



Nabwana (Suing as the Personal Representative of the Estate of Pascal Nabwana Wakoli) v County Government of Bungoma & 3 others (Constitutional Petition E007 of 2022) [2025] KEELC 4230 (KLR) (21 May 2025) (Judgment)

Neutral citation: [2025] KEELC 4230 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
CONSTITUTIONAL PETITION E007 OF 2022**

EC CHERONO, J

MAY 21, 2025

BETWEEN

GERALD NALIANYA NABWANA (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF PASCAL NABWANA WAKOLI) PETITIONER

AND

COUNTY GOVERNMENT OF BUNGOMA 1ST RESPONDENT

COUNTY LAND REGISTRAR OF BUNGOMA 2ND RESPONDENT

CABINET SECRETARY MINISTRY OF LANDS 3RD RESPONDENT

HON. ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

1. The petitioner instituted this petition dated 07/11/2022 against the Respondents seeking the following orders;
 - a. A declaration that the proprietary interest in the parcel land Kimilili/Kimilili/ which the Kimilili B Market stands together with the buildings and structures allocated for private individuals through a cartel of mayors, councillors and town clerks vests in the petitioner.
 - b. A declaration that the compulsory acquisition of land parcel no. Kimilili B Market (formally comprised in Kimilili/Kimilili/ and Kimilili/Kimilili/2XX8 and Kimilili/Kimilili/2XX1 to 2XX9 excessively without consent or compensation violated Section 75 of the Independence Constitution and Article 40 of the new *Constitution of Kenya, 2010*.



- c. An order of mandamus to compel the 1st to 4th Respondents to jointly and/or severally pay the estate of Pascal Nabwana Wakoli mesne profits for the loss of user for the Kimilili B Market measuring 5 plots and the entire parcel of land Kimilili/Kimilili/1.
 - d. A mandatory injunction directing the first respondent to immediately vacate or be evicted from the original land parcel No. Kimilili/Kimilili/1 therefrom in accordance with the law and should there be any resistance, the assistance of the Officer Commanding (OCS) Kimilili Police Station or other authorized officer be sought.
 - e. An order requiring 1st, 2nd, 3rd and 4th respondents to amend the registry index map on original land parcel no Kimilili/Kimilili/1 that was sub-divided into the following parcel of land no. Kimilili/Kimilili/2XX8 and Kimilili/Kimilili/2XX1 to 2949 and reinstate its boundary so that it confirms and reflects the correct original boundary as per the original map of the petitioner's land parcel no. Kimilili/Kimilili/1 as it exists in the prompt as per mutation form duly signed by the original owner of the land parcel no. Kimilili/Kimilili/1 by the name Pascal Nabwana Wakoli (now deceased and registered in his name within the particular period and be gazetted forthwith).
2. The 1st Respondent entered appearance through the firm of BS Advocates LLP and filed a Replying affidavit sworn by one Cleophas Waswa on 17/03/2023. The Hon. Attorney General through its Principal State Counsel Stafford Nyauma also entered appearance for the 2nd, 3rd and 4th respondents while one Nadi Mohamed Counsel with the National Land Commission entered Appearance for the interested party.
 3. When this matter came up for pre-trial conference, the petitioner sought to withdraw the entire petition with no order as to costs. Counsels representing the Respondents and the Interested party had no objection to the application for withdrawal of the petition but sought for costs. After failing to agree on costs, the parties agreed to canvass the issue by way of written submissions.
 4. The Petitioner filed submissions dated 24/02/2025 and cited the case of *Okoit & 2 Others v Attorney General & 14 Others* (Petition (Application) 2 (E002) OF 2021) [2023] KESC (KLR) (21 April 2023). He argued that the 2nd-4th Respondents were not entitled to costs as they have been responsible for delaying the progress of this petition by filing responses two years after service of the petition. He further argued that this being a Constitutional petition seeking to safeguard constitutional rights, it is in the interest of justice that each party bears their own costs. Lastly, it was argued that the petition was not frivolous nor a waste of judicial time but the withdrawal is aimed at protecting the estate of the deceased from a protracted litigation process as the cause of action arose way back in the year 1974 and the acquisition of some documents has been challenging. He submitted that if the court is inclined to award costs, it should cap the same at a reasonable minimum.
 5. The 1st Respondent filed their submissions dated 17/02/2025 in which they submitted that they filed a replying affidavit on 17/03/2023 in opposition to the petition and had similarly opposed an application by way of Notice of motion dated 21/11/2022 which was dismissed with costs by this court. Further, it was submitted that they had attended court on numerous dates and therefore incurred costs. They stated that the provisions of Section 27(1) of the *Civil Procedure Act* provides that costs are incidental to all suits and is a discretion of the court. They relied in the case of *Ocean Engineering Works v. SBM Bank of Kenya Limited Civil Appeal No. 112 of 2021*. They urged the court to award them costs.
 6. I have considered the application and rival submissions by the Respondents. Rule 27 of the Mutunga Rules is on withdrawal and/or discontinuance of Petitions and provides as follows: -



