



**TWW v KJH & 2 others (Constitutional Petition E267 of 2021)
[2023] KEHC 1607 (KLR) (Constitutional and Human Rights) (10 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1607 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E267 OF 2021**

AC MRIMA, J

MARCH 10, 2023

BETWEEN

TWW PETITIONER

AND

KJH 1ST RESPONDENT

CHILDREN’S COURT (NAIROBI - MILIMANI) 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. This subject ruling is in respect of the Petitioner’s application by way of a Notice of Motion dated 11th February, 2022. The application seeks to withdraw the Petition in this matter.
2. The Petition sought to be withdrawn principally challenged the constitutionality of the Children’s/ Magistrates’ Court to punish for contempt of Court. The Petition was instituted after the Petitioner herein was found to be in contempt of Court by the Children’s Court at Milimani in Nairobi and was due to be sentenced.
3. Following deliberations, the Petitioner and the 1st Respondent entered into a consent on the access to the minor and the Petitioner was subsequently pardoned by the Court in respect of the adjudged contempt.
4. As a result of the said developments, the Petitioner then filed a Notice of Withdrawal of the Petition. The notice was contested and this Court directed the Petitioner to file a substantive withdrawal application. The Petitioner obliged and filed the application under consideration, hence, this ruling.



5. The Petitioner and the 1st Respondent contested the application. They filed responses, written submissions and Lists of Authorities in support of their rival positions.
6. Given the length and nature of the responses and submissions, I will not reproduce the same verbatim in this ruling. However, I will consider the parties' positions, arguments and decisions referred to in the discussion herein.
7. 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. These rules are commonly known as 'the Mutunga Rules'.
8. Rule 27 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.
9. Given the above provision, it is this Court's position that in so far as the Petition involves withdrawal of a constitutional Petition, then decisions on withdrawal of ordinary suits are not helpful. (See the Court of Appeal at Malindi in Civil Appeal No. 52 of 2015 *Harry John Paul Arigi & 2 others v Board, Kenya Ports Authority & 2 others* [2016] eKLR).
10. The essence of Rule 27 was the subject in *Harry John Paul Arigi & 2 others v Board, Kenya Ports Authority & 2 others* where the Court had the following to say: -

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).

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

12. Deriving from the above, the role of the Court in withdrawal of Petitions cannot be gainsaid. Any withdrawal must, no doubt, be sanctioned by a Court. The rationale behind such a position is that public interest is involved in constitutional Petitions and the Court has a duty to ensure that such interest is protected for the larger good. Therefore, in considering withdrawal applications, a Constitutional Court must be satisfied that any such withdrawal will not be counter public interest. One way of doing so is to ascertain whether a Petition is a public interest litigation.
13. Speaking to the doctrine of public interest litigation, the High Court at Mombasa in Petition No. E017 of 2022 *Ndoro Kayuga & Another vs. Mike Sonko Mbuvi Gideon Kioko & Others* had the following to say: -
 24. According to Black's Law Dictionary¹ '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.
14. In Petition 429 of 2017 *Brian Asin & 2 others v Wafula W. Chebukati & 9 others* [2017] eKLR the Court adopted the definition of PIL in the Black's Law Dictionary.
15. The Indian Supreme Court in *Ashok Kumar Pandey vs. State of West Bengal writ* Petition 199 of 2003 pronounced itself on the matter of PIL by stating thus: -

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

¹ (content missing)



such busy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs.

16. Having laid the guiding principles in withdrawal applications, this Court will now apply them to the instant Petition.
17. As stated above, the Petition mainly challenges the constitutionality of the Children's/Magistrates' Court to punish for contempt of Court. That is a serious constitutional issue which transcends the personal boundaries of the Petitioner and the 1st Respondent into the public interest litigation spectrum. It is indeed in great public interest that this Court expresses itself on this important issue.
18. Given the nature of the Petition herein, this Court is of the firm position that the Petition herein ought to, instead, proceed to full hearing. In making this finding, this Court is alive to the fact that there some aspects of the Petition which the parties compromised in filing the consent in the Magistrate's Court. Such matters, therefore, do not need to be part of this Petition.
19. Having said so and for clarity purposes, the key issue for determination in this Petition will be, among others if any, the constitutionality of the Children's/Magistrates' Court to punish for contempt of Court.
20. With such a finding, the application is determined as follows: -
 - a. The Notice of Motion dated 11th February, 2022 is hereby dismissed.
 - b. The Petition shall be heard and determined on its merits.
 - c. As the Petition is a public interest litigation, each party shall bear its own costs of the application.

Orders accordingly.

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

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

Mr. Dunstan Omari, Counsel for the Petitioner.

Mr. Mbichile, Counsel for the 1st Respondent.

Regina/ Chemutai – Court Assistants.

