



Wandabwa & 3 others v County Executive Committee Member -Lands, Urban/Planning,Housing and Municipalities Bungoma County & 2 others (Environment and Land Constitutional Petition E004 of 2024) [2024] KEELC 7566 (KLR) (14 November 2024) (Ruling)

Neutral citation: [2024] KEELC 7566 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E004 OF 2024

EC CHERONO, J

NOVEMBER 14, 2024

IN THE MATTER OF ARTICLES 10,20,21,22,23,24,25,27,35,40,50,60,159,162(2) (B),232,258,259 AND 260 OF THE CONSTITUTION, 2010

AND

IN THE MATTER OF THE ALLEGED VIOLATION OF THE RIGHTS PROTECTED UNDER THE CONSTITUTION

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE

AND

IN THE MATTER AND PROCEDURE RULES, 2013 RULES 13,19 AND 23 OF THE LAND REGISTRATION ACT, 2012

AND

IN THE MATTER OF THE PHYSICAL AND LAND USE PLANNING ACT, 2019

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT, 2012

AND

IN THE MATTER OF THE TITLE E. BUKUSU/ N.KANDUYI/1112, 2387, 5610 &3153

BETWEEN

IMELDA NASIMIYU WANDABWA 1ST PETITIONER

HAGGAI TIMOTHY OMUNYUN 2ND PETITIONER

AGGREY SIMIYU WALEKWA 3RD PETITIONER



ROSE NAFULA KHISA 4TH PETITIONER

AND

COUNTY EXECUTIVE COMMITTEE MEMBER -LANDS, URBAN/
PLANNING,HOUSING AND MUNICIPALITIES BUNGOMA COUNTY 1ST
RESPONDENT

THE GOVERNOR BUNGOMA COUNTY 2ND RESPONDENT

COUNTY GOVERNMENT OF BUNGOMA 3RD RESPONDENT

RULING

1. This application seeks to determine the oral application by the Petitioners to withdraw the Petition herein dated on 12/04/2024.
2. Mr Wesonga Advocate for the Respondents did not oppose the application but asked this court to award him costs of the Petition. It was the Mr. Wesonga's position that they entered appearance, Replying affidavit to the Petition and the interlocutory application for injunction as well as other supporting documents and also appeared in court on various dates and are therefore eligible to be awarded costs of the Petition if the same is to be withdrawn.
3. The Applicants argued that the decision to withdraw the petition was by consent of the parties and that the Respondents are not entitled to costs. They contend that they have also incurred costs by engaging an advocate and have equally lost their property and income which they were earning and now have no hope of recovering.
4. By way of background, the Petitioners herein instituted this suit having been aggrieved by an enforcement notice dated 31/1/2024 issued by the 1st Respondent for demolition of developments erected on the suit properties which the Petitioners argued contravened provisions of *the Constitution*, 2010 and breached their guaranteed rights over property generally. The matter was in the first instance placed before the court on 15/04/2024 for determination of an interim application dated 12/04/2024 when directions were issued on service and filing of the respective responses and for a hearing on 15/05/2024. Before the Notice of motion filed alongside the petition could be heard, the Petitioners have now sought to have the petition withdrawn.
5. The Court has considered the application and the rival submissions by Counsel for the Respondents. Rule 27 of the Mutunga Rules is on withdrawal or discontinuance of Petitions. It provides as follows: -
 - (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.
 - (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.
6. On costs, Rule 26 of the Mutunga Rules states as follows: -



- (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.
7. Section 27 of the *Civil Procedure Act*, Cap. 21 of the Laws of Kenya provides as follows: -
- (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:
 - (2) 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.
8. In Petition of Appeal No. 18 of 2019, Director of Public Prosecution -vs- Michael Sistu Mwaura Kamau & 4 others [2020] eKLR, the Learned Judges of the apex court gave meaning to Section 27 of *Civil Procedure Act* and in so doing made reference to its earlier decision in *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others* where it was observed as follows: -
- (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. (emphasis added).
- ... in the classic common law style, the Courts have to proceed 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 ...
- ... Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.
9. Since the award of costs is a discretionary power, what matters is that the same has to be exercised judicially and not whimsically. A party who moves the Court to make such an order for costs has an obligation to lay a firm basis by giving sufficient reasons why he should be awarded costs. In determining the current application, the court is called upon to consider several factors including the conduct of the parties, the extent of effort, financial resources and time the Respondent expended in defending the Petition among many other considerations.
10. As earlier mentioned, the interim application filed by the Petitioners is yet to be heard. On the part of the Petitioners, they have only filed a Notice of Motion and Petition while the Respondents have



filed a notice of preliminary objection, grounds of opposition, replying affidavit and submissions to the notice of motion application.

11. In determining whether or not to award costs, this Court must be mindful not to hinder the advancement of constitutional justice. It is my considered view that though this matter is not a public interest litigation and given the peculiar circumstances in the matter and the calling in Rule 26 of the Mutunga Rules coupled with the fact that this matter had not substantially proceeded, is the finding of this Court that, although the matter is not a public interest litigation, the fairest order is that each party bears their own costs.
12. In the end, the following final orders do hereby issue: -
 - (a) The Petition dated 14th April, 2024 is hereby marked as withdrawn.
 - (b) Each party to bear their own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 14TH, DAY OF NOVEMBER, 2024.

HON.E.C CHERONO

ELC JUDGE

In the presence of

Mr. Wesonga for the Respondents

Petitioners/Applicants-present

Bett C/A

