



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC PETITION NO. 6 OF 2017

MAKUENI COUNTY ASSEMBLY.....PETITIONER/APPLICANT

VERSUS

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....1ST RESPONDENT

KENYA FOREST SERVICE.....2ND RESPONDENT

CEC MEMBER WATER, IRRIGATION

AND ENVIRONMENT GOVERNMENT OF

MAKUENI COUNTY.....3RD RESPONDENT

CABINET SECRETARY,

ENVIRONMENT AND NATURAL RESOURCES....4TH RESPONDENT

AND

MBOONI DEVELOPMENT GROUP.....1ST INTERESTED PARTY

MBOONI WEST SAW MILL LIMITED.....2ND INTERESTED PARTY

BASIKIKA NYAKIRARIO MORRIS

SAW MILL LIMITED.....3RD INTERESTED PARTY

KATENDE SAWMILL LIMITED.....4TH INTERESTED PARTY

KIKIMA TIMBER & HARDWARE.....5TH INTERESTED PARTY

FARM TECHNOLOGY

SOLUTIONS COMPANY LIMITED.....6TH INTERESTED PARTY

RULING

1. The application for determination is dated 10th December, 2019 filed by the Petitioner/Applicant under certificate of urgency on even date. It is brought under Article 50(1) of the Constitution, Sections 80 and 27(1) of the Civil Procedure Act, Order 45 Rules 1,2 and 3 of the Civil Procedure Rules as well as Rule 26(3) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

2. The Applicants seeks the following Orders:

i) Spent.

ii) Spent.

iii) THAT the judgment of this court delivered on 13th June, 2019 be reviewed to vacate the orders as to costs.

3. The application is supported by the affidavit of Robert M. Musyoka, the acting clerk of the Applicant, sworn on 10th December, 2019. The basis of the application is that by virtue of this Court's judgment delivered on 13th June, 2019 the Petitioner/Applicant was condemned to bear the costs of the suit. That thereafter, the Advocates for the 2nd to 6th Interested Parties filed a bill of costs against the Applicant and considerable progress had been made towards finalization of the taxation proceedings. The affiant deposes that the petition was couched as public interest litigation on behalf of the residents of Mbooni South in Makueni County for the sake of protection of South Mbooni Forest. That the petition was necessitated by acts of logging in the forest which had threatened to bring destruction to a catchment area depended on by the community. That the petition was not filed for purposes of private gain. That the law discourages the award of costs in matters of public interest litigation with particular reference to "Rule 26(3) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rule, 2013". That the Petitioner/Applicant being condemned to bear costs is likely to diminish future public interest litigation and therefore it is in the interest of justice and fairness that the application be allowed.

4. The application is opposed vide the affidavit of Joseph Musau Ndavi in his capacity as the Director of the 4th Interested Party. The affiant also opposes the application on behalf of the 2nd to 6th Interested Parties. He deposes therein that the general rule as to costs is provided under Section 27 of the Civil Procedure Act. That among the considerations the Court takes into account is the conduct of the parties, the subject of litigation, the circumstances leading to the institution and termination of the proceedings, the relationship of the parties and whether there had been attempts towards reconciliation. That in this Court's judgment delivered on 13th June, 2019, the findings were that the petition was hopelessly defective in form and substance and that it was therefore liable to be struck out with costs. That the subject of the petition was Kivale Forest which is not recognized in law. The only legally recognized forest is South Mbooni Forest which is not an indigenous forest but rather a plantation forest established for commercial purposes. Thus, the petition was rightly dismissed for being hopelessly frivolous and vexatious.

5. The Petitioner/Applicant filed submissions dated 26th February, 2021 in support of the application. They went on to submit on the meaning of public interest as defined in the ***Black's Law Dictionary, 9th Edition*** and the role of public interest litigation in our legal system as set out in the case of **Mumo Matemu –Vs- Trusted Society of Human Rights Alliance and 5 others [2014] eKLR**. The Applicant reiterated the fact that the filing of the petition was prompted by logging at the South Mbooni Forest in order to determine the legality of the exercise thereof for the benefit of residents of Mbooni South, Makueni County. The Petitioner further submitted at length on the rationale for awarding costs in constitutional petitions and why the court has deviated from the conventional principle that costs must follow the event. On this submission, the Petitioner Applicant relies on the following sets of authorities: -

i) Brian Asin & 2 others –Vs- Wafula W. Chebukati & 9 others [2017] eKLR; and

ii) Kenya Human Rights Commission & another –Vs- Attorney General & 6 others [2019] eKLR.

