



**REPUBLIC OF KENYA**

**High Court at Bungoma**

**Petition 60 of 2012**

**JOHN WEKESA KHAOYA.....PLAINTIFF**

**versus**

**ATTORNEY GENERAL.....DEFENDANT**

**RULING**

**The Application**

[1] I am called upon to make a decision on the application dated 14/11/2012 which seeks among other things;

(a) *That the Plaintiff be granted leave for the proceeding he commenced on 26/4/2012 pursuant to Article 22 (2) (I) of the Constitution of Kenya to proceed in accordance with Article 22 (4) of the Constitution.*

[2] The application is supported by the affidavit of the plaintiff himself sworn on 14/11/2012.

**Grounds of application**

[3] The major grounds for the application as discerned from the application and affidavit in support thereof are as follows:

(a) *That this proceeding was filed pursuant to Article 22 (2) (c ) of the Constitution.*

(b) *That the proceeding is filed on behalf of public interest I.e. the inhabitants and stakeholders of Nangwe Location.*

(c) *That the nature of the public interest which the proceedings intend to protect relates to checks and balances of the CDF/LATF projects and disbursements of public funds in particular to the project of Chemwa Bridge Dispensary.*

**CONSTITUTIONAL GROUNDING**

**Scope**

[4] In this matter, the *locus standi* of the Petitioner to file a public interest litigation is not in issue. In any event, the *locus standi* to file judicial proceedings, representative or otherwise, has been greatly

enlarged by the Constitution in Article 22 and 258 of the Constitution which ensures unhindered access to justice. The matter in question is; whether the Petitioner should pay court fees on this Petition albeit he had filed it without paying court fee.

### **Issues**

[5] I can decipher from the application and the affidavit the following should be the issues the court is called upon to decide:-

1. *Whether a prospective Petitioner should apply for exemption from paying court fees before filing a public interest litigation?*
2. *What is the proper procedure of applying for the exemption?*
3. *What criteria will the court apply in determining the application for exemption?*
4. *Is the absence of rules contemplated under Article 22(3) of the Constitution a licence for litigants to unilaterally decide that they should not pay court fees?*

### **Provisions of the Constitution**

[6] The application is premised on Article 22 of the Constitution but more specifically Article 22 (2) ( c ), Article 22 (3) ( c ) and Article 22 (4). I will set out these articles below.

[7] Article 22 (2) ( c ) of the Constitution provides:-

*In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by*

*( c ) a person acting in public interest.*

[8] Article 22 (3) ( c ) of the Constitution seems to be the relevant one herein. It provides:-

*The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that-*

*( c ) no fee may be charged for commencing the proceedings.*

[9] Article 22 (4) of the Constitution provides:-

*The absence of rules contemplated in clause (3) does not limit the right of any person to commence court proceedings under this article and to have the matter heard and determined by a court.”*

[10] The issue is simple. Should the applicant pay fees on this petition?

### **Applicant did not pay filing fee**

[11] The Petitioner filed this petition without paying the requisite court fee. The only fees that he has paid are those that relate to a mention date and subsequent pleadings including the instant application.

### **PROCEDURE TO APPLY FOR EXEMPTION FROM FEES**

[12] The absence of the rules under Article 22(3) of the Constitution makes it absolutely necessary that a prospective Petitioner should file an application to be exempted from paying court fee before filing the substantive petition. But, neither the Constitution nor the existing rules provides for the manner of approaching the court for exemption from paying fees on a public interest litigation under Article 22 of

the Constitution. What therefore is the constitutionally permissible and acceptable procedure that guarantees unhindered access to justice and vindicates public interest?

### **Borrow a leaf from pauper litigation**

[13] Although public litigation is not pauper litigation, I should think the appropriate procedure is akin to what is known as *pauper litigation* under Order 33 of the Civil Procedure Rules. The provisions of Order 33 of the CPR have also been adopted in Order 44 of CPR on *Pauper Appeals*. Under this procedure, the court decides whether it will allow the request depending on the nature of the case and the reasons the Applicant will have given for the exemption. That procedure is generally acceptable and constitutionally permissible where exemption from paying court fee on any proceeding is concerned. It should therefore offer guidance as to how a party should approach the court for an order permitting the party to file a petition on behalf of public interest without paying fee as we wait for rules by the Chief Justice. The court will ordinarily consider such requests objectively and if the subject of litigation is in the nature of public interest, it will almost invariably grant the request. This is a procedure that is in consonance with and gives effect to the provisions of Article 22 (4) of the Constitution to stand in the gap created by absence of the Rules anticipated under Article 22 (3) ( c ) of the Constitution.

