



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. E170 OF 2021

(Before Hon. Justice Dr. Jacob Gakeri)

IN THE MATTER OF: ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 28, 33, 35, 41, 47, 48, 50, 73, 75, 165, 232, 236 AND 258 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: IN THE MATTER OF CONTRAVENTION OF ARTICLES 10, 22, 23, 28, 41, 47, 48, 50, 73, 75, 229, 232 AND 236 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: RULES 4, 5, 10, 23 AND 24 OF THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS) (PRACTICE AND PROCEDURE) RULES, 2013

AND

IN THE MATTER OF: SECTION 4, 36, 41 AND 42 OF THE COUNTY ASSEMBLY SERVICE ACT, NO. 24 OF 2017

AND

IN THE MATTER OF: SECTIONS 4, 5, 6 AND 12 OF THE FAIR ADMINISTRATIVE ACTIONS ACT NO. 4 OF 2015

AND

IN THE MATTER OF: SECTIONS 8, 9, 10, 11, 12 AND 36 OF THE PUBLIC OFFICER ETHICS ACT, NO. 4 OF 2003

AND

IN THE MATTER OF: THE EMPLOYMENT ACT, 2007

BETWEEN

PAULINE AKUKU

JAMES MWANGI

SAMMY KIPTOO

ROBERT SITUMA..... PETITIONERS

(Suing on. behalf of all the members of staff affected by

the Nairobi City County Assembly Report and Resolution)

VERSUS

SPEAKER, NAIROBI CITY COUNTY ASSEMBLY.....1ST RESPONDENT

JUSTICE AND LEGAL AFFAIRS COMMITTEE.....2ND RESPONDENT

NAIROBI CITY COUNTY ASSEMBLY..... 3RD RESPONDENT

THE ACTING CLERK,

NAIROBI CITY COUNTY ASSEMBLY.....4TH RESPONDENT

NAIROBI CITY COUNTY ASSEMBLY

SERVICE BOARD..... 5TH RESPONDENT

JUDGEMENT

1. Before the Court is a notice of motion dated 30th October 2021 made pursuant to Articles 22, 23, 41, 47 and 50 of the Constitution of Kenya, 2010, Rules 4, 23 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 and all other enabling provisions of law seeking various reliefs pending the hearing and determination of the application.

2. The application is premised on the grounds annexed to the notice of motion and further supported by the the affidavit of Robert Sifuna, Sammy Kiptoo, Pauline Akoko and James Mwangi, the Petitioners.

3. The application was slated for hearing on 16th December 2021 on which day Counsel for the Petitioners Mr. Ashioya, who was holding brief for Mr. Ochich told the Court that Mr. Ochich had filed the petition for all the 39 Petitioners and had filed a notice of withdrawal of the motion and petition dated 4th November 2021 and filed on 11th November 2021. He submitted that the notice of withdrawal was filed before the motion and the petition were served on the Respondents and thus there was no motion or petition to be served on the Respondents.

4. Mrs. Kamau informed the Court that she had been instructed by three (3) of the Petitioners to come on record but had not filed notice of change of advocates. Counsel for the Petitioners argued that there was no petition before the Court for Mrs. Kamau to represent the alleged three (3) Petitioners and if desirous, the three Petitioners were free to file a new petition and motion of their own.

5. Counsel prayed for the grant of the application for withdrawal of the petition as well as the notice of motion.

6. Mrs. Kamau pointed out that she was appearing for Hellen Mutie, Eric Robert Otieno and Ahmed Silo Makokha. That the three were opposed to the notice of withdrawal of the petition to ensure that their rights are safeguarded.

7. Mr. Theuri, Counsel for the Respondents argued that he had requested for a mention date by letter dated 1st December 2021 for purposes of directions on the notice filed by the Petitioners dated 4th November 2021 on the ground that Rule 27 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules), require that the Court conducts a hearing of the parties to the proceedings and make a determination as to the juridical effects of the notice of withdrawal. Counsel submitted under the Rules before a notice of withdrawal takes effect, a hearing was necessary and sought a hearing of the notice and its effects. He suggested that parties file submissions on this aspect and be accorded 14 days to do so.

8. In response Mr. Ashioya submitted that the question was:

i. Whether the notice of motion was served upon the Respondents or Mr. Theuri. In other words, whether the matter had been brought to their attention;

ii. Second, Mr. Ashioya's instructions were that neither the notice of motion nor the petition had been served upon the Respondent or Counsel and the withdrawal was to proceed ex parte and the notice of motion and petition be deemed withdrawn.

iii. Third, Rule 27(1) of the Mutunga Rules required the Petitioner to notify the Court its intention to withdraw the petition.

9. Finally, Mr. Theuri submitted that he filed a notice of appointment on 3rd November 2021 and the notice of withdrawal dated 4th November 2021 was filed on 11th November 2021. That the inquiry as to whether the petition or notice of motion were served was an exercise in futility since he was already on record for the Respondents.

10. The Court gave the Petitioner 14 days to file and serve its submissions on the notice of withdrawal and the Respondent 14 days after service and the ruling was scheduled for 8th February 2022.

11. Intriguingly, by 28th January 2022, when the ruling was written, neither of the parties had filed submission. Consequently, the Court did not benefit from the insights and perspectives of Counsel on the issue.

12. The Petitioners' notice of withdrawal dated 4th November 2021 and filed on 11th December 2021 is grounded under Order 25 Rule 1 of

the Civil Procedure Rules.

13. Instructively, the withdrawal notice was not served upon the Respondents ostensibly because the petition had not been served.

