



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF AT NAIROBI**

**CONSTITUTIONAL PETITION NO. 93 OF 2020**

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 25, 27, 32, 33, 35, 46, 48, 56, 73, 159, 165(3), 232, 234, 258 & 260 OF THE CONSTITUTION OF KENYA, 2010;**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 10, 20, 27, 28, 32, 33, 232 AND 236 OF THE CONSTITUTION OF KENYA, 2010;**

**AND**

**IN THE MATTER OF THE ENFORCEMENT OF THE CONSTITUTION OF KENYA, 2010;**

**AND**

**ON THE MATTER OF SECTIONS 5, 7, 7, 9 & 10 OF PUBLIC SERVICE (VALUES AND PRINCIPLES) ACT NO. 1A OF 2015**

**AND**

**IN THE MATTER OF SECTIONS 9, 10, 13 & 22 OF THE PUBLIC OFFICER ETHICS ACT CAP 183 OF 2003**

**AND**

**IN THE MATTER OF SECTIONS 8, 9, 10, 11 & 13(B & E) OF LEADERSHIP & INTEGRITY ACT CAP 182 OF 2012**

**AND**

**IN THE MATTER OF RULES 4, 10, 11, 22, 23 AND 24 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**BETWEEN**

**DINDI OSCAR OKUMU.....PETITIONER/APPLICANT**

**VERSUS**

**ROBERT PAVEL OIMEKE.....1<sup>ST</sup> RESPONDENT**

**BOARD OF DIRECTORS ENERGY & PETROLEUM**

**REGULATORY AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**PUBLIC SERVICE COMMISSION.....3<sup>RD</sup> RESPONDENT**

**CABINET SECRETARY**

**MINISTRY OF ENERGY.....4<sup>TH</sup> RESPONDENT**

RULING

THE APPLICATION

1. Following the withdrawal of the Application and Petition both dated 10<sup>th</sup> March 2020 on 13<sup>th</sup> July 2020 Court directed submission be filed on issue of costs. The 1<sup>st</sup> Respondent filed Submissions on the Issue of Costs dated 4<sup>th</sup> September 2020. The 1<sup>st</sup> Respondent submits that an order for costs should be made against the Petitioner as the Petitioner had no *boni fide* legal dispute against the 1<sup>st</sup> Respondent and that the Application and Petition are frivolous, scandalous and vexatious. It is further argued that the Petitioner is guilty of abuse of the process of the Constitutional Court as the underlying proceedings did not raise any pure constitutional question and therefore do not amount to constitutional litigation. Reliance is placed in the case of *Feisal Hassan & 2 others v Public Service Board of Marsabit County and another [2016] eKLR*.

2. The 1<sup>st</sup> Respondent further argues that he is entitled to reimbursement of the legal costs incurred in pursuing the Petition and Application; drawing the Notice of Preliminary Objection and Replying Affidavit; attending court on several occasions for various directions, and researching and preparing for the hearing of the Petition and Application.

PETITIONER'S RESPONSE

3. The Petitioner filed submissions dated 11<sup>th</sup> November 2020 raising the following issues for determination:-

*a. Whether the Petition is in a public interest matter.*

*b. Whether the firm of Muthomi and Karanja, Company Advocate is properly on record.*

*c. Whether the 1<sup>st</sup> Respondent is entitled to costs.*

4. On the first issue, the Petitioner submits that the Petition meets the test of *bona fide* public interest litigation. The Petition is not vague or indefinite, and the facts relied upon in the Petition are *prima facie* true and correct, in the sense that the Respondents violated clear provisions of the Constitution and national legislation which they corrected making the Petitioner withdraw the suit. The Petitioner argues that he approached this Honourable Court with *bona fide* intention and not a motive for personal gain, private profit or political or other oblique consideration. On this principle reliance is placed in the cases of *People's Union for Democratic Rights & others v Union of India & others [1982] 3 SCC 235; and Kenya Anti-corruption Commission v Deepa Chamanlal Kamani and 4 others [2014] eKLR*.

