



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MILIMANI LAW COURTS**

**ELC PETITION NO 19 OF 2019**

**IN THE MATTER OF : THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS AS ENSHRINED UNDER ARTICLES 1,10,19,20,21, 22 , 23, 24, 40, 47, 94, 95, 114, AND 259 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, NO.3 OF 2012**

**AND**

**IN THE MATTER OF: ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT**

**AND**

**IN THE MATTER OF: SECTION 9 , STANDARDS ACT**

**AND**

**IN THE MATTER OF: NOTICE ISSUED BY THE DIRECTOR GENERAL, NEMA DATED 19/03/2019**

**AND**

**IN THE MATTER OF: THE STATUTORY INSTRUMENTS ACT, NO. 23 OF 2013**

**AND**

**IN THE MATTER OF: NON-WOVEN PROPYLENE ( PPP) BAGS**

**AND**

**IN THE MATTER OF: ENFORCEMENT & INTERPRETATION OF THE CONSTITUTION**

**BETWEEN**

**KENAFRIC MANUFACTURERS LTD.....1<sup>ST</sup> PETITIONER**

**NES POLYPACK LIMITED.....2<sup>ND</sup> PATITIONER**

**ECO BAGS LIMITED (All suing as members of the Poly Propylene ( PPP)**

*Non-woven Manufactures Division of the Kenya*

*Association of Manufacturers).....3<sup>RD</sup> PETITIONER*

**=VERSUS=**

KENYA BUREAU OF STANDARDS.....1<sup>ST</sup> RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY..2<sup>ND</sup> RESPONDENT

HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT

### RULING

1. This Constitutional Petition was filed by three petitioners in their capacity as members of the Poly Propylene (PPP) Non-Woven Manufacturers Division of the Kenya Association of Manufacturers. The Petition was filed in the Constitutional and Human Rights Division of the High Court on 29<sup>th</sup> March 2019. The Petition was filed to contest a Notice published on 19<sup>th</sup> March 2019 by the 2<sup>nd</sup> Respondent which intended to stop further manufacture, importation, supply and use of non-woven bags in the Kenyan market with effect from 31<sup>st</sup> March 2019. This notice followed the ban of plastic bags vide Gazette Notice No.2334 and 2356.

2. The Notice followed concerns that manufacturers were making low grade non-woven bags after the plastic bags were banned . The petition and notice of motion were placed before justice Makau on the same day of filing. The Judge certified the petition as urgent and directed that it be served for directions on 4<sup>th</sup> April 2019. On 4<sup>th</sup> April 2019, the counsel for Petitioners, 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondent submitted that the petition be transferred to the Environment and Land Court.

3. When this matter was mentioned before me on 5<sup>th</sup> March 2019, the counsel for the 2<sup>nd</sup> Respondent indicated to the court that he had instructions to settle this matter. On 27<sup>th</sup> June 2019, counsel for the Petitioners indicated that there was a consent which had been drafted by counsel for the 2<sup>nd</sup> Respondent and that parties involved were looking at its terms. Subsequently the petitioners' counsel indicated to court that they were agreeable to all terms of the consent save for costs. The petitioners' counsel then asked court to be allowed to submit on costs.

4. The petitioners' counsel filed submissions dated 26<sup>th</sup> January 2021. The 2<sup>nd</sup> Respondent filed submissions dated 28<sup>th</sup> January 2021. I have considered the submissions filed by the parties herein . The only issue for determination is whether costs should be granted to the petitioners. In trying to persuade the court to grant costs, the petitioners' counsel submitted that they had to make a number of appearances in court; that they had to prepare a comprehensive petition and that the 2<sup>nd</sup> Respondent decided to settle the matter after going through their petition.

5. In trying to persuade the court not to grant costs , the counsel for the 2<sup>nd</sup> Respondent submitted that the 2<sup>nd</sup> Respondent did not file any response to the petition and that they indicated to court in time that they wished to settle the matter at an early stage . The 2<sup>nd</sup> Respondent's counsel also contends that this petition was filed as a public interest litigation which should not attract costs.

6. The issue of costs is founded on Section 27(1) of the Civil Procedure Act which provides as follows: -

***(1) 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 to give all necessary directions for the purposes aforesaid; and the fact that the court or judge 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 reason otherwise order”.***

7. Section 27(1) of the Civil Procedure Act has been the subject of many decisions. For instance in the case of **Supermarine Handling Services Limited Vs Kenya Revenue Authority (2010) eKLR** the Court of Appeal stated as follows:-

***“ Costs of any action, cause or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. Thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate court will interfere if it is satisfied that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute ‘good reason’ within the meaning of the rule”.***

8. In the instant case, this petition was filed for the benefit of the public interest. Plastic bags had been banned and manufacturers were allowed to make non-woven bags for use by the public. When the 2<sup>nd</sup> Respondent published notice in the press on 19<sup>th</sup> March 2019 banning manufacture and importation of non-woven bags, this petition was filed on 29<sup>th</sup> March 2019. The ban was to take effect on 31<sup>st</sup> March 2019 but when the matter was placed before the judge on 29<sup>th</sup> March 2019, the Judge certified it urgent and ordered that it be served for directions on 4<sup>th</sup> April 2019. On the 4<sup>th</sup> April 2019, the Judge gave a temporary injunction pending interpartes hearing.

9. There was no response filed in opposition to either the Notice of Motion or petition. The 2<sup>nd</sup> Respondent's Advocate indicated on 3<sup>rd</sup> June 2019 that he had instructions to settle the matter and indeed by 27<sup>th</sup> June 2019 , the petitioners' advocate indicated that they had received a draft consent which they were looking at . Th petitioners' advocate subsequently informed the court that they had agreed on all terms except for costs.

10. As section 27(1) of the Civil Procedure Act states, the issue of costs is at the discretion of the court. When the court exercises its discretion whether to allow costs or not, that discretion has to be exercised judiciously . In the instant case , the petition herein was filed for

public interest. The Respondent did not file any grounds of opposition or replying affidavit to either the Notice of Motion for conservatory orders or to the petition. The 2<sup>nd</sup> Respondent proceeded to have this matter settled out of court promptly. There were only mentions which were for purposes of adopting the consent which had been proposed by the 2<sup>nd</sup> Respondent.

11. There were other petitions and judicial review applications which had been filed by other petitioners who were members of the Kenya Manufacturers Association. These include **Judicial Review 16 of 2019 Mega Plastics (EA) VS NEMA & Others** , **Judicial Review 15 of 2019 Elogical Green Ltd Vs NEMA & Others** **Petition No. 24 of 2019 Peter Wanjohi t/a Nairobi Marketers Team Vs NEMA & Others** and **Petition No.17 of 2019 Importers and small Traders Association of Kenya ( IASTA) Vs NEMA**. All these Judicial Review Applications and Petitions were settled with no order as to costs.

12. Considering the fact that there was no opposition to the petition and that settlement was promptly reached and given that the court appearances were only meant to confirm the settlement, and further given that similar cases had been settled with no order as to costs, I find that it will be fair that there be no order as to costs regarding this Petition. I therefore decline to award any costs. This matter is therefore marked as settled with no order as to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29TH DAY OF APRIL 2021.**

**E.O.OBAGA**

**JUDGE**

In the Virtual Presence of :-

Mr Gichana for Mr Mogeni for Petitioners

Mr Gitonga for 2<sup>nd</sup> Respondent

Court Assistant: Okumu

**E.O.OBAGA**

**JUDGE**