



Lonyala & 26 others v Lodio & 11 others; Cabinet Secretary Ministry of Lands and Settlement & 11 others (Respondent) (Environment & Land Petition 2 of 2014) [2023] KEELC 19332 (KLR) (10 August 2023) (Ruling)

Neutral citation: [2023] KEELC 19332 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND PETITION 2 OF 2014
FO NYAGAKA, J
AUGUST 10, 2023**

BETWEEN

CHRISTOPHER KURUTYON LONYALA & 26 OTHERS PETITIONER

AND

EKTELA EKAI LODIO & 11 OTHERS RESPONDENT

AND

CABINET SECRETARY MINISTRY OF LANDS AND SETTLEMENT & 11 OTHERS RESPONDENT

RULING

1. The 1st Petitioner brought a Notice of Motion dated 31/01/ 2023. He did so under Sections 3 and 3A of the Civil Procedure Act, 2010, Order 22 Rule 23, Order 22 Rule 22 and Order 45 Rules 1, 2,3, 4 and 5 of the Civil Procedure Rules 2010, Articles 22 and 159 (1) of the Constitution and all other enabling laws (sic). He sought the following orders:-
 1. ...spent
 2. That only the part of payment of costs by the petitioner to the respondents in part (b), the whole of the decree and Order of Honorable Justice Mwangi Njoroge, Judge issued on 29/05/2020 and delivered on 15/01/2021 in this court against the petitioners be set aside and discharged for parties to bear their own costs
 3. That the respondents be ordered to ensure the compliance of the order granted in two above in respect of Article 22 of Constitution as read with Article 159 (1) of the Constitution of Kenya 2010



4. That the issue of intended payment of costs against the provision of the constitution under Article 22 be disposed to finality.
5. That there be made any further order(s) as the ends of Justice may demand in this matter.
2. The Application was based on seven (7) grounds and supported by an affidavit sworn by the 1st Petitioner on 31/01/2023. It was filed together with the Application on 03/02/2023. The grounds were that the petitioners were genuine squatters and very needy cases of a class of landless people in Chepchoina Settlement Scheme Phase II. That they would suffer irreparable injury, substantial loss and prejudice if the execution of the whole decree and decision and all the subsisting decree and order for payment of costs was enforced against them. That it was constitutional under Article 22 as read with 159 (1) of Constitution of Kenya 2010 that a representative suit should not be adjudged for payment of costs and each party ought to bear their own costs, in the interest of justice and without any prejudice. That the ends of justice equally favored the granting of the orders sought being those seeking to set aside the part of payment of costs in paragraph (b) in whole judgment and decision of the court through the decree.
3. He further stated that unless the payment of costs was discharged the Petitioners would suffer substantial irreparable losses and be prejudiced by injustice to be caused by virtue of their desire to defend their rights and the rights of others who were not capable of coming to court. That unless the orders were granted the purpose of the suit (sic) was likely to be defeated beyond this court's intervention and the Petitioners' prejudice. That the suit property herein being PHASE II of Chepchoina Settlement Scheme was allocated by the government through the provincial commissioner Rift Valley in liaison with the managing director of ADC and the Commissioner of Lands following an Executive Order No.1 by H. E. President Daniel Toroitich Arap Moi vide a presidential decree in 1994. He concluded by stating that the Application was made in good faith, with clean hands and without any prejudice to any party and was in pursuit of the interest of justice under the provisions of Article 22 of the Constitution as read with all relevant empowering laws.
4. In the supporting affidavit he swore on 31/01/2023 he stated that he was the authorized lead Petitioner in the matter hence competent to swear make the Affidavit. He deponed that the Petitioners agreed with the relief given as (a), being the order of dismissal of the Petition, in the judgment delivered by the Honourable Judge on 29/05/2020 but disagreed with part (b) thereof. That by the dismissal it meant that the government was not supposed to do anything and the status quo ante was to be maintained. That the petitioners therefore sought the removal into this Court and the setting aside of the part of the decree which directed that the petitioners do pay costs to the Respondents. That by virtue of Article 22 of the Constitution, the petition having been a representative suit the costs should not have been awarded. He deponed that the government was in breach of its duty when it purported to carry out irregular and unlawful acts against the genuine squatters and needy cases and evicting illegally settlers who were targeted in the suit land hence the actions were unconstitutional. Lastly, that it was prudent that each party bear their own costs.

SUBMISSIONS

5. The Application was disposed by way of both oral and written submissions. Oral arguments were made on 18/06/ 2023.
6. On his part the 1st Petitioner argued that the suit land was given to Petitioners by the H.E. the President in 1994 and the beneficiaries were identified by the Provincial Commissioner (PC) and the then Minister of Agriculture. The parcels of land were 8 in number. He stated that only the Chepchoina farm was interfered with by the Respondents. He stated that he had attached to the Application a letter



dated 17/12/2012 to show how the land was to be divided and that was against the National Land Commission Act of 2012, as the persons who were given the land lost. The Petition was dismissed and the Petitioners were ordered to pay 56 million. However, they were not told of the taxation date and yet they sued as activists. They thus complained that they were not involved in the taxation. He confirmed that he had not met with other petitioners but brought the claim as an individual, and Article 23 he had the permission to bring the Petition.

7. The 11th and 12th Respondents through the learned counsel Mr. Karani Advocate stated that the Petition was determined on 29/05/2020. The bill of costs was filed and served upon the Petitioners who were represented by the firm of Rono Advocates and the said law firm was still on record for them. He argued that the advocate had never ceased acting and had not been “fired” hence the 1st Petitioner does not have capacity to address the court. He quoted the 1st Petitioner who had acknowledged that the Application before Court was brought in individual capacity and not on behalf of the other 27 Petitioners. He questioned the capacity of the 1st Petitioner to address the court.
8. He further stated that the party and party bill of costs was entertained by the taxing master who determined it on 15/01/2021. That learned counsel of petitioners was duly informed about the same: that he was served but did not attend court. That the costs remained unpaid for three (3) years now and the law on challenging on the decision of the taxing master was well set out in the Advocate Remuneration Order. That an aggrieved party was required to do so within fourteen (14) days and the said period had already lapsed without the Applicants filing an appeal thereto. Thus, they sat on their rights. He concluded that the application was irrelevant and be disallowed as it was intended to mislead the court and waste the court’s time.

DETERMINATION AND ANALYSIS

9. I have considered the application and the facts and the rival submissions of the parties.
 - i. Whether the Notice of Motion was properly before Court.
 - ii. Whether the Application dated 31/01/2023 is merited.
 - iii. Who to bear costs.
10. Beginning with the first issue, the Court ought to determine whether the Applicant moved it within the law. It is not disputed that the Application herein was brought after judgment. The judgment was delivered on 29/05/2020. By that time the Petitioners were represented by the law firms of Ms. Naikuni, Ngaah and Miencha and Company Advocates. To date the latter law firm has neither filed an application to cease acting for the Petitioners nor have the Petitioners themselves filed an application to act in person and urged it to conclusion or obtained a consent from the Advocates on record and parties herein to act in person. Order 9 rule 9 of the Civil Procedure Rules provides for a Change of Advocates after judgment to be effected by order of Court or consent of parties. It provides that;
 - “Where 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 or 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;
 - (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 be.”



11. The purpose of Order 9 Rule 9 of the *Civil Procedure Rules* was aptly discussed in the case of *Serab Wanjiru Kung'u v Peter Munyua Kimani* [2021] eKLR where the Court struck out an application by Advocates who were not properly on record. At paragraph 13, the learned judge stated that:-

“The above framework was introduced in the Civil Procedure Rules to deal with disruptive changes that litigants and advocates used to effect, often for the purpose of unfairly dislodging previous advocates without settling their costs. The provision on filing consent between the outgoing and the incoming law firms was intended to ease the process of effecting change of advocates post-judgment. In my view, once the consent is executed and filed and a notice of change is filed, the new law firm is properly on record. The adoption of the consent as an order of the Court is merely intended to make the Court record clear for avoidance of doubt...

12. In *Lalji Bhimji Sanghani Builders & Contractors v City Council of Nairobi* [2012] eKLR the Court held that:-

“A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the rules of the procedure the Court may well be entitled to conclude that the failure to comply therewith was deliberate”.

13. In my view the issue of representation is a vital component of the civil practice and the court cannot turn a blind eye to situations where the rules are flagrantly breached. The mischief that Order 9 Rule 9 sought to cure was to protect advocates or firms of advocates being replaced or fired without notice and without their legal fees being settled. Again, if the party is represented, it is clearly unprocedural for him/her to sneak into the matter and purport to conduct proceedings behind his duly recognized agent. It is a slap on the face of the law of agency. I would strike out the instant Application on that account.

