



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 394 OF 2014**

**HON. JOSEPH NDATHI.....PETITIONER**

**VERSUS**

**THE HON. ATTORNEY GENERAL.....1ST RESPONDENT**

**THE NATIONAL ASSEMBLY.....2ND RESPONDENT**

**CLERK OF THE NATIONAL ASSEMBLY.....3RD RESPONDENT**

**AND**

**ANTHONY MWANIKI MUCHIRI.....1<sup>ST</sup> INTERESTED PARTY**

**THUITA MWANGI.....2<sup>ND</sup> INTERESTED PARTY**

**ALLAN WAWERU MBURU.....3<sup>RD</sup> INTERESTED PARTY**

**ETHICS & ANTI-CORRUPTION COMMISSION.....4<sup>TH</sup> INTERESTED PARTY**

**RULING**

1. Hon. Joseph Ndathi is the Petitioner. The Hon. Attorney General, the National Assembly, and the Clerk of the National Assembly are the respective 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents. Anthony Mwaniki Muchiri, Mwangi Thuita, Allan Mburu, and the Ethics and Anti-Corruption Commission are the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> interested parties respectively.

2. On 7<sup>th</sup> August, 2019 the Deputy Registrar issued a notice to the advocates for the parties to show cause why the suit should not be dismissed for want of prosecution. On 11<sup>th</sup> September, 2019 when the notice came up for hearing, the 1<sup>st</sup> Interested Party's counsel was the only one present in Court. He urged the Court to dismiss the petition with costs. Bwonwong'a, J who was seized of the matter issued an order as follows:-

**“Petition is hereby dismissed with no order as to costs”.**

3. Now, the 1<sup>st</sup> Interest Party through the notice of motion dated 2<sup>nd</sup> October, 2019 brought under rules 3, 19 and 26 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (hereinafter the “Mutunga Rules”) and Article 20(3) of the Constitution of Kenya 2010 seeks orders as follows:

**“a.) That this Court be pleased to review its Orders issued on 11<sup>th</sup> September 2019 with respect to the costs awardable to the 1<sup>st</sup> Interested Party and substitute the same with Orders awarding costs of the Petition to the 1<sup>st</sup> Interested Party.**

**b.) That costs of this Application be provided for”.**

The application is supported by the grounds on its face and an affidavit sworn on the date of the application by Wilfred Ngunjiri Nderitu, the Applicant's counsel.

4. In seeking a review of the order on costs, the Applicant avers that on 23<sup>rd</sup> January, 2015, the Honourable Lady Justice Mumbi Ngugi ordered the Petitioner to amend his petition within seven days of the order, failing which the petition would stand dismissed with costs to the respondents and the interested parties. His deposition is that although the Petitioner filed and served an amended petition he did not do so within the seven-day deadline as ordered by the Court.

5. It is further the averment of the Applicant that on 11<sup>th</sup> September, 2019 the petition came up before Bwonwong'a, J for notice to show cause why it should not be dismissed for want of prosecution. On that date, his counsel prayed that the petition be dismissed with costs to the respondents and interested parties in accordance with the order of the Court given on 23<sup>rd</sup> May, 2015. However, the Judge instead dismissed the petition but declined to award costs to the respondents and interested parties as prayed by his advocate.

6. According to the Applicant, the finding of the Court that he did not file any response and accordingly was not entitled to costs is an error apparent on the face of the record because the Applicant filed grounds of opposition and actively participated in the proceedings. Further, that the application has been filed without delay and it is only just and fair that the orders sought be granted.

7. The Applicant supported his case by filing the submissions dated 23<sup>rd</sup> January, 2020. I shall refer to those submissions in the process of determining the instant application since the application is not opposed. The only question for the determination of the Court is whether the Applicant has met the threshold for the review of the order issued by Bwonwong'a, J on 11<sup>th</sup> September, 2019.

8. The power to review a court order or decree as provided by Section 80 of the Civil Procedure Act, Cap. 21 and Order 45 Rule 1 of the Civil Procedure Rules, 2010 was explained by the Court of Appeal in **National Bank of Kenya Limited v Ndungu Njau [1997] eKLR** as follows:-

**“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review”.**

9. Although the Applicant contends that the learned Judge declined to grant costs on the ground that the Applicant did not file pleadings, this assertion is incorrect as the court record does not show that the Judge made such a determination. In constitutional petitions, the award of costs is governed by Rule 6 of the Mutunga Rules which provides that:-

**“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”.**

10. In awarding costs, the Court is therefore exercising discretionary power and in my view, the exercise of discretionary power by a Judge cannot be equated to an apparent error or omission on the face of the record. A wrong exercise of discretion will be best addressed through an appeal. What the Applicant is telling me to do is to find that Bwonwong'a, J erred by declining to award him costs. Proceeding to do as asked by the Applicant will amount to exercise of appellate jurisdiction over the decision of a Court of coordinate jurisdiction. I do not have such powers. In short, the instant application is without merit. Since the application was not defended, there will be no order as to costs.

**Dated, signed and delivered through video conferencing/email at Nairobi this 28<sup>th</sup> day of May, 2020.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**