



REPUBLIC OF KENYA



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**Odilia v Kenyatta University (Petition E271 of 2021) [2022] KEHC 13171 (KLR)  
(Constitutional and Human Rights) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13171 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION E271 OF 2021**

**AC MRIMA, J**

**SEPTEMBER 30, 2022**

**BETWEEN**

**MURUNGA VERAH ODILIA ..... PETITIONER**

**AND**

**KENYATTA UNIVERSITY ..... RESPONDENT**

**RULING**

**Background**

1. The Petitioner herein, Murunga Verah Odilia, is a registered student in the Respondent's Law School. The Respondent, Kenyatta University, is a body corporate established under the [Kenyatta University Act](#), Cap. 210C of the Laws of Kenya.
2. Arising from allegations of examination irregularities, the Petitioner and other students were taken through some disciplinary processes which culminated with the Petitioner filing the instant Petition and together with an application by way of a Notice of Motion. Both were dated 9<sup>th</sup> July, 2021.
3. In the main, the Petitioner sought the following reliefs: -
  - i. A declaration be made that the Petitioners fundamental rights and freedoms under Articles 10, 23, 27, 28,29,35,43 and 47 of the [Constitution](#) of Kenya, 2010 have been contravened and violated by the Respondent.
  - ii. A declaration be made that the Petitioner has met the requirements for graduating with a bachelor of laws degree from the Respondent and is thus eligible for graduation.
  - iii. An order do issue for purposes of compelling the Respondent to graduate the Petitioner during the graduation ceremony scheduled for the 23 of July 2021.



- iv. An order do issue compelling the Respondent to issue the Petitioner with her final transcripts and Degree certificate on or before the 1s of September 2021.
  - v. A declaration be made that the Petitioner is entitled to the payment of damages and compensation for violation and contravention of her fundamental human rights and freedoms by the Respondent herein as provided for under the Constitution of Kenya, 2010 and an assessment of the said damages be done by the Court.
  - vi. Costs of the Petition be awarded to the Petitioner.
  - vii. Any other orders writs and directions the Honourable Court considers appropriate and just to grant for purposes of protecting and securing the Petitioners constitutional rights.
4. The Respondent opposed the Petition. It filed a Replying affidavit and a Further Replying Affidavit both dated 19<sup>th</sup> July, 2021. They were sworn by Prof. Paul Okemo, the Respondent's Deputy Vice-Chancellor (Academics).
  5. In a Ruling No. 1 delivered on 21<sup>st</sup> July, 2021 the Court declined to issue interim orders to allow the Petitioner to graduate in a graduation ceremony scheduled for 23<sup>rd</sup> July, 2021.
  6. The Court directed that the Petition and the Notice of Motion be heard together and gave directions on the hearing.
  7. When the matter came up for highlighting of submissions on 25<sup>th</sup> August, 2021 the Petitioner's Counsel informed the Court of a suspension letter dated 26<sup>th</sup> January, 2021 served on the Petitioner by the Respondent. The Petitioner thus resolved to and thereby sought to withdraw the instant petition.
  8. The withdrawal was not contested by the Respondent, but the costs.
  9. The Court allowed the withdrawal of the Petition and directed the parties to file and serve submissions on the aspect of costs, hence this ruling.

**The Respondent's submissions:**

10. The Respondent in supporting its position that it be awarded costs of the withdrawn Petition, submitted that Order 25 Rule (1) of the *Civil Procedure Rules* allowed the Petitioner to withdraw the suit, and thereby permitted the Respondent to apply for costs. The Respondent acknowledged that costs were at the Court's unfettered discretion.
11. Nevertheless, the Respondent submitted that the awarding of costs is subject to such conditions and limitations as may be prescribed and to the provisions of the law and that ordinarily costs ought to follow the event unless the Court has good reasons to order otherwise.
12. The Respondent pointed out Section 27(1) of the *Civil Procedure Act*, Cap. 21 of the Laws of Kenya as the main reference to the law of judicial procedure in civil matters, which provision stipulates that:

Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction shall be no bar to the exercise of those powers:



Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

13. To illustrate the application of the above section, the Respondent cited *Joseph Oduor Anode v. Kenya Red Cross Society*, Nairobi High Court Civil Suit No. 66 of 2009; [2012] eKLR where Odunga, J. observed: -

... whereas this Court has the discretion when awarding costs, that discretion must, as usual, be exercised judicially. The first point of reference, with respect to the exercise of discretion is the guiding principles provided under the law. In matters of costs, the general rule as adumbrated in the aforesaid statute [the *Civil Procedure Act*] is that costs follow the event unless the court is satisfied otherwise. That satisfaction must, however, be patent on record. In other words, where the Court decides not to follow the general principle, the Court is enjoined to give reasons for not doing so. In my view it is the failure to follow the general principle without reasons that would amount to arbitrary exercise of discretion ...

