



**Opiyo & 2 others v Kenya Revenue Authority & 2 others; Institute of Certified Public Accountants & another (Interested Parties) (Commercial Petition E013 of 2025) [2025] KEHC 15023 (KLR) (Commercial and Tax) (23 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 15023 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**COMMERCIAL AND TAX**  
**COMMERCIAL PETITION E013 OF 2025**  
**F GIKONYO, J**  
**OCTOBER 23, 2025**  
**N THE MATTER OF CONSOLIDATED TAX**  
**LAWS**  
**AND**  
**IN THE MATTER OF THE**  
**UNCONSTITUTIONAL AND**  
**DISCRIMINATORY IMPLEMENTATION OF**  
**THE VAT SPECIAL TABLE BY THE KENYA**  
**REVENUE AUTHORITY**

**BETWEEN**

**PETER OPIYO ..... 1<sup>ST</sup> PETITIONER**

**CPA PETER GACHERU ..... 2<sup>ND</sup> PETITIONER**

**CPA DENIS NYAMBATI ..... 3<sup>RD</sup> PETITIONER**

**AND**

**KENYA REVENUE AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**COMMISSIONER GENERAL, KENYA REVENUE AUTHORITY .... 2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS .. INTERESTED PARTY**



## RULING

### Withdrawal of Public Litigation Suit

1. The 1<sup>st</sup> to 3<sup>rd</sup> petitioners/ applicants filed the notice of motion dated 28<sup>th</sup> July 2025, expressed to be brought under Article 23(3) of the Constitution of Kenya, 2010, Rules 3(3), 23, and 26 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.
2. The applicants seek the following orders: -
  2. Consideration of the Notice of Withdrawal dated 28<sup>th</sup> May 2025.
  3. That the ruling date scheduled for 23<sup>rd</sup> October 2025 in this petition be vacated.
  4. The Notice of withdrawal dated 28<sup>th</sup> May 2025 be effected.
  5. That this Constitutional Petition be withdrawn in its entirety with no order as to costs.
3. The grounds for applying are, that: -
  1. the petitioners filed this matter on 23<sup>rd</sup> May 2025.
  2. the court directed that it be served upon the respondents and interested parties.
  3. before service of the pleadings and court directions, the petitioners instructed their advocates on record to withdraw the petition, and a notice of withdrawal was filed on 28<sup>th</sup> May 2025.
  4. The petitioners have since filed a related matter, Bomet High Court Petition No. 10 of 2025.
  5. This matter is scheduled for a ruling on 23<sup>rd</sup> October 2025 and is likely to prejudice Bomet HC Petition No. 10 of 2025.
  6. Granting this application will not prejudice the Respondents or Interested Parties, as no responses have been filed, and no substantive proceedings have occurred.

### Analysis and Determination

4. The issue for determination is whether the court should permit the withdrawal of the petition.
5. The application under consideration seeks withdrawal of a constitutional petition challenging the constitutionality of the implementation of the VAT special table by the Kenya Revenue Authority.
6. In *Harry John Paul Arigi & 2 others v Board, Kenya Ports Authority & 2 others* [2016] KECA 141 (KLR), the Court of Appeal observed 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.”



7. Rule 27 of the *Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (hereafter the Mutunga Rules) provides: -

“27. The petitioner may -

- (1)
  - 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.”

8. The applicant filed a notice of withdrawal dated 28<sup>th</sup> May 2025. It also filed the instant application in accordance with rule 27 above.

9. Some insights of principles for consideration in determining whether to permit withdrawal were captured by the court in *Luka v Narok Bursaries Management Board & 6 others; Narok County Assembly (Interested Party) (Constitutional Petition E016 of 2023) [2024] KEHC 2523 (KLR) (13 March 2024)* (Ruling). The court noted that: -

“17. The jurisprudence coming through is that public interest litigation is not a party’s private suit which he may withdraw or discontinue at whims. Any withdrawal or discontinuance of such proceedings as constitutional petitions, must be sanctioned by a Court. The requirement of leave of the court also protects public interest litigation from abuse by parties for ulterior or personal motives. For instance, Odunga JA always states that some parties file public interest litigation with the sole aim of having them dismissed, thereby blocking any other litigation on the subject on the basis of *res judicata* or the doctrine of *functus officio*. Others file public litigation cases for personal gain or to settle scores. And, the list could be long.”

10. Thus, exerting judicial incubational power upon collected wisdom from the available case law, legal text and observations over time, three broad principles emerge which should guide the court in determining an application under rule 27 of the Mutunga Rules. The court must be satisfied that, the withdrawal of public litigation; a) will not and is not intended to prejudice public interest-this is one of the juridical effects of the decision under the rule; b) is made in good faith and not for any ulterior motive or personal gain; and c) the court cannot proceed with the hearing of the petition, for instance, because no person has signified to proceed with the petition. This general formulation forms the functional foundation for determination of an application under rule 27 of the Mutunga Rules.

11. There is no doubt that the petition raises serious constitutional issues. The applicants sought to withdraw the petition because it has filed a related matter, Bomet High Court Petition No. 10 of 2025.

12. From the averments by the petitioners, it appears they filed a notice of withdrawal of this petition and subsequently filed the Bomet petition before leave to withdraw this petition had been applied for and obtained from court. This is a major omission that may taint the competence of the subsequent



petition. The court also notes that the petitioners did not even annex copies of the petition in Bomet High court.

13. Whereas the High court has jurisdiction to hear applications for violation of rights and fundamental freedoms under article 165 of the *Constitution*, the court will resist and frown upon any or any attempt for forum-shopping or suits that may run afoul of rules on sub judice.
14. From the foregoing, the actions by the petitioners will struggle to justify bona fides and adherence to critical procedural rectitude required to excite court's discretion in their favour.
15. Further, without necessarily reading any ulterior motive on the part of the applicants in filing the Bomet petition before seeking leave of the court to withdraw this petition, nothing shows that the application was served as had been directed by the court on 24<sup>th</sup> May, 2025.
16. There are other parties cited as interested parties who are critical players in public litigation and the relevant industry herein. They must participate. The procedure for leave also gives other persons who may be interested to take up the mantle and prosecute the petition. Nothing shows that these parties were served with the application for leave.
17. Within this context, it is not defensible the applicants' argument that these proceedings will prejudice the Bomet HC Petition No. 10 of 2025.
18. To avoid any prejudice to public interest, I decline leave to withdraw this petition. I let the petition survive and continue breathing. Let the petitioners move any of the court for transfer of one of the petitions to either of the High courts- a decision that will be made after hearing all the parties including the interested parties in accordance with rule 27 of the Mutunga Rules. It bears repeating that, the course adopted prevents prejudice to, and offers an opportunity to all parties to participate in this public litigation and even take over the petition to secure public interest.
19. Towards that end, the ruling scheduled for 23<sup>rd</sup> October 2025 is arrested. This ruling be served upon all the parties for their information and action if any. The DR of the court to transmit this ruling to the DR of Bomet High Court as well as to all parties herein. This matter shall be mentioned at a date to be assigned by the court.

**DATED, SIGNED AND DELIVERED THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 23<sup>RD</sup> DAY OF OCTOBER, 2025.**

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**F. GIKONYO M**

**JUDGE**

In the presence of:

Wanyanga for Applicant

Chabula for Respondent (KRA)

CA Kinyua

