



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

(Before Hon. Lady Justice Maureen Onyango)

PETITION NO. 138 OF 2018

CENTRAL ORGANISATION OF

TRADE UNIONS (COTU-K)..... PETITIONER

VERSUS

THE CABINET SECRETARY,

NATIONAL TREASURY..... 1ST RESPONDENT

THE CABINET SECRETARY, MINISTRY OF TRANSPORT

AND INFRASTRUCTURE..... 2ND RESPONDENT

THE ATTORNEY GENERAL..... 3RD RESPONDENT

AND

FEDERATION OF KENYA EMPLOYERS (FKE).....INTERESTED PARTY

AS CONSOLIDATED WITH PETITION NO. 90 OF 2019

KENYA UNION OF POST PRIMARY

EDUCATION TEACHERS (KUPPET)..... PETITIONER

VERSUS

THE CABINET SECRETARY,

NATIONAL TREASURY..... 1ST RESPONDENT

THE CABINET SECRETARY, MINISTRY OF TRANSPORT

AND INFRASTRUCTURE..... 2ND RESPONDENT

THE COMMISSIONER GENERAL,

KENYA REVENUE AUTHORITY..... 3RD RESPONDENT

THE ATTORNEY GENERAL..... 4TH RESPONDENT

AS CONSOLIDATED WITH PETITION NO. 31 OF 2019

TRADE UNIONS CONGRESS OF KENYA (TUC-KE).....PETITIONER

VERSUS

THE CABINET SECRETARY,

NATIONAL TREASURY.....1ST RESPONDENT

THE CABINET SECRETARY, MINISTRY OF TRANSPORT

AND INFRASTRUCTURE..... 2ND RESPONDENT

THE ATTORNEY GENERAL..... 3RD RESPONDENT

AS CONSOLIDATED WITH PETITION NO. 40 OF 2019

PAUL CHERUIYOT SIGEIPETITIONER

VERSUS

THE CABINET SECRETARY,

NATIONAL TREASURY.....1ST RESPONDENT

THE CABINET SECRETARY, MINISTRY OF TRANSPORT

AND INFRASTRUCTURE..... 2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

AS CONSOLIDATED WITH PETITION NO. 69 OF 2019

CONSUMER FEDERATION (COFEK)..... PETITIONER

VERSUS

THE CABINET SECRETARY, MINISTRY OF TRANSPORT,

INFRASTRUCTURE, HOUSING, URBAN DEVELOPMENT

& PUBLIC WORKS..... 1ST RESPONDENT

THE ATTORNEY GENERAL..... 2ND RESPONDENT

AS CONSOLIDATED WITH PETITION NO. 72 OF 2019

KENYA NATIONAL UNION OF NURSES PETITIONER

VERSUS

THE CABINET SECRETARY, MINISTRY OF TRANSPORT,

INFRASTRUCTURE, HOUSING, URBAN DEVELOPMENT

& PUBLIC WORKS..... 1ST RESPONDENT

THE ATTORNEY GENERAL..... 2ND RESPONDENT

RULING

This petition was marked as settled on 10th May 2021 following confirmation that Statute Law Miscellaneous Amendment Act No. 20 of 2020 deleted Section 31A of the Employment Act which was the subject of Petitions 138 of 2018, as consolidated with petitions no. 69 of 2019, 72 of 2019, 31 of 2019, 90 of 2019 and 40 of 2019. The Petitioners have prayed for payment of 50% of costs on grounds that the amendments came after the petitions had been instituted.

The Respondents oppose payment of any costs on grounds that the petitions were filed in public interest, Mr Ogosso for the Respondents relied on the principle that suits filed in public interest do not attract costs. He submitted that costs would discourage Petitioners from taking up matters of public interest. For emphasis he cited the Court of Appeal decision in **Kenya Human Rights Commission & Another v Attorney General & 26 Others (2019) eKLR**.

In response, Mr. Okwe Achiando submitted that the Petitioner in Petition 138 of 2018 expended public funds in institution, and prosecuting the petition. He submitted that not all public interest litigation are to be determined without costs. That parties filed voluminous documents in Court severally and expended resources. That the Petitioners have waited for a long time for the respondents to actualize pleas that they were going to make amendments

Ms. Akello for Petitioner in Petition 90 of 2019 submitted that in addition to the sentiments of Mr. Achiando which she associated herself with, the Respondents cannot now plead public interest when in coming up with the amendments, they did not consider public interest. That they ought to be condemned to pay costs as a deterrence for making such unnecessary inclusions in the law. That this case should be looked at in a different perspective from the authority cited by the Respondent's counsel.

