



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gikenyi & 3 others v Attorney General & 2 others; Koskei & 2 others (Interested Parties) (Petition E014 of 2024) [2024] KEHC 9814 (KLR) (24 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9814 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
PETITION E014 OF 2024**

**PN GICHOHI, J**

**JULY 24, 2024**

**IN THE MATTER OF: THE CONSTITUTIONAL VALIDITY OF SECTIONS 8(3),8(5),8(6)(A),8(8),12A(1),12A(2),12A(4) AND 12A(8), NATIONAL GOVERNMENT COORDINATION ACT [CAP. 127,LAWS OF KENYA, AS AMENDED BY NATIONAL GOVERNMENT ADMINISTRATION (AMENDMENT) ACT, 2024]**

**IN THE MATTER OF: ARTICLES 1,2,3(1),**

**0,21,22,23,24,25,27,28,47,48,50(1),52,53,54,55,56,57,73,74,75(1),93,94,95,129,130,131,132,135,152(1),153,155,156,159,162(1),**

**(3)(A,B AND D)(I-III),230,232(1 AND 2), 233(1),234(1 AND 2),**

**236, 248, 249 (1 AND 2), 253,258(1AND2(C))259(1) AND 260.**

**IN THE MATTER OF: ALLEGED VIOLATIONS OF OR THREATS OF VIOLATIONS OF RIGHTS OR FUNDAMENTAL FREEDONS IN THE BILL OF RIGHTS UNDER ARTICLES 19,20,21,24,25,28,47,48,52,53,54,55,56 AND 57 OF THE CONSTITUTION OF KENYA.**

**IN THE MATTER OF: ALLEGED VIOLATIONS OF OR THREATS**

**OF VIOLATIONS OF ARTICLES 1,2(1,2,4 AND 6),3,6,10,73,**

**74,75(1),93,94,95,129,130,131,132,152(1),153,155,156,159,230,232, 234,**

**236, 248, 249, 259 AND 260 OF THE CONSTITUTION OF KENYA.**

**IN THE MATTER OF: IN THE MATTER OF RULE 4,10,11,13 OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL FREEDOMS) – HIGH COURT PRACTICE AND PROCEDURE RULES 2013)**

**IN THE MATTER OF: DOCTRINES OF BILL OF RIGHTS,  
CONSTITUTIONALISM, RULE OF LAW AND LEGITIMATE EXPECTATIONS**

**BETWEEN**

**DR MAGARE – GIKENYI B ..... 1<sup>ST</sup> PETITIONER**

**ELIUD KARANJA MATINDI ..... 2<sup>ND</sup> PETITIONER**

**BLAIR ANGIMA OIGORO ..... 3<sup>RD</sup> PETITIONER**

**OKIYA OMTATAH OKOITI ..... 4<sup>TH</sup> PETITIONER**



AND

HON ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT  
PUBLIC SERVICE COMMISSION ..... 2<sup>ND</sup> RESPONDENT  
SALARIES AND REMUNERATION COMMISSION ..... 3<sup>RD</sup> RESPONDENT

AND

FELIX K KOSKEI ..... INTERESTED PARTY  
KATIBA INSTITUTE ..... INTERESTED PARTY  
LAW SOCIETY OF KENYA ..... INTERESTED PARTY

RULING

1. The background of this ruling is that under a Certificate of Urgency, the Petitioners herein moved this Court by Notice of Motion and Petition dated 29<sup>th</sup> May 2024 on the constitutional validity of Section 8(3) , 8 (5) , 8 (6) ,8 (8), 12A (1) , 12A (2) 12A (4) and 12A (8) of *National Government Coordination Act* (CAP 127 Laws of Kenya) as enacted by the *National Government Administration Laws (Amendment ) Act* , 2024.
2. The Petitioners therefore seeks A Declaration That:- Section 8(3) , 8 (5) , 8 (6) ,8 (8), 12A (1) , 12A (2) 12A (4) and 12A (8) of *National Government Coordination Act* (CAP 127 Laws of Kenya) are unconstitutional, null and void.
3. Further, they seek that upon making the that declaration, the Court does issue an Order:
  - a. Voiding Sections 8(3) , 8 (5) , 8 (6) ,8 (8), 12A (1) , 12A (2) 12A (4) and 12A (8) of *National Government Coordination Act* (CAP 127 Laws of Kenya)
  - b. That the Court be pleased to issue an order of judicial review by way of Certiorari, quashing the purported appointment of the 1<sup>st</sup> Interested party Mr. Felix K. Koskei or any other person as chief of staff and head of civil service.
  - c. That the court be pleased to issue an order of judicial review by way of Prohibition, prohibiting the Respondents from appointing and/or purporting to make any appointments in regard to the positions of chief administrative secretary (CAS) and /or chief of staff and head of civil service.
  - d. That Pursuant to order (b) above, the court is pleased to issue an order of Certiorari, quashing the appointments to the position of chief administrative secretary (CAS) which may occur during the hearing and determination of the petition.
  - e. That any other order or/and modification of the petitioner’s prayers which this honourable court may deem fit so as to achieve objects of justice for majority of Kenyans as a whole.
  - f. That this being a public interest petition filed in defence of the *Constitution* , ordering each party herein to meet their costs.
4. Therefore , in the Notice of Motion, the Petitioners sought conservatory orders pending hearing and determination of the petition.



