



Wamakima t/a the Fedge Residency v Kimemia & 4 others (Environment and Planning Petition E043 of 2024) [2025] KEELC 3422 (KLR) (30 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3422 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND PLANNING PETITION E043 OF 2024**

AA OMOLLO, J

APRIL 30, 2025

**IN THE MATTER OF ARTICLES 19, 20, 22(1), 23(1),
40, 70(1), OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF ONGOING BREACH, VIOLATION AND CONTRAVENTION
AND FURTHER INTENDED BREACH, VIOLATION AND CONTRAVENTION OF
ARTICLES 28, 42, 43(1)(B), 69(1), 70 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF ENVIRONMENT MANAGEMENT
& COORDINATION ACT NO. 8 OF 1999**

AND

IN THE MATTER OF THE NATIONAL CONSTRUCTION AUTHORITY

BETWEEN

ELIUD NDUNGU WAMAKIMA T/A THE FEDGE RESIDENCY ... PETITIONER

AND

**JANE NJERI KIMEMIA 1ST RESPONDENT
KEMAROG BUILDERS LIMITED 2ND RESPONDENT
THE NAIROBI COUNTY GOVERNMENT 3RD RESPONDENT
NATIONAL ENV. MANAGEMENT AUTHORITY 4TH RESPONDENT
NATIONAL CONST. AUTHORITY 5TH RESPONDENT**



RULING

1. This Petition was withdrawn and so the only issue for determination regards the question on whether to award costs to the 1st and 2nd Respondents following the withdrawal. Vide submissions dated 29th January 2025, the Petitioner urged that the court does exercise her discretion not to award costs the 1st and 2nd Respondents. The 3rd to 5th Respondents did not claim costs.
2. He (the Petitioner) placed reliance on Section 27 of Civil Procedure Act and the case of Rosaline Njeri Macharia vs Daima Bank Ltd (2012) eKLR which pointed factors to be considered while awarding costs thus;
 - a. The nature of the allegations a plaintiff has made against a defendant.
 - b. The nature of the claim and the likelihood of success.
 - c. The nature of liability that would attach against a defendant if he does not defend the claim.
 - d. The nature of the defence, if any, filed by the defendant and
 - e. The stage at which the suit is being withdrawn or discontinued.”
3. The Petitioner submit further that he filed this suit after failing to get remedy from the relevant approval authorities he contacted. That it was after the matter was filed when the 1st Respondent chose to take remedial action by demolishing the wall. Consequently, the 1st and 2nd Respondents are not entitled to costs where they are guilty of misconduct.
4. The 1st and 2nd Respondents vide submissions dated 18th February, 2025 aver that they are entitled to costs. They also cited the provisions of section 27 of the Civil Procedure Act. These Respondents cited the case of Ocean Engineering Works Ltd & Another vs SBM Bank Ltd (2024) KEELC 4724 (KLR) which held that a successful party is entitled to costs unless there are other exceptional factors.
5. It is their submissions that they incurred costs in retaining an advocate, filing and serving a Replying Affidavit. They also cite the case of Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 others S.C Pet. No. 4 of 2012 (2014) eKLR which stated that costs follow the events implies that the party who calls forth the event by instituting a suit bears the costs if the suit fails.

Analysis and Determination:

6. In instances where a suit is withdrawn, the court does not ask the reasons for the withdrawal. Secondly, a withdrawal does not necessarily imply the Petitioner is a loser or otherwise. Therefore, the holding in the case of Jasber Singh Rai & 3 Others supra that a successful party is entitled to costs is distinguishable to this case where neither party can be said was successful.
7. Similarly, in the case of Ocean Engineering Works Ltd & Another supra, it held that though a successful party entitled to costs, there are exceptional circumstances when costs would not be awarded. The Petitioner submitted that the Respondents remedied the act which necessitated the filing of the suit only after the matter was brought to Court. This is an averment which the court cannot ascertain since no reason was given for withdrawing the suit and the statement of removing the offending structure/ wall was only introduced in the submissions.
8. While generally in civil proceedings the principle on costs is that costs 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.

9. In the case of *Feisal Hassan & 2 others vs Public Service Board of Marsabit County & another* [2016] eKLR Muriithi J., stated at paragraph 3 that:

“In constitutional litigation, the principle of access to the court must, consistently with the public importance and interest in 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. However, a petitioner for constitutional enforcement need not present a case that must succeed and it cannot therefore, be taken against him that his petition is eventually lost if it otherwise meets the public interest criteria. Although 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.”

10. Consequently, having reviewed the rival arguments, I decline to award costs for the following reasons. First, the Respondents deposes in their replying affidavit that the petitioner had been raising complaints before this Petition was filed. They however do not depose to sharing their approved development plans/licences with the Petitioner to ward off the filing of the petition. The inference is that the Petitioner had genuine concerns which were not addressed.

11. Secondly, the suit was commenced as a constitutional petition seeking remedy for violation of constitutional rights. As held in the case of *Feisal Hassan & 2 others supra* that in constitutional matters whether touching on public interest or not as long as they are aimed at enforcing the bill of rights that costs follow the event, where it can be shown that the petition was wholly frivolous, or that petitioner was guilty of abuse of the constitutional court process.

12. In this instance, the petition was withdrawn at an early stage even before the inter-parties hearing of the application and the costs incurred if any were minimal. Following the withdrawal, this court cannot ascertain that it was frivolous and as stated earlier, the 1st and 2nd Respondents were made aware of the Petitioner’s complaint even before the same was filed. I find no good reason to award costs to them.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF APRIL, 2025

A. OMOLLO

JUDGE

