



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 11 OF 2014
CONSOLIDATED WITH
PETITION 14 OF 2014
BETWEEN
DR. EVANS ODHIAMBO KIDERO.....1ST PETITIONER
HON. RACHAEL SHEBESH 2ND PETITIONER
AND
DIRECTOR OF PUBLIC PROSECUTIONS....1ST RESPONDENT
INSPECTOR GENERAL OF
THE NATIONAL POLICE SERVICE.....2ND RESPONDENT
THE DIRECTOR OF
CRIMINAL INVESTIGATIONS.....3RD RESPONDENT

RULING NO. 2

1. The consolidated petition herein was lodged by the petitioners to challenge the decision of the Director of Public Prosecutions (“the DPP”) to commence criminal proceedings against them for an incident that occurred 6th September 2013 involving Hon. Rachel Shebesh and Hon. Evans Kidero.
2. During the course of these proceedings, after directions for hearing had been given, the parties reached a reconciliation agreement dated 6th February 2013 and filed in court. Both Hon. Shebesh and Hon. Kidero agreed to renounce and withdraw the complaints they had made against each other.

3. Obviously, the DPP was not part of the agreement and when the matter came up for directions on 7th February 2014, he sought time to consider the agreement. At the mention on 21st February 2014, counsel representing the DPP indicated that the learned DPP had indicated that the proper procedure was for the parties to proceed to the Police Station and withdraw their complaints whereupon he would reconsider his position.
4. Both petitioners have now withdrawn their respective complaints in accordance with their accord. They now apply that this matter be marked as settled with no order as to costs.
5. The DPP, while not in opposition to the petitioners' settlement, is of the view that the proper order is one for withdrawal of the petition as the he is not a party to the petitioners' accord. He contends that he is entitled to exercise his authority independently upon consideration of the advice of the Division Criminal Investigation Officer ("DCIO") who has received the petitioners' accord.
6. Both the Attorney General and DPP seek costs of the petition as they have attended proceedings and have been forced to defend the petition which the parties would have settled without necessarily involving the Court.
7. I agree with the respondents that the proper order is to mark the matter as withdrawn. The settlement of the parties cannot bind the DPP, an independent office, established under **Article 157** of the Constitution unless he consents to the settlement. He is entitled to assert his authority to reconsider his decision in light of the accord between the petitioners and the withdrawn proceedings having regard to public interest and other factors outlined in **Article 157(11)**.
8. As regards costs, the general principle is that this court retains, discretion to award costs (see *John Harun Mwau and Others v The Attorney General Nairobi 65 of 2011 [2012]eKLR*). In matters of enforcement of fundamental rights and the Constitution, the Court leans against awarding costs to the State and its entities as this would necessarily have a chilling effect on the ability of citizens to indicate their rights. Moreover, it would negate the open door policy of the Court in **Articles 22** and **258** of the Constitution. This matter was withdrawn at a primordial stage and I am not convinced that the petitioners ought to be mulcted with costs for settling their differences outside the Court.
9. The order that commends itself to this Court is as follows;
 1. **Petition No. 11 of 2014 and Petition No. 14 of 2014 be and are hereby marked as withdrawn.**
 2. **There shall be no order as to costs.**

DATED and DELIVERED at NAIROBI this 19th March 2014.

D.S. MAJANJA

JUDGE

Prof. Ojienda, S.C., instructed by Prof Tom Ojienda and Associates Advocates for the 1st petitioner.

Mr Miller instructed by Miller and Company Advocates for the 2nd petitioner.

Mr Kamula, Deputy Director of Public Prosecutions, instructed by the Director of Public Prosecutions.

Ms Munyi, Senior Principal Litigation Counsel, instructed by the State Law Office for the 2nd and 3rd respondents.