- (1) The Petitioner may-
 - (a) on notice to the court and to the respondent, apply to withdraw the petition; or
 - (b) with the leave of the court, discontinue the proceedings.
 - (2) The Court shall, after hearing the parties to the proceedings, decide on the matter and determine the juridical effects of that decision.
 - (3) Despite sub rule (2), the Court may, for reasons to be recorded, proceed with the hearing of a case petition in spite of the wish of the petitioner to withdraw or discontinue the proceedings.
7. On costs, Rule 26 of the Mutunga Rules states as follows: -
- (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.
8. Section 27 of the *Civil Procedure Act*, Cap. 21 of the Laws of Kenya 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:
 - (2) 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.
9. In Petition of Appeal No. 18 of 2019, Director of Public Prosecution -vs- Michael Sistu Mwaura Kamau & 4 others [2020] eKLR, the Learned Judges of the apex court defined Section 27 of *Civil Procedure Act* and in so doing so, made reference to its earlier decision in *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others* where it was observed as follows: -
- (18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation. (emphasis added).
 ... in the classic common law style, the Courts have to proceed on a case by case basis, to identify “good reasons” for such a departure. An examination of evolving practices on this question shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs ...



... Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

10. Since the award of costs is a discretionary power, what matters is that the same has to be exercised judicially and not whimsically. A party who moves the Court to make such an order for costs has an obligation to lay cogent basis by giving sufficient reasons why costs should be awarded to him. In determining an application for costs, a court is called upon to consider several factors including the conduct of the parties, the complexity of the matter, financial resources used and the time taken
11. As elsewhere in this Ruling, the petitioner instituted this petition dated 07/11/2022 against the Respondents and later filed an application by way of a Notice of Motion dated 21/11/2022, which was agreed to be canvassed written submissions and was ultimately dismissed in a ruling dated 14/06/2023. It is imperative to note that the Respondents neither filed responses to the application nor submitted any written submissions. Regarding the petition herein, only the 1st respondent filed a replying affidavit. Despite participating in these proceedings including taking directions to comply, the other Respondents and the interested party failed and/or neglected to file any response to the Petition.
12. It is also imperative to note that, despite this suit having been filed in 2022, it has never been set down for hearing. A perusal of the record reveals that the petition did not take off for hearing primarily because the 2nd, 3rd, and 4th respondents as well as the interested party failed to file any responses. This is despite having entered appearance and being represented by counsel in various court sessions. It is for this reason, among others, that the petitioner contends that he opted to withdraw the petition in order to save the estate of the deceased from a protracted litigation process. Notably, these parties have not provided any substantial reason for their omission, nor did they file submissions in support of their claim for costs.
13. I also take note that apart from filing their respective memorandums of appearance and the 1st Respondent filing its response to the petition, this matter has not been determined on its merits and although the period between the time this petition was filed and the time the application for withdrawal is made which is about 2 years, not much was done towards setting down the matter for hearing. In these circumstances, and to give effect to the principle of access to courts for justice under Article 48 of *the Constitution* and Rule 26(2) of the Mutunga Rules, it is my view that each party should bear their own costs.
14. In view of the foregoing reasons, I find that each party shall bear their own costs of this petition which has since been withdrawn by consent of the parties.
15. Orders accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 21ST DAY OF MAY, 2025.

HON.E.C CHERONO

ELC JUDGE

In the presence of;

M/S Namukuru H/B for Were for the Petitioner

M/S Aloo H/B for Mr. Wasilwa for the Respondents.

Bett C/A.

