



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC PETITION NO. 1 OF 2020

PETER ODHIAMBO AGORO.....PETITIONER

VERSUS

ANNE KANANU MWENDA.....1ST RESPONDENT

HON. MIKE MBUVI SONKO.....2ND RESPONDENT

AND

COUNTY ASSEMBLY OF NAIROBI CITY COUNCIL.....1ST INTERESTED PARTY

THE DIRECTOR OF PUBLIC PROSECUTION.....2ND INTERESTED PARTY

RULING

1. The Petitioner herein **Peter Odhiambo Agoro** filed a petition dated 13th January 2020 seeking the following orders:

(i) A declaration that the 2nd Respondent has failed to comply with, and/or breached the provisions of the Constitution, in discharging his duties as the Governor of Nairobi County Government, and thus is in gross violation of the law.

(ii) A declaration that the nomination of the 1st Respondent as the Deputy Governor Nairobi County contravenes the law and is premised on improper motives.

(iii) An order of injunction barring, restraining, stopping and/or prohibiting the 2nd Respondent from nominating any other person for the position of the Deputy Governor Nairobi County until the conclusion of Anti-Corruption Criminal Case No. 32 of 2019.

(iv) Costs of the suit.

2. Responses and submissions were filed and the parties were on 10th December 2020 referred to the Registry to take a date for highlighting of the submissions. No date has been taken for that purpose up to now.

3. In the meantime, other applications have been filed even as the matter remained pending the highlighting of submissions before a date for judgment could be given. The first application is one dated 31st December 2020 by the 1st Respondent who wants the court to have IEBC enjoined to the proceedings as a 3rd Respondent and the Hon. Attorney General as the 3rd interested party. She also sought for an order staying the Gazette Notice No. 10914 dated 21st December 2020 issued by IEBC.

4. The 2nd application is dated 3rd January 2021 by one Paul Ndore Musyimi who wishes to be enjoined as a second Petitioner. Other intended interested parties were Oscar Mafunga Igaida and Joseph Kariuki represented by **Dr. John Khaminwa** and **Simon Mburu** respectively.

5. Amidst all this a Notice of Withdrawal of Petition dated 4th January 2021 was filed by Makallah, Theuri and Co. Advocates on behalf of the Petitioner. The same was served on all the parties in the Petition.

6. In his brief submissions Mr. Theuri for the Petitioner explained that the reasons for the decision to withdraw were that the factual position that led to the filing of the petition had been destroyed and was moot. It had been premised on the bail terms given to the 2nd Respondent who had been impeached and was no longer in office. The public interest was no longer rife in the matter.

7. He has further submitted that a petition belongs to a Petitioner who is in this case has decided to withdraw it. He referred to the case of **Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others (2014) eKLR** where the said finding was made. He also cited **Rule 27(2) of the Mutunga Rules** on what should be considered as the juridical effect of withdrawal.

8. Counsel argued that the matter before this court had been partly considered by the Court of Appeal with regard to the bail conditions in barring the 2nd Respondent from accessing the office. The Court of Appeal explained such a bar did not amount to removal.

It's his submission that the continuation of this petition would amount to an academic exercise. He asked the court to allow the withdrawal with minimal costs to the parties.

9. **Mr. Paul Muite** for the 1st Respondent in support of the withdrawal and has asked the court to deal with the issue of costs. He submits that all the other applications ought to fall by the road side and any party is at liberty to file his/her own petition.

10. **Mr. Kithi** for the 2nd Respondent asked the court to make an evaluation of all that had transpired and been submitted and decide on whether the case make room for the Petitioner to withdraw the case. He argues that the facts herein are not disputed and the substratum of the matter has been altered.

11. Counsel has referred to **Rule 27 of the Mutunga Rules, Articles 47 and 50 of the Constitution, the Muruatetu** case in respect to public interest *vis a vis locus standi*.

12. **Mr. Njenga** for the 1st Interested Party associated himself with the submissions by his seniors who had submitted before him. He is in support of the withdrawal.

13. **Mr. Kihara** for the 2nd Interested Party submitted that they had been enjoined to the proceedings vide a court order and the 2nd Respondent is no longer in office. They took time to prepare but since it's the court that enjoined them they would not ask for costs. The 2nd Interested Party is not opposed to the withdrawal, since the Petitioner is in control of his case.

14. In a brief response Counsel expressed his gratitude to the Respondents and Interested Parties who are not opposed to the withdrawal. He reiterated that the **Mutunga Rules** made no provision for joinder by a co-petitioner.

15. The court asked Mr. Muite for the 1st Respondent to address it on the application dated 31st December 2020. He submitted that the said application was triggered by the impeachment of the 2nd Respondent and a Gazette Notice by the IEBC calling for elections for the Governor's seat. He reiterated his earlier submissions on the Notice for withdrawal stating that all applications and interlocutory orders would automatically lapse upon the withdrawal of the Petition.

16. **Mr. Ongoto** for the intended second Petitioner was also given a chance to argue his application dated 3rd January 2021. His contention is that since none of the parties though served, responded to his application the same should be allowed as unopposed. He further submits that the Petition herein is a public interest one and was representative since the Petitioner and the intended co-petitioner were working together initially.

