, ignorance, social and economically disadvantages cannot themselves assert and quite often not even aware of those rights. A casual reading of the instant Petition leaves no doubt that it raises public interest issues and therefore the plea to withdraw must be weighed against the tests laid down in *Peter Makau Musyoka & 19 others (Suing on their own behalf and on behalf of the Mui Coal Basin Local Community) v Permanent Secretary, Ministry of Energy & 14 others*(supra) which are: -
- a. That the public interest initially presented in the case will not suffer as a result of the withdrawal.
 - b. That there is no abuse of the process of the law.
 - c. That the case at hand is not an exercise in futility
26. The applicant did not address the above tests. It's my finding that the reasons cited for the withdrawal do not surmount the above tests. On this ground alone, the application collapses.
27. The other argument proffered by the 1st Petitioner is that once he is allowed to withdraw, his affidavit is also withdrawn, and with it goes the Petition. This argument is legally frail. It collapses not on one but on several fronts. First, it ignores the fact that withdrawal from the Petition is not a matter of course or right. This is the language of Rule 27 (2) & (3). These provisions provide that the court shall, after hearing the parties to the proceedings, decide on the matter and determine the juridical effects of that decision. It is for the court to determine the juridical effects of the Petition, not the withdrawing Petitioner. Also, despite sub rule (2), the court may, for reasons to be recorded, proceed with the hearing of a Petition in spite of the wish of the Petitioner to withdraw or discontinue the proceedings.
28. Second, the argument completely ignores the nomenclature of Rule 11 (1) which provides that the Petition filed under these rules may be supported by an affidavit. The word deployed in this rule is "may," which is not obligatory. Had the law maker desired an affidavit to be mandatory, nothing prevented him from deploying the word "shall." Courts cannot import words or meaning in a statute which are not supported by the words used in the statute or a meaning the provisions does not contemplate. Third, the argument flies on the face of the informality rule provided in Rule 11(3) which reads: -
- "Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom."
29. Granting or refusing to grant the order sought is a matter of judicial discretion. The classic definition of 'discretion' by Lord Mansfield in *R. v Wilkes*¹² is that 'discretion' when applied to courts of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful, 'but legal and regular'. As the King's Bench in *Rookey's Case*¹³ stated: -
- "Discretion is a science, not to act arbitrarily according to men's will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are

¹² 1770 (98) ER 327.

¹³ [77 ER 209; (1597) 5 Co.Rep.99].



to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity is by the constitution entrusted with.”

30. Considering the juridical questions raised in this Petition, the tests for allowing withdrawal of Petitions discussed above, I find and hold that the most appropriate orders which I hereby issue are: -
- a. That the 1st Petitioner, Mr. Ngoro Kayuga be and is hereby allowed to withdraw from this Petition and he is hereby discharged from these proceedings immediately.
 - b. That the 1st Petitioner’s withdrawal from this Petition does not and will not in any manner affect the Petition.
 - c. That for avoidance of doubt the 2nd Petitioner Mr. George Odhiambo shall proceed with this Petition to its logical conclusion.
 - d. No orders as to costs.

Orders accordingly

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 24TH DAY OF MAY 2022

JOHN M. MATIVO

JUDGE