14. The Respondent also referred to the decision by the Supreme Court in *Jasbir Singh Rai & others v Tarlochan Rai & Others* Petition No. 4 of 2012 when addressing itself as to matters costs, the Court referred to Mr. (Rd.) Justice Kuloba's Book *Judicial hints on Civil Procedure*, 2<sup>nd</sup> Edition (Nairobi Law Africa, 2011), p.94 which states: -

[T]he objects of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure...Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action.

15. The Respondent further averred that the essence of awarding costs was that costs follow the event and that the principle was not to be used to penalize the losing party, but rather it was for compensating the successful party for the trouble taken in prosecuting or defending the suit.

16. In submitting that the dispute was not a public interest litigation and as such the Respondent ought to be accorded costs, the Respondent referred to the *Black's Law Dictionary* Eighth Edition where 'public interest' is defined as follows: -

The general interest of the public that warrants recognition and protection. It goes on to define it as something in which the public as a whole has a stake; especially an interest that justifies governmental regulation.

17. Further litigation therein was defined as 'a lawsuit, legal action, including all proceedings therein. Contest in a court of law for the purpose of enforcing a right or seeking a remedy.'

18. The Respondent also cited Petition No. 429 of 2017 *Brian Asin & 2 others v Wafula W. Chebukati & 9 others* [2017] eKLR which adopted the *Black's Law Dictionary* in the definition of 'Public Interest Litigation' to mean: -

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.

19. It was submitted that the rationale in determining public interest litigation is what interest the litigant is advancing, whether it is public interest as opposed to personal gain. The Indian Supreme Court



decision in *Ashok Kumar Pandey vs. State of West Bengal writ* Petition 199 of 2003 was referred to when the Court pronounced itself on public interest litigation as follows: -

Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/ or publicity seeking is not lurking. It is to be used as an effective weapon in the armoury of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. As indicated above, Court must be careful to see that a body of persons or member of public, who approaches the court is acting bona fides and not for personal gain or private motive or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique considerations. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs.

20. The Respondent also argued that there are other considerations in awarding costs including the motivations and conduct of the parties.

21. The instant matter, the Respondent argued that it is entitled to costs since the Petition was aimed at wasting the Court's precocious time and was an abuse of the Court's process since it advanced personal gain as opposed to the curing of a constitutional mischief that would plague other citizens facing a similar course of action.

22. The decision in *Brian Asin & 2 others v Wafula W. Chebukati & 9 Others* case (*supra*) was again referred to in underscoring other considerations where the Court expressed itself as follows: -

the primary consideration in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice. The nature of the issues rather than the characterization of the parties is the starting point. Costs should not be determined on whether the parties are financially well-endowed or indigent.

23. The Respondent also submitted on the urgency, extent and the effort its Counsel had to go to participate in the matter and the resultant expenses. Further, that pro bono representation of the Petition should limit the realization of costs by the Respondent in the Petition.

24. In buttressing the above, the Respondent relied on the Supreme Court of Kenya in *Jasbir Singh Rai & Others vs Tarlochan Rai & Others* case (*supra*) where the Court observed that: -

in the classic common law style, the courts have to proceed on a case by case basis, to identify good reasons for such a departure. An examination of evolving practices on this question shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs...

25. The Respondent further argued that public institutions have in the past been ordered to pay costs of suit to other litigants and thus there is no reason why costs should not be paid to such public institutions, where necessary. The decision in ELC JR No. 43 of 2017. *Republic vs. National Land Commission & 2 others, Ex parte Vipingo Beach Resort Limited* where the National Land Commission was condemned to pay costs for causing the institution and termination of proceedings was relied on.