5. On the second issue, the Petitioner asserts that the said firm of Advocates are not properly on record having not participated in these proceedings from its inception, neither have they filed a Notice of Change of Advocates as required by the law. They have not complied with Order 9 rule 9 of the Civil Procedure Rules, 2010. Reliance is placed on the decisions in *John Langat v Kipkemoi Terer & 2 others [2013] eKLR* and *Florence Hare Mkaha v Pwani Tawakal Mini Coach & another [2014] eKLR; Mombasa H.C.C.C No. 85 of 2010* on the requirement to comply with *Order 9 rule 9 of the Civil Procedure Rules*.

6. On the final issue, the Petitioner contends that there is a general rule as to costs provided in *Section 27 of the Civil Procedure Act*, that the award of costs is in the discretion of the Court. However, in the same provision there exists a caveat that where there is a good reason to depart from that rule, then the Court should deny costs. The Petitioner further avers that what should be considered in this particular suit is the fact that costs follow the event. The Court is further urged to consider that the nature of the matter being a public litigation case it should not attract costs. Reliance is placed on the cases of *Impressa Ing Fortunato Federice v Nabwire [2001] 2 EA 383; Re Ebuneiri Waisswa Kafuko (Deceased) Kampala HCMA No. 81 of 1993; Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR; and John Harun Mwau and 3 others v Attorney General and 2 others [2012] eKLR*.

ANALYSIS AND DETERMINATION

7. Upon consideration of the facts of this case and parties rival submissions the following issues arise for consideration:-

*a) Whether the firm of Muthomi and Karanja Company Advocates is properly on record.*

*b) Whether the Petition was brought in public interest and therefore exempted from costs.*

**A. WHETHER THE FIRM OF MUTHOMI AND KARANJA COMPANY ADVOCATES IS PROPERLY ON RECORD.**

8. The Petitioner's contention is that the firm of M/s Muthomi and Karanja Advocates are not properly on record having not participated in these proceedings, from its inception and neither having filed any Notice of Change of advocates as required by the law.

9. It is further urged the said firm of Advocates did not comply with *Order 9 Rule 9 of Civil Procedure Rules, 2010* which clearly provides as follows:-

**“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change of intention to act in person shall not be effected without an order of the Court:-**

**a) Upon an application with notice to all the parties; or**

**b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may.”**

10. The Petitioners on this proposition sought reliance in the case of *John Langat v Kipkemoi Terer & 2 others [2013] eKLR* and *Florence Hare Mkaha v Pani Tawakal Mini Coach & another [2014] eKLR*, where it was stated:-

**“There was no application made to change advocates. In the Replying Affidavit, the appellant swore that there was a consent entered into between his previous advocates and his present advocate to effect change. This was done following the judgment. He annexed the consent. There is no evidence that the Respondents were put in the picture. But more important, the consent could not effect the change of advocates “without an order of the Court.” No such order was sought or obtained. It follows, and I agree with Mr. Theuri and Mr. Nyamweya, that Anyoka & Associates are not properly on record for the appellant, and therefore the appeal and the application are incompetent.”**

11. Similarly in the case of *Florence Hare Mkaha v Pani Tawakal Mini Coach & another [2014] eKLR Mombasa H.C.C.C. No.85 of 2010* Hon. Mary Kasango, J held that:

**“16. The question is; was the execution validly carried out on behalf of the Plaintiff? There are glaring anomalies in respect of the representation of the Plaintiff. As clearly set out above the Plaintiff was represented by Pandya & Talati Advocate up and until judgment was entered in her favour on 31<sup>st</sup> July 2012. Once judgment was entered the provisions of Order 9 Rule 9 had to be complied with if the Plaintiff required to change the advocates representing her. This was not the case. She was variously represented by Shikely Advocate, who filed the submission in support of the Plaintiff’s Bill of Costs, and was represented by Kinyua Njagi & Co. Advocates through the execution of the decree stage. In both those occasions the two advocates did not obtain an order of the court to take over the conduct of Plaintiff’s case. Much more Shikely Advocate was not properly on record to enable him consent for Kinyua Njagi & Co. Advocates to conduct the Plaintiff’s case.”**

12. The 1<sup>st</sup> Respondents Counsel in their submission have not taken up this issue nor have they addressed the Court on the same. I find that notwithstanding, that this question can be answered through a quick perusal of the Court file record; the Court record reveal that the 1<sup>st</sup> Respondent filed a Notice of Change of Advocate on 13<sup>th</sup> July 2020, before the Petition had been withdrawn thus, before entry of any Judgment. Indeed Mr. Muthomi Thiankilo Advocate appeared on 13/7/2020 and addressed the Court in presence of the other Counsel for other Party. The said Counsel appeared thereafter on 29/9/2020 and 16/11/2020.

