



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 24 OF 2015

IN THE MATTER OF: ARTICLES 20, 22(1), 23(3), 40, 47, 232, 258 AND
259 OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF: KENYA PORTS AUTHORITY RETIREMENT
BENEFITS SCHEME, 2012, THE TRUST DEED AND RULES
THEREUNDER

IN THE MATTER OF: THE RETIREMENT BENEFITS AUTHORITY
ACT

IN THE MATTER OF: INTERFERENCE, HINDRANCE,
OBSTRUCTION AND/OR MEDDLING WITH THE INVESTMENTS,
MANAGEMENT AND/OR RUNNING OF THE KENYA PORTS
AUTHORITY, 2012 BY THE RESPONDENTS

AND

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS ENSHRINED IN THE
BILL OF RIGHTS AND IN PARTICULAR THE RIGHT TO PROTECT
PROPERTY

BETWEEN

1. HARRY JOHN PAUL ARIGI
2. JOAN ZAWADI KARMA
3. RENSON JUMA THOYA

(suing as Member Elected Trustees of the KENYA PORTS AUTHORITY

4. RETIREMENT BENEFITS SCHEME, 2012.....PETITIONERS

AND

1. THE BOARD OF DIRECTORS, KENYA PORTS AUTHORITY
2. MANAGING DIRECTOR, KENYA PORTS AUTHORITY

3. GENERAL MANAGER, BOARD AND LEGAL SERVICES

KENYA PORTS AUTHORITY.....RESPONDENTS

RULING

1. The sole question to be determined in this Ruling is whether the Deputy Registrar has in exercise of her ministerial duty under Order 49 of the Civil Procedure Rules 2010, jurisdiction to order withdrawal of a Constitutional Petition under rule 27 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) High Court Practice and Procedure Rules, 2013. However, before answering that question, I give a short history of the antecedents which gave rise to the Deputy Registrar's orders purporting to withdraw the Petition.

2. **Firstly**, I will deal with the role of the court of first instance which deals with an application *ex parte*. At the first instance, the court merely considers whether there is a **prima facie** case which justifies the grant of an interim relief or conservatory order. At that stage the Applicant/Petitioner comes to court **ex parte**. The position of the Respondent or an Interested Party is unknown. Despite that lack of information on the position of Respondents, if the court of first instance is persuaded that there is a serious issue to be tried, and if the balance of convenience, including the wider public interest lies, then it may grant an interim relief. It must be emphasized that the court has not, and is not required, to go deep into the application, and more importantly, the court has not had the benefit of argument or the case of the Respondent or the affected or Interested Party. The Respondent's or affected or Interested Party's case is only heard at the **inter partes** hearing.

3. **Secondly**, at the **hearing inter partes** the court is seized of argument of both the Petitioners or Applicants and the Respondents. That court has therefore the benefit of argument and submissions of counsel by both sides, and is therefore in a position to maintain the interim orders or otherwise. It is not a contest between two Judges of cognate jurisdiction as counsel for the Petitioners/Applicants intended to reduce his argument into.

4. **Thirdly**, in this case having heard and considered submissions by counsel for the Petitioners/Applicants and counsel for the Respondents, this court was in a position to determine whether to maintain the interim orders made by the Judge of first instance or to vary them. I varied them in these terms –

“...the status quo...that is to say, no transaction between the Applicant and the third parties who are not parties to these applications, be made pending the simultaneous determination of the Applicants' application dated 16th April, 2015 and the Respondents' Applications dated 30th April, 2015, and fixed the matter for hearing on 12th May, 2015.”

5. However, on 11th May, 2015 the Respondents filed another application dated 7th May, 2015 which I certified urgent and directed that it be served upon the Applicants' counsel, and be heard on 12th May, 2015.

6. On 12th May, 2015, counsel for the Applicants made an oral application to amend both Petition and the Notice of Motion on the grounds that the amendments would bring out real issues for determination of the court, and counsel for the Applicants urged that the application for amendment be heard first.

7. This was however opposed by counsel for the Respondents who protested that the application for amendment was served upon them the previous day at 4.00 p.m., despite the fact that it was filed on 8th May, 2015, and that no reasons were given for the late service. Counsel urged that he had sought further instructions from his clients and would not be in a position to argue the application until first instructed by his clients, the Respondents.

8. Thinking that it was the proper order to make in the circumstances, the court granted leave to the

Respondents' Counsel to take instructions and file a Replying Affidavit to the application for Amendment of the Petition and Notice of Motion within seven days and fixed the Applications for hearing on 26th May, 2015, and directed the orders of **status quo** be maintained till that date.

