



REPUBLIC OF KENYA

IN THE CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO 329 OF 2016

FEISAL HASSAN1ST PETITIONER

ADAN ALI2ND PETITIONER

BILLOW ISSACK3RD PETITIONER

VERSUS

THE PUBLIC SERVICE BOARD OF MARSABIT COUNTY1ST RESPONDENT

THE COUNTY GOVERNMENT OF MARSABIT2ND RESPONDENT

RULING

1. This is a ruling on costs prayed for by the Respondents upon withdrawal of the petition by the Petitioner. The counsel for the petitioner asked the court to consider that the matter was in the nature of a public interest litigation, which in accordance with established practice of the court does not ordinarily attract an award for costs. Counsel for the respondent urged eh court to consider the fact that the petition was withdrawn after it had been set for hearing after the respondent had filed a substantive replying affidavit in opposition to the petitioners’ case.

2. Costs of litigation are in the in discretion of the Court. 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.***

3. 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.

4. In this petition, the Court by its ruling of 16th August 2016 granted the conservatory order halting the public recruitment exercise for the respondent County staff not on the basis of the private petitioners, some who did not qualify for the positions that they had applied, but on the public interest concerns of right of information and transparency in County Government recruitment, for which petitioners as persons suing in public interest, had an arguable case, as follows:

“36. Accordingly, I find that the petitioners have an arguable case for the enforcement of the constitutional and statutory provisions of the County Governments Act 2012 and the Public Service (Values and Principles) Act, 2015. On the materials before the court at this stage, in the absence of the information as to the full list of applicants and the full list of shortlisted applicants, the court is not able to, and it is not required so to do, to hold at his stage that the petitioners have been discriminated against or the gender rule has been violated.

Risk of prejudice

*37. As I have found that the petitioners, in common with every person, have an interest in the observance by public bodies of constitutional and statutory provisions despite their failure to hold qualifications, as alleged by the respondents, for the positions that they applied, **there is a real risk of prejudice as regards the public interest in the observance of the Rule of Law.***

Balance of convenience

*38. Public interest would require that the process of appointment of the officers of the 2nd Respondent be done in accordance with the law. **As citizens enforcing that public interest, the petitioners despite their personal interest, have the every person’s right and interest in the Rule of Law. There is, therefore, really, no divergence and need for any balancing of public interest versus the petitioners’ personal interest.**”*

5. Accordingly, for the reasons set out above, the Court does not make any order as to costs.

DATED AND DELIVERED THIS 23TH DAY OF SEPTEMBER, 2016.

EDWARD M. MURIITHI

JUDGE

Appearances

M/S Kangéthe Waitere & Company, Advocates for the Petitioners.

Mr Walukwe of M/S Okongo Omogeni & for the Respondents.

Mr. Kazungu - Court Assistant.