



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

PETITION NO. 50 OF 2020

**IN THE MATTER OF: THE PROTECTION OF RIGHTS &
FUNDAMENTAL FREEDOMS, PRACTICE AND PROCEDURE RLES, 2013**

AND

IN THE MATTER OF: THE CRIMINAL PROCEDURE CODE

AND

**IN THE MATTER OF: ARTICLES 25(c), 27, 28, 29, 48, 49(1) (f)
(i), 50(1), (2)(a), (4) OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF: SECTIONS 72 AND 81(1) AND
(2) OF THE CRIMINAL PROCEDURE CODE**

AND

**IN THE MATTER OF: BREACH, CONTRAVENTION AND
VIOLATION OF THE APPLICANT'S RIGHT TO FAIR TRIAL**

AND

**IN THE MATTER OF: THE CHOICE OF FORUM AND PLACE
FOR COMMENCEMENT OF CRIMINAL TRIAL**

AND

IN THE MATTER OF: THE DOCTRINE OF LEGITIMATE EXPECTATION

AND

IN THE MATTER OF A PETITION BY:

ABDALLA SALIM BAJABER.....1ST PETITIONER

SHEIKH ALI YASIN BAJABER.....2ND PETITIONER

JOSEPH MUNYAO.....3RD PETITIONER

AND

OFFICE OF DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

INSPECTOR GENERAL, NATIONAL POLICE SERVICE.....2ND RESPONDENT

THE RESIDENT MAGISTRATE COURT, SHANZU.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

RULING

Background

1. This petition was filed together with Notice of Motion Application both dated 24/7/2020, under certificate of urgency for the following orders:

a) Spent

b) That pending the inter-parte hearing and determination of this application inter-parte the honourable Court be pleased to issue and hereby do issue conservatory orders staying Shanzu Criminal Case Number 141 of 2020, Republic vs Abdalla Salim Bajaber, Sheikh Ali Yasin Bajaber & Joseph Munyao, pending hearing of this Application.

c) That pending hearing and determination of this Petition the honourable Court be pleased to issue and hereby do issue conservatory orders staying Shanzu Criminal Case Number 141 of 2020, Republic vs Abdalla Salim Bajaber, Sheikh Ali Yasin Bajaber & Joseph Munyao.

2. The Court did not give any interim orders and directed the Petitioner to serve the other parties for *inter-partes* hearing on the 28/7/2020. On the 28/7/2020, when the application came up for *inter-partes*, both Mr. Fedha and Mr. Nguyo learned Counsel for the Respondents were not ready to proceed with the Application because they needed time to file their respective response to the Petition and the Application. **Mr. Magolo** Learned Counsel for the Petitioners on the other hand indicated his eagerness to prosecute the application that sought interim conservatory orders to stop the Criminal Case 141 of 2020, which was coming up for hearing on 29/7/2020. Counsel submitted that if this Court was inclined to grant an adjournment to the Respondent's Counsel, then the Court ought to grant the Petitioners an interim conservatory order to halt the Criminal Case at Shanzu.

3. Both Counsel for the Respondents opposed the prayer for interim conservatory order. Mr. Fedha indicated that the Petitioners had been charged at Shanzu on 22/1/2020, and the criminal case was coming up for hearing on the 29/7/2020 and a witness had already travelled all the way from Garissa.

4. The Court considered the submissions by the parties, but declined to grant an interim conservatory orders for reasons that it would be unfair to stop the prosecution process without hearing the prosecution on the said issue, and in any event, if the Petitioners prove that they deserve the orders sought, the case would still be terminated even when the trial has commenced. Hearing of the application was adjourned to the 24/9/2020. However, on the 3/8/2020, this Court's attention was drawn to a Notice of Withdrawal of the Petition dated 29/7/2020, under Order 25 Rule 1, stating that he has wholly withdrawn the Petition and application as against the Respondents. The Court directed that the Notice of Withdrawal be served upon the 1st Respondent and both parties to appear before it on 4/8/2020.

5. The 1st Respondent opposed the Notice of Withdrawal vide Grounds of Opposition dated 3/8/2020, summarized herein as follows:

a) That the notice was inconsistent with Section 25(3) of the Civil Procedure Rules 2010.

b) That the petitioners did not obtain leave of Court to withdraw the Petition.

c) That the Notice contravenes Section 3A of the Civil Procedure Act, and it is misconceived, fatally defective, bad in law and as such is an abuse of the Court process aimed to defeat justice.

d) That the Applicant proceeded with Revision 179 of 2020 ex-parte staying the Criminal Case No. 141 of 2020 without material disclosure of this instant Petition which is pending before this Court. Therefore, filing multiplicity of applications and suits on the same cause of action in various High Court amounts to forum shopping.

e) That the Notice of Withdrawal contravenes Rule 27 of the Constitution of Kenya (Protection of rights and fundamental freedoms) Practice and Procedure Rules, 2013. (Mutunga Rules)

6. In response to the 1st Respondent's Grounds of Opposition, the Petitioners filed an Affidavit sworn on 8/9/2020 by the 1st Petitioner. He avers that the instant Petition was meant to address the unfair and irregular trial before the Principal magistrate. However, no interim orders were issued by this Court and the Criminal case was at liberty to proceed on 29/7/2020. On 29/7/2020, the trial before the magistrate concluded with a ruling by the trial Court which ruling the petitioners were not satisfied with, prompting them with advice of their Counsel on record to seek for immediate revision of the same on the same day vide Revision No. 179 of 2020.

