



**Musaina v General & another; Salaries and Remuneration Commission & 3 others (Interested Parties) (Petition E019 of 2023) [2024] KEHC 8239 (KLR) (10 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8239 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
PETITION E019 OF 2023**

**HM NYAGA, J**

**JULY 10, 2024**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND  
FUNDAMENTAL FREEDOMS UNDER ARTICLES 27,30,35,40,41(2)  
(A), & (B), ARTICLE 43(1) (C) ,ARTICLE 46; AND ARTICLE 50(1),  
2(A),(B),(D),(G) AND (K) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS  
UNDER ARTICLES 10(2) (B) AND (C); 201(A), (D) AND (E);  
205(1) AND (2); 232 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS  
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013) AND  
IN THE MATTER OF THE NATIONAL SOCIAL SECURITY FUND ACT NO. 45 OF 2013**

**AND**

**IN THE MATTER OF NATIONAL SOCIAL SECURITY  
FUND CAP 258 OF THE LAWS OF KENYA (REPEALED)**

**AND**

**IN THE MATTER OF RETIREMENT BENEFITS ACT NO. 3 OF 1997**

**BETWEEN**

**GODFREY MUSAINA ..... PETITIONER**

**AND**

**HON. ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**THE NATIONAL SOCIAL SECURITY FUND BOARD OF  
TRUSTEES ..... 2<sup>ND</sup> RESPONDENT**



**AND**

**SALARIES AND REMUNERATION COMMISSION ..... INTERESTED PARTY**  
**COMPETITION AUTHORITY OF KENYA ..... INTERESTED PARTY**  
**FEDERATION OF KENYA EMPLOYERS ..... INTERESTED PARTY**  
**CENTRAL ORGANIZATION OF TRADE UNIONS ..... INTERESTED PARTY**

**RULING**

1. The Petitioner through Okubasu & Munene Advocates commenced these proceedings by way of a petition dated 4<sup>th</sup> September, 2023 filed in court on 7<sup>th</sup> September, 2023 wherein he prays for –
  - a. A declaration to issue that Section 3, 13, 19(2), 20, 21 and 23 of the National Social Security Fund Act 2013 are inconsistent with Articles 10(1)(b) and (c), 21(1), 47(1), 230(4), 232(1), 27, 36, 41, 32, 33, 40 & 43 of the Constitution and are null and void.
  - b. That a declaration do issue and is hereby issued restraining the 2<sup>nd</sup> Respondent, by themselves, their servants, agents, assigns or any person claiming through them or otherwise that deduction of six per centum (6%) from the salary, wages or earnings of the employees and requiring the employer's contribution of six per centum (6%) of the employee's pensionable earnings and remitting the same to the National Government in terms of the National Social Security Fund Act, 2013.
  - c. Such other, further, additional, incidental and/or alternative reliefs or remedies as the Honourable Court may deem just and expedient.
  - d. Costs of this Petition.
2. The petition is said to be anchored on Articles 19(2) & (3), 20(2), 22(1), 258(1), 2(1) & (2), 10, 23, 27, 40, 47, 50 & 165 of the Constitution.
3. The petition is accompanied with a supporting affidavit sworn by the Petitioner on even date with several annexures thereto.
4. Contemporaneously with the Petition, the petitioner filed a Notice of Motion dated 4<sup>th</sup> September, 2023 seeking conservatory order suspending the implementation of Sections 3, 13, 19(2), 20, 21 and 23 of the National Social Security Fund Act, 2013 and for costs of the Application.
5. Upon service, the 2<sup>nd</sup> Respondent entered appearance through the firm of P. K. Mbabu & Co. Advocates and in opposition to the petition swore a replying affidavit through its Managing Trustee one David Koros on 9<sup>th</sup> October, 2023.
6. Concurrently, the 2<sup>nd</sup> Respondent filed a Notice of Motion Application dated 9<sup>th</sup> October, 2023 seeking for Orders: -
  - a. That the Honourable Court be pleased to issue an order striking out the Petitioner's Petition and the accompanying Application for being a gross abuse of the court process.
  - b. That in the alternative to prayer (1) above, the Honourable Court be pleased to issue an order staying proceedings herein pending the hearing and determination of Supreme Court Petition No. E004 of 2023 as consolidated with Petition No. E002 of 2023.



