



**Luka v Narok Bursaries Management Board & 6 others; Narok
County Assembly (Interested Party) (Constitutional Petition
E016 of 2023) [2024] KEHC 2523 (KLR) (13 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2523 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CONSTITUTIONAL PETITION E016 OF 2023
F GIKONYO, J
MARCH 13, 2024**

BETWEEN

JIMMY PARNYUMBE LUKA PETITIONER

AND

NAROK BURSARIES MANAGEMENT BOARD 1ST RESPONDENT

**WARD BURSARIES COMMITTEES, NAROK COUNTY GOVERNMENT 2ND
RESPONDENT**

**COUNTY EXECUTIVE COMMITTEE MEMBER IN CHARGE, FINANCE &
ECONOMIC PLANNING NAROK COUNTY 3RD RESPONDENT**

NAROK COUNTY GOVERNMENT 4TH RESPONDENT

GOVERNOR, NAROK COUNTY GOVERNMENT 5TH RESPONDENT

ETHICS & ANTI CORRUPTION COMMISSION 6TH RESPONDENT

ATTORNEY GENERAL 7TH RESPONDENT

AND

THE NAROK COUNTY ASSEMBLY INTERESTED PARTY

RULING

Withdrawal or Discontinuance of Petition

1. The petitioner filed a notice of withdrawal dated 01/02/2024 wholly withdrawing this petition.



2. The Petition sought to be withdrawn principally challenged the constitutionality of section 12 of the Narok County Bursary Fund Act, the office of the 1st, 2nd, and 3rd respondents as currently constituted, and the bursary award process.
3. When the matter came up for directions on 22/02/2024, Ms Njihia informed the court that the petitioner had filed a notice of withdrawal of the petition. She submitted that the 1st and 2nd respondents are not opposed to the withdrawal with no orders as to costs. Ms Lyonah holding brief for Maina for the 3rd, 4th, and 5th respondents stated that they do not object to the withdrawal with no order as to costs.

Analysis and Determination.

4. This court has considered the pleadings, and the oral submissions by parties herein as well as the notice of withdrawal of petition.

Issues

5. The single issue for determination is: -
 - i. Whether the court should permit withdrawal of the petition.
6. Withdrawal or discontinuance of constitutional Petitions in Kenya is provided for under Rule 27 of [*the Constitution*](#) of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013- commonly known as ‘the Mutunga Rules’.
7. Rule 27 provides as follows: -
 27.
 - (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.

A kind of legislative malady

8. But, before I delve into the propriety or otherwise of the notice to withdraw the petition, it is worth of mention that, the rule appears to make a distinction between ‘withdrawal’ and ‘discontinuance’, the former is by notice to the court and the respondent, whereas, the latter is by leave of the court. ‘Withdrawal’ relates to ‘the petition’ whilst ‘discontinuance’ relates to ‘the proceedings’. Questions of practical as well as jurisprudential importance may arise out of the manner the rule is formulated, to wit;
 - i) whether there is any or the purport of the difference between the two terminologies and motions; and
 - ii) whether, parties are left to choose which motion to invoke or there is a particular characterization of cases which determines the appropriate motion.



9. These questions are not idle; they portray real practical issues that may arise under the rule. Which, calls for reconsideration of the rule for amendment to remove the seeming confusion.
10. These issues notwithstanding, the general consensus is that whatever motion applied- withdrawal or discontinuance- the court must give leave.

Essence of the rule explained

11. The essence of Rule 27 was explained in *Harry John Paul Arigi & 2 others v Board, Kenya Ports Authority & 2 others* where the Court had the following to say: -

Rule 27 (1) (a) allows a petitioner who wishes to withdraw a petition to apply to withdraw the same after giving notice of his intention to both the court and the respondent. Clearly under that provision, the withdrawal of the petition is not automatic and is not achieved merely by notice. Under 27(1)(b) the petitioner can also discontinue the proceedings, but after obtaining the leave of the court. If there ever was any doubt from rule 27(1) that the leave of the Court is required before a constitutional petition may be withdrawn, Rule 27(2) puts the matter beyond dispute by stating that the court shall decide on the matter “after hearing the parties to the proceedings”. The role of the court in the withdrawal of a constitution petition is reinforced by Rule 27(3), whose effect is that notwithstanding the petitioner’s wish to withdraw the petition or to discontinue the proceedings, the court may for reasons to be recorded, still proceed to hear and determine the petition. (emphasis added).