7. The deponent avers that the Revision was based on the decision of the magistrate delivered on the 29/7/2020 which came after the filing of

the Petition, and to avoid any duplication, misunderstanding and/or mischief they opted to withdraw the Petition since the remaining issue of damages can be pursued in a Civil suit. Consequently, the withdrawal of the Petition does not prejudice any party except the petitioners.

Submissions

8. On the 4/6/2020, the Court directed that the Notice of Withdrawal be dispensed with via written submissions. The Petitioners submissions were filed on 15/6/2020, while the 1st Respondent's submissions were filed on 4/9/2020.

9. **Mr. Magolo** submitted that the Revision of the magistrate's ruling is not forum shopping as the same was commenced by way of a letter and the Court was at liberty to issue any direction it deemed fit. Further, Counsel submitted that the Revision related to only two issues, which are the defects of the charges and the place of trial.

10. **Mr. Magolo** submitted that withdrawal of the Petition ought to be allowed for reasons that the Petitioners have expressed their desire not to prosecute the Petition, and the subsequent development at Shanzu which resulted in the Revision touch on issues also raised in the Petition.

11. Counsel submitted that the Petitioners' Petition is not a public interest litigation, and therefore they should be allowed to withdraw the same and in support of the submission, Counsel cited **Harry John Paul Arigi & 2 others vs. Board, Kenya Ports Authority & 2 others [2016] eKLR**, which Counsel sought to distinguish from this instant Notice of withdrawal.

12. On costs, **Mr. Magolo** submitted that it is the trial Court that has the right and duty to give directions on payment of witness expenses.

13. **Mr. Masila** learned Counsel for the 1st Respondent submitted that a constitutional Petition cannot be withdrawn without leave of Court as there is a public interest issue to be addressed and this Court must have an audit of what happened. **Mr. Masila** submitted that these proceedings were not commenced under the Civil Procedure Act and the Rules made thereunder. Therefore, withdrawal of this instant Petition ought to be governed by Rule 27 of the *Mutunga Rules*. Counsel cited **Harry John Paul Arigi & 2 others vs. Board, Kenya Ports Authority & 2 others [2016] eKLR**, where the Court of Appeal held that the Appellants were obliged to comply with Rule 27 before they could competently withdraw the Petition.

14. Counsel submitted that the Criminal Revision Application was full of misrepresentation and non- disclosure of material facts which has led to two conflicting decisions on the same cause of action in courts of equal jurisdiction and therefore the said action amount to forum shopping and is an abuse of the Court process. Therefore, by filing the Notice of Withdrawal, the Petitioners' are trying to evade the orders issued by this Court on the 28/6/2020.

15. On the issue of costs, Counsel submitted that the Petitioners cunningly ensured that the 1st Respondent's three (3) witnesses who travelled from Malaba to testify in Criminal case 141 of 2020 did not testify despite this Court ordering the said trial to proceed on the 29/6/2020. Therefore, parties must be aware the consequences of filing frivolous suits and they should be condemned to shoulder the costs of the frivolous suit.

Determination

16. I have carefully considered the Notice of Withdrawal, Grounds of Opposition, evidence, Replying Affidavit, and submissions. I have also considered the relevant law and jurisprudence on the key issues falling for determination, namely:

a) Whether the Notice of withdrawal is regular

b) Whether the Criminal Revision 179 of 2020 is an abuse of the Court process.

c) Who should bare the cost of the suit after withdrawal.

(1) Whether the Notice of withdrawal is regular

17. It is not in doubt that **Order 25 Rule 2** of the Civil Procedure Rules applies to withdrawal of Civil Suits. Be that as it may, this is a Constitutional Petition and the same is not subject to the Civil Procedure Rules. Pursuant to Article 22(3) of the Constitution, on 28th June 2013, Vide Legal Notice No 117, the Chief Justice made the Constitution of Kenya (Protection of rights and fundamental freedoms) Practice and procedure Rules, 2013 rules. Clause 3(1) of the rules provides that they shall apply to all proceedings for enforcement of fundamental rights and freedoms under Article 22. On the withdrawal of constitutional petitions, the applicable Rule is Rule 27, which stipulates:

“27. (1) The petitioner may—

(a) on notice to the court and to the respondent, apply to withdraw the petition; or

(b) with the leave of the court, discontinue the proceedings.

(2) The Court shall, after hearing the parties to the proceedings, decide on the matter and determine the juridical effects of that decision.