- c. That Costs of this Application and of the Petition be borne by the Petitioner.
7. The above application is supported by the affidavit of the said Deponent, David Koros sworn on even date.
  8. All the other parties save for the 1<sup>st</sup> Respondent and the 1<sup>st</sup> interested party did not enter Appearance.
  9. Pursuant to this Court's orders issued on 18<sup>th</sup> October, 2023, the 2<sup>nd</sup> Respondent duly filed its submissions to the Application dated 9<sup>th</sup> October, 2023.
  10. On 28<sup>th</sup> February, 2024, the Petitioner's Counsel prayed that in view of the decision of the Supreme Court in Petition No. 2 of 2023, this matter be marked as settled with no orders as to costs.
  11. The 2<sup>nd</sup> Respondent had no objection save for the issue of costs. He submitted that this petition is an abuse of the court process since the petitioner was well aware of the pending case before the Supreme Court, but still filed the same. He submitted that the 2<sup>nd</sup> Respondent has incurred costs to defend the petition and prayed that it be awarded costs.
  12. In a brief rejoinder, the Petitioner Counsel submitted that this is public interest litigation and the same ought not to be discouraged by costs.
  13. The court thereafter marked the matter as withdrawn and directed parties to file submissions on the issue of costs.
  14. Only the 2<sup>nd</sup> Respondent's submissions are on record.
  15. The 2<sup>nd</sup> Respondent submitted the basic rule on attribution of costs under Section 27 of the Act is that costs follow the event unless for some good reason the Court orders otherwise. It further argued that the Court has discretion in deciding to award the same. To bolster this position, the 2<sup>nd</sup> Respondent referred this court to the Supreme Court case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR cited with approval the holding of Odunga J. (as he then was) in the case of *Joseph Oduor Anode v. Kenya Red Cross Society, Nairobi High Court Civil Suit No. 66 of 2009*; [2012] eKLR.
  16. The 2<sup>nd</sup> Respondent posited that whereas Courts are reluctant to award costs in public interest litigation, it is not the law that in all public interest litigation costs must never be awarded but the Court should consider the circumstances of each case in deciding one way or another. In support of this proposition, the 2<sup>nd</sup> Respondent relied on the case of *Real Deals Limited & 6 others vs Kenya National Highways Authority & another* [2017] eKLR, where the Court held as follows:

'It therefore follows that the fact that a matter amounts to litigation in the public interest may be a factor that may be properly considered by the Court in the award of costs. It is however not the law that in all public interest litigation cost must never be awarded. Everything depends on the circumstances of each case and the Court's own appraisal of the various factors that went into the determination of the matter.'
  17. The 2<sup>nd</sup> Respondent argued that considering the circumstances of this case warrants an award of costs in its favor since the Petitioner filed this Petition while aware of the pending Petition before the Supreme Court which involved similar issues as the issues raised herein, and was aware that there was a good chance the Supreme Court reversing the Judgment of the Court of Appeal thus effectively rendering this Petition otiose. The 2<sup>nd</sup> Respondent posited that the Petitioner therefore ought to have waited for the Supreme Court's decision before filing this petition or apply to be a party to the Appeal in the Supreme Court instead of instituting this petition.



18. The 2<sup>nd</sup> Respondent also urged this court to note that despite filing an application seeking to strike out the petition on account of the pending proceedings before the Supreme Court, the Petitioner still insisted on proceeding with the same.
19. It was their submission that this Petition is a classic case of gross abuse of the court process as it has resulted into a multiplicity of suits involving the same issues. To support this position, the 2<sup>nd</sup> Respondent relied on the cases of *Satya Bhama Gandhi vs Director of Public Prosecutions & 3 Others* [2018] eKLR; *Ephraim Miano Thamaini vs Nancy Wanjiru Wangai & 2 Others* [2022] eKLR.
20. In light of the above, the 2<sup>nd</sup> Respondent prayed that they be awarded costs.

### **Analysis & Determination**

21. The only issue that arises for determination is whether the 2<sup>nd</sup> Respondent is entitled to costs.
22. The general rule with regard to costs is found in Section 27 of the *Civil Procedure Act* which 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 give all the necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers;

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 direct.”

23. In *Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant vs Ihururu Dairy Farmers Co-operative Society Ltd* Judicial Review application no 6 of 2014 court held as follows: -

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”

24. Costs are at the discretion of the court, yet, follow the event. See the *Halsbury’s Laws of England*; 4<sup>th</sup> Edition (Re-issue), {2010}, Vol.10. para 16;

“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice.”



25. See also writing by Justice (Retired) Kuloba Judicial Hints on Civil Procedure, 2<sup>nd</sup> Edition, ( Nairobi) Law Africa) 2011, page 94 that: -

“Costs are {awarded at} the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise...”

26. “Good reasons” that justifies departure from the general rule that ‘costs follow the event’ will vary from case to case. See the Supreme Court of Kenya in the case of Jasbir Singh Rai & Others vs Tarlochan Rai & Others {2014} eKLR observed that:

“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.....”

27. The petitioner submitted that the nature of the matter being a public litigation case it should not attract costs.

28. The Black’s Law Dictionary 9<sup>th</sup> Edition defines public interest as:

“...the general welfare of the public that warrants recognition and protection, something in which the public as a whole has stakes, especially that justifies Governmental regulation”. In litigating on matters of “general public importance”, an understanding of what amounts to ‘public’ or ‘public interest’ is necessary. “Public” is thus defined: concerning all members of the community; relating to or concerning people as a whole; or all members of a community; of the state; relating to or involving government and governmental agencies; rather than private corporations or industry; belonging to the community as a whole, and administered through its representatives in government, e.g. public land.”

29. In the case of Mumo Matemu vs Trusted Society of Human Rights Alliance and 5 others [2014] eKLR the Supreme Court explained the essence of public interest litigation thus;

“Public Interest Litigation plays a transformative 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. This 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”.

