



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 57 OF 2019**

**KENYA AVIATION WORKERS UNION.....APPLICANT/PETITIONER**

**VERSUS**

**KENYA AIRPORTS AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**KENYA AIRWAYS PLC.....2<sup>ND</sup> RESPONDENT**

**CABINET SECRETARY, MINISTRY OF TRANSPORT,**

**INFRASTRUCTURE, HOUSING, URBAN DEVELOPMENT &**

**PUBLIC WORKS.....3<sup>RD</sup> RESPONDENT**

**CABINET SECRETARY, THE NATIONAL TREASURY.....4<sup>TH</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT**

**RULING**

1. On 16<sup>th</sup> October, 2019, this Court allowed the Petitioner, Kenya Aviation Workers Union, to withdraw its petition dated 14<sup>th</sup> February, 2019 after all the five respondents being Kenya Airports Authority; Kenya Airways PLC; Cabinet Secretary, Ministry of Transport, Infrastructure, Housing, Urban Development & Public Works; Cabinet Secretary, National Treasury; and the Attorney General consented to the withdrawal of the petition.
2. Counsel for the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents also agreed that the petition be marked as withdrawn with no order as to costs. However, counsel for the 2<sup>nd</sup> Respondent insisted that costs be awarded to his client and the Court agreed with counsel and awarded the 2<sup>nd</sup> Respondent Kshs.200,000/- as costs against the Petitioner.
3. The Petitioner through the application dated 22<sup>nd</sup> October, 2019 seeks to vacate, set aside, review or vary the order awarding costs against it in favour of the 2<sup>nd</sup> Respondent. The application which is supported by the affidavit of Moss Ndiema who is the Petitioner's Secretary-General is premised on the sole ground that the Petitioner has discovered new and important evidence which was not in its possession at the time the matter was being withdrawn and the 2<sup>nd</sup> Respondent should not therefore benefit from non-disclosure of material facts.
4. The gist of the Petitioner's case is that the 2<sup>nd</sup> Respondent participated in the discussions that led to the decision by the Petitioner to withdraw the petition and the 2<sup>nd</sup> Respondent had therefore misled the Court that it was never engaged in the negotiations that led to the withdrawal of the petition. The Petitioner places reliance on the agreement entered between it and the 2<sup>nd</sup> Respondent before the Conciliation Committee on 3<sup>rd</sup> May, 2019.
5. The 2<sup>nd</sup> Respondent opposed the application through a replying affidavit sworn on 8<sup>th</sup> November, 2018 by its Chief Human Resources Officer, Evelyne Munyoki. The 2<sup>nd</sup> Respondent's position is that there was no agreement between it and the Petitioner that the petition would be withdrawn with no orders as to costs. Also that the agreement of 3<sup>rd</sup> May, 2019 did not discuss the withdrawal of the petition. Further, that the 2<sup>nd</sup> Respondent had all along held the view that the petition was premature.

6. The parties were instructed to file written submissions. The Petitioner did not comply. Nevertheless, counsel for the Petitioner was allowed to make oral submissions. Mr. Wanyama for the Petitioner submitted that the application to withdraw the petition was made after substantive negotiations with all the parties. He stated that the 2<sup>nd</sup> Respondent's counsel took advantage of the advocate who was holding brief for him on the day the matter was withdrawn by claiming that the 2<sup>nd</sup> Respondent was never involved in the negotiations. Counsel submitted that they had placed before the Court a document signed by all the parties, and particularly a representative of the 2<sup>nd</sup> Respondent, showing that there were negotiations on the withdrawal of the petition. The Court was therefore urged to allow the application and review the order awarding costs to the 2<sup>nd</sup> Respondent.

7. Through written submissions filed on 17<sup>th</sup> December, 2019, the 2<sup>nd</sup> Respondent's counsel asked the Court to dismiss the application on the ground that the threshold for the review of an order or decree set in Order 45 Rule 1 of the Civil Procedure Rules, 2010 (CPR) has not been met. According to counsel, the Petitioner has not placed before the Court any new and important evidence which it did not have during the withdrawal of the matter. An email dated 7<sup>th</sup> October, 2019 addressed to the 2<sup>nd</sup> Respondent's counsel by the Petitioner's counsel is cited as confirming that the decision of the Petitioner was to withdraw the matter against the 1<sup>st</sup> Respondent alone and not the other parties.

8. The instant application is premised on rules 3(8), 19 and 26 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, hereinafter simply referred to as the Mutunga Rules. Rule 3(8) preserves the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. Rule 20 provides for the making of a formal application under the Rules by notice of motion. Rule 26 legislates about the award of costs in constitutional petitions.

9. Counsel for the Petitioner urged that the legal regime that governs the instant application is contained in the Mutunga Rules and not the CPR. The Petitioner's counsel has not pointed out any specific rule in the Mutunga Rules that provides for review of a decree or order. As such, the applicable legal principles in respect of an application for review are those found in Order 45 Rule 1 CPR.

