



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.418 OF 2014

BETWEEN

ISIOLO COUNTY ASSEMBLY.....3RD PETITIONER/APPLICANT

THE CHIEF WHIP (MAJORITY)

AND

THE SPEAKER (MOHAMMED TUBI)

ISIOLO COUNTY ASSEMBLY.....1ST RESPONDENT

THE COUNTY SECRETARY ISIOLO...1ST PETITIONER/2ND RESPONDENT

THE DEPUTY SPEAKER

ISIOLO COUNTY ASSEMBLY.....2ND PETITIONER/3RD RESPONDENT

RULING

1. The 3rd Petitioner in these proceedings is one, Paul Mero, the Chief Whip (majority) of the Isiolo County Assembly. By his Application filed on 17th December 2014, he seeks orders that ***“the Petition filed against the Respondent be wholly withdrawn.”***
2. In a brief Supporting Affidavit sworn on 15th December 2014, he depones that he no longer wishes to pursue the Petition as he is aware that the business of the Isiolo County Assembly is running smoothly under the leadership of the Respondent and that all other issues between the Parties can be settled amicably by them outside Court.
3. In arguing the Application, he added that this Court and the Senate had implored the Parties to seek reconciliation and in that spirit, a decision had been taken to withdraw all cases involving the Isiolo County Assembly. That he did not therefore see any reason why the present Petition should continue.
4. Prof. Ojienda, S.C., appearing for the Respondent, supported the Application and went further to argue that since Parties had reconciled, there was no longer any dispute to be determined. Further, that once the 3rd Petitioner had withdrawn his Petition, then grounds 2, 3, and 6 in support thereof

would have collapsed and with them the substratum of the Petition would also have collapsed and the other Petitioners can only file fresh Petitions if they wish to do so.

5. Mr. Ngatia for the Petitioners in opposing the 3rd Petitioner's Application submitted that firstly, there is no evidence that all pending cases involving the Parties have been withdrawn.
6. Secondly, that looking at **Rules 27(1), (2) and (3)** of the **Constitution** of High Court (Protection of Fundamental Rights Freedoms) **Practice and Procedure Rules 2013**, it is the Court that has the last word or whether an application for withdrawal of a Petition should be granted. That in fact the Court can choose to proceed and determine a dispute despite an attempt at withdrawing it.
7. Thirdly, on whether the 3rd Petitioner is the one who swore the Affidavit in support of the Petition, that the issue is moot as in fact a Petition can proceed without any Affidavit in support being filed.
8. Lastly, that the two remaining Petitioners are intent on proceeding with the Petition and their right to do so should not be curtailed.
9. I have considered the Application and the rival Submissions made. I should begin by noting that the present proceedings have been less than straightforward. Although initially filed under Certificate of Urgency, every attempt has been made to delay finalization thereof including by attacks on alleged partiality on the part of the Court. While I have no reason to doubt the *bona fides* of the 3rd Petitioner's Application, one can only look back and wonder why an otherwise simple matter should drag on for months because of the conduct of some Parties and I maintain that it is the duty of this Court to expedite its hearing despite all that has been done and said of it.
10. In any event, so far as I know, if a party wishes to withdraw any pleading, neither an opposing party nor the Court should be a bar to such an action. I have for example seen the statement by B.K. Mukherjea J. in **Nandi s/o Trailakhya vs Shyama Sundar Nandi s/o Hati Nandi AIR 1943 Cal 320** that where a party wishes to withdraw a suit with no intention of filing a fresh one, then he can do so *suo motu* without leave of Court.
11. In addition, and only by way of example, under **Rule 27(1)(a)** of the **Rules** aforesaid, a Petitioner may apply to withdraw his Petition by giving notice to the Court and to the Respondent. Under **Rule 27(1)(b)**, he may with the leave of Court, discontinue the proceedings and of importance in the said Rules however, is **Rule 27(3)** where the Court has the discretion to proceed with a Petition even after a Petitioner has applied to withdraw it. In doing so, the Court must give its reasons for proceeding.
12. The aforementioned Rules are applicable to questions of alleged violations of fundamental rights and freedom and the present Petition has nothing to do with that subject but has to do with the interpretation and application of **Articles 75 and 77** of the **Constitution**. The Rules are however indicative of the situation applicable to the present Application and I will therefore invoke **Rule 27** aforesaid as well as general principles on the procedure and practice relating to withdrawals of pleadings in determining the same.
13. Having so said, it follows that principally and as a matter of right, the 3rd Petitioner has a right to withdraw the Petition against the Respondent but the question is, what happens to the Petition if withdrawn by one Petitioner and the intention of the other Petitioners is to continue with it?
14. In that regard, the Petition before me was brought by three Petitioners, jointly (see paragraph 1 of the Petition). The Supporting Affidavit was sworn by the 3rd Petitioner but it is obvious that he was doing so on behalf of himself and the other two Petitioners. To insinuate that his withdrawal of the Petition also means that the Supporting Affidavit stands withdrawn is to stretch the imagination too far.

15. Further, the 3rd Petitioner, by withdrawing from the Petition cannot by that action alone bind the remaining Petitioners who stand by the Petition and the complaints in it. In any event, borrowing from the language of **Rule 27(3)**, aforesaid, the Court must reserve the right to determine whether a withdrawal should in fact be allowed. The same principle is to be found in **Order 25 Rule 2(2)** of the **Civil Procedure Rules** where leave must be sought from the Court before any withdrawal can be made with the obvious presumption that if the Court declines to grant leave, then the matter will proceed to hearing. One of the considerations to be taken by the Court in that regard is the rights of other Parties to the suit. That is why in **Nandi (supra)**, the Court stated that the right to withdraw ***“is not absolute in all cases and may be controlled by rights existing in other parties to the suit.”*** Although made in the context of ordinary civil proceedings, that statement achieves an even higher place in constitutional litigation such as is the case in the present Petition, - See also **King vs Sunday Pictorial Newspapers Ltd (1924) 41 TLR 229**

16. Having so said, I see no reason to deny the 3rd Petitioner his wish to withdraw the Petition but the remaining Petitioners shall be granted their right to pursue it.

17. In the event, the Application dated 18th August 2014 is allowed and the 3rd Petitioner shall no longer be a party to these proceedings.

18. Let each Party bear its own costs.

19. Let the Petition now proceed for hearing on a date to be agreed between the Parties and without further delay.

20. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 12TH DAY OF JUNE, 2015

ISAAC LENAOLA

JUDGE

In the presence of:

Miron – Court clerk

Mr. Ingutya for Petitioners

Mr. Kisaka for Respondents

3rd Petitioners Applicant present

Order

Ruling duly delivered.

ISAAC LENAOLA

JUDGE

Further Order

Submissions to be highlighted on 11/8/2015 and in the meantime Parties at liberty to record consent.

ISAAC LENAOLA

JUDGE

12/6/2015