13. From the foregoing and considering the pleadings on record, I find that the Notice of Change of Advocates by M/s Muthomi & Karanja Advocates dated 13<sup>th</sup> July 2020 to be proper and that the said firm of Advocates to be properly on record as Notice of Change was filed before entry of Judgment and while suit was pending determination.

#### **B. WHETHER THE PETITION WAS BROUGHT IN PUBLIC INTEREST AND THEREFORE EXEMPTED FROM COSTS.**

14. The Petitioner urges that the Petition herein is in public interest and so the Petitioner should be exempted from paying costs.

15. What one has to consider in view of the Petitioner’s submissions, first is what is the definition of **“Public Interest Litigation”** *The Black’s Law Directory the 10<sup>th</sup> Edition* describes 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 class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected.”**

16. The Petitioner further on matter of public interest rely on the decision in the case of *Kenya Anti-Corruption Commission vs. Deepak Chamanlal Kamni and 4 others, [2014] eKLR* where it was 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.”**

17. The Petitioner placed further reliance on public interest law in the case of *Thakur Bahadur Singh and Another vs. Government of Andhra Pradesh* and ... on 23 September, 1998 the Andhra High Court stated:-

**5. PIL has a significant American development. The Council for Public Interest Law set up by the Ford Foundation in USA, in its report (1976) at pp.6-7 defined PIL thus:**

**“Public Interest Law is the name that has recently been given to efforts to provide legal representation to previously unrepresented groups and interests. Such efforts have been undertaken in recognition that the ordinary market place for legal services fails to provide such services to significant segments of the population and to significant interest. Such**

*groups and interests include the poor, environmentalists, consumers, racial and ethnic minorities, and others.”*

18. Further reliance was placed in the case of *People’s Union for Democratic Rights & Others v Union of India & Others (1982) 3 SCC 235* where it was observed that:-

**“Public interest litigation is essentially a cooperative or collaborative effort by the Petitioner, the State or public authority and the Court to secure observance of constitutional or basic human rights, benefits and privileges upon poor, downtrodden and vulnerable sections of the society.”**

19. The Petitioner urges that this Petition was filed in good faith pursuant to *Article 3(1), 22 and 258 of the Constitution* to respect, uphold and defend the Bill of Rights and the Constitution in general. It is contended that the Petition meets the test of bona fide public interest litigation. It is urged further that the Petitioner is a crusader of constitutionalism, good governance, and probity in public affairs management, and the information in the Petition is not vague or indefinite. The facts relied upon in the Petition are prima facie true and correct in the sense that the Respondents violated clear provisions of the Constitution and national legislation, which they corrected making the Petitioner to withdraw the suit.

20. The Petitioner in support of the contention that this Petition is public interest litigation sought reliance on *Article 1(1) of the Constitution* which provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution while under *Article 1(3)(c)* sovereign power under the Constitution is delegated *inter alia* to the Judiciary and independent tribunals.

21. The Petitioner further contend the Counsel for the 1<sup>st</sup> Respondent has gone on a frolic of his own to reopen the case which was summarily concluded to state that the Petition and the Application are frivolous, scandalous and vexatious for lack of adducing evidence to support the allegations. It is the Petitioner’s respectful submission that such allegation is an afterthought and time barred. It is further stated the Petitioner approached this honourable Court with bona fide intention and not with a motive for personal gain, private profit or political or other oblique considerations.

22. It is noted while the 1<sup>st</sup> Respondent seeks for costs against the Petitioner, he urges that the Petition and application are frivolous, scandalous and vexatious as Petitioner did not adduce any evidence nor provide particulars of alleged instances of competence, abuse of office, nepotism and other forms of malfeasance on the part of the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent therefore states the only logical inference that avails itself is that the Petitioner had no bona fide legal dispute against the 1<sup>st</sup> Respondent accordingly, he had no business filing and dragging the 1<sup>st</sup> Respondent to court as (i.e. the Petitioner) did. For this reason alone it is contended that, the Court should censure the Petitioner by making an award of costs against him.

