



**Sheria Mtaani na Shadrack Wambui & another v Director of Public Prosecution
& another; Inspector General of Police & another (Interested Parties)
(Petition E096 of 2022) [2023] KEHC 1958 (KLR) (10 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1958 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
PETITION E096 OF 2022
AC MRIMA, J
MARCH 10, 2023**

BETWEEN

SHERIA MTAANI NA SHADRACK WAMBUI 1ST PETITIONER

AMRIK SINGH HEER 2ND PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTION 1ST RESPONDENT

NOORDIN MOHAMMED HAJI 2ND RESPONDENT

AND

INSRCTOR GENERAL OF POLICE INTERESTED PARTY

DIRECTOR OF CRIMINAL INVESTIGATIONS INTERESTED PARTY

RULING

1. The Petitioners herein instituted the proceedings by filing a Petition dated March 9, 2022 together with an even dated application by way of Notice of Motion.
2. The proceedings mainly challenged the constitutionality of the Respondents' 'Guidelines on the Decision to Charge, 2019' contending that the duty to charge is the prerogative of the Interested Parties herein.
3. This Court directed that the Petition and the application be served and that the matter be scheduled for directions on March 31, 2022.
4. When the matter came up for directions, the Petitioners sought to withdraw the Petition citing that the issues raised therein had recently been decided vide High Court at Nairobi Petition No E266 of



2020 Okiya Omtatah Okiiti v The Director of Public Prosecutions & Others whose judgment was rendered on March 24, 2022.

5. The request was vehemently opposed by the Respondents. They variously contended that they had filed applications seeking to strike out the Petition such that even if the withdrawal is allowed then the Petitioners be condemned to pay the costs of the suit.
6. The Petitioners submitted that the only reason they were out to withdraw the Petition was as a result of the decision in Petition No E266 of 2020 and not otherwise.
7. The Court has carefully considered the parties' submissions alongside the record. It is a fact that Petition No E266 of 2020 was determined by way of judgment which was delivered on 24th March, 2022. The instant Petition was filed in early March, 2022.
8. There is also no doubt that the substratum of Petition No E266 of 2020 largely mirrored the issues raised in the instant Petition. As a result, the Petition herein was rendered moot and the doctrine of *res judicata* would readily step in. Therefore, the request by the Petitioners to withdraw the Petition was reasonable and in line with the law.
9. The Respondents also acknowledge as much. The only contention is on the aspect of costs.
10. The issue of costs is captured in Section 27 of the [Civil Procedure Act](#), Cap. 21 of the Laws of Kenya.
11. The provision 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 to give all necessary directions for the purposes aforesaid; and the fact that the court or judge 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 order.
 - (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.
12. The Supreme Court has on several occasions dealt with instances where parties have disagreed on costs in a withdrawn matter.
13. For instance, in Petition of Appeal No 18 of 2019, [Director of Public Prosecution -vs- Michael Sistu Mwaura Kamau & 4 others](#) [2020] eKLR, the Apex Court presided over the contention where parties were unable to agree on costs upon withdrawal of the Petition. In determining the issue of costs, the Learned Judges gave meaning to Section 27 of [Civil Procedure Act](#) and in so doing referred to its earlier decision in [Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others](#) (supra) where it was observed as follows: -
 - (18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or Respondents will bear the costs. However, the vital factor in setting



the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation. (emphasis added).

... 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 ...

14. In *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others* case (supra) the Apex Court further observed the aspect of discretion and how it ought to be exercised. It discussed as follows: -

... Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

15. After reiterating its earlier findings as reproduced in the foregoing paragraphs, the Learned Judges of the Supreme Court in *Director of Public Prosecution -vs- Michael Sistu Mwaura Kamau & 4 others case* (supra) discussed the legal position in scenarios where a party withdraws a Petition when it is ready for hearing.

16. In ordering each party to bear its own costs, the Court stated as follows: -

9. We have considered the rival submissions and are convinced that, whereas the Appellant has withdrawn the Petition when it was ready for hearing and while the Respondents have spent time and resources preparing for the hearing aforesaid, we must agree with both the High Court and the Court of Appeal that the issues raised in the Appeal were of great public interest – i.e. the extent of powers bestowed upon the Ethics and Anti-Corruption Commission and whether corruption related offences can be initiated when the said Commission was not properly constituted and whether the President of the Republic of Kenya can direct the Commission or the Director of Public Prosecutions in the execution of their constitutional mandates. These matters transcended the specific interests of the parties and have settled in the public sphere thus attracting the public interest. An order of costs against any party would, in the circumstances, not be fair....

17. In Reference No 1 of 2014, *Council of Governors v Senate & another* [2014] eKLR the only issue before the Supreme Court was who bears costs upon the withdrawal of a Petition before Court.

18. In determining the issue, the Court referred to its earlier decisions and stated as follows: -

- (25) The issue whether the Court can order for costs upon withdrawal of a matter before it was settled in the *John O. Ochanda v. Telkom Kenya limited*, Motion Application No 25 of 2014 in which Ibrahim, SCJ held:

... I do hold the view that a prospective appellant is at liberty to withdrawal a Notice of appeal at any time before the Appeal has been lodged and any further steps taken. No proceedings have commenced strictly. I am also of the view that just like under the Civil Procedure Rules or Court of Appeal Rules, the right to withdrawal or discontinue proceedings or withdraw a Notice of Appeal respectively ought to be



allowed as a matter of right subject to any issue of costs which can be claimed by the Respondents if any....

19. The Court further discussed discretion and the obligation upon the party praying for costs as: -

Since it (award of costs) is a discretionary power, what matters is that the same has to be exercised judicially and not whimsically. A party who moves the Court to make such an order for costs has an obligation to lay a firm basis by giving sufficient reasons why he should be awarded costs.

20. In the stated case, the Court made an award against the party that withdrew the application on the basis that it had abused Court process, wasted judicial time and failed his professional duty and obligation it had to the Court. For clarity, the Court observed as follows: -

(32) The Court has reviewed its record since the time the Reference was filed until it was withdrawn. We agree with the chronological account given by the Senate. It is true that the applicant made an application for leave to amend the Reference. The same leave was given but the amendment was not done. An oral stay of proceedings application was again made. Directions were given, but again they were not heeded. The applicant then sat back and waited until the 1st Interested Party filed a Preliminary Objection and the matter was listed for hearing before a two judge bench. During the intended hearing of the Preliminary objection, the applicant then makes an application orally for withdrawal of the Reference. This conduct leaves a lot of questions to be asked by this Court on the real intent of the applicant.

21. From the foregoing discussion, it is clear that at the very core in the award of costs particularly on withdrawal of Petitions is the Court's discretion which must be exercised judicially. In doing so, the Court must consider several issues including the nature of the Petition, the conduct of the parties, the extent of effort applied into the matter, the timing of the withdrawal, financial resources the Respondents applied in defending the Petition, whether the Petition is a SLAPP, among many other considerations. (See: *Cecilia Karuru Ngayu v Barclays Bank of Kenya & another* (supra).

22. The Petition herein was a public interest litigation. (See Mombasa High Court Petition No E017 of 2022 *Ndoro Kayuga & Another v Mike Sonko Mbuvi Gideon Kioko & Others* (2022) eKLR).

23. The Petitioners acted with speed to save this Court's limited resources. They stated that the withdrawal was a result of a recently delivered decision of the High Court. They even pointed out the matter was rendered moot and was to be caught up by the doctrine of res judicata.

24. The intended termination of the Petition was immediately after the judgment in Petition No E266 of 2020. The Respondents were yet to file responses to the Petition save the applications to strike out the Petition.

25. By considering the nature of this matter, the circumstances under which it was instituted and the conduct and relationship of the parties, this Court finds that the befitting order in this case is that the parties do bear their respective costs of the withdrawn Petition.

26. Consequently, the following orders do hereby issue: -

- a. The Petition and the Notice of Motion dated March 9, 2022 are hereby marked as withdrawn.
- b. Parties shall bear their respective costs.

Orders accordingly.



DELIVERED, DATED AND SIGNED AT KITALE THIS 10TH DAY OF MARCH, 2023.

A. C. MRIMA

JUDGE

Ruling No 1 virtually delivered in the presence of:

Mr. Shadrack Wambui, Counsel for the Petitioners.

Mr. Taib (SC), Mr. Mule, Mr. Muteti, Miss. Obwoo, Miss. Kihara, Miss. Sigei and Miss. Thunguri, Counsel for the 1st Respondent.

Mr. Taib (SC), Counsel for the 2nd Respondent.

Regina/Chemutai – Court Assistants.