26. It was argued that litigation involving public institutions is funded from scarce public funds. These costs should, therefore, be recovered from individuals who occasion unnecessary spending of the said public funds.
27. In concluding its submissions, the Respondent maintained that the Petition was of a civil nature and not one of advancing a constitutional issue. It further argued that before the Petitioner withdrew the Petition, the Respondent had fully participated in responding to the Petition and that it neither intended nor stood to profit out the advancement of this suit.
28. In a further scathing attack, the Respondent submitted that it was funded by public funds and it would be unfair for it to spend the scarce public resources to defend frivolous cases by some students with no chance of being compensated when cases are resolved in the University's favour.
29. The Respondent submitted that it had demonstrated that it was deserving of an order as to costs and prayed that the costs of the Petition be awarded to it, the Respondent, as against the Petitioner.

**The Petitioner's submissions:**

30. The Petitioner in opposing award of costs to the Respondent made submissions under the following issues: -
  - i. Whether the Petition was frivolous, vexatious and an abuse of the court process to warrant an award of costs?
  - ii. Whether the Respondent was a successful party to favour an award of costs?
  - iii. Whether this is a proper occasion to award costs?
  - iv. Whether the matter in question is one of public interest?
  - v. Whether the Courts discretion to award costs can be exercised in favour of the Respondents?
31. The Court will briefly capture the Petitioner's arguments on the above issues.
  - i. Whether the Petition was frivolous, vexatious and an abuse of the Court process to warrant an award of costs?
32. The Petitioner answered the above issue in the negative.
33. She argued that she approached the Court claiming infringement of her rights and fundamental freedoms including the right to fair and expeditious administrative action. She asserted that she had been taken off the Respondent's graduation list with no valid reason given to her and that she had not been issued with a decision of the irregular disciplinary proceedings and her rights were thus being infringed on.
34. The Petitioner contended that the Respondent did not deny the averment, but instead defended the delay to issue a verdict as having been caused by Covid-19 which allegation was vehemently opposed.
35. The Petitioner maintained that it was during the pendency of the Petition that the Respondent issued a verdict in a letter dated 26<sup>th</sup> July, 2021 suspending the Petitioner, thus changing the substratum of the Petition and rendering it untenable and thereby the Petitioner resolved to withdraw the suit.
36. The Petitioner reiterated that at the time she approached the Court as the Petitioner, she genuinely believed and was aware that her rights had been infringed on, and also that a decision of the disciplinary proceedings had not been issued to her by the Respondent.



37. The Petitioner referred the Court to *Consumers Federation of Kenya (COFEC) v Kenya Commercial Bank & another* [2021] eKLR where the Court decided on whether the Petition was frivolous and vexatious in stating that: -

The question therefore is whether the petition before me is frivolous or vexatious and in my view, the answer is in the negative. The Petitioner approached the court in order to vindicate the negative listing of its member by two credit reference bureaus at the instigation of the 1<sup>st</sup> Respondent. The Petitioner believed that the actions of the 1<sup>st</sup> Respondent contravened the consumer rights of its member as guaranteed by Article 46 of the Constitution. The matter has been settled between the Petitioner and the 1<sup>st</sup> Respondent with the 1<sup>st</sup> Respondent agreeing to white-list the Petitioner's client on all credit reference bureaus. This proves that the petition was not frivolous or vexatious and there was a constitutional question to be answered in the proceedings.

38. Further, Petitioner cited the Supreme Court in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR where the Court stated at paragraph 24 this: -

It is plain to us that, at the time the Petition was lodged in the Supreme Court, it was, in every respect, a valid cause of action; and thus, no blame attaches to the act of filing.

By Article 50(1) of the Constitution of Kenya, 2010 –

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court....

It is to be concluded that the petitioners, indeed, had a constitutional right to submit themselves to the judicial process before the Supreme Court.

39. The Petitioner emphasized that the actions of the Respondent rendered the filing of the Petition and as such the Petition was not frivolous, vexatious or an abuse of the Court process.
40. It was argued that there was indeed a constitutional question to be answered as to whether the Respondent had infringed on the Petitioner's rights and fundamental freedoms.
- ii. Whether the Respondent was a successful party to favour an award of costs?
41. The Petitioner submitted that the Petition was never decided on merit. Additionally, that the Respondent only reacted to the institution of the suit and immediately delivered a verdict, which it had previously failed to issue to the Petitioner which decision essentially altered the entire substratum of the Petition, leading to the withdrawal of the Petition. Therefore, the Petitioner maintained that there was no successful party and thus an award of costs cannot be favoured on the Respondent.
- ii. Whether this is a proper occasion to award costs?
42. The Petitioner answered this issue in the negative.
43. She referred to Section 21(7) of the *Civil Procedure Act* and whereas she agreed that Courts have discretionary power on awarding of costs; she nevertheless, argued that the Court must consider the guiding principles in exercise of the discretion.



