



**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO. 138 OF 2019**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLES 10,19(2),20(1),(2),(3), & (4), 21(1) & (3),22(2) (c),23(3),24,27,28,35,40,47,55,73(2),(b),(c),(d),94,95(1),(2) & (3),118,129(2),131(2),156(6),159(2)(e),160,201(a)(b) & (d),232(1) (a-f) & 258 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATER OF THE SPORTS ACT (AC NO.25 OF 2013)**

**AND**

**IN THE MATTER OF THE PUBLIC FINANCE MANAGEMENT ACT**

**AND**

**IN THE MATTER OF THE PUBLIC FINANCE MANAGEMENT (SPORTS, ARTS & SOCIAL DEVELOPMENT FUND) REGULATIONS, 2018 (L/N 194 OF 2018)**

**AND**

**IN THE MATTER OF THE STATUTORY INSTRUMENTS ACT**

**BETWEEN**

**NICHOLAS KARIMI MUNA .....PETITIONER**

**AND**

**OFFICE OF THE PRESIDENT.....1<sup>ST</sup> RESPONDENT**

**PRINCIPAL SECRETARY, MINISTRY OF SPORTS**

**CULTURE AND HERITAGE .....2<sup>ND</sup> RESPONDENT**

**CABINET SECRETARY NATIONAL TREASURY**

**AND PLANNING.....3<sup>RD</sup> RESPONDENT**

**KENYA REVENUE AUTHORITY.....4<sup>TH</sup> RESPONDENT**

**BOARD OF TRUSTEES, NATIONAL SPORTS FUND.....5<sup>TH</sup> RESPONDENT**

**SPORTS, ARTS & SOCIAL DEVELOPMENT FUND**

**OVERSIGHT BOARD.....6<sup>TH</sup> RESPONDENT**

**THE SPEAKER NATIONAL ASSEMBLY.....7<sup>TH</sup> RESPONDENT**

RULING

1. The petitioner through a petition dated 4<sup>th</sup> April 2019 filed on the even date primarily challenged the legality of the Public Finance Management (*Sports, Arts and Social Development Fund*) Regulations 2018, Legal Notice 194 of 2018 and the Sports Amendment Bill 2018 as illegal, unconstitutional and null and void. There was however a sudden change in circumstances as the president on the 12<sup>th</sup> June 2019 asserted to law the said sports Amendment Bill 2018. It is for that reason that on 16<sup>th</sup> October 2019 the petitioner sought to withdrawal his petition having been overtaken by events with no order as to costs.
2. All respondents did not object to the withdrawal of the petition but sought costs to be awarded to them.
3. The court accordingly marked the petition withdrawn and directed that the issue of costs be canvassed through written submissions. The petitioner filed his submissions dated 3<sup>rd</sup> December 2019 on 4<sup>th</sup> December 2019. In response all the respondents save the 7<sup>th</sup> Respondent did not file any response to petitioner's submissions on costs. The 7<sup>th</sup> Respondent filed submissions dated 4<sup>th</sup> November 2019 on 13<sup>th</sup> November 2019.
4. Upon considering the submissions by the petitioner and those of the 7<sup>th</sup> Respondent only one issue arises thus: who should bear the costs of this petition?
5. The petitioner urge that the 7<sup>th</sup> Respondent had been sued in its capacity as the public office presiding over legislative and other business on National Government matters. It is argued that during the institution of this petition, it was presiding over the passage of Amendment Bill that purported to transfer the mandate of the National Sports Fund to an illegal entity established under legal Notice 194 of 2018.
6. The petitioner asserts that the constitution of Kenya (*Protection of Rights and Fundamental Freedoms*) *Practice and Procedure Rules 2013; Rule 26(1)* state that an award of costs is at the discretion of the court. Rule 26(2) on the other hand require the court to ensure every person has access to court to determine their rights and fundamental freedoms.
7. The 7<sup>th</sup> Respondent contend that the petitioner should not have filed this petition, but ought to have made submissions to the National Assembly to engage the legislative proposals he was aggrieved with and as such it is argued the petition was made in bad faith and termed by the 7<sup>th</sup> Respondent as frivolous, vexatious and an abuse of court process. That the prayers in the petition are not in the scope or mandate of the 7<sup>th</sup> Respondent.
8. On the issue of costs in public litigation matters the petitioner sought to rely in the case of **Kenya Human Rights Commission and another vs The Hon. Attorney General and 6 others (2019) eKLR (Civil Appeal No. 147 of 2015)** where the court stated:-
 