[14] True it is, the absence of the rules does not preclude a party from filing a public interest suit, except the exemption from paying fees must be sought first from the court, under the existing legal framework. The application should be made under the cover of certificate of urgency, a process which is designed to avoid a delay of any kind. Nothing prevented the Petitioner from filing the current application before filing the petition, and is regrettable he has inversed the process completely. Nonetheless, he has applied and that is laudable.

### **Constitutional necessity to apply**

[15] The court is aware and has developed a real consciousness of the elegant provisions of Article 159, particularly 159(2) (d) of the Constitution that admonishes the courts from placing undue emphasis on technicalities in the dispensation of justice. But the need for the court to ensure that the intended suit is public litigation for enforcement of the Bill of Rights under Article 22 of the Constitution is not a technicality, rather it is a substantive constitutional necessity. The Constitution treats this subject as quite substantive, and its undiminished significance is seen in the constitutional requirement that the Chief Justice shall make express rules which should satisfy the criteria that no fees may be charged for commencing a proceeding under Article 22, and public interest litigation is one such proceeding.

[16] From the available judicial material, procedures and constitutional provisions, it seems that the acceptable constitutional bounds which will be used in determining this application should be that the litigation must:-

- a) *Be public interest litigation,*
- b) *Be brought to advance a legitimate public interest,*
- c) *Be one that will contribute to a proper understanding of the law; and*
- d) *Not be aimed at giving the applicant a personal gain.*

Public interest litigation is critical in the new constitutional dispensation as it is an effective tool to realize public scrutiny of and participation in public affairs. See the case of **JOHN HARUN MWAU & 3 OTHERS v ATTORNEY GENERAL & 2 OTHERS [2012]** where the court expressed itself thus:-

*In matters concerning public interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed.*

[17] I here below reproduce a rendition of the expressions on costs by *Justices Lenaola, Majanja and Mumbi Ngugi* in **JOHN HARUN MWAU & 3 OTHERS V ATTORNEY GENERAL & 2 OTHERS [2012]**. The view taken by the Justices is relevant in this case and supports the view I have taken that a request for exemption from paying fees on a public interest litigation should be looked at with a kind eye by the court. I dare say that public litigation should be encouraged where necessary. The sentiments expressed by said Justices are as follows:

*The intent of Articles 22 and 23 of the Constitution is that persons should have free and unhindered access to this court for the enforcement of their fundamental rights and freedoms. Similarly, Article 258 allows any person to institute proceedings claiming the Constitution has been violated or is threatened. The imposition of costs would constitute a deterrent and would have a chilling effect on the enforcement of the Bill of Rights.*

*In matters concerning public interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed. Costs should therefore not be imposed on a party who has brought a case against the state but lost. Equally, there is no reason why the state should not be ordered to pay costs to a successful litigant. The court also retains its jurisdiction to impose costs as a sanction where the matter is frivolous, vexatious or an abuse of the court process.*

*Our Constitution places a premium on the values of social justice and rule of law, patriotism and participation of the public. Without unhindered access by the public to the courts, these values would be undermined. An award of costs is also one of the remedies the court may consider in granting appropriate relief under Article 23(3) and Article 258.*

*Our approach to the issue of costs in cases concerning the enforcement of fundamental rights and freedoms and for the enforcement of the Constitution is that the court has discretion in awarding costs. Like all forms of discretion, it must be exercised judicially, in light of the particular facts of the case and giving due regard to the values set out in the preamble of the Constitution and Article 10 in order to achieve the objects of Article 259(1).*

[18] Let me emphasize that where an application for exemption is premised on the fact that the matter is to promote public interest, then two issues must be established, to wit, 1) the intended suit must be public litigation and 2) should not be aimed at deriving any personal gain to the applicant.