23. The 1<sup>st</sup> Respondent further in seeking for costs contends that the Petitioner is guilty of abuse of the process of the constitutional Court. Reliance is placed in *Feisal Hassan & 2 others v Public Service Board of Marsabit County (supra)*. The 1<sup>st</sup> Respondent submits that the underlying proceedings did not raise any pure constitutional question and therefore do not amount to constitutional litigation.

24. Further the 1<sup>st</sup> Respondent urges the Petition and the Application are nothing than a succession dispute orchestrated by the Petitioner (in his own capacity or as an emissary) disguised as constitutional litigation. The Petitioner’s motivation it is stated as evidenced by the pleadings lay in precluding the 1<sup>st</sup> Respondent’s appointment to the position of the Director General, Energy & Petroleum Regulatory for a second term. Notably, the Petitioner did not attempt to explain why he felt it necessary to withdraw the Petition and Application as he did on 13<sup>th</sup> July 2020.

25. The 1<sup>st</sup> Respondent avers that it is otherwise entitled for a reimbursement of the legal costs incurred in (inter alia) perusing the Petition and Application; drawing the Notice of Preliminary Objection and Replying Affidavit; attending Court on several occasions for various directions; and researching and preparing for the hearing of the Petition and Application.

26. In determining whether the Petition herein is a public interest litigation, I have to have a look at the Petition as drawn and filed. The Petition herein is dated 10<sup>th</sup> March 2020 drawn by Petitioner Mr. Dindi Oscar Okumu under paragraph 1 of the Petition, the Petitioner states:-

**“The Petitioner is a Kenyan Citizen residing and working in Nairobi City County within the Republic of Kenya. He is a tax payer and a consumer of various products directly and or indirectly under the ambit of the Energy & Petroleum Regulatory Authority as managed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. He brings this Petition on his own behalf and on behalf of the entire Kenyan Public as the issues to be addressed in this Petition affecting or are likely to affect the entire country.”**

27. From the contents of paragraph 1 of the Petition it is clearly pleaded that “He brings this Petition on his own behalf and on behalf of the entire Kenyan Public as the issues to be addressed in this Petition affect and or are likely to affect the entire country.

28. From the contents of paragraph 1 of the Petition herein, it is clear that this Petition is brought in public interest litigation, as the legal action as initiated in this Petition is purely for enforcement of public interest or general interest in which the public or class of community have pecuniary interest or some interest by which their legal rights or liabilities are affected. The whole society has a stake in the Petition in which the legal rights or liability are threatened and this Petition purely is for advancement of the cause of minority or disadvantaged groups or individuals and is not for Petitioner’s personal gain.

29. *Rule 26(1) and (2) of the Constitution of Kenya (Protection of Rights and fundamental Freedoms practice and Procedure Rules*

2013) provides :-

**“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.”**

30. In the case of *Feisal Hassan & 2 others v Public Service Board of Marsabit County & another* [2016] eKLR it was stated that:-

**“3. 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.” [Emphasis added]**

31. Further in *John Harun Mwaui & 3 Others v Attorney General & 2 Others* [2012] eKLR it was held that:-

**“180. In matters concerning public interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed. Costs should therefore not be imposed on a party who has brought a case against the state but lost. Equally, there is no reason why the state should not be ordered to pay costs to a successful litigant. The court also retains its jurisdiction to impose costs as a sanction where the matter is frivolous, vexatious or an abuse of the court process.”**

In considering the public and intention of having public interest litigation emerges clearly that the Public Interest Litigation was designed to serve the purpose of protecting rights of the public at large through vigilant action by public spirited persons and swift justice. But the profound need of this tool has been plagued with misuses by persons who file Public Interest Litigations just for the publicity and those with vested political interests. The Courts therefore, need to keep a check on the cases being filed and ensure the *bona fide* interest of the petitioners and the nature of the cause of action, in order to avoid unnecessary litigations. **Vexatious and mischievous litigation must be identified and struck down so that the objectives of Public Interest Litigation aren't violated.** The constitution envisages the judiciary as **“a bastion of rights and justice.”**

32. The 1<sup>st</sup> Respondent contends that pleadings by the Petitioner is scandalous, frivolous and vexatious. So what does it mean when pleadings are said to be scandalous, frivolous and vexatious?