**“It is therefore clear that in suits invoking genuine public interests litigation, courts are slow to award costs’. The rationale explained by the Court of Appeal was as follows:-**

**Public interest litigation, in most cases, is for the benefit of the public and not the persons or entities that institute the proceedings. Considering an unsuccessful party to pay costs in genuine public interest litigation can become a deterrent. More likely than not, a party would hesitate to institute suits in defence of the Bill of Rights and the Constitution for fear of being condemned to pay costs.”**
9. The 7<sup>th</sup> Respondent asserts that the court can depart from the normal trend of refusing to award costs in public interest litigation relying on the South African case of **Affordable Medicine Trust vs Minister of Health where Ngcobo J** remarked thus:-
 

**“There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs. The ultimate goal is to do that which is just having regard to the facts and circumstances of the case”.**
10. The 7<sup>th</sup> Respondent further sought to place reliance on Halsbury's Law of England, 4<sup>th</sup> Edition (Re-issue) 2010, Vol 10 paragraph 1, when it is stated as follows:-
 

**“Its trite law that the court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially: it must not be exercised arbitrarily but in accordance with reason and justice.”**
11. The 7<sup>th</sup> Respondent aver that the petitioner has subjected it to various costs in the defence of the petition only for it to be withdrawn. It is urged that award of costs is normally guided by the principle that *“costs follow the event”*, the effect therefore being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails, but if the party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs.
12. It is important to point out that costs is a judiciously exercised discretion of the court, while accommodating the special circumstances of

a case, being guided by the ends of justice. No doubt a claim 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 party; prior to, during and subsequent to the actual process of litigation.

13. The 7<sup>th</sup> Respondent puts further reliance in seeking costs to the case of **Speaker of the Senate & another vs Hon. Attorney General & another & 3 others Advisory opinion reference No. 2 of 2013 eKLR** where the court was of the opinion that:-

**“This court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The court cannot supervise the workings of Parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another.”**

14. In determining who should be awarded costs, I find that this court should consider whether this petition is actuated by bad faith and whether the same is frivolous, vexatious and an abuse of the court process and further whether the same was instituted for benefit of public and not the petitioner herein.

15. There is no doubt that under Article 22 and 258 of the constitution every person has a right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened or the constitution has been contravened or is threatened with contravention and in addition to a person acting in his/her own interest, court proceedings may be instituted by a person acting in the public interest.

16. The instant petition is questioning the constitutionality of the Public Finance Management (*Sports, Arts and Social Development Fund*) Regulations 2018 and the Sports Amendment Bill, 2018. The petition further sought to have an account of monies in the National Sports Fund or the Sports, Arts and Social Development Fund. In view of the contents of the petition should the petitioner be said to have acted in bad faith and be condemned to pay costs for seeking that public officers to account for public funds? Secondly I find that it has not been demonstrated that the litigation is frivolous or vexatious and an abuse of the court process to justify departure from the normal trend that suits involving genuine public interest litigation, courts are slow to award costs in most cases where cases are for the benefit of public to have suits instituted.

17. In the instant petition, it has not been shown the petitioner stood to gain anything from institution of this petition. It should be noted that public interest litigation plays a transformative role in the society and society benefits but not the person bringing up the suit as it deals with myriads of issues affecting the various spheres of society represented in the litigation.

18. I have further considered whether the reason for withdrawal of the petition was justifiable. The petition was filed on 4<sup>th</sup> April 2019. The matter was mentioned before court on 5/4/2019, 9/4/2019 and 16/10/2019 when the petition was withdrawn. The President assented to the law the Sports Amendment Bill 2018 on 12<sup>th</sup> June 2019; meaning that the petition before court had been overtaken by events. The petitioner, during the next mention date sought withdrawal of the petition for the reason of the petition having been overtaken by events. The petitioner acted without unreasonable delay and on justifiable cause. I find the 7<sup>th</sup> Respondent as a National Assembly was properly joined in these proceedings.

19. I have considered the rival submissions on the issue of costs and in view of my findings, I find the order that commands itself in the issue before this court is that as the petition was brought up in public interest and as the petitioner was litigating for benefit of the public and not his own, I direct that each party bears its own costs.

**Dated at Nairobi this 26<sup>th</sup> day of March, 2020.**

**Delivered on 29<sup>th</sup> Day of April 2020.**

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**J .A. MAKAU**

**JUDGE**