44. Referring to *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* case (*supra*), the Petitioner pointed out that at paragraph 18 the Court has stated thus: -

However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.

45. The Petitioner briefly analysed each guiding factor as herein under: -

**The special circumstances of the case:**

46. It was submitted that the instant case was a special and unique one and its circumstances inclined the discretion of the Court not to award costs.
47. The Petitioner submitted that the Petition was presented and founded on a legitimate cause of action and that the Petition was withdrawn based on the Respondent's action to issue a verdict to the disciplinary proceedings that were the origin of the Petition.
48. Further, the Petitioner submitted that she was still a student without any source of income, she had not yet graduated due to the suspension letter and also that the Petition was presented on her behalf on *pro bono* basis. In addition, that the relationship was confirmed by the Respondent and that an award of costs, which she shall be unable to pay, shall affect her academic relationship.
49. The Petitioner also submitted that the Petition was a public interest litigation and hence exempted from award of costs.

**Ends of justice:**

50. The Petitioner averred that the circumstances in the matter would not serve the ends of justice if the Petitioner is burdened with costs.
51. The Petitioner argued that the Petition was presented and founded on a legitimate legal question and cause of action and its determination on its merit could have added to the jurisprudence of infringement of constitutional rights, specifically by public bodies.
52. The Petitioner argued that to award costs against her would discourage students, being the victims of such infringement, from instituting like Petitions of this nature for fear of the punitive and consequential costs.
53. The Petitioner submitted that the ends of justice can only be attained where students have the advantage to Petition the Court without being burdened with costs.

Public interest, motivations and the conduct of the parties, prior-to, during and subsequent to the actual process of litigation.

54. It's the Petitioner's submission that the Petition was a public interest litigation and, therefore, no cost ought to be awarded.



55. She relied on *Consumers Federation of Kenya (COFEC) v Kenya Commercial Bank & another* case (*supra*) at paragraph 14 where the Court explained why it considered the matter before it one of public interest. The court stated as under: -

Although the case against the 1<sup>st</sup> Respondent was towards the vindication of the member's personal rights, the case against the 2<sup>nd</sup> Respondent was brought to challenge its failure in carrying out its legal mandate under the Credit Bureau Regulations, 2013. The Petitioner therefore sought to hold the 2<sup>nd</sup> Respondent responsible for a duty which affects the public at large. This petition thus became a matter of public interest.

56. It was the Petitioner's further submission that although the Petitioner approached the Court on facts that were affecting her personally, the Petition was presented to challenge the Respondent on duties it owes the general student body and the public at large. It was contended that the Petitioner was challenging the Respondent's decision to refuse to graduate her, refuse to issue her with a timely verdict for disciplinary proceedings, subject her to an unlawful disciplinary process, among others.
57. Submissions were made that the Respondent was a public body established by Cap. 210C of the Laws of Kenya and is duty bound to uphold the Constitution to the later and to perform the functions and objects owed to the Citizens of the Republic as set out in Section 4 of the establishing Act.
58. The Petitioner further pointed out that it is a fact that on the same day the withdrawn Petition was filed, a similar Petition against the Respondent, Petition number E270 of 2021 was also filed. Therefore, it was argued, to think of the withdrawn Petition as one of pure private gain would be to suffocate the categorization of public interest matters.
59. The Petitioner reiterated that the matter was a case of public interest and should not attract an award of costs against the Petitioner.
60. On the conduct of the parties, the Petitioner submitted that the Respondent's conduct in delaying to conclude the disciplinary proceedings allegedly caused by Covid-19 and the rush manner in which the proceedings were concluded and the Petitioner suspended immediately the Petitioner filed the Petition, were a testimony of acting in bad faith and as such the Respondent should not be awarded for such conduct.
61. To the Petitioner, the Respondent's conduct amounted to an abuse of the Court process, since the Respondent had opportunities to avert the Petition proceedings, but by its omission and commission entertained the process to a significant point.
62. As such, the Petitioner contended that any accrued costs can only be as a result of the Respondent's actions and thus the Court is not entitled to exercise its discretion in favour of the Respondent.
63. The Petitioner referred to the decision in *Cecilia Karuru Ngayu v Barclays Bank of Kenya & another* [2016] eKLR where the factors to be considered by a Court in awarding costs were discussed as follows:

-

To my mind, in determining the issue of costs, the court is entitled to look at inter alia;

- i. the conduct of the parties,
- ii. the subject of litigation,
- iii. the circumstances which led to the institution of the proceedings,
- iv. the events which eventually led to their termination,



- v. the stage at which the proceedings were terminated,
- vi. the manner in which they were terminated,
- vii. the relationship between the parties and
- viii. the need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of the *Constitution*.

64. The Petitioner wound up the argument in maintaining that awarding costs in favour of the Respondent would cause the Petitioner more difficulty and hardship considering the special academic relationship of the parties and the likelihood that the Petitioner may undoubtedly be unable to comply with the order on costs.

65. The Court was urged to exercise its discretion in not awarding any costs.

- ii. Whether the Courts discretion to award costs can be exercised in favour of the Respondents?

66. The Petitioner submitted in the negative.

67. It was contended that no party is entitled to costs since award of costs are at the discretion of the Court.

68. The Petitioner called upon the Court to look at the matter holistically and be guided by the criteria and legal principles as expounded in her submissions.

69. Further reference was made to the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure, 2013 specifically Rule 26 which provides as follows: -

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.

70. The Petitioner referred to *Consumers Federation of Kenya (COFEK) v Nakumatt Holdings Limited & 4 others* [2018] eKLR where the Court dealt with the said Rule 26 and held that: -

The rationale behind the above rule (rule 26, The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure, 2013) is well laid out in *Consumers Federation of Kenya (COFEC) v Kenya Commercial Bank & another* [2021] eKLR at paragraph 12 where the court states;

Similarly, in *Feisal Hassan & 2 others v Public Service Board of Marsabit County & another* [2016] eKLR at paragraph 3, it was held that: In constitutional litigation, the principle of access to the court must, consistently with the public importance and interest in the observance and enforcement of the Bill of Rights in the Constitution, override the general principle that costs follow the event, unless it can be shown that the petition was wholly frivolous, or that petitioner was guilty of abuse of the constitutional court process by say filing a constitutional petition on matters that do not raise purely constitutional issues and which properly belonged to other competent courts or tribunals, and which should, therefore, have been filed and competently disposed of by those other courts or tribunals. However, a petitioner for constitutional enforcement need not present a case that must succeed and it cannot therefore, be taken against him that his petition is eventually lost if it otherwise meets the public interest criteria. Although developed in the realm of protection and enforcement of rights and fundamental freedoms, the principle applies with



the same force in general constitutional litigation for interpretation and enforcement of the Constitution. Indeed, the rights of access to court under Article 22 and 258 of the Constitution for the enforcement, respectively, of the Bill of Rights and the other parts of the Constitution are in the same terms.

71. The Petitioner again submitted that an award of costs in the circumstances would discourage students from approaching the Court for protection of their rights or fundamental freedoms.
72. The Petitioner, hence, pleaded that the Court do consider the effect that this decision would have on would-be Petitioners (Students) in enforcing their rights against the Respondent (University), where there is alleged imminent or actual threat to their rights and fundamental freedoms; for fear of being burdened with costs.

#### **Analysis:**

73. This Court appreciates the detailed manner in which the parties submitted on the issue of costs. The parties referred to several decisions on the subject which this Court has fully approved of.
74. Whereas there may appear to be some repetitions on the said decisions, that will be for the sole purpose of the ease of sustaining the Court's argument on an issue. The Court will, however, endeavour to keep that to the minimum.
75. Having said so, on carefully consideration of the submissions, this Court formulates the following issues for determination: -
  - i. Whether the Petition was a public interest litigation.
  - ii. Whether costs be awarded.
76. I will consider the issues in seriatim.
  - a. Whether the Petition was a public interest litigation:
77. The concept of Public interest litigation, commonly referred to as 'PIL', has been defined in judicial determinations. I will consider just two of them.
78. In Mombasa High Court Petition No. E017 of 2022 *Ndoro Kayuga & Another vs. Mike Sonko Mbuvi Gideon Kioko & Others* (unreported), the Court while rendering its ruling on whether a Petitioner may be allowed to withdraw a Petition had the following to say about PIL: -
  24. According to Black's Law Dictionary '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.
  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.
79. In Petition 429 of 2017 *Brian Asin & 2 others v Wafula W. Chebukati & 9 others* [2017] eKLR the Court adopted the definition of PIL in the Black's Law Dictionary.



