



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**PETITION NO. 15 OF 2010**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA, ARTICLE 22 AND 23**

**IN THE MATTER OF: ARTICLES 42, 69 AND 70 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOM ENSHRINED IN THE CONSTITUTION AND BILL OF RIGHTS ARTICLES 42, 69(1) (a) (e) (h) (2) AND 70 OF THE CONSTITUTION**

**IN THE MATTER OF: AN AGREEMENT BETWEEN KENYA WILDLIFE SERVICE AND NOVOZYMES A/S ENTERED INTO IN MAY 2007 ENTITLING NOVOZYMES A/S TO ACCESS AND EXPLOIT FOR COMMERCIAL PURPOSES GENETIC RESOURCES, ENZYMES AND MICRO ORGANISMS WITHIN NATIONAL PARKS, NATIONAL RESERVES AND OTHER PROTECTED AREAS WITHIN KENYA**

**BETWEEN**

**MULUNGUSI MUTHEMBWA MUTUNGA.....PETITIONER**

**VERSUS**

**1. THE MANAGING DIRECTOR,**

**KENYA WILDLIFE SERVICE.....1<sup>ST</sup> RESPONDENT**

**2. THE MANAGING DIRECTOR,**

**NOVOZYMES A/S.....2<sup>ND</sup> RESPONDENT**

**3. THE DIRECTOR GENERAL**

**NATIONAL ENVIRONMENTAL**

**MANAGEMENT AUTHORITY.....3<sup>RD</sup> RESPONDENT**

**RULING**

**Introduction**

1. By way of a Petition dated 5<sup>th</sup> October 2010, the petitioner MULUNGUSI MUTHEMBWA MUTUNGA who described himself as “an adult Kenyan of sound mind residing and working for gain in Mombasa and elsewhere in the Republic of Kenya” sought to enforce his right to a clean environment under Article 42 as read with Articles 69 and 70 of the Constitution and prayed for specific orders as follows:

*(a) An order to declare that the continued existence of the agreement entered into between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in May 2007 entitling the 2<sup>nd</sup> Respondent to access and exploit for commercial purposes genetic resources, enzymes and microorganisms within Kenya’s National reserves and other protected areas violates and threatens the Petitioners Constitutional rights as enshrined in Article 42 of the Constitution as read together with Articles 69 and 70 of the Constitution and is to that extent unconstitutional, invalid, null and void, and order to nullify the same.*

*(b) A consequent order to declare that the continued access and exploitation of genetic resources, enzymes and microorganisms within Kenya’s National reserves and other protected areas by the 2<sup>nd</sup> Respondent is unconstitutional, to restrain the 2<sup>nd</sup> Respondent or its agents from continuing with the said access and exploitation of genetic resources as aforesaid.*

***(c) An order to compel the 3<sup>rd</sup> Respondents to take measures to stop or discontinue the operation of the agreement between the 1<sup>st</sup> and 2<sup>nd</sup> Respondent and any activities stemming from the said agreement.***

*(d) An order to compel and direct the 2<sup>nd</sup> Respondent to revert all and nay commercial/financial benefits derived under the agreement to the people of Kenya by providing an account of the same and remitting the entire sum of benefits to the National Environmental Trust Fund.*

*(e) An order for costs of this Petition with interest.*

2. The Petition was supported by the affidavit of MULUNGUSI MUTHEMBWA MUTUNGA dated 5<sup>th</sup> October 2010 in which he averred that:

(i) The 1<sup>st</sup> and 2<sup>nd</sup> Respondents entered into an agreement in May 2007 which entitles the 2<sup>nd</sup> Respondent to access and exploit for commercial purposes genetic resources, enzymes and microorganisms found within the National Parks, National Reserves and other protected area within the Republic of Kenya.

(ii) The existence of the agreement is a matter of the public domain and it is well publicized in the official websites of both the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

(iii) In HCCC NO. 321 of 2008 *McMillan Edwin Jengo vs KWS & Novozymes A/S*, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents swore an affidavit through Dr. James Njogu in which the existence of the said agreement was expressly admitted in paragraph 11 and 19 thereof.

(iv) The stated agreement is still in force and the 1<sup>st</sup> and 2<sup>nd</sup> respondents are actively implementing it. However, the said agreement is not available on the website of any of the two organizations.