#### **a) Suit must be public interest litigation**

[19] In my opinion, as this petition is framed to defend public interest, it must be shown to have been brought to Court in good faith and in the public interest. I am certain that even the rules to be made by the Chief Justice will provide for a criteria that no fees shall be paid on a litigation on behalf of public interest; and brought in good faith.

#### **b) Suit should not be for personal gain**

[20] Moreover, for purposes of an application of this nature, the prospective Petitioner on behalf of public interest under Article 22 (2) ( c ), as sign of good faith, should satisfy the court that the intended suit is not aimed at giving personal gain to the applicant. By that requirement, the court gives effect to unhindered access to justice and legitimate efforts to protect public interest, but also prevents abuse by private litigants who may wish to take advantage of the Article for selfish, parochial and private gains. The court reckons that not all suits filed and styled as constitutional applications are public interest litigation.

#### **Existing rules made under section 84(6) of old Constitution**

[21] All constitutional applications are and should be governed by the *Constitution of Kenya, High Court*

*Practice and Procedure Rules, 2006* made under Section 84(6) of the former Constitution, except with necessary modifications, until the Chief Justice makes the rules contemplated under Article 22 (3). On my part, I think, under the said *Rules, 2006* and other practice directions by the Chief Justice, fees is payable on constitutional petitions except exemption from paying fees should be obtained as provided under the law and through the procedure outlined herein. The courts will however readily exercise its discretion judiciously in accordance with the Constitution and no deserving public interest litigation should be denied the advantage of being filed or conducted free of costs or court fee.

### **Absence of rules not license to exempt self!**

[22] It bears restating that, although the absence of the rules contemplated under Article 22 (3) ( c), and the provisions of Article 22 (4) is not a license for a party to assume authority and exempt self from paying fees. That kind of practice by litigants would be tantamount to impunity and a transgression upon the very Constitution from which the Applicant is seeking public remedy.

[23] A small but necessary detour. I note that the Applicant is the Regional Coordinator Western Province for Centre for Human Rights. I wish he clarified if that society is a registered society. If it is, then it should be best placed to apply for public remedy. I suppose from the name of the society, its objects are to advance public rights.

### **The decision**

[24] Before the rules contemplated under article 22(3) of the Constitution are made by the Chief Justice to provide for the criteria on which no fee may be charged on a proceeding commenced under Article 22, the acceptable procedure is that the Petitioner should apply to court to be exempted from paying court fee. The application should be made under the cover of certificate of urgency, a process which is designed to avoid a delay of any kind. This procedure does not hinder the right to access to justice but is; a constitutionally acceptable procedure; necessary to avoid abuse of the process of the court and the right of access to justice by unscrupulous litigants; and protects the unhindered prospects of filing genuine actions aimed at advancing a legitimate public interest. I am convinced, that necessity may be removed or accordingly redirected by the rules the Chief Justice will make under Article 22(3) of the Constitution, as those rules will provide for the entire regime on the filing, prosecution and adjudication of constitutional applications for enforcement of the Bill of Rights.

[25] For now, I find this petition:-

- a) *Relates to public interest litigation,*
- b) *Is brought to advance a legitimate public interest,*
- c) *Will contribute to a proper understanding of the law; and*
- d) *Is not aimed at giving the applicant a personal gain.*

In the circumstances, I exempt payment of filing fee or any further fee on the petition. However, any fee that is already paid, unless it is the initial filing fee on the petition, will not be refunded.

[26] I wish to thank the Petitioner for this bold move which reminds the people of Kenya that it is profitable for the members of the public to utilize provisions of the Constitution to advance public interest. That practice, as long as it is well intended, should be encouraged particularly now that devolution is taking shape, and there will be need for constant scrutiny of all public affairs by the people through legal and recognized methods. This is a perfect example where the right to access to justice is the enabler of active participation in public affairs. Except, it must be understood that any such litigation should be made in utmost good faith for the general good of the public without expecting any particular personal gain.

**Dated, signed and delivered in open court at Bungoma this 25th day of February, 2013**

**F. GIKONYO**  
**JUDGE**

In the presence of:

M/s Maina for A-G

Applicant present  
CA: Khisa

Ruling delivered in open court.

**F. GIKONYO**  
**JUDGE**