5. In its orders published on 30<sup>th</sup> June 2024, this Court certified the matter as not being urgent and directed that it be served for directions on 24<sup>th</sup> June 2024.
6. It was after those directions that the Petitioners filed a Notice of withdrawal of the petition and wrote a letter dated 6<sup>th</sup> June 2024 and filed on even date requesting for a date for confirmation of withdrawal of the Petition.
7. When the matter came for directions as scheduled, the 1<sup>st</sup> Petitioner confirmed having filed a Notice of withdrawal of Petition and prayed that the petition and application be marked as withdrawn and closed . He urged that there be no orders as to costs as the parties had not filed any response. That was supported by Mr. Matindi for the 2<sup>nd</sup> Petitioner .
8. That withdrawal was opposed by Mr. James Oduor Advocate for the 1<sup>st</sup> Interested Party on the grounds that once Constitutional Petition is filed, the Petitioner ceases control of the matter. Citing Rule 27 of Mutunga Rules, Counsel submitted that the Petitioner cannot file a Petition and then withdraw it.
9. Counsel argued that it was after the court declined to grant the conservatory orders, that the Petitioner filed a Notice of Withdrawal thus taking the law into their own hands and trying to take away control by court.
10. Citing Rule 27 of Mutunga Rules, Counsel submitted that the Petitioner cannot do so as this court is yet to subject to judicial scrutiny as to why the petition is being withdrawn. That reasons have to be given for withdrawal.
11. It was submitted that the reason for withdrawal as per that Notice is that the Petitioners wished to amend the petition and add more parties. Counsel submitted that though a petition can be amended, there is a mischief in this case in that instead of amending the petition, the Petitioners filed another petition in Kisii being Petition No.E007 of 2024 which Petition is word for word as this Petition and seeking similar orders and which the 1<sup>st</sup> Interested Party has objected to as it was filed when this petition was still pending before this Court.
12. Counsel submitted that filing a similar petition while this petition is still pending is an abuse of this court process, an attempt at forum shopping hoping to get conservatory orders which they failed to get from this court.
13. It was further submitted under Rule 8 of Mutunga Rules, a Petitioner ought to file a Constitutional Petition in that place where the alleged constitutional violation occurred but, in this case, the Petitioners filed in Nakuru, failed to get orders and went to file in Kisii.
14. Counsel submitted that the issues raised in this petition are very grave and therefore, if they wish to amend the petition, they should do so in this petition. In support of that issue Counsel cited the decision *Regim Industrial designing and Industrial Design and Research v Lagoon Ltd* [2015] eKLR, and submitted that the Court has power to stop such abuse.
15. While relying on the case of *Peter Musali Musyoka & 19 others v PS Ministry of Energy & 14 others* [2014] eKLR, Counsel submitted that the court ought to consider public interest in the matter and disallow such withdrawal in the circumstances herein where the court has given directions at certificate stage and therefore, they cannot purport to file another in Kisii.
16. Counsel further relied on *TWH v KJH & 2 others* [2023] KEAHC page 1607 on the proposition that public interest litigation should be taken seriously as it can be riddled with malice as is the case here.



