



Kenya Medical Training College v Mutisya ((Representative of The Estate of Onesmus Mutisya Muambe)); Makueni County Assembly & 5 others (Interested Parties) (Environment & Land Petition E006 of 2021) [2022] KEELC 3719 (KLR) (27 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3719 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND PETITION E006 OF 2021**

**TW MURIGI, J
JULY 27, 2022**

BETWEEN

KENYA MEDICAL TRAINING COLLEGE PETITIONER

AND

**JOSEPH MUIA MUTISYA DEFENDANT
(REPRESENTATIVE OF THE ESTATE OF ONESMUS MUTISYA MUAMBE)**

AND

NATIONAL LAND COMMISSION INTERESTED PARTY

MAKUENI COUNTY ASSEMBLY INTERESTED PARTY

**MAKUENI NATIONAL GOVERNMENT CONSTITUENCY ... INTERESTED
PARTY**

MAKUENI COUNTY GOVERNMENT INTERESTED PARTY

DEVELOPMENT COMMITTEE INTERESTED PARTY

MAKUENI COUNTY LAND REGISTRAR INTERESTED PARTY

RULING

1. The petitioner, Kenya Medical Training Institute initiated this petition against the respondents on the 15th of September 2021 and sought for the following orders: -
 - a) A declaration that the respondents has violated the petitioners fundamental right and freedoms as protected under articles 28, 35, 40, 43, ,47 and 48 of the Constitution of Kenya 2010.



- b) A declaration that the petitioner be compensated the amount of money that the court deems sufficient and/or appropriate by the respondent for the violation of the petitioner's rights and fundamental freedoms under articles 28, 35, 40, 43, 47 and 8 of the Constitution of Kenya 2010.
 - c) This honourable court be pleased and do hereby grant an order of permanent injunction restraining the respondent his agents, associates, servants employees and/or representatives from trespassing, entering into, destroying any structure, constructing and or building any structure near or next to the subject land and/or in any manner whatsoever from interfering with the petitioner's possession, occupation and use of the land upon the land which the petitioner's Wote Campus is built on or the disputed 26 plots LR NO Makueni/Unoa/605 to 630.
 - d) A declaration that the surveyed disputed 26 plots LR No Makueni/Unoa/ 605-630 are public land.
 - e) A declaration that the titles to the allegedly surveyed disputed 26 plots LR NO Makueni/Unoa/605-630 and issued to private individuals are illegal, null and void.
 - f) A declaration that the Wote urban land use plan which contained the part development plan for the proposed site for Makueni Kenya Medical Training College measuring 2.74 hectares (6.77 acres) prepared by the county without the involvement or concurrence of the National Land Commission (NLC) - which under article 62(2)(a) of the Constitution to administer public land is illegal, null and void.
 - g) A declaration that the petitioner be allocated a minimum of 10 acres (4.05HA) of land as per the KMTC expansion policy 2019 on guidelines for starting a campus at clause 4 (1) and be issued with the documents thereto forthwith.
 - h) General and punitive damages.
 - i) Any other or further relief that this honourable court may deem fit to grant.
 - j) Any other remedy that the court may find just to grant.
2. On 20th of April 2022, Mr Makoha learned counsel for the petitioner applied to withdraw the petition with no orders as to costs. Ms Kellen learned counsel appearing for the respondent and Mr Kithuka learned counsel for the 2nd interested party were not opposed to the application subject to payment of costs.
 3. In response, Mr Makoha argued that the discretion to award costs solely lay with the court. In addition, Mr Makoha contends that the respondents are not entitled to costs since the petition had not proceeded substantially and that no response was filed. Counsel argued that it was not prudent for a government institution to insist on costs from another government institution.
 4. The issue for determination is whether the respondent and the 2nd interested party are entitled to costs.
 5. Section of the 27(1) of the Civil Procedure Act provides as follows;

Subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid and give all the necessary



direction for the purposes aforesaid and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers;

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reasons otherwise direct.

6. It is clear from the above provisions that in civil proceedings, costs follow the event. However, in constitutional litigation the award of costs is at the discretion of the court. The *Constitution of Kenya (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules, 2013* provides for guidelines on the issue of costs in constitutional litigation as follows: -

Section 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.
7. In tracing the steps taken by the parties in this petition, I note from the proceedings that the petitioners initiated this petition against the respondent and the interested parties and sought for prayers therein. upon service of the petition, the respondent filed a notice of appointment on 1st of October 2021 and a replying affidavit on 4th of November 2021 through the firm of Muumbi and Co Advocates. The 2nd interested party filed a memorandum of appearance on 28th of September 2021. The 4th interested party equally filed the notice of appointment through the firm of Maanzo and Co Advocates. This was an important step towards defending the petition.
8. The court finds that the respondent and the 2nd and 4th interested parties incurred costs in filing of the notice of appointment, memorandum of appearance and replying affidavit. However, this petition is in the nature of public interest litigation. Costs should not be awarded in public interest litigation.
9. This being a public interest litigation I direct that each party will bear its own costs.

RULING DATE, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS DAY 27TH DAY OF JULY 2022.

.....

HON T. MURIGI

JUDGE

IN THE PRESENCE OF:-

Kwemboi - Court Assistant.

Makhoha for the Petitioner.

Ms Kellen for the Respondent.

Ms Kellen holding brief for Nthiwa for the 2nd Interested Party.