Mr. Nyandieka, Counsel for Petitioner in Petition 31 of 2019 concurred with submissions of Mr. Achiando and Ms. Akello and added that the Court should exercise discretion in favour of awarding costs to the Petitioner as all the Petitioners did not gain locus through public interest. That they all had intrinsic locus. That the amendments were made without public participation.

Mr. Kurauka for Petitioner in Petition No. 69 of 2019 added that the case cited by the Respondents was distinguishable as the private parties were condemned to pay costs. He observed that the Court has indulged the Respondents very many times and the circumstances should persuade the Court to award costs to the Petitioners on the basis of quantity of work and number of court attendances.

Mr. Okoth Obera appearing for Petitioner in Petition 72 of 2019, besides associating himself with Counsel for the other Petitioners, submitted that the authority cited by Counsel for the respondents was dealing with nomination of parties for political positions unlike the instant case where the Cabinet Secretary introduced levies without consultation.

Further, that the deletion of the impugned Section 31A of the Employment Act by the Respondents implied admission.

In reply, Mr. Ogosso for the Respondent submitted that the executive does not control the calendar of the legislative arm of government.

Further, that the remedies sought were *in rem*, not *persona*. He submitted that the principle he cited has been relied upon in many other cases such as Jasbir Singh Rai including decisions by the Supreme Court. He urged the Court to order that each party bears its own costs.

Determination

I have considered submissions of parties. It is note in contention that this is a public interest litigation suit. It is further not contested that the suit was settled following the repeal of the impugned Section 31A of the Employment Act through Statute Law Miscellaneous Amendment Act No. 20 of 2020.

The Employment and Labour Relations Court Act provides for costs in Section 12(4) as follows –

(4) In proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the Court considers just.

Costs are therefore at the discretion of the court.

In the instant case the Petitioners seek payment of half of costs on the basis that they have expended substantial time and resources in the prosecution of the case which was caused by the unconstitutional manner in which the impugned section of the law was amended.

In **John Harun Mwau & 3 Others v Attorney General & 2 Others [2012] eKLR** it was held that:

“180. In matters concerning public interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed. Costs should therefore not be imposed on a party who has brought a case against the state but lost. Equally, there is no reason why the state should not be ordered to pay costs to a successful litigant. The court also retains its jurisdiction to impose costs as a sanction where the matter is frivolous, vexatious or an abuse of the court process.”

In **Feisal Hassan & 2 others v Public Service Board of Marsabit County & another [2016] eKLR** it was held that:

“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 therefore, 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.”

The Court also had this to say in the case of **Brian Asin & 2 Others v Wafula W. Chebukati & 9 Others [2017] eKLR** the issue as to whether public interest litigation should attract costs was determined as follows:

“60. The Public Interest Litigation was designed to serve the purpose of protecting rights of the public at large through vigilant action by public spirited persons and swift justice. But the profound need of this tool has been plagued with misuses by persons who file Public Interest Litigations just for the publicity and those with vested political interests. The courts therefore, need to keep a check on the cases being filed and ensure the bona fide interest of the Petitioners and the nature of the cause of action, in order to avoid unnecessary litigations. Vexatious and mischievous litigation must be identified and struck down so that the objectives of Public Interest Litigation aren’t violated. The constitution envisages the judiciary as “a bastion of rights and justice...”

63. The question is whether the proceedings before me are frivolous or vexatious bearing in mind that it is the duty of the court to see whether the Petitioner who approaches the court has a bona fide intention and not a motive for personal gain, private profit or political or other oblique considerations.”

In **Consumers Federation of Kenya (COFEC) v Kenya Commercial Bank & Another [2021] eKLR**, Korir J. held that–

“16. In view of the cited authorities, the appropriate order in the circumstances of this case is to direct the Petitioner and the 2nd Respondent to meet their respective costs in respect of the proceedings as there is no reason to deviate from the principle that costs should not be awarded in public interest litigations. Furthermore, the petition is not frivolous, vexatious or an abuse of the court process and I therefore see no reason to impose costs on the Petitioner. The Petitioner and the 2nd Respondent will therefore meet own costs of the proceedings.”

From the authorities referred to above, it is clear that the general rule is that no costs should be imposed in constitutional cases instituted to advance public interest unless such suits are frivolous, vexatious or filed to advance private personal interest.

The Petitioners have not given justification for deviation from the above principle. Further the petition was resolved without parties having to argue any pleadings.

I find no reason to deviate from the principle that courts should not award costs in public interest litigation. As Mr. Ogosso submitted, had Petitioners been on the opposite side, they would have benefited from the same principle.

For these reasons I order that each party shall bear its costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF MAY 2021

MAUREEN ONYANGO

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.

MAUREEN ONYANGO

JUDGE