14. Moving to the second issue which is whether the notice of motion dated 31/01/2023 is merited, the Court is of the humble view that the above finding notwithstanding, the Application is not meritorious at all. There is nowhere and there is no finding that the Petition herein was a representative one or filed in public interest. Public interest should be a feature that points to a benefit by way of the reliefs sought to be to the general public as a result of the litigation but not in favour of the litigant/s. A litigant may well be a member of the public but as long as he/she has a direct or indirect benefit to gain from the litigation, then it ceases to be a matter of public interest per se. “Public interest” is defined in Bryan A. Garner’s *Black’s Law Dictionary*, 9th Edition (page 1350) as: “the general welfare of the public that warrants recognition and protection” or “something in which the public as a whole has a stake, especially an interest that justifies governmental regulation”. Therefore, the argument by the Petitioners that the Court should not have awarded costs herein, and that the award be set aside, is flawed and fallacious.

15. In *Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others* [2014] eKLR the Supreme Court held as follows:

“It is clear that there is no prescribed definition of any set of “good reasons” that will justify a Court’s departure, in awarding costs, from the general rule, costs-follow-the-event. In the classic common law style, the Courts have proceeded on a case-by-case basis, to identify “good reasons” for such a departure. An examination of evolving practices on this question,



shows that, as an example, matters in the domain of public-interest litigation tend to be exempted from award of costs. In *Amoni Thomas Amfry and Another v. The Minister for Lands and Another*, Nairobi High Court Petition No. 6 of 2013, Majanja, J concurred with the decision in *Harun Mwau and Others v. Attorney-General and Others*, Nairobi High Court Petition No. 65 of 2011, [2012] eKLR, in which it was held [para.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.”

16. Even assuming that the matter was a public interest litigation one, the Supreme Court of Kenya has clearly stated that where a party brings a frivolous public interest litigation he will not escape the payment of costs. It is not an automatic release valve from the requirement to pay costs just because a matter is a public interest litigation one, worse where it is abused. Thus, in *Holicow Pictures Pvt Ltd vs Prem Chandra Mishra & Others* A12 2008 SC 913 the Indian Supreme Court stated that public interest litigation must not be abused and that a Court has the duty to protect the noble motive of public interest litigation from the filing of cases for ulterior motives. Therefore, in the Kenyan jurisdiction, in *Kenya Revenue Authority v Export Trading Company Limited* (Petition 20 of 2020) [2022] KESC 31 (KLR) (Civ) (17 June 2022) (Judgment) the Supreme Court stated as follows:

“...where suits involved genuine public interest, courts were slow to award costs as against the losing party. Condemning an unsuccessful party to pay costs in genuine public interest litigation can act as a deterrent factor preventing parties from instituting proceedings that benefit the public generally for fear of being condemned to pay costs. The general rule on costs was therefore not immutable and although deeply entrenched, certain specific circumstances and considerations may necessitate non-application of the principle.”

17. In the instant case, the Petitioner brought the matter for and on their behalf. They had every right to gain had the Petition gone their way. Had it, they would be shouting at the roof tops to be paid costs. Under Section 27 of the *Civil Procedure Act*, costs follow the event but are ordinarily awarded in full or to such an extent deemed fit at the discretion of the judge or court. and each party is to bear its own costs. I have not been given any reasons why the judgment of the Court should be set aside.
18. The Petitioners are cherry picking and being subtly selective, On the one hand, they cannot agree to one part of the judgment and disagree to the other and move the same Court to vary or set aside that other which is unpleasant to them. They should have appealed against the decision. They did not hence they are bound by the same. The reasons given by the Applicant cannot base the review of the judgment of the Court. They have not brought themselves within the parameters of Order 45 of the *Civil Procedure Rules*.
19. On the other hand, I find the argument by the Respondents that the Petitioners should have filed an Appeal by way of a reference against the taxation. The Applicants do not challenge the amount found due in the taxation but that the judge should not have ordered the payment of costs by them in the first place. That is not a matter of filing a reference but should have been taken up by an appeal against the judgment.



20. In the end, I find the Application dated 31/01/2023 absolutely unmeritorious and dismiss it with costs which should be borne personally by the Applicant, the 1st Petitioner herein.
21. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 10TH DAY OF AUGUST, 2023.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE

