



REPUBLIC OF KENYA



**Ratemo v Senate (Petition 001 of 2024) [2024] KEHC 3915 (KLR) (22 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3915 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA**

**PETITION 001 OF 2024**

**WA OKWANY, J**

**APRIL 22, 2024**

**BETWEEN**

**JARED MAIRURURA RATEMO ..... PETITIONER**

**AND**

**THE SENATE ..... RESPONDENT**

**RULING**

**Introduction**

1. Jared Mairurura Ratemo, the Petitioner in the original case, being Machakos HC CHR Pet. No. 006 of 2024 (hereinafter “the Machakos Petition”) filed the petition on 20<sup>th</sup> March 2024 seeking the following orders: -
  - a. A Declaration be and is hereby issued that the removal of Hon. Dr. Robert Onsare Monda; the Deputy Governor from the office of Deputy Governor of Kisii County Government, the decision of the Respondent on 14/03/2024 is illegal, unconstitutional, null and void.
  - b. An order of Certiorari be and is hereby issued quashing the resolution passed by the 2<sup>nd</sup> Respondent on 29/02/2024 and the Resolution passed by Respondent on 14/03/2024 purporting to remove Hon. Dr. Robert Onsare Monda; the Deputy Governor from the office of Deputy Governor of Kisii County Government and all consequential orders and gazette notices issues pursuant to the said Resolutions.
  - c. An Order of Prohibition prohibiting the Respondent either by itself, its servants, agents, agencies, employees and or any person or entity acting on their behalf or under their authority from acting upon or effecting any decision arising from the resolutions of the Respondents and/or the impeachment Hon. Dr. Robert Onsare Monda and or publishing, gazetting and/ or circulating a notice appointing any person to the office or replacing Hon. Dr. Robert Onsare Monda as the Deputy Governor of Kisii County Government pursuant to Article 183 of [the Constitution](#).



2. Concurrently with the petition, the Petitioner filed an application seeking the following orders: -
  1. Spent.
  2. That this Honourable Court be pleased to issue a conservatory order staying the Resolution passed by the Respondent on 14/03/2024 to remove Hon. Dr. Robert Onsare Monda; the Deputy Governor from the office of Deputy Governor of Kisii County Government and all consequential orders and gazette notices issued pursuant to the said Resolution dated 14/03/2024 pending the determination of this Application inter parties.
  3. That this Honourable Court be pleased to issue a conservatory order restraining the Respondents either by themselves, servants, agents, agencies, employees and or any person or entity acting on their behalf or under their authority from acting upon or effecting any decision arising from the resolutions of the Respondent made on the 14th March 2024 and/or the impeachment of Hon. Dr. Robert Onsare Monda and or publishing, gazetting and/or circulating a notice appointing any person to the office or replacing Hon. Dr. Robert Onsare Monda as the Deputy Governor of Kisii County Government pursuant to Article 183 of *the Constitution* pending the determination of this Application inter parties.
  4. That this Honourable Court be pleased to issue an order certifying that the Application and the Petition raises weighty and serious constitutional issues that requires the Chief Justice to constitution a constitutional bench of three Judges for determination.
  5. That this Honourable Court be pleased to issue a conservatory order staying the Resolution passed by the Respondent made on 14/03/2024 to remove Hon. Dr. Robert Onsare Monda; the Deputy Governor from the office of the Deputy Governor of Kisii County Government and all consequential orders and gazette notices issued pursuant to the said Resolution pending the determination of this Petition.
  6. That this Honourable Court be pleased to issue a conservatory order restraining the Respondents either by themselves, servants, agents, agencies, employees and or any person or entity acting on their behalf or under their authority from upon or effecting any decision arising from the resolutions of the Respondents and/or the impeachment Hon. Dr. Robert Onsare Monda and/or publishing, gazetting and/or circulating a notice appointing any person to the office or replacing Hon. Dr. Robert Onsare Monda as the Deputy Governor of Kisii County Government pursuant to Article 182 of *the Constitution* pending the determination of this Petition.
  7. That this Honourable Court be pleased to issue any other and/or further orders at the discretion of the court in the interest of justice.
  8. That cost be provided for.
3. On the same date of filing, the High Court at Machakos considered the Petitioner's application and issued the following orders: -
  1. That the Notice of Motion Application dated 20<sup>th</sup> March 2024 raises serious and weighty issues and is therefore certified urgent.
  2. That the court notes that the issues raised in this petition touch on Matters which occurred in the Senate, (the respondent herein) and by extension at Kisii County Assembly and it would be inappropriate to have this Matter heard at Machakos High Court.



3. That this matter be mentioned before Honorable Justice Eric Ogola – Principal Judge (High Court) at Milimani Commercial Court on 10<sup>th</sup> April 2024 for further directions.
  4. That in order to preserve the status quo and to allow the petitioner ventilate the issues raised in this petition no gazetteement is to be issued declaring the seat of DG – Kisii County vacant until the next mention date.
  5. The petitioner is directed to serve the respondent within the next three days and upon service the Respondent is granted seven (7) days to file their response to the said petition.
4. The Machakos Petition was thereafter transferred to the High Court Commercial & Tax Division where it was assigned Petition No. 003 of 2024.
  5. On 28<sup>th</sup> March 2024, the Petitioner filed a Notice of Withdrawal of suit wherein he gave notice that he had withdrawn the whole suit and all the attendant orders.
  6. When the Petition came up for mention before the Principal Judge in Nairobi on 4<sup>th</sup> April 2024, Mr. Muli, Advocate for the Petitioner informed the court that the Petitioner had filed his notice of withdrawal of suit. He urged the court to endorse the withdrawal.
  7. Ms. Kariuki Owesi advocate, then acting for the Petitioner, informed the court that she was neither aware of the withdrawal of suit nor the Notice of Change of the Petitioner’s Advocates.
  8. Ms. Opola, Advocate for the Respondent conceded to the withdrawal and confirmed that the Respondent had not filed any response to the Petition and Application.
  9. Mr. Theuri, Mr. Mwenda, Ms. Waweru and Mr. Gichigo, Advocates for intended Interested Parties, supported the withdrawal of the Petition and indicated that they will not be pursuing their respective Applications for joinder.
  10. The Principal Judge, issued the following orders after hearing submissions by Counsel over the issue of the withdrawal of the Petition: -
    1. That the interim conservatory orders herein are extended to 12/4/2024.
    2. That the following petitions shall be consolidated and heard together to save judicial time: -
      - i. This Petition Nairobi COMM. PET. E003/2024.
      - ii. Kisii PET. E003/2024.
      - iii. Kisii PET. E004/2024
      - iv. Nairobi PET. E159/2024.
    3. That to avoid the hostility of the County of origin all these petitions shall henceforth be heard and determined by Hon. Lady Justice Wilfrida Okwany, the Presiding Judge of the Nyamira High Court.
    4. That the Presiding Judge shall call for all the files in Kisii to Nyamira and make appropriate directions.
    5. That the matter will be mentioned before the Presiding Judge in Nyamira on 12/4/2024 for further directions.
    6. That for the foregoing orders the date herein earlier issued for mention before me on 10/4/2024 Is overtaken by events and is vacated.



7. When the matter came up for mention before me on 12<sup>th</sup> April 2024, the issue of whether the Petitioner had changed Advocates and withdrawn his Petition arose.
8. After hearing rival submissions from the Counsel claiming to have been instructed by the Petitioner and upon noting that the Petitioner presented himself in court, in person, and informed this court that he had changed Counsel and withdrawn his Petition, this court rendered a ruling in which it found that the law firm of Munyalo Muli Advocates was properly on record for the Petitioner. The matter was thereafter listed for further mention on 16<sup>th</sup> April 2024 for directions.
9. When the matter came up for mention on 16<sup>th</sup> April 2024 parties addressed this court on the issue of the Notice of Withdrawal of Suit.
10. This ruling is therefore in respect to the issue of whether or not the Notice of Withdrawal of suit filed by the Petitioner on 28<sup>th</sup> March 2024 should be endorsed and adopted as an order of this court.
11. Mr. Muli, acting for the Petitioner submitted that the “Machakos Petition” should be marked as withdrawn as the Respondent (Senate) was not opposed to the withdrawal.
12. Mr. Wambulwa, appearing for the Senate, did not oppose the withdrawal. He however asked for costs. He argued that no prejudice will be suffered by any party in view of the fact that there are four (4) other cases over the same subject of impeachment of the Kisii County Deputy Governor (DG).
13. Mr. Ochieng Oginga, advocate for the proposed 3<sup>rd</sup> and 4<sup>th</sup> Respondents cited the decision by the three bench Judge in Dock Workers Union & Another v AG and Others [2019] eKLR where it was held that once a Petitioner withdraws the Petition he/she walks away with all the pleadings. He added that it will be an exercise in futility to be enjoined in a Petition that has been withdrawn. He urged the court to endorse the withdrawal of suit in order to save on judicial time.
14. Mr. Ndegwa Njiru, Advocate for an intended Respondent supported the withdrawal of suit. He cited the decision in Priscilla Nyambura Njue v Geochem Middle East Ltd [2021] eKLR for the argument that every petition should have an initiator such that if the Petitioner withdraws his suit, nothing stops any other party from filing a separate suit.
15. He added that a party’s right to withdraw his suit under Order 25 of the Civil Procedure Rules cannot be taken away from him. It was submitted that the mere fact that a case is of public interest does not mean that it cannot be withdrawn.
16. Mr. Mutuma, also acting for an intended Respondent, supported the withdrawal and submitted that the Petition cannot stand once the Petitioner withdraws his affidavit in support of the Petition. He noted that no member of the public had applied to be enjoined in the suit to substitute the Petitioner. He emphasized that a party is at liberty to withdraw his suit at any stage of the proceedings either partially or wholly.
17. Mr. Theuri, Advocate for an intended Respondent supported the withdrawal and urged the court to consider the juridical effect of the Notice of Withdrawal. He argued that the withdrawal will advance public interest in view of the fact that there are 4 other Petitions over the same subject matter. He urged the court to consider the use of judicial time so as to avoid various proxy litigations that are intended to abuse the court process.
18. Mr. Ochoki, appearing for an intended Interested Party (Kisii Deputy Governor), opposed the withdrawal of the Petition and submitted that the Petitioner does own a Petition filed in public interest. He argued that even where a Notice of Withdrawal is filed, the court still has to sanction the withdrawal. It was submitted that the Petition transcends the Petitioner’s personal boundaries.



19. Mr. Katwa Kigen, acting alongside Mr. Ochoki, submitted that Rule 27 (1) (a) and 27 (3) of the Mutunga Rules requires that an application be made to withdraw a Petition. He disputed the argument that a Petitioner in a Constitutional Petition walks away with all the pleadings and maintained that the Petition outlives the Petitioner. He cited the decision in Peter K. Muchoka & 6 others vs the P. S. & 2 Others [2012] eKLR for the argument that no legitimate reason had been advanced for the withdrawal.
20. I have carefully considered the extensive arguments made by the Advocates for the parties over the subject of the withdrawal of the Machakos Petition.
21. Withdrawal of constitutional Petitions in Kenya is provided for under *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 commonly known as ‘the Mutunga Rules’. Rule 27 of the said Rules 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.
22. Decisions or procedures on withdrawal of ordinary suits under Order 25 of the Civil Procedure Rules are not helpful where the matter involves the withdrawal of a Constitutional Petition. This is the position that was taken by the Court of Appeal in Harry John Paul Arigi & 2 others vs. Board, Kenya Ports Authority & 2 others [2016] eKLR where the Court held as follows on the essence of Rule 27 of the Mutunga Rules : -

“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).

23. 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 *Mutunga Tea & Coffee Company Ltd v. Shikara Ltd & Another*, Ca No 54 of 2014. (emphasis added).

24. The next issue for consideration is whether the Petitioner herein complied with the provisions of Rule 27 of the Mutunga Rules when seeking to withdraw the instant petition. Parties opposed to the withdrawal argued that the Petitioner was, under Rule 27 of the Mutunga Rules, required to file a formal application for withdrawal explaining the reasons for such withdrawal. The Petitioner however maintained that he had complied with all the requirements for withdrawal.
25. My understanding of Rule 27 is that it does not provide for the filing of a formal application or an explanation/reason for the withdrawal. All that a Petitioner is required to do is to notify the court and the respondent of the intention to withdraw the petition and to apply to withdraw the Petition. I note that not only did the Petitioner file his Notice of Withdrawal of Suit on 28<sup>th</sup> March 2024 and serve the same on the Respondent, but that his counsel also applied, orally, to be allowed to withdraw the Petition on 4<sup>th</sup> April 2024, 12<sup>th</sup> April 2024 and 16<sup>th</sup> April 2024 when the matter came up for directions. I further note that all the parties to this petition and related petitions including those who intended to be enjoined in the suit were granted an opportunity to extensively submit on the Petitioner's application to withdraw the Petition. I find that, having exhaustively heard the arguments for and against the withdrawal of the Petition, it will be pointless to once again require the Petitioner to file an application to withdraw the Petition. It is my finding that the Petitioner herein complied with the provisions of Rule 27 of the Mutunga Rules.
26. The decision in *Harry John Paul Arigi* case (supra) is clear on the the role of the Court in withdrawal of Constitutional Petitions and posits that such withdrawal must be sanctioned by the Court. Arguments were advanced to the effect that the public interest involved in Constitutional Petitions requires the Constitutional Court to satisfy itself that the withdrawal of a petition will not go against the public interest. What then is Public Interest Litigation (PIL)?
27. The doctrine of public interest litigation was discussed in *Mombasa High Court Petition No. E017 of 2022 Ngoro Kayuga & Another vs. Mike Sonko Mbuvi Gideon Kioko & Others* where the court held that:-
  24. According to Black's Law Dictionary<sup>1</sup> '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."