9. Unknown to the court and counsel for the Respondents, counsel for the Applicant had taken offence with the courts off-record comments, asking counsel for the Petitioners/Applicants what (if any) constitutional issue was being raised in the Petition, which essentially concerned the management of a Pension Retirement Benefits Scheme, sponsored by the Kenya Ports Authority (KPA). According to the Petitioners' counsel, when the Petitioners were informed of this comment, they decided that this showed bias on the part of the court, and that they would not get justice in this court. Counsel was instructed to withdraw the Petition, and file another suit before another Division of this court in which the Petitioners/Applicants would get justice by obtaining the orders they sought.

10. In aid of the Petitioners' way of thinking their counsel filed on 15th May, 2015 a Notice of **Withdrawal of Petition**. The Notice was duly endorsed by the Deputy Registrar on 20th May, 2015.

11. So when the matter came up for hearing on 26th May, 2015, counsel for the Petitioners informed the court rather curtly that there was no Petition or Notice of Motion to be heard by the court. He urged the court to accept as authority binding upon this court, the decision of the Supreme Court in the case of **NICHOLAS KIPTOO ARAP KORIR SALAT VS. THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION and 7 OTHERS [2014] eKLR** in which that court held *inter alia* –

“A party's right to withdraw a matter before the court cannot be taken away. A court cannot bar a party from withdrawing his matter. All that the court can do is to make an order as to costs where it is deemed appropriate.”

12. The Supreme Court cited with approval, the decision of a single Judge of that court, in **JOHN OCHANDA VS. TELKOM KENYA LIMITED (Notice No. 25 of 2014)** in granting an application for withdrawal of a Notice of Appeal the Judge stated *inter alia*,

“I hold the view that a prospective Appellant is at liberty to withdraw 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 the 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).”

13. This court has no hesitation in following the above decision if an applicant or Petitioner follows or followed the Rules applicable to withdrawal, and the stage at which the application for withdrawal is made, that is, any time **before the appeal has been lodged and any further steps taken, where no proceedings have commenced strictly.** (*emphasis added*)

14. Order 25 of the Civil Procedure Rules 2010 provide the procedure for **Withdrawal, Discontinuation and Adjustment of Suits**, but subject to conditions, for instance, the withdrawal is not a bar to a subsequent suit Order 25 rule (1), is subject to costs, (Order 25 rule (3)), and any subsequent suit may be stayed pending the payments of costs. That is the position in withdrawal of civil suits.

15. Likewise, the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provide the procedure for withdrawal of Petitions. Rule 27 of the said Rules provide 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 leave of the court, discontinue proceedings,
- (c) the court shall, after hearing the parties to the proceedings, decide on the matter and determine the juridical effects of that decision;
- (d) 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.”

16. Neither the Constitution nor the Rules aforesaid define

what the expression notice to the court and to the Respondent means or entails. In my view in the absence of any other enabling provision to the contrary, “a Notice” to the court, and to the Respondent means a Notice **in Writing** as an oral application can only be made in the presence of the Respondent or the Respondent’s Advocate. The Petitioners breached this fundamental rule, and acted in extreme bad faith.

17. They acted in extreme bad faith because, they treated the Petition as an ordinary civil case, where under Order 25, it could be withdrawn and a new suit commenced. This is what the Petitioners did, and no doubt under advice of their counsel, **“as they would not get justice in this court”** whose orders they were trying to evade by filing a new suit in the Civil and Commercial Division (HCCC NO. 64 of 2015) seeking the same reliefs as in the Petition which they obtained without disclosing to the court they had a Petition pending for the same orders. The purported Notice of Withdrawal of Petition dated 11th May, 2015 however failed to meet the requirements of Rule 27 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. It also failed to meet the tests for withdrawal of a Petition as was held in Constitutional Petition No. 305 of 2012, consolidated with Petition No. 34 of 2013, where a three Judge bench set out the legal tests for withdrawal of a Constitutional Petition.

- (1) the court will recognize the public interest in the matters being litigated under the petition,
- (2) the court will not permit the withdrawal of a petition where the withdrawal would have adverse juridical effects on public interest involved in the matter,

18. These tests were considered by the Supreme Court of

India in the Indian case of **S.P. ANAND VS. H.D. DEVE GOWALA [1996] 6 SCLR 734** where the court said:-

“Here we must mention that in PUBLIC INTEREST LITIGATION (PIL) cases, the Petitioner is not entitled to withdraw his petition at his sweet-will unless the court sees reason to permit withdrawal. In granting permission the court would be guided by considerations of public interest and would also ensure that it does not result in abuse of the process of law. Courts must guard against possibilities of such litigants settling the matters out of the court to their advantage and then seeking withdrawal of the case. There are umpteen ways in which the process can be abused and the courts must be aware of the same before permitting withdrawal of the petition.”