80. The Indian Supreme Court in *Asbok Kumar Pandey vs. State of West Bengal writ* Petition 199 of 2003 pronounced itself on the matter of PIL by stating thus: -

Public interest litigation is a weapon which has to be used with great care and circumspection and the Judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armoury of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. As indicated above, Court must be careful to see that a body of persons or member of public, who approaches the court is acting bona fides and not for personal gain or private motive or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique considerations. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives. Often they are actuated by a desire to win notoriety or cheap popularity. The Petitions of such busy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs.

81. A cursory look at the Petition in this matter reveals an attempt by the Petitioner to champion her rights and fundamental freedoms as a result of the delay on the part of the Respondent in finalizing the disciplinary proceedings against the Petitioner. The matter related to the Petitioner alone and no more. Further, there was no remedy sought which affected the public in any manner.
82. The position fronted by the Petitioner that the Petition was a PIL matter cannot, therefore, hold.
83. Having so found, I must state that it was on this Court's understanding that the Petition herein was not a PIL matter that it allowed the parties to withdraw it without much ado.
84. This Court is aware that PIL matters cannot easily be withdrawn and even when parties have agreed to have a PIL matter withdrawn, a Court may refuse and order the matter to proceed for hearing. (See: *Ndoro Kayuga & Another vs. Mike Sonko Mbuvi Gideon Kioko & Others, 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* (2014) eKLR Supreme Court of India in *Sheela Barse v Union of India* AIR 1988 SC 2211 among many others).
- b. Whether costs be awarded:
85. Having found that the Petition herein was not a PIL matter, it follows that the order on costs is at the discretion of the Court. However, in arriving at the decision, this Court is called upon to consider a myriad of considerations which the parties have ably discussed in their respective submissions.
86. A brief recap will suffice.
87. Withdrawal or discontinuance of Petitions provided for in Rule 27 of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules](#), 2013 (hereinafter referred to as 'the Mutunga Rules').
88. The Rule 27 states that: -
1. The Petitioner may-
    - (a) on notice to the Court and to the Respondents, apply to withdraw the Petition; or



- (b) with the leave of the Court, discontinue the proceedings.
- 2) The Court shall, after hearing the parties to the proceedings, decide on the matter and determine the juridical effects of that decision, and
  - 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.
89. Further, Rule 29 of the [Mutunga Rules](#) provide for settlement by consent as follows: -
- The parties may, with leave of the Court, record an amicable settlement reached by the parties in partial or final determination of the case.
90. Rule 26 of the [Mutunga Rules](#) is on costs. It states thus: -
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.
91. As captured above, the decision in *Consumers Federation of Kenya (COFEK) v Nakumatt Holdings Limited & 4 others* [2018] eKLR substantively dealt with the rationale behind Rule 26 of the [Mutunga Rules](#).
92. The issue of costs is also captured in Section 27 of the [Civil Procedure Act](#), Cap. 21 of the Laws of Kenya.
93. The provision provides as follows: -
1. Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:  
  
Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order.
  - (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.
94. The Supreme Court has on several occasions dealt with instances where parties have disagreed on costs in a withdrawn matter.
95. For instance, in Petition of Appeal No. 18 of 2019, [Director of Public Prosecution -vs- Michael Sistu Mwaura Kamau & 4 others](#) [2020] eKLR, the Apex Court presided over the contention where parties were unable to agree on costs upon withdrawal of the Petition. In determining the issue of costs, the Learned Judges gave meaning to Section 27 of [Civil Procedure Act](#) and in so doing referred to its earlier decision in [Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others](#) (*supra*) where it was observed as follows: -
- (18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or Respondents will bear the costs. However, the vital factor in setting



the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation. (emphasis added).

... in the classic common law style, the Courts have to proceed on a case by case basis, to identify “good reasons” for such a departure. An examination of evolving practices on this question shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs ...

96. In *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others case* (*supra*) the Apex Court further observed the aspect of discretion and how it ought to be exercised. It discussed as follows: -

... Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

97. After reiterating its earlier findings as reproduced in the foregoing paragraphs, the Learned Judges of the Supreme Court in *Director of Public Prosecution -vs- Michael Sistu Mwaura Kamau & 4 others* case (*supra*) discussed the legal position in scenarios where a party withdraws a Petition when it is ready for hearing.

