



**Makarena v Directorate of Criminal Investigations & 3 others; peaker  
of the Senate & 5 others (Interested Parties) (Petition E122 of 2022)  
[2023] KEHC 20346 (KLR) (Constitutional and Human Rights) (21 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20346 (KLR)

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

**PETITION E122 OF 2022**

**M THANDE, J**

**JULY 21, 2023**

**BETWEEN**

**MICHAEL MAKARENA ..... PETITIONER**

**AND**

**THE DIRECTORATE OF CRIMINAL INVESTIGATIONS .... 1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 2<sup>ND</sup> RESPONDENT**

**THE ETHICS AND ANTI-CORRUPTION COMMISSION ... 3<sup>RD</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**THE SPEAKER OF THE SENATE ..... INTERESTED PARTY**

**THE KENYA NATIONAL COMMISSION OF HUMAN  
RIGHTS ..... INTERESTED PARTY**

**THE NATIONAL TREASURY OF KENYA ..... INTERESTED PARTY**

**THE ASSETS AND RECOVERY AGENCY ..... INTERESTED PARTY**

**THE KENYA REVENUE AUTHORITY ..... INTERESTED PARTY**

**THE INDEPENDENT ELECTORAL AND BOUNDARIES  
COMMISSION ..... INTERESTED PARTY**



## RULING

1. The Petitioner filed a Petition in this Court dated March 22, 2022 seeking orders which inter alia touched on the Interested Party. The Petition was opposed by the 3<sup>rd</sup> Interested Party vide a replying affidavit sworn on May 6, 2022. Thereafter the Petitioner filed an amended Petition with leave of Court dated June 9, 2022. The 3<sup>rd</sup> Interested Party filed a supplementary affidavit sworn on June 28, 2022. Thereafter on November 9, 2022, pursuant to a notice of withdrawal dated October 27, 2022, the Court marked the Petition as withdrawn with no order as to costs. Thereafter, the 3<sup>rd</sup> Interested Party requested a mention of the matter. On December 8, 2022, Counsel for the 3<sup>rd</sup> Interested Party informed the Court that although his client was happy that Petition was withdrawn, he was unhappy that the same was withdrawn with no order as to costs. Counsel stated that the notice of withdrawal was not served upon him and that the manner of withdrawal brings the administration of justice into disrepute. He sought review of the order of November 9, 2022 and that the Court awards costs to his client.
2. The Court directed that given the order of November 9, 2022 allowing the withdrawal, there was no Petition before it. Accordingly, no order could be granted without an application for reinstatement of the matter being filed and allowed first.
3. The 3<sup>rd</sup> Interested Party proceeded to file an application dated December 19, 2022 seeking the following orders:
  1. The petition is hereby reinstated for the limited purposes of the review of the court orders of November 9, 2022 (hereinafter, “the withdrawal orders”) to award costs to the 3<sup>rd</sup> interested party and to make such further orders and/or giving such directions as may be necessary for ensuring the fair administration of justice.
  2. The withdrawal orders issued by Court (Hon. Mugure Thande) on November 9, 2022 are hereby varied by deleting paragraph 2 thereof that reads “no orders as to costs” and replacing it with an order awarding costs to the 3<sup>rd</sup> interested party.
  3. Such other, further, incidental and/or alternative Order(s) as the Honourable Court may deem just and expedient.
4. The Application is premised on the grounds that on July 18, 2022, the Court directed that certain applications for misjoinder by the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Interested Parties be heard on November 14, 2022. However, unbeknownst to the 3<sup>rd</sup> Interested Party, on October 27, 2022, the Petitioner filed a Notice of Withdrawal of Suit of even date and requested a mention date for the same. On November 9, 2022, this Honourable Court allowed the withdrawal of the Petition with no order as to costs. The 3<sup>rd</sup> Interested Party contends that the Petitioner irregularly and unprocedurally failed to serve him with the said notice of withdrawal together with the mention notice of November 9, 2022. It is the 3<sup>rd</sup> Interested Party’s case that the Petition was disingenuous, scandalous, frivolous, vexatious and an abuse of judicial process and prima facie foredoomed to fail, for reasons that it offended the doctrines of sub judice and res judicata to the extent that it revolved around matters that were pending or had been heard and finally determined by courts/tribunals of competent jurisdiction; that the Petitioner was a mercenary/hireling of Hon Kiraitu Murungi and Mr George Kinoti who had orchestrated a media vilification campaign and judicial persecution campaign against the 3<sup>rd</sup> Interested Party for the past 4



years. This was intended to coerce him to drop his bid for the Meru gubernatorial seat and his support for Dr William Samoei Ruto in the August 2022 General Elections. The 3<sup>rd</sup> Interested Party further claimed that the clandestine manner of withdrawal of the Petition by the Petitioner was motivated by the frivolity and absurdity of the allegations and was a deliberate move by the Petitioner to avoid payment of costs.