17. Counsel argues that the constitutional issues raised in this Petition will not be resolved by the withdrawal of the Petition. It's his position that a public interest case cannot be withdrawn, and prays for all the conservatory orders in place to remain.

18. **Mr. Theuri** for the Petitioner in response submitted that Mr. Ongoto was not properly on record as the firm of Eliakim Owala was no longer representing the Petitioner, and there was no Notice of appointment of an advocate for the intended co-petitioner.

19. Counsel for the 1st and 2nd Respondents, and the interested parties asked the court to determine the issue of withdrawal before any other matter herein.

20. I have considered the Notice of Withdrawal, the two other applications and the submissions by all the concerned parties. The withdrawal of a Constitutional Petition is not automatic and that is why I gave all the parties in this petition and the intended ones an opportunity to express themselves.

21. A withdrawal such as this is governed by **Rule 27 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013** referred to as "**Mutunga Rules**," which provide as follows: **R 27(1)**

"The Petitioner may:

(a) On the notice to the Court and the Respondent, 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.*

(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”.*

22. 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** [2014] eKLR the court set out the legal test for withdrawal of a Petition in public interest litigation as follows:

“...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. The considerations which a court should take into account were also expressed by the Supreme Court in the Indian Case of **S. P. Anand v. H.D. Deve Gowda (1996) 6SCC 734** as follows:

“Here we must mention that in PIL cases, the petitioner is not entitled to withdraw his petition as 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 the court must be aware of the same before permitting withdrawal of the petition.”

24. However, it is important to note that in the **Peter Makau Musyoka case [supra]**, the court, despite declining to allow the application for withdrawal of the Petition, allowed two of the Petitioners to withdraw their further participation in the Petitions which were consolidated. The court pronounced itself as follows;

“We are, however, persuaded that there is a distinction between withdrawing Petition 305 of 2012 and permitting the individual Petitioners in that Petition to withdraw their further participation in the Consolidated Petition. It would be unfair and foolhardy to compel un-interested Petitioners to persist in a Constitutional Petition they have lost interest in or one they feel their grievances have already been adequately addressed. We will therefore follow the cue provided by the persuasive authority in the Sheela Barse Case (cited above) and permit that the individual Petitioners in 305 of 2012 be permitted to individually withdraw from the Consolidated Petition and that their names be deleted from the Consolidated Petition for purposes of future proceedings.”

25. Applying the above principles to the present case, the observation I make is that the Petitioner was challenging the nomination of the 1st Respondent by the 2nd Respondent in clear contravention of court orders barring him from going back to his office. The said orders barring him did not in any way mean that he had been removed from his office as Governor and so he still retained his seat. He has subsequently been impeached and is no longer the holder of that office.

26. It's on the basis of this that all the parties represented herein find that the substratum of the case has been destroyed as far as the Petitioner's claim is concerned. There is no public interest in this matter that will suffer as a result of the Petitioner's decision. The issues raised by the Petitioner were purely legal and can be raised anytime by anybody who has an interest.

27. More so the Petitioner filed this petition as an individual and nowhere in the pleadings is he shown to be representing any other person's interest. Mr. Paul Ndore Musyimi claims to have been working hand in hand with the Petitioner in the matter. There is nothing to confirm that.

28. Did he act with any ulterior motive in filing the Petition and/or in withdrawing the same? No material has been placed before this court to support that. Mr. Ongoto has told the court of pressure from some quarters forcing the Petitioner to withdraw. This is neither here nor there.

29. As a matter of fact, all the Respondents and interested parties who would be at the forefront to complain have supported the withdrawal

of the Petition. They have submitted that from what has taken place in relation to the position of the 2nd Respondent, pursuing the petition would be a pure academic exercise.

30. As was held in the case of **Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others [2014] eKLR** a petition belongs to a Petitioner. He cannot be forced to continue with a case when he has voluntarily decided to pull out of it.

31. There is an application by one Paul Ndore Musyimi to be enjoined as a 2nd petitioner. The original Petitioner has clearly shown lack of interest in the Petition which he voluntarily filed. He cannot be forced to continue with the case. Further one cannot be enjoined in proceedings by force. There is no evidence showing that the Petitioner herein consented to the intended co-Petitioner's joinder as a party or that they filed the Petition together. Failure to respond to the application for joinder does not mean the applicant can just be enjoined for the sake of it. There must be a subsisting suit for him to be enjoined to.

32. This Petition was filed on 15th January 2020 and the said Paul Ndore Musyimi had all the time to seek for joinder, but he did not do so. Even if his application were to be allowed, to what would he be enjoined to in view of the withdrawal of the Petition by the Petitioner? The consolation is that Mr. Paul Ndore and any other interested party still have the liberty to file their own petitions as they deem fit. I am informed of a cross petition filed by Mr. Kinyanjui who was appearing for the 2nd respondent. It has not been paid for and so is not on record.

33. After considering all the material before me and the law I find that there is no reason to make me disallow the Petitioner's Notice for withdrawal of the Petition dated 13th January 2020. It follows that the Petition is hereby withdrawn.

34. All the pending applications fall by the side as they have nothing to hang on.

35. Each party shall bear his/her own costs.

Orders accordingly.

Delivered, signed and dated this 7th day of January 2021 in open court at Nairobi.

H. I. ONG'UDI

JUDGE