(v) The 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not apply for and obtain, and to date they do not have, an access permit from NEMA as mandatorily required under the provision of Regulation 9 of the Environmental Management and Coordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources, and Benefit Sharing) Regulations 2006.

(vi) The 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not obtain the prior informed consent, PIC of any interested parties, stakeholders and the community prior to and during operationalization of their project,

which is in contravention of Regulation 9(2) of the Regulations.

(vii) The 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not execute and have not executed a Material Transfer Agreement, MTA as required under Regulation 18 of the Regulations.

(viii) The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have not conducted an Environmental Impact Assessment and annual Environmental Audits of their activities and they have not obtained an EIA License from NEMA as expressly required under the provisions of Section 58 of EMCA as together with the Second Schedule 13(f) thereof.

(ix) No sufficient benefits can accrue to Kenyans out of the proceeds of an illegal agreement and activity.

(x) The said agreement is illegal and activities of the project involve the exploitation of genetic resources from Kenya by a foreign company, my right to a clean and healthy environment as clearly enshrined in Articles 42 of the Constitution as read together with the Articles 69 and 70 is being violated, infringed and threatened by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in the following manner;

(a) The rare, rich and unique genetic wealth of Kenya is being exploited by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents under the auspices of an illegal agreement.

(b) That in the absence of an EIA and Environmental Audits, it is not possible to evaluate the socio-environmental Impacts of the activities carried out under the agreement. Consequently, the precautionary principle of sustainable development should be applied strictly.

(c) That the Respondents are not protecting the genetic resources and biodiversity of Kenya. They are plundering it under an illegal agreement.

(d) The Respondents have failed to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources and have failed to ensure the equitable sharing of the accruing benefits.

(e) The respondents have completely shut out public participation and involvement in the process of entering into the agreement and in its operationalization.

(f) The 3<sup>rd</sup> Respondent is the Government organ obligated to exercise general supervision and coordination over all matters relating to the environment of relevance to this petition, the 3<sup>rd</sup> respondent is obligated to:

(a) Coordinate and oversee the activities of the 1<sup>st</sup> Respondent as a lead agency with a view to ensuring the proper management and sustainable utilization of genetic resources in protected areas.

(b) Receive application for, process and grant/deny access permit to the 2<sup>nd</sup> Respondent.

(c) Enforce environmental regulations relating to access to exploitation of Kenya's genetic resources.

(d) Enforce the law relating to carrying out of EIA and Environmental Audit by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent.

(g) The 3<sup>rd</sup> Respondents is the principal Government instrument in the protection and enhancement of the rights that are enshrined in Article 42 of the Constitution as read together

with Articles 69 and 70 of the Constitution.

### ***Withdrawal of Petition and Application for Costs***

3. The respondent parties filed their respective responses but the petition was subsequently withdrawn against all the respondents before it was heard on the merits, and the question of costs for the petition arose as between the petitioner and the 3<sup>rd</sup> respondent. The 1<sup>st</sup> and 2<sup>nd</sup> respondents did not pursue costs.

4. Consequently, the contest on the costs is between the 3<sup>rd</sup> respondent and the petitioner and it is in that regard convenient to set out the 3<sup>rd</sup> respondent's response to the Petition.

### ***The Response by the 3<sup>rd</sup> respondent on the merits***

5. The 3<sup>rd</sup> Respondent had filed a Replying Affidavit sworn by AYUB NDARUGA MACHARIA dated the 15<sup>th</sup> of December 2010 stating that -

(i) As the Acting Director General of the National Environment Management Authority of the 3<sup>rd</sup> Respondent he was duly authorized to swear the affidavit.

(ii) The Petitioner has not provided any reasonable evidence in support of the Petition as against the 3<sup>rd</sup> Respondent.

(iii) The 1<sup>st</sup> and 2<sup>nd</sup> Respondent entered into an agreement on or about May 2007 and that the said agreement was in respect to the 2<sup>nd</sup> Respondent accessing and exploiting for commercial purposes genetic resources, enzymes and microorganisms found within the National Parks, National Reserves and other protected area within the Republic of Kenya.

(iv) Contrary to the Petitioners allegations that the 3<sup>rd</sup> Respondent has general supervision and coordination over all matters relating to the Environment, issues dealing with Wildlife Management is well spelt out in Section 3A of Chapter 376 of the Laws of Kenya which indeed confers Environmental issues in Wildlife protected areas to the Wildlife Conservation and Management Act Chapter 376 of the Laws of Kenya.