Analysis and Determination

14. I have carefully considered the notice of withdrawal, oral submissions by Counsel and the relevant law. The issues for determination are:

(i) *Whether the withdrawal of the petition and notice of motion is merited;*

(ii) *Whether Mrs. Kamau was properly before the Court.*

15. Before delving into the issues, it is essential to determine whether the notice of withdrawal is grounded on the relevant law. The notice is grounded on Order 25 Rule 1 of the Civil Procedure Rules which provides that –

“At any time before the setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.”

16. Undeniably, Order 25 Rule 1 of the Civil Procedure Rules applies to withdrawal of civil suits before they are set for hearing. The Plaintiff has unrestricted freedom to withdraw the suit by a notice in writing which must be served to all the parties and may withdraw the entire claim or part thereof.

17. In **Kofinaf Company Limited & another v Nahashon Ngige Nyagah & 20 others [2017] eKLR**, the Court stated that: -

“From the two decisions of the Court of Appeal (which needless to say are binding on this Court) the law can be stated to be that as a general proposition the right of a Plaintiff to Discontinue a Suit or Withdraw a Claim under the provisions of Order 25 Rule 1 (that is where the suit has not been set down for hearing) is an absolute and untrammelled right. Also, again as a general proposition, it takes effect upon the filing of the Notice. No leave of Court is required nor a Court endorsement necessary to give effect to this withdrawal.”

18. Be that as it may, it is common ground that that the matter before the Court is a petition grounded on the Constitution of Kenya 2010. Such petitions are governed by the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013. Specifically, Rule provides that:

(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.

19. It is common ground that the proceedings that the Petitioner seeks to withdraw by its notice of withdrawal dated 4th November 2021 is a constitutional petition for enforcement of fundamental rights as opposed to an ordinary civil suit which are governed by the Civil Procedure Act and applicable rules.

20. In **Harry John Paul Arigi & 2 others v Board, Kenya Ports Authority & 2 others [2016] eKLR**, the Court of Appeal affirmed the role of the Court in the withdrawal of constitutional petitions. The Court expressed itself as follows:

“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. We are satisfied that the right of a petitioner to withdraw a constitutional petition is circumscribed by rule 27 ...”

21. See also **Abdalla Salim Abdalla & 2 others v Office of Director of Public Prosecutions & 3 others [2020] eKLR** where Ogola J. observed that: -

“Since the withdrawal of constitutional Petitions is controlled by a specific regime that is traceable directly to the provisions of the Constitution, the Petitioners’ were obliged to comply with Rule 27 before they could procedurally withdraw the petition.”

22. The Court is in agreement with these sentiments.

23. Applying the above principles to the instant case, it is clear that that Petitioners filed Petition No. E170 of 2021 on 2nd November 2021 together with the notice of motion dated 30th October 2021 under a certificate of urgency of even date.

24. It is also evident that on 11th November 2021, the Petitioners' Counsel notified the Court his intention to withdraw the petition and the notice of motion dated 30th October 2021. The notice was served upon all the Respondents. It is also not in dispute that the Respondent's Counsel filed a Notice of Appointment of Advocates on 4th November 2021 as Counsel submitted and sought a mention date by letter dated 1st December 2021.

25. The notice of withdrawal of the petition and notice of motion was filed on 11th November 2021 after Counsel for the Respondents had come on record.

26. By 16th December when parties were heard by the Court, Mrs. Kamau had not filed a notice of appointment was thus not on record for any party although she purported to associate herself with the sentiments of Mr. Theuri, Counsel for the Respondents and did not come on. Mrs. Kamau came on record thereafter by a notice of appointment dated 15th December 2021.

27. As regards whether Mrs. Kamau was properly before the Court on the date of hearing, the Court is guided by the Civil Procedure Rules and judicial authorities. Order 9, Rule 5 of the Civil Procedure Rules provides that –

“A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”

28. The sentiments of the Court of Appeal in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR** are also instructive where Kiage JA stated that –

“I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules ... I am not prepared to hold that parties can simply wave the Constitution and the oxygen principles in the Act hoping thereby to obliterate their defaults and cure the incompetencies and defaults ...”

29. The Court is in agreement with these sentiments.

30. Applying the above principles to the instant matter, it is not in dispute that Mrs. Kamau appeared in Court on 16th December 2021 and purported to participate in the proceedings without being on record for any of the parties to the suit.

31. She neither sought the Court's indulgence nor the Counsels on record and was for all intents and purposes a stranger. Relatedly Mrs. Kamau made no request or application to the Court *“on behalf”* of the purported clients and did not file submissions to assist the Court in its determination. Her submission would have demonstrated a burning desire to urge her *“clients”* case even though she was not on record on 16th December 2021. Such submissions would have adverted not only to the provisions of Article 159 of the Constitution of Kenya, 2010 and Section 1A of the Civil procedure Act but also relevant judicial authorities in support of the submissions. Counsel did not do so.

32. In sum by November 2021 when the Petitioners' Counsel filed the notice of withdrawal, the firm was acting for all the Petitioners and no objection was raised. In fact up to 28th January 2022, when this ruling was written there was no objection on record and as adverted to elsewhere, none of the parties had filed submissions by that date.

33. In the premise, the Court is satisfied that since the Petitioners notified the Court their intention to withdrawal the petition and the notice of motion dated 30th October 2021 and applied for the application to be allowed on 16th December 2016, and there was no objection in any form on record for the Court to peruse and make a determination on its bearing in relation to the application, the Court is constrained to allow the withdrawal of the petition and notice of motion dated 30th October 2021 with no orders as to costs.

34. The juridical effect of the withdrawal of the petition and notice of motion dated 30th October 2021 is that since the matters have not been heard and determined on merit and the issues arising therefrom were not canvassed and determined, any party interested or desirous of litigating the issues is at liberty to file a petition or any other action as it may deem necessary.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 8TH DAY OF FEBRUARY 2022

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE