



Spart Freight Logistics Limited v Commissioner General Kenya Revenue Authority & another; Bidco Africa Limited & 2 others (Interested Parties) (Petition E157 of 2021) [2023] KEHC 2005 (KLR) (Constitutional and Human Rights) (21 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2005 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E157 OF 2021
HI ONG'UDI, J
MARCH 21, 2023**

BETWEEN

SPART FREIGHT LOGISTICS LIMITED PETITIONER

AND

**COMMISSIONER GENERAL KENYA REVENUE AUTHORITY 1ST
RESPONDENT**

THE HONOURABLE ATTORNEY GENERAL 2ND RESPONDENT

AND

BIDCO AFRICA LIMITED INTERESTED PARTY

KEFAH ONCHIRI TORA INTERESTED PARTY

BORNFACE WAMBUA KIOKO INTERESTED PARTY

RULING

1. The subject of this Ruling is the Notice Of Withdrawal Of Petition dated May 4, 2022. It states:

Take notice that the Petitioner herein hereby withdraws the Petition dated 28th April 2021 in its entirety, with no order as to costs.

Dated at Nairobi this 4th day of May, 2022

(signed)

Csa Advocates Llp



Advocates For The Petitioner

2. The 1st and 2nd Respondents, 2nd and 3rd Interested Parties are not opposed to the Notice to withdraw the Petition. It is only the 1st Interested Party who has opposed it.
3. In its grounds of opposition dated May 17, 2022 the 1st Interested Party states that the application is incompetent, fatally defective, frivolous and an abuse of the Court process. Further that it's not in compliance with Rule 27 of the "Mutunga Rules" and does not disclose any reasonable cause of action to merit the application. That the Court is yet to hear the case to determine whether it has a public interest.
4. In her long and detailed replying affidavit Joyce Katile on behalf of the 1st Interested Party averred giving details of the 1st Interested Party's interaction with Hanlink Investment Limited (Hanlink) and the role Hanlink played in this matter (JK 001 page 1 – 16). Also brought on board was the Petitioner and Blitz Logistics Limited (Blitz). That the 1st Interested Party was now dealing with the three sister companies and clearly set out the role played by the Petitioner. Entries of the shipment would be made and later the 1st Respondent issued a Tax Investigations Findings Report dated March 10, 2020 in respect of eight (8) entries. The same was responded to vide a detailed report submitted on May 27, 2021 JK-001 pages 58 – 282.
5. She averred that since the 1st Interested Party was compliant and under section 147 of the *East Africa Community Customs Management Act* it is the Petitioner to bear liability of the payment of any duties as if it were the owner of the goods. There was therefore a Principal – Agent relationship. She adds that the Petitioner has admitted liability in the matter and the 1st Interested Party should not be crucified for this. And that any fraud or negligence by the Petitioner and the 1st Respondent's officials should not be placed on the 1st Interested Party.

Parties submissions

6. The Petitioner/Applicant's submissions are dated February 24, 2023 and filed by Bwogo Manoti & Chepng'eno associates. Counsel submitted that the issue before this court was and is still a tax controversy and / or dispute for which there is a statutory forum mandated to adjudicate over it. The petitioner denies filing the petition blaming the filing on the 3rd Interested Party who did it secretly. He explains how the 3rd Interested Party was to clear a consignment through Blitz and Hanlink. That the 3rd Interested Party used his account to receive money from the 1st Interested Party and that the Petitioner and 2nd Interested Party were never involved. All relevant material has been forwarded to the 1st respondent.
7. Referring to the case of Joseph Okumu v Standard Chartered Bank HCCC No. 899 of 1994 and Mercy Nduta Mwangi t/a Mwangi Keng'ara & Co. Advocates vs. Invesco Assurance Co. Limited [2019] eKLR counsel submitted that the Petition is scandalous, frivolous, vexatious and an abuse of the Court process and is bent on frustrating and/or blocking the 1st Respondent's mandate of investigating suspected tax evasion on the 1st Interested Party's business.
8. The 2nd limb of his submission is that there are other avenues and/or forums for determining the real issues herein. In support he cited; (i) *John Harun Mwau v Peter Gastrow & 3 others* [2014] eKLR (ii) *Uhuru Muigai Kenyatta vs. Nairobi Star Publications Limited* (2013) eKLR (iii) *Republic vs National Environmental Authority* [2011] eKLR.
9. The 1st Interested Party filed submissions dated March 8, 2023 through the firm of Triple ok Law LLP. Counsel while referring to Rule 27 of the "Mutunga Rules" submitted that the same had not been



adhered to by the Petitioner in filing the Notice of withdrawal. He cited *Harry John Paul Arigi & 2 others v Board Kenya Ports Authority & 2 others* [2016] eKLR where the Court of Appeal held 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.”