5. The Petitioner, though served, did not file any response. The Application has therefore proceeded as unopposed.
6. The 3<sup>rd</sup> Respondent has applied for reinstatement of the Petition to enable him then prosecute his request for an award of costs. Article 50 of the [Constitution](#) guarantees to every person the right to a fair hearing. Clause (1) provides:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

7. The prayer for costs cannot be entertained in a vacuum given that there is no pending petition before me. The 3<sup>rd</sup> Interested Party is entitled to have his prayer for costs heard and resolved by the Court. I accordingly allow the prayer for reinstatement to enable the exercise by the 3<sup>rd</sup> Interested Party of his right under Article 50(1). The reinstatement is limited for the purposes of considering and determining the prayer for review of the court orders of November 9, 2022 and to award costs to the 3<sup>rd</sup> Interested Party.
8. The law is that a petitioner is at liberty to if he so wishes, withdraw or discontinue a petition. Rule 27 of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules](#), 2013 (Mutunga Rules) provides:

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. The Rule provides that withdrawal of a petition must be on notice to the court and to the respondent. No leave is required for withdrawal of a petition and withdrawal may be done as a matter of right. This was the holding of the Supreme Court in the case of [John Ochanda v Telkom Kenya Limited](#) [2014] eKLR. The Court stated:

- (6) Notably, on 10th June, 2014, the applicants filed Application No 25, John O Ochanda vs Telkom Kenya Limited in which they sought leave of the Court to withdraw the said ‘defective



notice of appeal'. The matter was heard by a single judge of the Court, Ibrahim, SCJ who while allowing the motion for withdrawal stated inter alia:

“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 withdraw 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.

In this particular case, there cannot be any reason for inter partes hearing and the matter can proceed *ex parte* as the right to withdraw cannot be taken away.”

10. The Petitioner herein was thus within his right to invoke the provisions of Rule 27 of the [Mutunga Rules](#). He filed his notice of withdrawal and served the Respondents which the Court allowed.
11. The 3<sup>rd</sup> Interested Party submitted that the withdrawal of the Petition was clandestine, unprocedural and irregular as the Petitioner failed to serve him with the notice in this regard, contrary to the provisions of the Civil Procedure Rules. The Court notes that on December 8, 2022, Counsel for the 3<sup>rd</sup> Interested Party informed the Court that his client was happy that the Petition had been withdrawn. He however objected to the withdrawal with no order as to costs and sought that costs be awarded to him. The Court therefore need not revisit the issue of the withdrawal.
12. On the issue of costs, the 3<sup>rd</sup> Interested Party reiterated his contention that the Petition was ex facie scandalous, frivolous, vexatious and an abuse of the court process. He contended that the Petitioner filed the Petition in his personal capacity and stood to solely benefit from the outcome thereof. The Petition had nothing to do with a genuine quest for justice as the Petitioner was a proxy for Hon Kiraitu Murungi and George Kinoti to derail the 3<sup>rd</sup> Interested Party's campaign for position of Governor of Meru County. Further that the Petition offended the doctrines of res judicata and sub judice to the extent that it revolves around matters that were subject to ongoing investigations and others that had been thoroughly investigated and closed by relevant competent investigative and law enforcement agencies. The Petition also revolved around matters that were pending hearing and determination and others that had been and heard and determined by courts and tribunals of competent jurisdiction. In light of the foregoing, the Petitioner should shoulder the costs. This will send a message to advocates and litigants to approach the Court with the seriousness and respect it deserves.
13. The issue before Court for determination therefore is whether the Court should award costs to the 3<sup>rd</sup> Interested Party.
14. It is trite that costs always follow the event. In the case of [jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others](#) [2014] eKLR, the Supreme Court stated that the purpose of costs is not to penalise the losing party but to compensate the successful party for costs incurred in prosecuting or defending the suit:

(14) So the basic rule on attribution of costs is: costs follow the event. But it is well recognized that this principle 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 suit. In Justice Kuloba's words [Judicial Hints on Civil Procedure, at p.94]:



“[T]he object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure...Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action.”

