



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW

PETITION NO. 239 OF 2015

**AND IN THE MATTER OF ARTICLES 1,2,3,4,(2) 10.12(1) (a), 19,20,21,22,23,24,35,46,47,48,50,156,232,258,259 AND 260 OF THE
CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF SUPERMARKETS COMMODITY PRICE DISCREPANCIES AT THE SHELVES AND AT THE
PAYMENT TILLS**

AND

**IN THE MATTER OF UNFAIR BUSINESS PRACTICES, FALSE REPRESENTATION AND UNCONSCIONABLE
REPRESENTATION**

AND

IN THE MATTER OF THE CONSUMER PROTECTION ACT, 2012

AND

IN THE MATTER OF COMPETITION ACT, CAP 504

AND

IN THE MATTER OF THE STANDARDS ACT, CAP, 496

AND

IN THE MATTER OF: ETHICS AND ANTI-CORRUPTION COMMISSION ACT, 2013

BETWEEN

CONSUMERS FEDERATION OF KENYA (COFEK) (Suing through its officials namely

STEPHEN MUTORO, EPHRAIM KANAKE AND HENRY OCHIENG....APPLICANT/PETITIONERS

-VERSUS-

NAKUMATT HOLDINGS LIMITED.....1ST RESPONDENT

ATUL SHAH.....2ND RESPONDENT

KENYA BUREAU OF STANDARDS.....3RD RESPONDENT

RULING

1. This matter came up before me on 9th April 2018 for the highlighting of the written submissions when Mr. Mugala, learned counsel for petitioner informed the court that the petitioner had on 26th March 2018 filed a notice of withdrawal of the petition. The reasons for the withdrawal were stated to be, *inter alia*, that the 1st respondent had been placed under administration and that the petitioner did not wish to pursue the 1st respondent's administrator. For the above reasons, the petitioner's counsel urged the court to mark the petition as withdrawn with no orders as to costs in view of the fact that the petition was a public interest litigation filed by the petitioner in its capacity as a consumer rights organization.

2. Mr. Ngatia, learned counsel for the 1st respondent confirmed that the 1st respondent had indeed been placed under administration and added that such placement was in the public domain. He however implored the court to condemn the petitioner to pay costs to the respondents following the withdrawal in view of the age of the case and the fact that the petitioner had for a period of 3 years not been keen in prosecuting it.

3. On his part, Mr. Mwangi, learned counsel for the 2nd respondent submitted that the petition raises important constitutional questions including allegations of criminal nature relating to grievous bodily harm and causing death which should be heard and determined in a conclusive manner. The 2nd respondent maintained that the prayers sought by the petitioner were still live and had not been overtaken by events. He accused the petitioner of laxity in prosecuting the petition which laxity, he submitted, ended in the dismissal of the petition on 3rd March 2017 for non-attendance before it was later reinstated. He further argued that it was apparent that the sole reason for the petitioner's move to reinstate the case, after its dismissal was to enable it circumvent the costs that were awarded following the said earlier dismissal.

4. The 2nd respondent further argued that he had been sued in his personal capacity and had incurred money, time, labor and skill in defending the petition for which he was entitled to an award for costs. It was the 2nd respondent's case that costs can be awarded even in public interest litigation cases where it is shown that the conduct of the petitioner was to bring a frivolous petition.

5. Mr. Odhiambo advocate for the 3rd and 4th respondent submitted that the petition was frivolous and that the petitioner failed to attend court on numerous occasions thereby leading to the aforementioned dismissal for non-attendance. In making a case for the award of costs following the withdrawal, counsel maintained that parties must always be aware of the consequences of filing frivolous suits.

6. Mr. Ogosso for the 5th respondent did not oppose the withdrawal of petition.

7. After considering the notice for withdrawal of the petition dated 26th March 2018 and the rival submissions tendered by the counsel herein I note that the following are the issues for determination:

- Whether the prayer for withdrawal of the petition should be allowed, and if so;
- Whether the respondents should be awarded the costs of the petition following the said withdrawal.

