



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**PETITION NO. 13 OF 2019**

**IN THE MATTER OF THE PETITIONERS RIGHT UNDER ARTICLE 47 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF ARICLES 22, 23, 165 AND 259 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)  
PRACTICE AND PROCEDURE RULES**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

**BETWEEN**

**ABDI ABDULLAHI.....1<sup>ST</sup> PETITIONER**

**AHMED ABDULLAHI MOHAMED ..... 2<sup>ND</sup> PETITIONER**

**VERSUS**

**THE CHIEF MAGISTRATE ISIOLO LAW COURTS...1<sup>ST</sup> RESPONDENT**

**MUKIRA MBAYA .....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. Vide the Petition dated 31<sup>st</sup> May 2019, the Petitioners seek the following orders that:

a. A declaration that, with respect to the bill of costs dated 9<sup>th</sup> February 2018 filed in Isiolo CMCC No. 19 of 2016 Abdi Abdullahi and Ahmed Abdullahi Mohamed V Mohamed Abdi, Hassan Issack and Francis Eyengan Supado, the petitioners were subjected to unfair administrative action and that therefore the petitioners rights under Article 47 of the Constitution of Kenya and section 4 of the Fair administrative Action Act 2015 were breached.

b. A declaration that the petitioners were not afforded fair administrative action by the Chief Magistrate Isiolo Law Courts in respect to the bill of costs dated 9<sup>th</sup> February 2018 filed in Isiolo CMCC No. 19 of 2016 Abdi Abdullahi and Ahmed Abdullahi Mohamed V Mohamed Abdi, Hassan Issack and Francis Eyengan Supado.

c. An order directing that the certificate of costs dated 10<sup>th</sup> May 2018 be and is hereby set aside.

d. An order directing the Isiolo Chief Magistrate's Court to issue notice for the hearing of representations from both sides in CMCC (Environment and Land) No. 19 of 2016 Abdi Abdullahi and Ahmed Abdullahi Mohamed V Mohamed Abdi, Hassan Issack and Francis Eyengan Supado on the bill of costs dated 9<sup>th</sup> February 2018 and the subsequent one dated 15<sup>th</sup> May 2019 save that such

hearing be before a magistrate other than S.M Mungai Chief Magistrate.

e. An order of costs in favor of the Petitioners.

2. There are 5 grounds cited on the face of the petition in support thereof as follows:

a. The Bill of Costs was not served upon the petitioners nor was it served on their advocates.

b. The petitioners were therefore denied a right to be heard on a matter which was likely to affect their right to property.

c. The court upon receiving the bill of costs was under a *duty to notify the petitioners' advocates but failed to do so*.

d. The petitioners' *right under Section 4 of the Fair Administrative Action Act 2015 was breached by the respondents*.

e. The actions by the *Chief magistrate were unfair and unjust*.

3. The petitioners also filed an application dated 31.5.2019 contemporaneously with the petition seeking a stay of execution on certificate of costs dated 10.5.2018 issued in Isiolo case CMCC NO. 19 OF 2016 as well as a stay of further proceedings thereof. Interim orders of stay of execution were granted on 7.6.2019 and were extended now and then. On 4.2.2020, this court gave directions for the aforementioned application to be heard by way of written submissions, each side having 30 days to do so. There was no compliance with these directions.

4. On 11.6.2020, the court gave further directions for the parties to file submissions. This time round, both the petitioner and the 2<sup>nd</sup> respondent did file submissions but in respect of the Petition and not the application. Thus on 21.1.2021, the petitioners urged the court to mark the application dated 31.5.2019 as spent and to consider their submissions as well as those of the respondent as properly on record in respect of the petition and to give a date for judgment.

5. The petitioners also withdrew the case against the 1<sup>st</sup> respondent. It is against this background that the court proceeded to mark the case against 1<sup>st</sup> respondent as withdrawn and also proceeded to write this judgment.

6. The petitioners have submitted that as parties before a court of law they were entitled to a fair judicial process, it was their legitimate expectation that they would be afforded a reasonable opportunity to be heard and that the 1<sup>st</sup> respondent breached the provisions of Article 47 & 50 of the Constitution by awarding costs to the defendant without affording the petitioners a right to be heard, being aware that the petitioners had not been served. They also relied on the provisions of Section 2 and 4 of the Fair Administrative Action Act.

7. The 2<sup>nd</sup> respondent submitted that the petitioners had sued the wrong person as they ought to have sued the clients, further that he should have been sued in his professional capacity and not his own personal capacity. That the petitioners jumped the gun and the present petition is premature and an abuse of judicial review remedies as Section 9(2) of the Law Reform Act and rule 11 of the Advocate Remuneration Order provide for specific procedures to be followed.