6. The 2nd – 6th Interested Parties also filed submissions dated 11th December, 2020. In opposition, the Interested Parties submit that costs of the suit should follow the event as outlined under Section 27 of the Civil Procedure Act. It is submitted further that this Court exercised its discretion correctly in awarding costs against the Petitioner/Applicant because this Court found the petition to be defective in both form and substance and thus not within the ambit of public interest litigation. They rely on two sets of authorities: -

i) Cecilia Karuru Ngayu –Vs- Barclays Bank of Kenya & another [2016] eKLR; and

ii) Brian Asin & 2 others –Vs- Wafula W. Chebukati & 9 others [2017] eKLR.

7. I have perused the parties' respective pleadings and submissions. I have also acquainted myself with the provisions of Rule 26 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and I did not encounter Rule 26(3). I must again denounce this level of oversight. That being said, the only issue arising for determination is whether the Petitioner/Applicant has presented sufficient grounds to warrant a review of the order as to costs in the judgment dated 13th June, 2019.

8. To adequately answer the above question, I have relooked at the facts upon which the petition was based. It is not in doubt that the petition was premised upon Articles 22 and 258 of the Constitution which allow every person the right to institute court proceedings claiming that a fundamental freedom in the Bill of Rights has been denied, violated or threatened. The test that the Petitioner/Applicant must overcome is to be found in the discourse by the Supreme Court in the case of **Mumo Matemu –Vs- Trusted Society of Human Rights Alliance and 5 others [2014] eKLR** where the essence of public interest litigation was explained as follows: -

“Public Interest Litigation plays a transformational role in society. It allows various issues affecting the various spheres of society to be presented for litigation. This was the Constitution’s aim in enlarging locus standi in human rights and constitutional litigation. Locus standi has a close nexus to the right of access to justice. In instances where claims in the interest of the public are threatened by administrative action to the detriment of constitutional interpretation and application, the Court has discretion on a case by case basis, to evaluate the terms and public nature of the matter vis a vis the status of the parties before it. The discretion is drawn from the command of Article 259(1) to interpret the Constitution in a manner that promotes its values and purposes, advances the rule of law, human rights and fundamental freedoms, permits the development of the law and contributes to good governance.”

9. Guided by the reasoning of my learned brother Justice M. Mativo in **Brian Asin & 2 others -Vs- Wafula W. Chebukati & 9 others [2017] eKLR**, this Court is required to examine whether the Petitioner/Applicant’s intention in bringing the suit was *bona fide* and devoid of extraneous motives, desires for personal gain, private profit or political or other oblique considerations. To this end, I am certain that Petitioner/Applicant filed this petition in its representative capacity on behalf of the people of Mbooni South, Makueni County. That is self-evident from the preamble to the petition. The alleged infringements to the Constitution were that contrary to Articles 42 and 69, the Respondents had allowed unlicensed, uncontrolled and unmonitored logging activities at Kivale Forest causing deforestation and exposing the community to the risk of untold water shortage and other weather hazards.

10. Save for the fact that I had adjudged the Petitioner/Applicant to have presented the petition without having first verified the identity of the subject matter of the petition i.e. South Mbooni Forest, I appreciate that there was a far-sight intention and effort to conserve the said resource for the benefit of the community. That being said, I find merit in the Petitioner/Applicant’s Notice of Motion dated 10th December, 2019 and I allow the same in terms of prayer number three (3). For the avoidance of doubt, the taxation proceedings before the Taxing Officer are hereby terminated with no orders to costs.

11. It is so ordered.

SIGNED, DATED AND DELIVERED AT MAKUENI VIA EMAIL THIS 30TH DAY OF JUNE, 2021.

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MBOGO C.G.

JUDGE

Court Assistant: Mr. Kwemboi