28. In Ashok Kumar Pandey vs. State of West Bengal writ Petition 199 of 2003 the Indian Supreme Court pronounced itself as follows on the matter of PIL: -

“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.”

29. The jurisprudence that emerges from the above cited cases is that public interest litigation is not a party's private suit which he may withdraw or discontinue as he wishes. This means that any withdrawal or discontinuance of proceedings that are PIL in nature must be sanctioned by a Court. The requirement for the leave of the court serves to protect public interest litigation from abuse by parties for ulterior or personal motives. In this regard, courts have noted that there are instances where some parties file public interest litigation with the sole aim of having them dismissed, thereby blocking any other litigation on the same subject under the doctrines of res judicata or functus officio. Other litigants file public litigation cases for personal gain or to settle scores.
30. Courts will therefore consider proceeding with the hearing of PIL matters where it is shown that the withdrawal is actuated by ulterior motive or for personal gain or upon collusion between the parties.
31. I will now turn to apply the above jurisprudence to the present case and consider if this petition can be classified as a Public Interest Litigation and if leave may be issued for its withdrawal.
32. Parties opposed the withdrawal of the Petition argued that since the instant Petition was a PIL, it did not belong to the Petitioner alone but to the public who, they alleged, had a stake in its outcome. They maintained that the Petition could still continue in the absence of the Petitioner.
33. Parties supporting the withdrawal of the Petition, on their part, were of the contrary view. They argued that once the Petitioner withdraws the Petition, it marks the end of the case as he would be walking away with all his pleadings.
34. The instant Petition primarily challenges the manner in which the impeachment proceedings against the Kisii County Deputy Governor were conducted before the Senate. The Petitioner contends that the said impeachment was conducted in a manner that violated various Articles of *the Constitution*.
35. This court is of the view that Petitions challenging the impeachment of a Governor, or Deputy Governor for that matter, can potentially be classified as public interest litigations especially if, as in the present case, they raise concerns about the constitutionality of the impeachment process or if they highlight broader public interest issues related to governance, accountability, or protection of democratic principles.



36. This court is aware that besides this Petition, there are at least four (4) other Constitutional Petitions, also challenging the same impeachment of the Kisii County Deputy Governor, a fact which was not disputed by the parties herein.
37. It did not also escape the attention of this court that besides this Petition, originally filed by Mr. Jared Mairurura in Machakos High court as HCCHRPET. No. E006/2024, there is yet another identical Petition, filed by a different Petitioner, Purity Moraa Kirera, before the same Machakos High Court being HCCHRPET. No. E007/2024. The said Petition has also been transferred to this court for hearing and determination. It is worthy to note that some of the parties to this case have questioned the circumstances under which the two petitions were transferred to this court.
38. This court is at a loss as to why matters which clearly arose from the impeachment of the Deputy Governor of Kisii County were filed in a far-flung court in Machakos County. In my humble view, the sheer number of cases that have, so far, been filed by different petitioners following the impeachment of the Kisii County Governor, coupled with the fact that some of those petitions were filed in far-flung courts away from Kisii County lend credence to the claim, by some of the parties supporting the withdrawal, that this Petition, even though clothed as a public interest litigation, could be a classic case of proxy litigants out to abuse the court process.
39. This court cannot help but read mischief in this Petition more so in view of the fact that no sooner had the Petitioner obtained ex parte orders than he quickly filed a notice to withdraw the petition. The conduct of the Petitioner herein leaves a lot to be desired and does not portray him as a litigant who was genuinely out to seek redress for a public wrong. For these reasons, I do not believe that it will serve the interest of justice to sustain or give life a petition that was clearly filed under suspicious circumstances and in utter disregard to the doctrines of sub judice and jurisdiction.
40. Having found that there are at least four (4) other Petitions over the same issue of impeachment of the Kisii County Deputy Governor, I find that sustaining the instant petition, in the face of its withdrawal by the initiator, will not serve any useful purpose. 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 more so considering the existence of at least four other similar petitions which are yet to be heard and determined. I am of the view that any party interested or desirous of litigating the issues of impeachment of the Kisii County Deputy Governor is at liberty to apply to be enjoined in any of the four remaining Petitions or file a fresh petition or take any other action as it may deem necessary.
41. In the upshot, I endorse the Notice of Withdrawal of Suit filed by the Petitioner on 28<sup>th</sup> March 2024 and grant him leave to withdraw his Petition in the original Machakos HCCHRPET. No. E006/2024. The said petition is hereby marked as withdrawn with no orders as to costs.
42. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIDE MICROSOFT TEAMS THIS 22<sup>ND</sup> DAY OF APRIL 2024.**

**W. A. OKWANY**

**JUDGE**