12. The Learned Judges of Appeal went on to add that: -

We are satisfied that the right of a petitioner to withdraw a constitutional petition is circumscribed by rule 27; that rule 27 like all the other rules enshrined in the 2013 rules, is constitutionally underpinned and is not a mere technicality; and that the rule is justified granted the public significance of an application alleging violation of the Bill of Rights, literally the heart of *the Constitution*. To the extent that the withdrawal of constitutional petitions is regulated by a specific regime that is traceable directly to the provisions of *the Constitution*, the appellants were obliged to comply with rule 27 before they could competently withdraw the petition. The duty of a party to follow a specifically prescribed procedure has been emphasized by this Court time and again, for example in *Speaker of The National Assembly v. Karume* (2008) KLR (ep) 425, *Kones v. Republic & Another Ex Parte Wanyoike & 4 Others* (2008) 3 KLR (EP) 291 and *Mutanga Tea & Coffee Company Ltd v. Shikara Ltd & Another*, Ca No 54 of 2014. (emphasis added).

Of public interest litigation

13. Much judicial ink has been spilt on the doctrine of public interest litigation.
14. The High Court at Mombasa in *Petition No. E017 of 2022 Ngoro Kayuga & Another vs. Mike Sonko Mbuvi Gideon Kioko & Others* stated as follows: -
 24. According to Black's Law Dictionary¹ ‘Public Interest Litigation’ means a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected.



25. In Public Interest Litigation, unlike traditional dispute resolution mechanism, there is no determination or adjudication of individual rights. The proceedings in a Public Interest Litigation are intended to vindicate and effectuate the public interest by prevention of violation of the rights, constitutional or statutory or sizeable segments of the society while owing to poverty, ignorance, social and economically disadvantages cannot themselves assert and quite often not even aware of those rights.
15. In Petition 429 of 2017 Brian Asin & 2 others v Wafula W. Chebukati & 9 others [2017] eKLR the Court adopted the definition of PIL in the Black's Law Dictionary.
16. The Indian Supreme Court in Ashok Kumar Pandey vs. State of West Bengal writ Petition 199 of 2003 pronounced itself on the matter of PIL by stating thus: -

Public interest litigation is a weapon which has to be used with great care and circumspection and the Judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest, and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armoury of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. As indicated above, Court must be careful to see that a body of persons or member of public, who approaches the court is acting bona fides and not for personal gain or private motive or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique considerations. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives. Often they are actuated by a desire to win notoriety or cheap popularity. The Petitions of such busy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs.

The legal threshold

17. The jurisprudence coming through is that public interest litigation is not a party's private suit which he may withdraw or discontinue at whims. Any withdrawal or discontinuance of such proceedings as constitutional petitions, must be sanctioned by a Court. The requirement of leave of the court also protects public interest litigation from abuse by parties for ulterior or personal motives. For instance, Odunga JA always states that some parties file public interest litigation with the sole aim of having them dismissed, thereby blocking any other litigation on the subject on the basis of res judicata or the doctrine of functus officio. Others file public litigation cases for personal gain or to settle scores. And, the list could be long.
18. The threshold, therefore is that, public litigation should not be withdrawn for ulterior motive or for personal gain or upon collusion between the parties. And, presence of the ills stated above, the court should consider proceeding with the hearing of the public litigation.
19. Having laid the guiding principles in withdrawal applications, this Court will now apply them to the instant Petition.
20. As stated above, the Petition mainly challenges the constitutionality of section 12 of the Narok County Bursary Fund Act, how the office of the 1st, 2nd, and 3rd respondents is currently constituted, and the bursary award process. These are serious constitutional issues.
21. However, there is nothing which compels the court to proceed with the hearing of the petition.



22. In addition, there is nothing which shows that the petitioner was motivated by any ulterior motive or personal gain in the filing as well as withdrawal of the petition. There is also no evidence of any collusion amongst the parties in the withdrawal of the petition or to defeat public interest.
23. The respondents do not also have nay objection to the withdrawal of the petition.
 1. The juridical effect of the withdrawal of the petition is that there is no determination of the issues in the petition on merit, which is not a bar to future litigation or action on the subject through such proper mediums including the court. Any party interested or desirous of litigating the issues is at liberty to file a petition or any other action as it may deem necessary.
 2. In the upshot, the court grants leave to the withdrawal of, and the petition is hereby marked as withdrawn with no order as to costs.
 3. Orders accordingly.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 13TH DAY OF MARCH, 2024.

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Hon. F. Gikonyo M.

Judge

In the presence of:

C/A – Mr. Otolu

M/s Njikia for M/s Maritim for 1st and 2nd Respondent – Present

M/s Lyona for Maina for 3rd, 4th & 5th Respondent – Present

M/s Lyona holding brief for M/s Leonida for Interested Party - Present