8. The 2<sup>nd</sup> respondent also argues that the issue of service could have been substantively and exhaustively canvassed using the path given under the advocate's Remuneration Order and no evidence has been provided by the petitioners that they exhausted the remedies before instituting this suit. He relied on the case of **Machira & Co. Advocates v Arthur K. Magugu & Another [2012]eKLR**

### **Analysis & Determination**

9. The issues before this court are straight forward. The petitioner instituted a suit at Isiolo Cmcc. no 19 of 2016 which he withdrew vide a notice of withdrawal dated 14.4.2016. The notice of withdrawal of the suit was allowed on 17.5.2016 with costs to the defendants. Thereafter, a bill of costs was assessed at shs.55,125. The petitioners then filed an application before the magistrate's court dated 29.6.2018 seeking a stay of further proceedings as well as the setting aside of the certificate of costs. Vide a ruling delivered on 30.4.2019, the said application was dismissed with costs to the defendants. A month or so later, this petition was prepared on 31.5.2019. I am able to discern the facts of the matter because the Isiolo file is attached to this petition, though it is not clear as to how the lower court file was brought to this court.

10. The question in my mind is, does this petition really meet the threshold of a constitutional petition? What are the constitutional questions that the petitioner desires to be determined? A perusal of the application dated 29.6.2018 as well as the submissions of the petitioner filed on 6.11.2018 before the Isiolo magistrate's court reveal that the issues raised before the magistrate's court are the same ones raised in this petition. The petitioner was arguing that he was not given a notice for the bill of costs, that the withdrawal of the suit was occasioned by the decision in the Malindi High court case which stated that magistrates had no jurisdiction on land matters. In their submissions before the trial court, the petitioners had relied on the provisions of Article 47 of the Constitution and Section 3 and 4 of the Fair Administrative Action Act.

11. In paragraph 3 (h) of the petition, the petitioners admit that their "application to set aside the certificate of costs was dismissed with costs but without issuance of notice of the ruling to counsel for the petitioners"

12. The Supreme Court in the case of **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR** stated as follows:-

**“Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show *the rights***

*said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Annarita Karimi Njeru v. Republic (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”*

13. In the Court of Appeal case of **Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another [2016] eKLR** , the court had this to say on the issue at hand;

**“The Constitution should not be turned into a thorough fare for resolution of every kind of common grievance”.**

14. In **Kariuki & Others Vs. Dawa Pharmaceuticals Company Limited & Others [2007] E.A. 235**, quoted in **Anne Wawuda & 3 others v Kenya Railways Corporation & another [2015] eKLR**, it was stated that;

**“.....Nothing can take away the court’s inherent power to prevent abuse or trivializing of its process by striking out a frivolous and vexatious application. Baptizing such matters constitutional cannot make them so, if they are plainly frivolous or vexatious or elevate them to a constitutional status when they are in fact plainly an abuse of the court’s process.”**

15. In the instant matter, the issues raised herein were the subject of the determination in the ruling delivered by the magistrate on 30.4.2019. What then would be the basis for this court to revisit the matter on a constitutional platform? None. The petitioner was obviously aggrieved by the ruling of the trial court, of which, the next step was to lodge an appeal or seek a review of the decision. Such an aggrieved person also has the liberty to seek enlargement of time in filing an appeal out of time in the event that he was for one reason or another unable to do so.

16. Further, it is noted that the case against the 1<sup>st</sup> respondent was withdrawn, yet the petitioners’ claim is primarily directed upon that respondent.

17. I find that the filing of this petition was meant to scuttle the verdict of an order of the court. The petitioner cannot have a second bite of the cherry by elevating the dispute to a constitutional matter. I therefore find that the petition has no merits and I proceed to give the following orders;

**1) This suit is hereby dismissed with costs to the 2<sup>nd</sup> respondent.**

**2) Any orders of stay of execution or of further proceedings relating to the Isiolo matter CMCC NO .19 OF 2016 are hereby discharged.**

**3) The court file Isiolo CMCC NO. 19 OF 2016 is to be severed from this petition and to be remitted back to the Isiolo Chief Magistrates Court with immediate effect.**

**DATED, SIGNED AND DELIVERED AT MERU THIS 17<sup>TH</sup> DAY OF MARCH, 2021**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

**ORDER**

The date of delivery of this Judgment was given to the advocates for the parties through a virtual session via Microsoft teams on 21.1.2021. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

**HON. LUCY N. MBUGUA**

**ELC**

**JUDGE**