15. Rule 26(1) of the *Mutungu Rules*, provides that the award of the costs is at the discretion of the Court. While the law provides that the costs of and incidental to all suits shall be in the discretion of the Court, which shall have full power to determine by whom and to what extent such costs shall be paid, the Court must determine whether the circumstances of this case call for an award of costs. In this regard, I find useful guidance in the case of Jasbir Singh Rai (*supra*), where the Supreme Court went on to state that the principle of law that costs follow the event is not invariable 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. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Appellant.

16. In the present case, there is no losing or successful party given that the Petition was withdrawn before being heard and determined.
17. Although the 3<sup>rd</sup> Interested Party contends that the Petitioner stood to benefit from the outcome, of the Petition, no evidence was placed before the Court to support this claim. In an apparent contradiction, the 3<sup>rd</sup> Interested Party also claimed that the Petitioner was a mercenary or hireling of Hon. Kiraitu Murungi and Mr George Kinoti who had orchestrated a media vilification campaign and judicial persecution campaign against the 3<sup>rd</sup> Interested Party for the past 4 years. According to the 3<sup>rd</sup> Interested Party, the purpose of the persecution was to coerce him to drop his bid for the Meru gubernatorial seat and his support for Dr William Samoei Ruto in the August 2022 General Elections. Again, no evidence was adduced to support this claim. The 3<sup>rd</sup> Interested Party further contended that the Petition was frivolous and an abuse of the Court process. That the matters raised in the Petition had been or are presently subject of judicial proceedings and investigative processes.
18. Our Courts have time and again stated the concurrent existence of the criminal proceedings and civil proceedings do not, *ipso facto*, constitute an abuse of the process of the court. In the case of *George Joshua Okungu & another v Chief Magistrate’s Court Anti-Corruption Court at Nairobi & another* [2014] eKLR, Korir and Odunga, JJ. (as they then were) stated:

The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, *ipso facto*, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the Petitioner to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim. In the exercise of the discretion on whether or not to grant an order of prohibition, the court takes into account the needs of good administration.

19. I associate with the sentiments expressed by the learned Judges. I find that that a conclusion that the Petition was an abuse of the court process on grounds that there were other proceedings elsewhere on



the same matters, could only be arrived at after the hearing of the Petition. Given that the Petitioner was withdrawn, it will never be known if this were the case.

20. The 3<sup>rd</sup> Interested Party cited the case of *Yusuf Gitau Abdallah v Building Centre (K) Ltd & 4 others* [2014] eKLR, to support the claim that the Petition was an abuse of the Court process and a waste of judicial time. In that case, Ibrahim, SCJ. while dismissing that matter, which in his view, ought not to have been filed in the Supreme Court stated:

The wheels of justice at the Supreme Court should not be clogged by matters that should not have been admitted in the first place.

21. With respect this not the case herein. Under Article 165(3)(b) and (d) of the *Constitution*, this Court has the jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. It also has the jurisdiction to determine the question whether anything said to be done under the authority of the *Constitution* or of any law is inconsistent with, or in contravention of, the *Constitution*. The matters before the Court for determination in the Petition were *inter alia* whether the Respondents neglected their constitutional mandates as independent organs of investigation and/or prosecution of offences in respect of the cause of death of one Dr. Stanley Maroe Mugwika and one Edith Kananu, fraud related charges against the 3<sup>rd</sup> Interested Party, theft at Cooperative Bank makutano branch at Maua, Meru County and the academic certificates of the 3<sup>rd</sup> Interested Party.
22. The circumstances herein are that the Petition was not heard on merit and was withdrawn by the Petitioner before hearing. Although no reasons were given for the withdrawal and there is no requirement under the Rules for reasons to be given, it cannot be said that the Petition was needless and that the same ought not to have been admitted in this Court.
23. Rule 26(2) of the *Mutunga Rules* provides that in exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms. In determining whether or not to award costs therefore, this Court must be mindful not to hinder the advancement of constitutional justice.
24. In view of the foregoing, I find that the circumstances herein do not merit the exercise of the Court's discretion to award costs. Accordingly, the Application dated December 19, 2022 lacks merit and the same is hereby dismissed with no order as to costs.

**DATED, SIGNED and DELIVERED in NAIROBI this 21<sup>st</sup> day of July 2023**

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**M. THANDE**

**JUDGE**

**In the presence of: -**

..... **for the Petitioner**

..... **for the 3<sup>rd</sup> Interested Party**

..... **Court Assistant**

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