8. On the first issue for determination, it is common ground that the proceedings that the petitioner sought to withdraw by their notice of withdrawal dated 26th March 2018 was a constitutional petition for enforcement of fundamental rights of the consumers/shoppers in line with **Article 46** of the Constitution and Consumer Protection Act. Under **Article 22(1)** of the Constitution, every person has the right to institute court proceedings claiming that a right or freedom guaranteed in the Bill of Rights has been denied, violated, infringed or threatened. **Article 23(1)** confers on the High Court jurisdiction to hear and determine applications where a party alleges denial, violation, infringement, or threat to a right or freedom guaranteed by the Bill of Rights.

9. Article 22(3) of the Constitution on the other hand makes provision for the procedure to be employed in proceedings for enforcement of fundamental rights and freedoms and for that purpose enjoins the Chief Justice to make the necessary rules of procedure. Pursuant to Article 22(3) of the Constitution, the Chief Justice on 28th June 2013, Vide Legal Notice No 117, made The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure, 2013 Rules. Clause 3(1) of the said rules provides that they shall apply to all proceedings for enforcement of fundamental rights and freedoms under Article 22. Rule 27, provides for withdrawal or discontinuance of constitutional petitions as follows:

“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.

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

d. (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.”

e. Rule 27 (1) (a) of the above provision allows a petitioner, who wishes to withdraw a petition, to **apply** to withdraw the same upon giving notice of his intention to both the court and the respondent. A petitioner may also under rule 27(1) (b) discontinue proceedings with the leave of the court. Rule 27(2) provides that the court shall decide on the matter **“after hearing the parties to the proceedings”**. Under rule 27(3), notwithstanding the petitioner’s wish to withdraw the petition or to discontinue the proceedings, the court may for reasons to be recorded, still proceed to hear and determine the petition.

f. In the instant case, I am satisfied that the petitioner complied with the procedure for withdrawing a constitutional petition as circumscribed by rule 27. I find that the reasons advanced for the withdrawal are plausible as it was not disputed that the 1st respondent has been placed under administration. This court takes judicial notice of the fact that the 1st respondent, previously a giant regional retailer, has closed most, if not all, of its shops countrywide. A perusal of the petition reveals that it mainly challenges the discrepancies in the till and shelf prices of the goods stocked in the 1st respondent’s stores such that in its absence as an on-going concern, the prayers sought, if granted, will be tantamount to this court granting orders in vain as there will be no substantive party against whom the orders can be executed.

g. Turning to the 2nd respondent’s claim that he had been sued in his own individual capacity for involvement in alleged acts of criminal nature, I find that it is clear, from a perusal of the petition, that the 2nd respondent was sued in his official capacity as the Managing Director and Chief Executive Officer of the 1st respondent in which case, the claim against him cannot be sustained in the absence of the 1st respondent as an on-going business enterprise. I note that nowhere in the petition has any claims of involvement in any criminal activity been made against the 2nd respondent directly or in his individual capacity outside his position as the 1st respondent’s Managing Director. In fact, the issue of criminal liability is only mentioned in the petition, albeit in general terms, as one of the prayers sought in the petition as follows:

h. “b. THAT the honourable court be pleased to declare and hereby declares that the 1st and 2nd respondent are criminally liable for any form of variation, distortion and mismatch, deliberate and or otherwise, as regards the variation of shelf and till prices.”

i. In light of the above findings and observations, I am satisfied that the petitioner has made out a strong case for the withdrawal of the petition and I hereby allow the said withdrawal and mark the petition as withdrawn.

j. On the 2nd issue of whether the respondents should be awarded the costs of the petition following the withdrawal, I note that the respondents argued that they were entitled to costs firstly; because the petition was frivolous and secondly; that the petitioner had, for a long time, been unwilling to prosecute its case. My finding is that it is not possible to determine the merits of the petition, at this stage, in view of the fact that it has not reached the judgment stage. Be that as it may, a perusal of pleadings shows that the petitioner herein, a consumer rights organization, had a basis for filing the petition in response to numerous complaints and public outcry by the 1st respondent’s customers over discrepancies in the pricing of their products. In view of the said complaints, one cannot say that the petition was frivolous or that the petitioner acted in jest or out of malice in filing the petition so as to justify their being penalized for costs.

k. Turning to the respondents’ claim that the petitioner had failed to prosecute the petition, I note, from a further perusal of the court file, that the petitioner prosecuted its case by filing its written submissions way back on 6th August 2015 and that on 15th August 2016, the petitioner’s counsel informed the court that he wished to rely on the said submissions. The matter that was then still pending before the court was the highlighting of the written submission by the parties’ advocates. My humble view is that even without the highlighting of the submissions, the court could still have proceeded to determine the petition based on the filed written submissions because highlighting is not a mandatory statutory requirement in the hearing of cases but is a practice adopted by the courts, over time, to assist it in summarizing each parties’ case. In light of the above circumstances, I find that there is no basis for the respondent’s argument that the petitioner was unwilling to prosecute the petition.

l. It is trite law that costs of litigation are in the sole discretion of the Court. The general rule is that costs in civil proceedings **“follow the event”** (see section 27 of the Civil Procedure Act). In constitutional litigation, however, the Rules make special provision for the guidance of the Court. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure, 2013 provides guidance at Rule 26 as follows:

“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.***

17. The rationale behind the above rule is that in constitutional litigation, the principle of access to the court and the observance and enforcement of the Bill of Rights in the Constitution, override the general principle that costs follow the event, unless it can be shown that the petition was wholly frivolous, or that petitioner was guilty of abuse of the constitutional court process by say filing a constitutional petition on matters that do not raise purely constitutional issues and which properly belonged to other competent courts or tribunals, and which should, therefore, have been filed and competently disposed of by those other courts or tribunals. Courts have held that a petitioner for constitutional enforcement need not present a case that must succeed and even in cases where such a petitioner loses the case, it cannot be taken against him that his petition is eventually lost if it otherwise meets the public interest criteria. Although the rule was developed in the realm of protection and enforcement of rights and fundamental freedoms, the principle applies with the same force in general constitutional litigation for interpretation and enforcement of the Constitution. Indeed, the rights of access to court under Article 22 and 258 of the Constitution for the enforcement, respectively, of the Bill of Rights and the other parts of the Constitution are in the same terms.

18. In this petition, I have already found that the petitioner filed the petition in order to pursue the fundamental rights of the consumers as guaranteed by the Constitution. This Petition therefore fits the bill of a Public Interest Litigation which is defined in Black's Law Dictionary (6th Edition) as "**a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected.**"

19. Courts have been reluctant to award costs in constitutional Petitions seeking to enforce constitutional rights in cognizance of the fact that costs may be a barrier to potential litigants in Public Interest Litigation and in tandem with the spirit of the constitution which allows any person to approach the court either on his behalf or on behalf of another person citing violation or threat of a constitutional right. This is further in recognition of the fact that in public litigation, a litigant is usually advancing public interest as opposed to personal gain. Courts have held the view that an order for costs would hinder the promotion of constitutional justice as parties who are not well-endowed financially would be shy to approach the seat of justice for fear of being condemned in costs should they be unsuccessful in their cases thus preventing a matter of public importance from being heard.

20. In the South African case of **Hotz and Others vs University of Cape Town [2017] ZACC 10, citing Biowatch Trust v Registrar, Genetic Resources [2012] ZACC 14** it was observed that an award for costs may have a chilling effect on the litigants who might wish to vindicate their constitutional rights.

21. In the case of **Jasbir Singh Rai & Others vs Tarlochan Rai & Others [2014] eKLR** the Supreme Court observed that:-

"in the classic common law style, the courts have to proceed 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....."

22. The above position does not however mean that courts do not award costs in constitutional all petitions. There are instances where courts have held an award of costs would be justified such as where the litigation is frivolous or vexatious or where the conduct of the litigant attracts censure by the court. (See **Affordable Medicines Trust vs Minister of Health 2006 (3) SA 247 (CC)**). However, as I have already found in this ruling, the instant petition cannot be said to have been without basis or an abuse of the court's process so as to justify the award of costs.

23. Having regard to my findings herein and the authorities cited I find no reason to depart from the generally accepted jurisprudence on the issue of the award of costs in constitutional petitions and accordingly I make no orders as to costs.

24. Dated and Delivered in open court at Nairobi this 19th day of April 2018.

W. A. OKWANY

JUDGE

In the presence of:

K.M. Mwangi for the 2nd Respondent

K.M. Mwangi holding brief for Ngatia for the 1st Respondent

Nyende for the 3rd Respondent

CA Kombo