



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

**PETITION NO 11 OF 2007**

**KUMAR SHAH .....1<sup>ST</sup> PETITIONER**  
**PHARMACEUTICAL MANUFACTURING CO(K)LTD.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**  
**DIRECTOR OF CID ..... 2<sup>ND</sup> RESPONDENT**  
**PARESH DODHIA .....3<sup>RD</sup> RESPONDENT**  
**NILAY DODHIA .....4<sup>TH</sup> RESPONDENT**  
**DIRECTOR OF PUBLIC PROSECUTIONS .....5<sup>TH</sup> RESPONDENT**

**RULING**

**Introduction**

1. On 23<sup>rd</sup> May 2014, the Court (Majanja J) made the following ruling:

***“As the matter in Kibera Criminal Case No. 6370 of 2006 has been withdrawn, the petition filed herein lacks substratum. Upon request by counsel for petitioner there being no objection from learned Counsel for DPP, the matter is marked as withdrawn with no order as to costs.”***

2. It is this order that has precipitated the application now before me dated 30<sup>th</sup> May 2014. In the said application, the 3<sup>rd</sup> and 4<sup>th</sup> respondents seek the following orders:

1. ***That this application be certified urgent and service be dispensed with in the first instance.***
2. ***That this Honorable Court be pleased to set-aside the Order herein issued on 23<sup>rd</sup> May 2014 ex debito justitae.***
3. ***That in the alternative this Honorable Court be pleased to award costs of the withdrawn petition to the 3<sup>rd</sup> and 4<sup>th</sup> Respondents.***
4. ***That costs of this application be provided for.***

3. The basis of the application is that no notice was served upon them and the orders of the Court of 30<sup>th</sup> May 2014 were therefore made without their participation despite the fact that they had participated in previous proceedings in the matter; that the matter was neither listed on 21<sup>st</sup> May or 23<sup>rd</sup> May 2014; that the matter is relatively old and the applicants have expended significant legal fees and other incidental costs and it is only fair that the Court pronounces itself on the issue of costs; and that they are desirous that the matter be determined inter partes on merit.

4. In his submissions on behalf of the applicants, Mr. Masaviru stated that the gist of the application is that they should be awarded costs. They are aggrieved that they were not aware of the Court appearance of 23<sup>rd</sup> May 2014 when the matter was withdrawn with no order as to costs. Counsel relied on section 27 of the Civil Procedure Act which gives the Court discretion on the issue of costs and submitted that given that this is a very old matter, the Court was not properly guided on the issue of costs as the applicants were not present. It was his submission that the Court should review the order of 23<sup>rd</sup> May 2014 and award the applicants costs.

5. In his response to the application, Counsel for the petitioner/respondent, Dr. Kuria, submitted that this Court has laid down the principles to guide the award of costs in petition for enforcement of fundamental rights in the case of **John Harrun Mwau -vs- Attorney General (2012)eKLR**; that the said principles are that the award of costs must advance constitutional justice; must not have a chilling effect on constitutional litigation; and that the Court must exercise discretion in a judicial manner.

6. It was the petitioner's case that the 3<sup>rd</sup> and 4<sup>th</sup> respondents were undeserving of costs; that as the criminal case that precipitated the present petition had been withdrawn by the 5<sup>th</sup> respondent, it is the petitioners therefore who were winners, and if costs follow the event, then it is the petitioners who are entitled to costs. Counsel argued that as the petitioners had filed the petition in order to enforce their right to liberty, the 5<sup>th</sup> respondent, by withdrawing the criminal case, has conceded that there had been a contravention of the petitioners' rights.

7. Dr. Kuria submitted further that the application for costs was based on a misapprehension that a complainant who leads to a criminal prosecution has power to dictate to the DPP that he completes the prosecution to the satisfaction of the complainant. According to Dr. Kuria, the DPP is vested with power under Article 157 to discontinue proceedings upon consideration of various factors.

8. Counsel argued further that the applicants were wholly to blame for not being in Court on the day the matter was marked as withdrawn, and they could not blame the Court for their absence.

9. In reply, Mr. Masaviru argued that the withdrawal of the criminal case against the petitioners did not lead to the substratum of the petition being lost; and that there were still many issues that the Court could have determined, the applicants' case being that they were wrongly included in the matter.

10. Counsel sought to distinguish the principles in **Harun Mwau -vs- The Attorney General** (supra) on the basis that the case raised issues of public interest while the present petition was baseless.

### **Determination**

11. I have considered the application and the documents in support, the response from the petitioners, as well as the submissions made before me at the hearing of this application. I have also considered the record of the proceedings before Majanja J prior to the orders of 23<sup>rd</sup> May 2014.

12. As conceded by the applicants, the core of their dissatisfaction with the order of 23<sup>rd</sup> May 2014 is that the petition was withdrawn with no order as to costs; and they feel strongly that they should have been awarded costs, which would have happened had they been present on that date.

13. The applicants allege in the affidavit sworn by their Counsel, Mr. Masaviru, that the Court was not

sitting on 21<sup>st</sup> May 2014. They contend, though, that Counsel for the petitioner should have called them; that a cause list is not a mention notice and a notice should have been served on them; and that the matter should be reinstated and heard on its merits, or the petitioner accedes to pay their costs.

14. The Court observes that, as contended by the applicants, this is a very old matter. It had been precipitated by complaints made by the 3<sup>rd</sup> and 4<sup>th</sup> respondent against the petitioners. There was a long period during which the matter did not proceed.