(v) In view of the foregoing, compelling the 3<sup>rd</sup> Respondent to take measures to stop or discontinue the operations of the above stated agreement between the 1<sup>st</sup> and 2<sup>nd</sup> Respondent is a nullity since the 3<sup>rd</sup> Respondent is not at all mandated by law to interfere with the Management of the 1<sup>st</sup> Respondents affairs.

(vi) Wildlife issues fall under the ambit of the Wildlife Conservation and Management Act whereas Environmental issues are the ambit of the Environment Management and Coordination Act of 1999.

(vii) The Constitutional Court lacks the jurisdiction to entertain this matter in the initial stage since section 3 of the Environmental Coordination and Management Act has not been properly invoked, since the Petitioner has failed to show how the said agreement between the 1<sup>st</sup> and 2<sup>nd</sup> Respondent has impacted on him or his environment.

(viii) Section 125 and 126 of the Environmental Management and Coordination Act requires the Petitioner to lodge his complaint with the relevant National Environmental Tribunal hence the Petitioner is wrongly before the court.

(ix) Under the Environmental Coordination and Management Act of 1999 there are no provisions thereunder requiring the National Environmental Management Authority to carry out an impact assessment of any project, and that such assessment should be done by the proponents of the

alleged project.

(x) The 3<sup>rd</sup> Respondent has never issued any license in relation to the project that was undertaken by the 2<sup>nd</sup> Respondent and further that the issuance of the said license does not fall under the ambit of the 3<sup>rd</sup> Respondents' powers.

(xi) The main object of the Wildlife Conservation and Management Act Cap 376 of the Laws of Kenya was for the protection and preservation of the said protected areas hence the 3<sup>rd</sup> Respondent has no or little mandate in control over the happenings of the 1<sup>st</sup> Respondent management.

6. Clearly, the 3<sup>rd</sup> respondent had joined issue with the petitioner on the issue of his liability for the reliefs sought against him in prayer (c) of the Petition as follows:

***“(c) An order to compel the 3<sup>rd</sup> Respondents to take measures to stop or discontinue the operation of the agreement between the 1<sup>st</sup> and 2<sup>nd</sup> Respondent and any activities stemming from the said agreement.”***

### **SUBMISSIONS BY THE PARTIES**

7. By consent of the parties, directions were given for parties to file written submissions on the issue of costs, which the Counsel for Petitioner and Counsel for the 3<sup>rd</sup> respondent did and ruling was reserved.

8. For the Petitioner it was contended that the petitioner had a good case for the protection of the environment brought for the benefit of the citizens of Kenya rather than for any private gain, and accordingly as a public interest litigation costs should not be decreed against the petitioner:

*“The said Petition was premised on Articles 22, 23, 42, 69 and 70 of the Constitution of Kenya.*

*The Petitioner challenge the constitutionalism of an Agreement entered into between the first and second respondents where the first Respondent allows the second respondent to access and exploit for commercial purposes, genetic resources, enzymes and Microorganisms within National Reserves and other protected areas falling under the mandate of the first respondent.*

*It was the Petitioner's informed view that the said agreement was illegal, null and void, and equally the continued access and exploitation of genetic resources by the 2<sup>nd</sup> Respondents as aforesaid was illegal, null and void since the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had failed to apply for an **ACCESS PERMIT** from the 3<sup>rd</sup> Respondent as required by the Mandatory provisions of **Regulation 9 (1) of the Environmental Management and coordination (Conservation of Biological Diversity and Resources Access to Genetic Resources and Benefit Sharing) Regulations 2006.***

*Your Lordship, the 3<sup>rd</sup> Respondent through ITS Acting Director General, one AYUB NDARUGA MACHARIA, swore the Replying Affidavit on 15<sup>th</sup> December, 2010 where at paragraph 7 there is an admission that NEMA was well aware of the agreement between the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents.*

### **PUBLIC INTEREST SUIT/LITIGATION**

*Your lordship, the Petitioner's Petition was brought before this Honourable Court for the benefit of all Citizens of Kenya.*