30. In the case of Brian Asin & 2 others vs Wafula W. Chebukati & 9 others [2017] eKLR the issue as to whether public interest litigation should attract costs was determined as follows:

60. The Public Interest Litigation was designed to serve the purpose of protecting rights of the public at large through vigilant action by public spirited persons and swift justice. But the



profound need of this tool has been plagued with misuses by persons who file Public Interest Litigations just for the publicity and those with vested political interests. The courts therefore, need to keep a check on the cases being filed and ensure the bona fide interest of the petitioners and the nature of the cause of action, in order to avoid unnecessary litigations. Vexatious and mischievous litigation must be identified and struck down so that the objectives of Public Interest Litigation aren't violated. *The constitution* envisages the judiciary as "a bastion of rights and justice..."

63. The question is whether the proceedings before me are frivolous or vexatious bearing in mind that it is the duty of the court to see whether the petitioner who approaches the court has a bona fide intention and not a motive for personal gain, private profit or political or other oblique considerations."
31. In *Feisal Hassan & 2 others vs Public Service Board of Marsabit County & another* [2016] eKLR it was held that:
  - "3. In constitutional litigation, the principle of access to the court must, consistently with the public importance and interest in the observance and enforcement of the Bill of Rights in *the Constitution*, override the general principle that costs follow the event, unless it can be shown that the petition was wholly frivolous, or that petitioner was guilty of abuse of the constitutional court process by say filing a constitutional petition on matters that do not raise purely constitutional issues and which properly belonged to other competent courts or tribunals, and which should, therefore, have been filed and competently disposed of by those other courts or tribunals. However, a petitioner for constitutional enforcement need not present a case that must succeed and it cannot therefore, be taken against him that his petition is eventually lost if it otherwise meets the public interest criteria. Although developed in the realm of protection and enforcement of rights and fundamental freedoms, the principle applies with the same force in general constitutional litigation for interpretation and enforcement of *the Constitution*. Indeed, the rights of access to court under Article 22 and 258 of *the Constitution* for the enforcement, respectively, of the Bill of Rights and the other parts of *the Constitution* are in the same terms."
32. In *Republic vs Independent Electoral and Boundaries Commission & 2 Others Ex-parte Alinoor Derow Abdullahi & Others* (2017) eKLR, Odunga J. summarized some of the factors to consider on whether or not to award costs in a public litigation case as follows:
  - "In determining the issue of costs, the Court is entitled to look at inter alia the conduct of the parties, the subject of litigation, the circumstances which led to the institution of the legal proceedings, the events which eventually led to their termination, the stage at which the proceedings were terminated, the manner in which they were terminated, the relationship between the parties and the need to promote reconciliation amongst the disputing parties pursuant to Article 159(2)(c) of *the Constitution*. In other words, the court may not only consider the conduct of the party in the actual litigation, but the matters which led up to litigation, the eventual termination thereof and the likely consequences of the order for costs. See *Hussein Janmohamed & Sons vs. Twentsche Overseas Trading Co. Ltd* [1967] EA 287 and *Mulla* (12<sup>th</sup>Edn) P. 150."
33. The principles which emerge from the above authorities are that public interest cases are in the interest of the public and not the petitioner, and a petitioner in a clear case of public interest ought not to be



- condemned to pay costs. The petitioner must however establish that the case was not frivolous or an abuse of the process of the court.
34. The Application to withdraw this petition was made after the 2<sup>nd</sup> Respondent had taken the trouble to defend this matter. It had filed response and application seeking to strike out the Petitioner's Application for being a gross abuse of the court process. Even after this was brought forth the petitioner sought to proceed with the matter.
  35. Ideally the petition herein and one filed before Supreme Court i.e. Petition No. 2 of 2023 & E004/2023 touched on the same subject matter. The petitioner herein was challenging the constitutionality of Sections 3, 13, 19(2), 20, 21 and 23 of the *National Social Security Fund Act* 2013 while the genesis of the issues before the Supreme Court revolved around the constitutionality of Sections 13, 17(6)(b), 18(4), 19(2), 20 and 21 of the *National Social Security Fund Act* 2013.
  36. The Petition herein has been withdrawn on the account of the outcome of the Supreme Court decision. The Petitioner herein did not dispute having knowledge of the Supreme Court matters before instituting the petition herein.
  37. In the circumstances, I find that filing of the petition in respect of the same subject matter in which the matter in issue was directly and substantially in Supreme Court Petition No. 2 of 2023 & E004/2023 pending before a court of competent jurisdiction was clearly an abuse of the court process.
  38. In the premises, I find the 2<sup>nd</sup> Respondent is entitled to costs.
  39. The petition is accordingly marked as withdrawn with costs to the 2<sup>nd</sup> respondent. There will be no orders as to costs as between the petitioner and the first respondent who did not appear in the matter.
  40. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 10<sup>TH</sup> DAY OF JULY, 2024.**

**H. M. NYAGA,**

**JUDGE.**

**In the presence of;**

C/A Jeniffer

Mr. Musyoka for Okubasu for Petitioner

Mr. Muuo for Mrs. Mbaabu for 2<sup>nd</sup> Respondent