33. On the issue of pleadings being scandalous, frivolous and vexatious I find guidance in the case of *Madison Insurance Company Limited v Augustine Kamanda Gitau* [2020] eKLR where it was stated:-

**13. A pleading is scandalous if it states**

**(i) matters which are indecent; or**

**(ii) matters that are offensive; or**

**(iii) matters made for the mere purpose of abusing or prejudicing the opposite party; or**

**(iv) matters that are immaterial or unnecessary which contain imputation on the opposite party; or**

**(v) matters that charge the opposite party with bad faith or misconduct against him or anyone else; or**

**(vi) matters that contain degrading charges; or**

**(vii) matters that are necessary but otherwise accompanied by unnecessary details.**

**14. However, the word “scandalous” for the purposes of striking out a pleading under Order 2 rule 15 of the Civil Procedure Rules is not limited to the indecent, the offensive and the improper and that denial of a well-known fact can also be rightly described as scandalous.**

**15. But they may not be scandalous if the matter however scandalising is relevant and admissible in evidence in proof of the truth of the allegation in the plaint or defence so that when considering whether the matter is scandalous regard must be had to the nature of the action.**

16. A matter is frivolous if (i) it has no substance; or (ii) it is fanciful; or (iii) where a party is trifling with the Court; or (iv) when to put up a defence would be wasting Court's time; or (v) when it is not capable of reasoned argument.

17. Again a pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense.

18. A matter is said to be vexatious when (i) it has no foundation; or (ii) it has no chance of succeeding; or (iii) the defence (pleading) is brought merely for purposes of annoyance; or (iv) it is brought so that the party's pleading should have some fanciful advantage; or (v). where it can really lead to no possible good.

19. Pleading tend to prejudice, embarrass or delay fair trial when (i) it is evasive; or (ii) obscuring or concealing the real question in issue between the parties in the case. It is embarrassing if (i) It is ambiguous and unintelligible; or (ii) it raises immaterial matter thereby enlarging issues, creating more trouble, delay and expense; or (iii) it is a pleading the party is not entitled to make use of; or (iv) where the defendant does not say how much of the claim he admits and how much he denies.

20. A pleading which tends to embarrass or delay fair trial is described as a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses, trouble and delay and that which contains unnecessary or irrelevant allegations which will prejudice the fair trial of the action and lastly a pleading which is abuse of the process of the court really means in brief a pleading which is a misuse of the Court machinery or process.

21. A pleading is an abuse of the process where it is frivolous or vexatious or both.

34. I find that the law clearly speaks and pronounces itself in cases where a matter is brought to Court in the public's interest that the litigant shall not be required to pay costs. The matter herein was withdrawn by the Petitioner after, according to his submissions, he sat down with the Respondents who acknowledged that they had acted contrary to the law and accepted to correct the mess and put its house in order. However, there is no proof of this agreement and the 1<sup>st</sup> Respondent has not admitted liability. On the contrary, the 1<sup>st</sup> Respondent argues that the Application and Petition were frivolous, vexatious and an abuse of the Court process. I am concerned and alive to the fact the Application and Petition were withdrawn before they were determined on their merits. I find the Petition was not determined on whether the Petitioner's case was *bona fide* or not and to do so now would be re-opening the case that is already withdrawn. All that is not indispute is that the Petition was withdrawn.

35. In the instant Petition, I find that there is no "**Successful**" litigant herein, in the traditional sense. I find however the Petitioner's case was in Public interest, that the Petition was brought under **Articles 1, 22, 46 and 258 of the Constitution of Kenya** and in paragraph 1 of the Petition, the Petitioner averred that he brought the Petition on his own behalf and on behalf of the entire Kenyan public. Further, the crux of the Petitioner's case was that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had violated **Articles 10, 73, 75 (1), 232 and 236 of the Constitution**. Whether or not the Petitioner's case had a likelihood of success, and even if it did not succeed, is not of particular importance, when determining whether a matter is a public interest case. Although the Petitioner sought to vindicate his own constitutional rights through the award of damages, he moreover sought for the Court to scrutinise the actions of the Respondents in light of the provisions of the Constitution and the implication of those actions on the rights of the people of Kenya. This in my view is a public interest case.

36. **In view of the conclusion that I have come to, I find that the 1<sup>st</sup> Respondent is not entitled to costs as sought. I direct that each party bears its own costs.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF SEPTEMBER, 2021.**

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**J. A. MAKAU**

**JUDGE OF THE HIGH COURT OF KENYA**