10. The Petitioner's case is anchored on the ground that it has since discovered new and important evidence which was not in its possession at the time of the withdrawal of the petition. In order to succeed in an application seeking review on the ground of discovery of new and important matter or evidence, an applicant must demonstrate the non-availability of the evidence at the time the decision sought to be reviewed was made, and that the new facts or evidence will justify the review of the decree or order. This was clearly explained by the Court of Appeal in **Rose Kaiza v Angelo Mpanju Kaiza [2009] eKLR** where it was held that:-

**“An application for review under Order 44 r 1 must be clear and specific on the basis upon which it is made. The motion before the superior court was based on the discovery of new facts. However, it is not every new fact that will qualify for interference with the judgment or decree sought to be reviewed. In the words of the rule itself, it is**

**“.....discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed.....”**

**The construction and application of that provision has been discussed in many previous decisions but we shall take it from the commentary by Mulla on similar provisions of the Indian Civil Procedure Code, 15<sup>th</sup> Edition at page 2726, thus:**

**“Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the Court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made.”**

11. The 2<sup>nd</sup> Respondent's counsel asserts that the agreement entered between his client and the Petitioner on 3<sup>rd</sup> May, 2019 was available to the Petitioner on 16<sup>th</sup> October, 2019 when the impugned decision was made and it cannot be termed as new evidence. Further, that the said agreement does not in any way support the Petitioner's claim that the parties had agreed to terminate the petition. The 2<sup>nd</sup> Respondent's position is correct. The agreement of 3<sup>rd</sup> May, 2019 was available to the Petitioner on 16<sup>th</sup> October, 2019 when the order of costs was made against the Petitioner. It is therefore not new evidence.

12. Even if this Court was to agree with the Petitioner that the said agreement is indeed new evidence, I would still find that the same is not important evidence that can justify the review of the order on costs. The agreement does not refer to the termination of the petition and neither is there any hint that the petition would be terminated with no order as to costs. The only mention about the 2<sup>nd</sup> Respondent's takeover of Jomo Kenyatta International Airport through a Privately Initiated Investment Proposal (PIIP) is found at paragraph 8 of Part B where it is stated:-

**“KQ Takeover of JKIA**

**a) Parties agreed the issue is being handled by the Parliamentary Group and both parties have been invited to make submissions.”**

Although the PIIP was indeed core to the withdrawn petition, there was no mention of the petition in the agreement.

13. Moss Ndiema swore a further affidavit on 11<sup>th</sup> November, 2019 to which he annexed two letters addressed to the Petitioner's counsel by the 1<sup>st</sup> Respondent's counsel. Mr Ndiema avers that the letters confirmed that the withdrawal of the suits was agreed in the meeting. Counsel for the 2<sup>nd</sup> Respondent has, however, correctly pointed out that the letters were between the Petitioner and the 1<sup>st</sup> Respondent. It is also clear that the letter dated 1<sup>st</sup> July, 2019 talks of a meeting held on 18<sup>th</sup> June, 2019 in which the parties agreed that Nairobi High Court Constitutional Petition No. 57 of 2019 and Nairobi ELRC case No. 68 of 2019 be withdrawn simultaneously with each party bearing its own costs. The minutes of that meeting have not been placed before this Court. It is also noted that the meeting referred to was held on a different date from the meeting of 3<sup>rd</sup> May, 2019.

14. Indeed the letter of 28<sup>th</sup> June, 2019 between the 1<sup>st</sup> Respondent and the Petitioner specifically referred to the withdrawal of the cases pending between the Petitioner and the 1<sup>st</sup> Respondent by stating that:-

**“During the meeting between the parties herein with the conciliation committee it was agreed by the parties that all pending cases between the Authority and the union be withdrawn....”**

15. The evidence placed before the Court clearly shows that there was no discussion between the 2<sup>nd</sup> Respondent and the Petitioner about the withdrawal of the petition. The impression one gets from the pleadings is that the Petitioner ignored the 2<sup>nd</sup> Respondent and then attempted to force a settlement on it at the last minute. That the 2<sup>nd</sup> Respondent was not in the picture all along was confirmed by counsel who was holding brief for Mr. Wanyama on 16<sup>th</sup> October, 2019 who went on record that the **“withdrawal has come after holding meetings with the 1<sup>st</sup> Respondent.”** The 2<sup>nd</sup> Respondent was therefore justified to seek costs when the Petitioner decided to withdraw the petition.

16. From what has been placed before this Court, it is clear that the Petitioner has not met the threshold for a review of the order on costs. The application dated 22<sup>nd</sup> October, 2019 is therefore found to be without merit and dismissed with costs to the 2<sup>nd</sup> Respondent, Kenya Airways PLC.

**Dated, signed and delivered through video conferencing/email at Nairobi this 30<sup>th</sup> day of July, 2020.**

**W. Korir,**

**Judge of the High Court**