15. However, the Court observes that the matter came up for mention on 5<sup>th</sup> February, 2014, and an order was made for it to be heard on 26<sup>th</sup> February, 2014. On that date, in the presence of Counsel for the petitioners and the 3<sup>rd</sup> and 4<sup>th</sup> respondents but in the absence of the Attorney General, the 1<sup>st</sup> respondent, and the Director of the Criminal Investigations Department (CID), the 2<sup>nd</sup> respondent, an order was made for joinder of the Director of Public Prosecutions. The matter was then fixed for mention on 19<sup>th</sup> March, 2014, and on that date, according to the Court record, it was then fixed for hearing on 2<sup>nd</sup> April 2014.

16. On 2<sup>nd</sup> April 2014, Counsel for the DPP indicated that the DPP had reviewed the matter and was no longer interested in proceeding with the criminal case against the petitioners. On his part, Mr. Masaviru, Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> respondents, indicated that he needed further instructions to resolve the matter. A further mention was fixed for 5<sup>th</sup> May 2014 when, in the presence of Mr. Masaviru and Dr. Kuria, the matter was again fixed for mention on 9<sup>th</sup> May 2014. Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> respondents did not appear before the Court on that date, but the DPP did, and indicated that the DPP was no longer interested in pursuing the criminal case, whereupon the Court directed that the parties appear before the court in Kibera seized of the criminal case for the DPP to formally withdraw the charges.

17. The matter was then fixed for mention on 21<sup>st</sup> May 2014, when a notice indicated that matters scheduled for hearing or directions before Majanja J, as well as part heard matters, would be listed before the Court on 23<sup>rd</sup> May 2014.

18. I have set out at some length the history of this matter preceding the present application for two reasons. First, it is apparent that it was within the knowledge of the 3<sup>rd</sup> and 4<sup>th</sup> respondents as far back as 2<sup>nd</sup> April 2014 that the DPP was no longer interested in pursuing the criminal prosecution which had given rise to the petition. It appears also that a copy of a proposed consent seeking to have the matter settled, with each party bearing its own costs, had been sent to their counsel on record. While they were represented in Court on 5<sup>th</sup> May 2014, their Counsel did not appear in Court on 9<sup>th</sup> May 2014 when the Court directed that the criminal prosecution be formally terminated. Service of the order of 9<sup>th</sup> May 2014 is not disputed.

19. Secondly, the award of costs is within the discretion of the Court. Majanja J, who was seized of the matter for some four months prior to its withdrawal and so was well versed with the proceedings, exercised his discretion in permitting its withdrawal with no order as to costs. It is undisputed that the award of costs is within the discretion of the Court. Section 27 of the Civil Procedure Code relied on by the petitioner provides this, as does Rule 26 of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**.

20. In my view, then, given the above matters, the applicants are asking this court to sit on appeal on the exercise of discretion by Majanja J. Given the history and circumstances of this matter set out above, I cannot properly do this. The history of the matter was such that the Court appears to have been satisfied on 23<sup>rd</sup> May 2014 that it was in order to permit a withdrawal of the petition as its substratum, the criminal prosecution in Kibera, was no longer there.

21. Counsel argues that the petition should be allowed to proceed on its merits and the parties' evidence taken. A consideration of the prayers sought in the petition leads to the inevitable conclusion that once the criminal case was withdrawn, there was no longer any basis for the petition. The petitioner had sought the

following orders:

- a. **A declaration that the dominant purpose for the institution and maintenance of the Chief Magistrate's Criminal Case No 6730 of 2006 is to extort money from the 2<sup>nd</sup> petitioner.**
- b. **A declaration that the dominant purported and intended arrest on 13<sup>th</sup> January 2007 by officers of the 2<sup>nd</sup> respondent and charging of the 1<sup>st</sup> petitioner with conspiracy to murder the 3<sup>rd</sup> respondent will be to extort money from the 2<sup>nd</sup> petitioner for the benefit of the 3<sup>rd</sup> respondent.**
- c. **A declaration that the arrest and holding in custody of the petitioner on 17<sup>th</sup> October, 2006, 5<sup>th</sup> December, 2006 and 6<sup>th</sup> January 2007 were contraventions of the 1<sup>st</sup> petitioner's right to liberty under section 72 of the Constitution.**
- d. **A declaration that the institution and maintenance of Chief magistrate's Criminal Case No 6730 of 2006 is an abuse of the criminal process.**
- e. **An order that the 1<sup>st</sup> petitioner be granted bail pending arrest.**
- f. **An order staying permanently Chief Magistrate's Court Kibera seized of Criminal Case No 6730 of 2006.**
- g. **An order that the respondents do pay the applicant's general damages.**
- h. **An order restraining the 2<sup>nd</sup> respondent from receiving and acting on complaints of criminality preferred against the petitioners by the 3<sup>rd</sup> and 4<sup>th</sup> respondents.**
- i. **The costs of this suit be provided for.**

22. With the 5<sup>th</sup> respondent having withdrawn the criminal prosecution, there is no basis for the Court to deal with the petitioners' complaints, and the petition was spent. Consequently, this Court will not engage in an exercise in futility, which is essentially what the applicants are asking it to do.

23. In the circumstances, I find no merit in the application dated 30<sup>th</sup> May 2014, and it is hereby dismissed but with no order as to costs.

**Dated, Delivered and Signed at Nairobi this 31<sup>st</sup> day of July 2014**

**MUMBI NGUGI**

**JUDGE**

**Mr. Nelson Masaviru instructed by the firm of Akoto & Akoto & Co. Advocates for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents/Applicants**

**Dr. Kamau Kuria instructed by the firm of Kamau Muria & Co. Advocates for the Petitioners/Respondent**