19. At paragraph 25 of their Ruling in the **“Machakos”** Petition the Judges observed that our rule 27(3) above cited is the crystallization of the reasoning in this case which the court adopted. The court expressed itself thus:-

“...Differently put, the test is simply that a court will only permit a petitioner to withdraw a Public Interest Litigation matter upon being satisfied that none of the following conditions which our Rules call “juridical effects” are present:

(a) That the public interest initially presented in the case will not suffer as a result of the withdrawal. Differently put, the question to ask here is whether the public interest concerns which were to be addressed in the case will suffer adverse effects resulting from the withdrawal of the suit. If the public interest would be compromised or diminished, in any way or the withdrawal of the suit would make it strategically, technically or procedurally more arduous to establish or consider the public interest in the case, it follows that considerations would counsel against leave to withdraw the petition.

(b) That there is no abuse of the process of the law. Here the court will seek to see whether the party seeking to withdraw acted in good faith both at the time she seeks to withdraw. In particular, acutely conscious of the role of Public Interest Litigation, the court will test to see if there is any inkling that the party seeking to withdraw does so in order to personally benefit from the case, or its publicity. This is to ensure that, in the words of the Supreme Court of India in Sheela Barsa vs. Union of India AIR 1988 SC 2211 -

“..... a person or body of persons cannot approach the court with ulterior motive or design to wrench some personal benefit by putting another within the clutches of law and using the court for a device only to that end but not interested in the result of the petition.”

(c) That the case at hand is not an exercise in futility. If the case has been by events or the points pressed by the petitioners are moot, it would be absurd to insist that the case proceeds even if initially it was dripping with public interest.”

APPLYING THE LEGAL TEST TO THE CASE AT HAND

20. The issue raised by the Petitioners is whether the Respondents, representing the Kenya Ports Authority a statutory body of the Government of Kenya established under the Kenya Ports Authority Act (Cap 391 Laws of Kenya) and the primary sponsor of the **Kenya Ports Authority Retirement Benefits Scheme**, 2012, has any legal right to question decision of the scheme's trustees to spend over Kshs. 700 million in the purchase of 100 acres of land, at the price of Kshs. 7 million per acre. The Kenya Ports Authority being a public body and the principal sponsor of the Retirement Benefits Scheme, the interest raised by the Petitioner concerns the public, the ordinary members of the scheme and their families, the ultimate beneficiaries of the scheme. The Kenya Ports Authority through its management, the Respondents in the Petition has every right to question the legitimacy of tying up vast sums of pension funds merely on undeveloped parcel of land, without a corresponding scheme for return of that money to the beneficiaries who retire from time to time. If there was no immediate and medium term return on that investment, the vast majority of retirees from the Kenya Ports Authority would be questioning that body as to why it did not protect their money while it was being tied up in long term investment in land, when they are unable to get their benefits at once.

21. It was therefore in the public interest that the court crafted the order for **status quo** in the manner it did so that time was given for the Petitioners and the Respondents to iron out what they thought were issues raised in the application of the Retirement Benefits Scheme. The alleged “*bias*” is a figment of imagination by the Petitioners.

22. Apart from the fact and the law that the purported orders of withdrawal of Petition by the Deputy Registrar was without jurisdiction, the withdrawal was also tainted with ill motive, to circumvent the **status quo** order of this court, and the immediate filing of HCCC No. 64 of 2015 in which contrary orders were granted. That is a classic case of an abuse of process. The court will not accept the abuse of its process. No Petitioner is permitted to either forum shop, nor to abuse the process of court.

ORDERS OF THE COURT

23. In the circumstances, I make the following orders:-

- (1) The orders of the Deputy Registrar made on 11th May, 2015 purporting to withdraw the Petition are hereby set aside.
- (2) The oral application by the Petitioner's counsel made on 26th May, 2015 to withdraw the Petition is declined.
- (3) The Petition be set for hearing on priority by either the Petitioners or Respondents.
- (4) The costs herein be in the cause.

24. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 2nd day of June, 2015.

M. J. ANYRA EMUKULE

JUDGE

In the presence of:

Mr. Tindika for Petitioners

Mr. Khagram for Respondents

Kaunda Court Assistant