17. Lastly, Counsel urged this court to take cognizance of Rules 2 and 4 of Mutunga Rules and find that the filing of Kisii matter was to defeat objectives of a constitutional petition.
18. Mr Murakaru for the 3<sup>rd</sup> Respondent was in support of submissions by Counsel for the 1<sup>st</sup> Interested party and had nothing else to add.
19. Though not a party in this matter, Mr. Sore Advocate for the National Assembly filed a Notice of Appointment in this matter on and submitted that withdrawal of this petition would compromise the petition in Kisii where the National Assembly was a party and which petition was pending ruling. He urged the court to consider the act of filing the 2<sup>nd</sup> petition in Kisii when this petition has not been withdrawn as an abused of court.
20. In response, Dr. Magare (1<sup>st</sup> Petitioner) urged the court to disregard the submissions by Mr. Sore as his client was not a party to this petition. Further he termed it as untrue the submissions that the Petitioners filed a similar petition as untrue as the number of Petitioners there is different. That the number of sections violated in the petition before this court are nine (9) while those in Kisii Petition are thirteen (13).
21. He submitted that there is no law that a constitutional petition should be filed in Nairobi and argued that any High Court in the country can hear and determine the petitions.
22. On forum shopping, he submitted that it is not forum shopping for one to a constitutional petition outside Nairobi.
23. He further submitted that one can opt to amend or withdraw a petition and neither of the two options is superior to the other and therefore the Petitioners herein opted to withdraw. Terming the objections as not on point of law, he urged the court to disregard the objection herein.
24. In addition to submissions by the 1<sup>st</sup> Petitioner, Mr Matindi submitted that the Nakuru Petition has been filed as a Public Interest matter but the Petitioners opted to withdraw it so as to better our pleadings and add more parties.
25. Counsel questioned the objection herein arguing that the parties in the Nakuru Petition had not been served with any pleadings. He submitted that when they filed the Notice of Withdrawal dated 30/5/2024, we filed the Kisii Court Petition No. E007 of 2024 which and that it was pending Ruling .
26. Citing the decision in *TWW v KJH & 2 others* [2023] KEHC 1607(KLR) , it was his submissions that the issue of Public Interest does not arise as it will be championed by Kisii petition.
27. On forum shopping, counsel submitted that the violations included in the Nakuru case were violation of the Constitution of Kenya which has force throughout the country and there is nothing to show that they filed this petition on personal issues or motive.
28. He urged the Court to allow withdrawal of this petition for purposes of expeditious finalisation of the petition in Kisii and that justice will be done.
29. In a rejoinder, Mr Oduol submitted that Rule 27 (1) (a) of Mutunga Rules allows a Petitioner to withdraw the Petition with Notice to other parties and under Rule 27 (1)(b) of the Rules, leave must be sought. That the court must hear the parties on the issue and then decide.
30. Arguing that the Mutunga Rules have not been declared unconstitutional by any court, he submitted that it would be a serious abuse of court process if this court allows the Petitioners to withdraw the Petition. His concern was whether the Petitioners would have moved to Kisii if this court had granted conservatory orders sought by the Petitioners.



## Determination

31. After hearing the parties herein, the issue for determination is simply whether the Petitioners should be allowed to withdraw this petition in the circumstances herein.
32. A public interest litigation cannot be treated as an ordinary case where a party can choose to withdraw at will. Even if it were any other case, the party must give notice of such withdraw and the withdrawal has to be adopted by the court for it to have any legal effect on the matter and on the other party in those proceedings.
33. There is no dispute that this is a public interest petition and that the Petitioners herein filed another public interest petition in High Court Kisii being Petition No. E 007 of 2024 while this Petition was still pending.
34. While it is a fact that the Petitioners filed a Notice of Withdrawal, it had not been sanctioned by this Court. It is apparent that aware of the need for such sanction, the Petitioner wrote a letter to the Deputy Registrar of this Court seeking a date to confirm the withdrawal. It is circumstances in which the petition in Kisii was that gave the impression to the other parties herein as having not been done in good faith.
35. While the Court will not dwell on the motive behind the said action or any other issue that may prejudice any of the parties, The *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 (commonly referred to as Mutunga Rules) are still in force should a party wish to withdraw a petition. That Rule provides that :-
  - (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. [Emphasis added]
36. The Petitioners' reasons for withdrawal had not been served on the Respondents and the Interested Parties and therefore, their spirited effort to give such reasons at the point of the objection raised by the 1<sup>st</sup> Interested Party may not suffice. The withdrawal should be after hearing the parties on the proceedings.
37. In conclusion therefore, this Court has not heard the parties on the proceedings and therefore the Petitioners are disallowed to withdraw this petition at this point.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 24<sup>TH</sup> DAY OF JULY, 2024.**

**PATRICIA GICHOHI**

**JUDGE**

In the presence of

Dr. Magare - Petitioner in person



Ms Nyambura Shirirka for 1<sup>st</sup> Respondent

Mr. Ongoso for 2<sup>nd</sup> Respondent

Mr. Murakaru Wahome for 3<sup>rd</sup> Respondent

Mr. Ochieng Oduor & Mr. Kevin Ouma for 1<sup>st</sup> Interested Party

Mr. Sore for National Assembly

Ruto Court- Assistant