98. In ordering each party to bear its own costs, the Court stated as follows: -

9. We have considered the rival submissions and are convinced that, whereas the Appellant has withdrawn the Petition when it was ready for hearing and while the Respondents have spent time and resources preparing for the hearing aforesaid, we must agree with both the High Court and the Court of Appeal that the issues raised in the Appeal were of great public interest – i.e. the extent of powers bestowed upon the Ethics and Anti-Corruption Commission and whether corruption related offences can be initiated when the said Commission was not properly constituted and whether the President of the Republic of Kenya can direct the Commission or the Director of Public Prosecutions in the execution of their constitutional mandates. These matters transcended the specific interests of the parties and have settled in the public sphere thus attracting the public interest. An order of costs against any party would, in the circumstances, not be fair....

99. In Reference No. 1 of 2014, *Council of Governors vs. Senate & another* [2014] eKLR the only issue before the Supreme Court was who bears costs upon the withdrawal of a Petition before Court.

100. In determining the issue, the Court referred to its earlier decisions and stated as follows: -

(25) The issue whether the Court can order for costs upon withdrawal of a matter before it was settled in the *John O. Ochanda v. Telkom Kenya limited*, Motion Application No. 25 of 2014 in which Ibrahim, SCJ held:

... I do hold the view that a prospective appellant is at liberty to withdrawal a Notice of appeal at any time before the Appeal has been lodged and any further steps taken. No proceedings have commenced strictly. I am also of the view that just like under the Civil Procedure Rules or Court of Appeal Rules, the right to withdrawal or discontinue proceedings or withdraw a Notice of Appeal respectively ought to be allowed as a matter of right subject to any issue of costs which can be claimed by the Respondents if any....



101. The Court further discussed discretion and the obligation upon the party praying for costs as: -

Since it (award of costs) is a discretionary power, what matters is that the same has to be exercised judicially and not whimsically. A party who moves the Court to make such an order for costs has an obligation to lay a firm basis by giving sufficient reasons why he should be awarded costs.

102. In the stated case, the Court made an award against the party that withdrew the application on the basis that it had abused Court process, wasted judicial time and failed his professional duty and obligation it had to the Court. For clarity, the Court observed as follows: -

(32) The Court has reviewed its record since the time the Reference was filed until it was withdrawn. We agree with the chronological account given by the Senate. It is true that the applicant made an application for leave to amend the Reference. The same leave was given but the amendment was not done. An oral stay of proceedings application was again made. Directions were given, but again they were not heeded. The applicant then sat back and waited until the 1<sup>st</sup> Interested Party filed a Preliminary Objection and the matter was listed for hearing before a two judge bench. During the intended hearing of the Preliminary objection, the applicant then makes an application orally for withdrawal of the Reference. This conduct leaves a lot of questions to be asked by this Court on the real intent of the applicant.

103. From the foregoing discussion, it is clear that at the very core in the award of costs particularly on withdrawal of Petitions is the Court's discretion which must be exercised judicially.

104. In doing so, the Court must consider several issues including the nature of the Petition, the conduct of the parties, the extent of effort applied into the matter, the timing of the withdrawal, financial resources the Respondents applied in defending the Petition, whether the Petition is a SLAPP, among many other considerations. (See: *Cecilia Karuru Ngayu v Barclays Bank of Kenya & another* (*supra*)).

105. Having carefully considered the relevant factors especially the Respondent's conduct that led to the withdrawal of the Petition once the substratum was changed, the relationship between the parties and the fast manner in which the Petitioner acted in order to avoid further costs, this Court is of the considered position that this is an ideal case where each party should bear its own costs.

#### **Disposition:**

106. As I come to the end of this ruling, I must profusely apologize for the late delivery of this decision. The delay was mainly occasioned by the number of election-related matters which were filed in the Constitutional and Human Rights Division from December 2021. From their nature and given that the country was heading to a General election, the said matters had priority over the rest, hence, the delay.

107. Consequently, the following final orders do hereby issue: -

- a. Each party shall bear its own costs.
- b. Matter is hereby marked as closed.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

**A. C. MRIMA**

**JUDGE**



**Ruling virtually delivered in the presence of:**

Mr. Amukhale, Learned Counsel for the Petitioner.

Mr. Thuo, Learned Counsel for the Respondent.

Kirong/Benard – Court Assistants.