*The agreement in question was to allow the 2<sup>nd</sup> Respondent to access and exploit for commercial purposes, genetic resource, enzymes and Microorganisms within National Parks, National Reserves and other protected areas falling under the mandate of the first respondent.*

*It is our humble submissions that the Petitioner did not have any personal private gain in this Petition. It was brought for and on behalf of all Citizens of Kenya and the future generation to ensure the environment was protected.*

*Your Lordship, this being a Public Interest Litigation suit, the Petitioner ought not to pay costs to any party.”*

9. Counsel for the Petitioner relied on the Court of Appeal decision in **Supermarine Handling Services Ltd. v. KRA**, Civil Appeal No. 85 of 2006 quoted in **R. v. Medical Practitioners and Dentist Board & 3 Ors. ex. P. Kenya Hospital Association** [2014] eKLR; **Harun Mwau & Ors. v. AG & Ors.**, Nairobi HC Pet. No. 65 of 2011 [2012] eKLR quoted with approval by the Supreme Court in **Jasbir Singh Rai & 3 Ors. v. Tarcholan Singh Rai & 4 Ors.** [2014] eKLR.

10. The 3<sup>rd</sup> Respondent claimed costs on the basis that it had in addition to filing its own replying affidavit to the Petition, perused in preparation for trial the replying and further affidavits of the 1<sup>st</sup> respondent, attended court on several occasions for various directions in the matter and finally in accordance with directions of the Court filed well researched and detailed written submissions in readiness for the hearing of the Petition, and that it was the 3<sup>rd</sup> respondents intention to defend the petition which by its replying affidavit it “*averred that the petition is fatally defective, dubious, vexatious, devoid of merit, dishonest, deceitful and a contemptuous attempt to mislead the court and to conceal material facts relevant to the just and fair determination of the facts in issue herein*” and that the 3<sup>rd</sup> respondent had protested in the replying affidavit that it was being dragged into a matter in which it was not privy and that there was clearly no case against the 3<sup>rd</sup> respondent.

11. It was further submitted for the 3<sup>rd</sup> Respondent that the notice of withdrawal of the petition was filed without notice to the 3<sup>rd</sup> respondent and, therefore, without opportunity to address the issue of costs, in breach of Rules 27 of the Constitution of Kenya (Protection of rights and Fundamental Freedoms) Practice and Procedure Rules 2013

12. Counsel for the 3<sup>rd</sup> respondent relied on the principle that costs follow the event and while the court has discretion to depart from the general principle it would do so only for reasons to be recorded which did not exist in this case as the petitioner had merely dragged the 3<sup>rd</sup> respondent to court knowing too well that it did not have a case against the 3<sup>rd</sup> respondent. Counsel cited among others Nairobi High Court Civil Suit No. 66 of 2009, **Joseph Oduor Anode v. Kenya Red Cross Society** (2012) eKLR, per Odunga, J. for the general proposition that costs follow the event.

## **DETERMINATION**

### ***The principle that costs follow the event***

13. It was accepted by both sides that the general rule on costs is that costs follow the event. This is the principle set out in section 27 of the Civil Procedure Act as follows:

#### **“27. Costs**

*(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.”*

14. However, in constitutional litigation, the consideration is a little different, regard being had to public interest consideration of access to justice by enforcement of the constitution. The Supreme Court in **Jasbir Singh Rai & 3 Ors. v. Tarcholan Singh Rai & 4 Ors.** [2014] eKLR has put the matter down as follows:

*“[15] It is clear that there is no prescribed definition of any set of “good reasons” that will justify a Court’s departure, in awarding costs, from the general rule, costs-follow-the-event. In the classic common law style, the Courts have proceeded 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....***

*[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 respondent 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.**”*

15. The statement of law and judicial policy by the Supreme Court regarding costs in public interest cases binds this Court. In similar terms this Court in Nairobi Petition No. 329 of 2016, **Feisal Hassan & 2 Ors. v. The Public Service Board of Marsabit County and Anor.**, had occasion to find as follows -

*2. Costs of litigation are in the in discretion of the Court. While generally in civil proceedings the principle on costs is that costs follow the event (see section 27 of the Civil Procedure Act), in constitutional litigation, however, the Rules make special provision for the guidance of the Court. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure, 2013 provides guidance at Rule 26 as follows:*