(3) Despite sub rule (2), the Court may, for reasons to be recorded, proceed with the hearing of a case petition in spite of the wish of the petitioner to withdraw or discontinue the proceedings.”

18. The Court of appeal in **Harry John Paul Arigi & 2 others vs. Board, Kenya Ports Authority & 2 others** (supra) held as follows:

“We are satisfied that the right of a petitioner to withdraw a constitutional petition is circumscribed by rule 27; that rule 27 like all the other rules enshrined in the 2013 rules, is constitutionally underpinned and is not a mere technicality; and that the rule is justified granted the public significance of an application alleging violation of the Bill of Rights, literally the heart of the Constitution. To the extent that the withdrawal of constitutional petitions is regulated by a specific regime that is traceable directly to the provisions of the Constitution, the appellants were obliged to comply with rule 27 before they could competently withdraw the petition.”

19. Since the withdrawal of constitutional Petitions is controlled by a specific regime that is traceable directly to the provisions of the Constitution, the Petitioners’ were obliged to comply with Rule 27 before they could procedurally withdraw the petition. It is noteworthy that where there are clear procedures of redress of any particular grievance prescribed by the Constitution or statute, then the procedure should be strictly followed and adhered to. See **Speaker of the National Assembly vs. Karume [2008] KLR (EP) 425**.

20. In invoking the above rules and the authority cited above, I find and hold that the said Rule requires the Petitioners to apply to the to obtain the necessary leave from to withdraw the Petition and consequently, the withdrawal of the said Petition without the leave of the Court is irregular and therefore void.

(2) Whether the Criminal Revision 179 of 2020 is an abuse of the Court process

21. I have considered the arguments advanced by the parties. It is not in dispute that the issue of the place of hearing and jurisdiction of the trial Court is an issue that had been raise in the Application together with this instant Petition, and this Court had directed that the same be determine during the inter-*partes* hearing on 24/9/2020. That notwithstanding, the Petitioners decided to re-litigate over the same issues vide Criminal Revision 179 of 2020 before my sister Njoki J, whose Court is a Court of equal status as this Court and an order staying the proceedings in Criminal case 141 of 2020 was issued. Further, the Petitioners have even conceded at paragraph 18 of their Affidavit sworn on 8/9/2020 as follows:

“That to avoid misunderstanding, duplication and any mischief we all decided to withdraw the Petition, since the question of damages can be persued by a Civil Suit.”

22. In **Stephen Oyugi Okero vs. Chief Magistrate's Court at Milimani Law Courts (Criminal) & another [2018] eKLR**, Mativo J observed as follows:

“In my view, this petition is founded on issues that have been dealt with by a competent court as outlined above and to me this Petition is an abuse of court process. It is trite law that the court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The black law dictionary defines abuse as “Everything which is contrary to good order established by usage that is a complete departure from reasonable use. An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use.”

23. Similarly, in **Kiambu County Tenants Welfare Association vs. Attorney General & another [2017] eKLR**, the court made the following observation: -

“It’s settled law that a litigant has no right to purse paripasua two processes which will have the same effect in two courts at the same time with a view of obtaining victory in one of the process or in both. Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks. In my humble view, the two processes are in law not available simultaneously. The pursuit of the two processes at the same time constitutes and amount to abuse of court/legal process.”

24. From the foregoing, I find and hold that by instituting multiplicity of actions in different courts of the same jurisdiction on the same subject matter against the same opponents, and without disclosing the same to the Learned Judge handling the criminal revision, the Petitioners are abusing the process of court. In **Omar Ali Abdulrahman vs. Mohamed Ali Abdulrahman [2019] eKLR**, the court made the following observation: -

“The institution of parallel proceedings by the Appellant over the same matter is tantamount to forum shopping and playing lottery with the Court which would render legal proceedings a circus. In order to prevent abuse of the court of process this Court must stop the Appellant from seeking a multiple-pronged attack on the same issue.”

(3) Who should bare the cost of the suit after withdrawal.

25. Having found that the institution of Criminal Revision 179 of 2020 was an abuse of the Court’s process, and having found that my sister Njoki J has already issued orders of stay of proceeding in Criminal Revision 179 of 2020, this petition shall be withdrawn. However, the Petitioners shall pay the costs incurred by the Respondents in ferrying and accommodating witnesses in Criminal Case 179 of 2020. The Deputy Registrar shall assess the said costs from receipts filed and submitted upon by the Respondents. Upon such assessment the Petitioners shall pay the said costs to the Respondents within 14 days of order.

26. The upshot is that:

a. The Petition together with the Application accompanying it are hereby withdrawn.

b. The Petitioners shall bear the costs of the 1st Respondent to be determined by the taxing officer.

Orders accordingly.

Dated, Signed and Delivered at Mombasa this 22nd Day of September, 2020.

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Mr. Magolo for Petitioners

Mr. Fedha for 1st Respondent

Ms. Peris Maina Court Assistant