



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CONST. PETITION NO. 26 OF 2019**

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010 ARTICLE 22 (2) (B) (3),**

**41 (B), ARTICLE 27, ARTICLE 28, 36, 39 AND 47 (2) AND CONTRAVENTION OF THE RIGHT EQUALITY AND FREEDOM  
FROM DISCRIMINATION AND**

**FAIR ADMINISTRATIVE ACTION**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACT NO. 4 OF 2015 SECTION 4, 5(1) (2) (3) (4), 7 (2) (A)€ (H) (K) (M) (N)  
LAWS OF KENYA**

**AND**

**IN THE MATTER OF RETIREMENT BENEFITS AUTHORITY ACT OF 1997**

**AND**

**IN THE MATTER OF LEGAL NOTICE NO. 193 OF 2018 –**

**THE RETIREMENT BENEFITS (GOOD GOVERNANCE PRACTICES) GUIDELINES, 2018)**

**BETWEEN**

**CLIFFORD OTIENO OBIERO (SUING ON BEHALF OF SELF AND MEMBERS OF**

**LAKE BASIN DEVELOPMENT AUTHORITY**

**PROVIDENT/PENSION SCHEME.....PETITIONER**

**AND**

**LAKE BASIN DEVELOPMENT AUTHORITY BOARD OF TRUSTEES ...1<sup>ST</sup> RESPONDENT**

**MR. PHILIP ORIARO OLOO..... 2<sup>ND</sup> RESPONDENT**

**MR. HENRY NYAGAKA MAKORI.....3<sup>RD</sup> RESPONDENT**

**SAISI TAHIRI .....4<sup>TH</sup> RESPONDENT**

**DAVID NJOGU MUTUOTA .....5<sup>TH</sup> RESPONDENT**

JOHN MEYO.....6<sup>TH</sup> RESPONDENT

ZEPHANIA OTIENO .....7<sup>TH</sup> RESPONDENT

OCTAGON INSURANCE BROKERS LIMITED.....8<sup>TH</sup> RESPONDENT

AND

LAKE BASIN DEVELOPMENT AUTHORITY ..... INTERESTED PARTY

RETIREMENT BENEFITS AUTHORITY.....INTERESTED PARTY

### RULING

On 26<sup>th</sup> January 2021 the Petitioner informed the Court that he had filed a Notice of Withdrawal of the Petition.

1. Mr. Yogo, the learned advocate for the Respondents, confirmed that the Petitioner had served upon him, the Notice of Withdrawal of the Petition.

2. Following the withdrawal of the Petition, the Respondents asked the Court to award them the costs of the said Petition, as well as the costs of the application dated 10<sup>th</sup> December 2019.

3. One of the issues raised by the Respondents was that the Petitioner had allegedly used forged signatures of some of the members of **LAKE BASIN DEVELOPMENT AUTHORITY PROVIDENT/PENSION SCHEME**.

4. In answer to the Respondent's prayer for costs, the Petitioner told the Court that he had not voluntarily withdrawn the Petition. He explained that he had only withdrawn Petition because he was no longer an employee of the Interested Party, the **LAKE BASIN DEVELOPMENT AUTHORITY RETIREMENT BENEFITS AUTHORITY**.

5. I have noted from the Replying Affidavit of **PHILIP ORIARO OLOO**, who is the Chairman of the **LBDA** Staff Provident Fund, that the Petitioner had resigned from the Fund on 22<sup>nd</sup> January 2020.

6. The Petitioner had lodged the Petition allegedly on behalf of the Members of the **LBDA** Provident/Pension Scheme. Therefore, after he resigned from the Fund, he no longer had the capacity to continue prosecuting a Petition which he had allegedly brought on behalf of the Members of the Fund.

7. However, prior to the withdrawal of the Petition, the Respondents had already lodged their respective answers to the application. In the circumstances, I hold the Considered view that it is in the interest of Justice that the Petitioner do pay to the Respondents, the costs of the application dated 10<sup>th</sup> December 2019. I therefore award the costs of the application to the Respondents and also to the 1<sup>st</sup> Interested Party.

8. As regards the Respondents' contention that the Petitioner had presented forged documents to the court, I note that the Respondents have lodged a criminal complaint with the Police. Therefore, regardless of the withdrawal of the Petition, I would expect the Respondents to continue pursuing the issue about the complaint, so that appropriate action is undertaken after the completion of investigations.

9. The withdrawal of the Petition cannot be deemed to constitute the withdrawal of documents which had been presented in court.

10. And because the investigations into the alleged forged documents may lead to either the vindication of the Petitioner or to his being held accountable, I find that this Court cannot therefore use the assertions about forged documents, as a basis for either granting or rejecting the Respondents' request for costs.

11. Pursuant to the provisions of **Section 27** of the **Civil Procedure Act**, the Court or Judge has full power to determine by whom and out of what property and to what extent costs of and incidental to all suits, are to be paid.

12. However, the proviso to **Section 27** makes it clear 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. Following the Petitioner's decision to withdraw the Petition, and because the Petitioner has not given me any reason why I should otherwise order, it follows that the Respondents and the Interested Party are entitled to the costs of the Petition. Therefore, the Petitioner will pay costs of the Petition, to the Respondents and also to the Interested Parties.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 24<sup>TH</sup> DAY OF MARCH, 2021**

**FRED A. OCHIENG**

**JUDGE**