*“26. (1) The award of costs is at the discretion of the Court.*

*(2) 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.*

***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 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.*

### **On the facts of this case**

16. Specifically at paragraphs 20-22 of the Replying Affidavit sworn on 15<sup>th</sup> December 2010, the 3<sup>rd</sup> respondent set out his case as follows:-

*“20. That I am informed by the 3<sup>rd</sup> respondent advocate on record on information I believe to be true that as per the above stated foregoing, the Petitioner has prematurely brought this petition against the 3<sup>rd</sup> Respondent.*

*21. That I know of my own knowledge that in the instant case no complaint has been filed by the petitioner before the complaints commission as required by section 32 and 33 of the Environmental Management and Coordination Act No. 8 of 1999 against the said project and or the alleged agreement.*

*22. That from the foregoing it is clear that **the 3<sup>rd</sup> Respondent is being dragged into a matter to which it was not privy to as the 3<sup>rd</sup> respondent was never a party to the agreement between the 1<sup>st</sup> and 2<sup>nd</sup> respondent herein.**”*

17. It is clear that the 3<sup>rd</sup> respondent had a substantive defence to the petition. However, it is not for the court to determine the respective merits of the parties' cases at this stage as the Petition has already been withdrawn and the court has not had heard arguments in the matter. It also cannot be said, as urged by the Petitioner, that the withdrawal of the petition was the result of a concession by the 2<sup>nd</sup> respondent as the Consent for the withdrawal by letter dated 16<sup>th</sup> March 2012 merely notified, without giving reasons therefor, the fact of agreement to mark as settled and withdrawn the Petition as follows:

*“By Consent, the Petitioner's Petition dated 5<sup>th</sup> October 2010 against the 2<sup>nd</sup> respondent MANAGING DIRECTOR NOVOZYMES A/S be and is hereby marked as settled and withdrawn as against the 2<sup>nd</sup> Respondent Managing Director Novozymes A/S.”*

18. Indeed, in his replying Affidavit for the 2<sup>nd</sup> Respondent, the Vice-President of Novozymes A/S, Ole Kirk, sworn on 27<sup>th</sup> January 2011 sets out its defence to the petition at paragraphs 23 - 26 as follows:

*“23. There is no loss and damage to be suffered by the petitioner in particular or by any Kenyan at all. The benefits that are to accrue to collection of samples of dung produced by wild herbivorous animals cannot result in any loss and/or damage as alleged by the petitioner as the same is biodegradable waste. The making use of microbial diversity from Kenyan wildlife protected areas does not have an adverse impact on any ecosystem.*

*24. The petition merely seeks to interfere with the first and second respondents' lawful exercise of their rights as granted by statute. It also seeks to jeopardize and/or frustrate the first and second respondents' efforts to make strides in developing Kenya's bio-genetic resources.*

*25. The petitioner has not demonstrated in what way the agreement between the first and second respondent infringes on his right to a clean and healthy environment, which I am informed by Michi Kirimi and believe it to be true is defined under elements or segments of the environment for recreational, educational, health spiritual and cultural purposes.*

*26. None of the activities undertaken under the agreement threaten the use of the environment in any way but on the other hand in deed aims at characterizing and preserving it for future generation through research into biological process and how to utilize them.*

*27. From all the foregoing, I verily believe that the petitioner has failed to demonstrate in what way if at all his rights to a clean and healthy environment have been infringed.”*

The 2<sup>nd</sup> Respondent also raised an issue of jurisdiction in view of Article 162 (2) of the Constitution which reserved jurisdiction in environment and land matters to the Environment and Land Court.

19. The matters of fact, wrongly set out in the written submissions by the Counsel for the Petitioner, that *“the 2<sup>nd</sup> respondent conceded to the demands before the petition could be concluded at the hearing and*

stopped all the works set out in the suit agreement and thereafter left the country” cannot be accepted as evidence by the Court as they were not made on oath in accordance with the law. In any event, the 3<sup>rd</sup> respondent did not concede the petitioner’s case at all.

20. Accordingly, I do not find that the event which would dictate the award of costs on the principle of costs follow the event is not the **withdrawal** but the alleged **concession** by the respondents of the case of the Petitioner, and the decision of the Court in **R v. Medical Practitioners and Dentist Board & 3 Ors. ex parte Kenya Hospital Association**, supra, is distinguishable in that regard. Even if the same were the case, concession by the 2<sup>nd</sup> respondent would not bind the 3<sup>rd</sup> respondent who was not even a party to the agreement between the 1<sup>st</sup> and 2<sup>nd</sup> respondents which was the subject of the petition.

### **Public Interest considerations**

21. Had this suit been purely a civil case between private citizens for the enforcement of private law rights, the Court would not have hesitated to give the costs to the 3<sup>rd</sup> respondent as a party who had been brought to court in a suit which is subsequently withdrawn for any reason including the concession by another party to the suit. However, in accordance with the Supreme Court decision in the **Rai** case, supra, this court must consider whether there petition disclosed a matter concerning public interest litigation.

22. The failure to observe the rules for notice of the withdrawal of petitions under Rule 27 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 must be excused by the overriding imperative of the principle of costs in constitutional Bill of Rights litigation set out in Rule 26 (2) thereof that-

**“26. (2) 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.”**

23. This Court would infringe on the directive in the said rule to ensure every person access to court for determination of their rights and fundamental freedoms. The counter-part of the rule as regards court fees in Bill of Rights litigation, that is the directive of the Constitution to the Chief Justice under Article 22 (3) that in making rules for the exercise of the Bill of Rights jurisdiction, His Lordship must satisfy the criteria, among others, that “(c) no fee may be charged for commencing the proceedings”, is instructive of the basic principle for access to justice by enforcement of the Bill of Rights.

24. In seeking to have the Agreement the subject of the Petition nullified, the petitioner was enforcing a right to protection of the environment for his own benefit and the benefit of the Public with whom he shared the environment. It is not a purely private claim for which the general rule that costs follow the event should be strictly applied. That he may have wrongly joined the 3<sup>rd</sup> respondent or approached the wrong court forum are matters which could only properly have been determined at the hearing of the petition and this court cannot make that determination now so as to make it the basis for its decision on costs. The petition having been withdrawn, the determination cannot be made without submission by the parties in that behalf.

25. From the pleadings and affidavits before the Court, even without deciding he merits of the case, I have not been persuaded that in filing the suit, the petitioner had no reasonable cause of action against the 3<sup>rd</sup> respondent or that the petition was frivolous or otherwise abusing the process of the court so as to deny him the protection of public interest consideration in the order on costs.

26. On the question of jurisdiction of the Court, I respectfully note the decision in **Patrick Musimba v National Land Commission & 4 Others** [2015] eKLR, where a five-Judge bench of this Court and the Environment and Land Court (E&LC) held as follows:

**“Concurrent and coordinate jurisdictions**

65. *The above analysis lead us to the **conclusion that both the High Court and the ELC Court have a concurrent and or coordinate jurisdiction and can determine constitutional matters when raised and do touch on the environment and land.** Neither the Constitution nor the ELC Act limit the High Court's jurisdiction in this respect..."*

27. The decision on costs herein therefore rests not on the perceived merits of the parties' cases but on the nature of the claim, which, as public interest litigation, generally attracts, in accordance with the case-law authorities, no award of costs.

### **CONCLUSION**

28. The matter before the Court was a public interest litigation for which costs should not generally be granted so as not to hinder litigation on enforcement of the Constitution in accordance with the principle of the Rule of Law and Constitutionalism. Had the matter been a regular civil suit, purely governed by the provisions of the Civil Procedure Act, the Court would have employed the general rule that costs follow the event and accordingly awarded costs to the respondents sued in the withdrawn petition without their concurrence or concession.

29. In this Petition, the public law element of public interest in the protection of the environment is a good reason for departure from the general rule on costs. The validity of the reason for departure is not vitiated by reasonable defences to the petition by the respondents, or indeed any eventual loss of the claim, as the public interest litigation must not always be one that ultimately succeeds in order to attract the exemption from the costs follow the event principle.

### **ORDERS**

30. Accordingly, for the reasons set out above, the Court makes no order as to costs in the Petition.

**EDWARD M. MURIITHI**

**JUDGE**

**DATED AND DELIVERED THIS 7<sup>TH</sup> DAY OF MARCH 2017.**

**E. K. OGOLA**

**JUDGE**

**Appearances:**

M/S Munyao, Muthama & Kashindi, Advocates for the Petitioner

M/S Miller & Co. Advocates for the 3<sup>rd</sup> Respondent