10. To further buttress this point counsel referred to *Speaker of the National Assembly V. Karume* [2008] eKLR (E.P) 425; (ii) *Stephen Mbugua Mwangiru vs. Chief Land Registrar & 4 others; Rosemary W. Njau & 2 others (Interested Parties)* [2019] eKLR.
11. On whether the Petitioner has satisfied the legal test for withdrawal of a constitutional petition counsel submitted that;
 - i. the withdrawal should not amount to an abuse of the process of the Court. See *Bejing Industrial Designing Research Institute vs. Lagoon Development Limited* CA No. 1 of 2015,
 - ii. Public interest in the matter should be recognized and the withdrawal should not have adverse juridical effects to the public interest in the matter. *Peter Makau Musyoka and 19 others (suing on their own behalf and on behalf of the Mui Coal Basin Local Community) v Permanent Secretary Ministry of Energy*.
12. Counsel pointed out that there were contradictions on the actual standing of Wambua Kioko (3rd Interested Party) followed by the allegation that the petition was filed by the 3rd Interested Party and not the petitioner. There was therefore “perjury” he argues, as stated in *James Mulinge vs. Freight Winop Limited & 3 others* [2016] eKLR.
13. Counsel urged the Court not to allow withdrawal of the petition since the matters raised therein extended beyond the petitioner’s interests and encompasses wider considerations relating to importation, taxation, social justice and the overall economy. Further that the Petitioners Notice of Withdrawal is a blatant abuse of the Court’s process. That under Article 23(1) this Court is not precluded from adjudicating on matters perjury if they are related to a petition before it: He therefore opposed the Notice of withdrawal.

Analysis and determination

14. I have carefully considered the Notice of Withdrawal of the Petition, responses, both submissions and I find the main issues falling for determination to be as follows:
 - i. Whether the petitioner complied with Rule 27 of the “Mutunga Rules”
 - ii. Whether the Notice for Withdrawal of the petition is merited.

Issue No. (i). Whether the petitioner complied with Rule 27 of the “Mutunga Rules”

15. The petition herein dated April 29, 2021 was filed by the firm of HMS Advocates LLP. A Notice of change of advocates dated February 21, 2022 was later on filed by Mr Madowo of CSA advocates LLP. The Notice of Withdrawal of Petition dated 4th May 2022 was filed CSA Advocates LLP, pursuant to Rule 27(1) (a) of the Protection of Rights & Fundamental Freedoms) Practice and Procedure Rules 2013 (Mutunga Rules).



16. The said Rule 27(1) provides as follows:
- (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.”
17. The 1st Interested party has challenged the Notice of Withdrawal of the Petition saying there was no compliance with Rule 27. Relying on the case of Harry John Arigi (*supra*) counsel argued that it was not enough for the applicants to just file a Notice of Withdrawal.
18. My understanding of Rule 27(1) is that a party wishing to withdraw or discontinue a constitutional Petition must issue a Notice to the Court and to the respondent/respondents. (ii) On issuing the Notice to apply to withdraw the petition or (iii) On issuing the Notice and with the leave of the Court, discontinue the proceedings.
19. In this case a Notice to withdraw was issued to the Court and the other parties. However no application to withdraw or discontinue the Petition was filed. But that was not all. There is still the other alternative limb of the requirement. With the notice served and with the leave of the Court one may discontinue the proceedings.
20. Besides the service of the Notice, the Petitioner did not make a formal application seeking leave to withdraw the application. The following is what transpired: On May 30, 2022 when this matter was mentioned and in the presence of the parties, Mr. Lemiso for the 1st respondent notified the Court that C.S.A advocates for the Petitioner had filed a Notice of Withdrawal of the Petition dated May 4, 2022. The 1st Interested Party who had been served opposed the said Notice by filing grounds of opposition. In view of the objection raised to the Notice by the 1st Interested Party this Court fixed the matter for hearing on the said issue for July 25, 2022. The same did not proceed as the Court was away on official duty. On February 16, 2023 the Court directed parties to file submissions in respect of the said Notice. This was complied with. Despite the wording of the Notice failed herein there is no way a Constitutional Petition can be withdrawn without the leave of the Court. Even where parties have consented the withdrawal must be with the leave/approval of the Court. In other words the fact that the petitioner did not formally request for leave or file a formal application to withdraw under Rule 27 is not reason to dismiss the Notice. To my mind the Notice in itself is an application and request for leave. In this case those opposed to the withdrawal were given an opportunity to respond upon service of the Notice and time to file submissions. I therefore do not agree with the 1st Interested Party that Rule 27 was not adhered to by the Petitioner.

Issue No. (ii). Whether the Notice for Withdrawal of the petition is merited.

21. From the material placed before this Court and inasmuch as the respondents, 2nd and 3rd interested parties have no objection to the intended withdrawal there is a serious contention between the petitioner and the 1st interested party. It will not be prudent to discuss the issues in this Ruling as they go to the root of the petition. It is the petitioner who sued the 1st Interested Party unlike the 2nd and



3rd interested parties who applied to be enjoined as parties. It would not be in the interest of justice to have this matter withdrawn and another suit arising from the facts filed soon thereafter, by the 1st Interested Party.

22. The best option would be to give the petitioner and 1st Interested Party an opportunity to resolve their outstanding issues. In the event of there being no consensus the petition will proceed to full hearing with the 3rd Interested Party being summoned for cross examination as earlier requested.
23. The above being the position I find the request to withdraw the petition at this stage to be without merit and the same is declined. The petitioner and 1st Interested Party are given forty (40) days within which to resolve their issues. Mention on May 11, 2023 for a report from the Petitioner and 1st Interested Party and further directions.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 21ST DAY OF MARCH, 2023 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

