



Consumer Federation of Kenya (Suing Through Ephraim Kanake, Stephen Mutoro and Henry Ochieng) ((Suing Through Ephraim Kanake, Stephen Mutoro and Henry Ochieng)) v Cabinet Secretary for Roads and Transport & 4 others; Katiba Institute & another (Interested Parties) (Petition E454 of 2024) [2025] KEHC 695 (KLR) (Constitutional and Human Rights) (31 January 2025) (Ruling)

Neutral citation: [2025] KEHC 695 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E454 OF 2024
EC MWITA, J
JANUARY 31, 2025

BETWEEN

CONSUMER FEDERATION OF KENYA PETITIONER
(SUING THROUGH EPHRAIM KANAKE, STEPHEN MUTORO AND HENRY OCHIENG)

AND

CABINET SECRETARY FOR ROADS AND TRANSPORT 1ST RESPONDENT
CABINET SECRETARY FOR NATIONAL TREASURY AND PLANNING 2ND RESPONDENT
KENYA ROADS BOARD 3RD RESPONDENT
ENERGY AND PETROLEUM REGULATORY AUTHORITY 4TH RESPONDENT
ATTORNEY GENERAL 5TH RESPONDENT

AND

KATIBA INSTITUTE INTERESTED PARTY
LAW SOCIETY OF KENYA INTERESTED PARTY



RULING

1. The petitioner filed this petition together with an application under urgency seeking some conservatory orders. The matter was placed before Mugambi, J on 5/9/2024 who considered the matter and rendered himself thus:

I have considered the notice of motion application dated 03/09/2024, the certificate of even date, together with the affidavit in support of the urgency sworn by Tali Israel Tali and note that there already exists similar application before the court, i.e. Petition E416/2024. The orders in the aforementioned file to apply in this instant application.

Further directions on 07/10/2024 before Hon. E C Mwita, J.

2. On 11th September 2024, another application under urgency dated 9th September 2024 was filed and placed before the same Judge. After considering that application, the Judge reiterated his earlier orders of 5th September 2024, that the file be mentioned before this court on 7th October 2024 together with petition E416 of 2024. The judge added that the directions given on 03/09/2024 were to remain until when both matters are mentioned on 07/10/2024 when the court may be moved to consider any other developments.
3. Meanwhile, petition E416 of 2024 was withdrawn on 9th September 2024 without parties bringing to the attention of the court the directions issued by Mugambi, J.
4. On 30th September, this court's attention was draw to the fact that the orders issued in petition E416 of 2024 were to apply to this file as directed by Mugambi, J on 5th September 2024. This court then issued orders in the presence of counsel for the parties restraining the respondents from implementing the Road Maintenance (Imposition of Levy) Order, 2024 until 07/10/2024 when the court would give further directions on the matter.
5. On 7th October 2024, counsel for the parties confirmed to have filed responses and skeleton arguments to the application dated 3rd September 2024. The court then directed that highlighting of submissions on that application be taken on 15th October 2024.
6. When the matter came up for submissions on 15th October, Mr. Tali, counsel for the petitioner informed the court that parties had signed and filed a consent dated 14th October 2024 settling the matter and asked the court to adopt that consent.
7. The court directed parties to argue whether a petition the court should accept the consent settling the matter. Parties were directed to file and exchange brief written submissions on the issue. The matter was fixed for arguments on 1st November 2024.
8. During the hearing, Mr. Tali, counsel for the petitioner, supported adoption of the consent settling the matter. He argued that the consent was arrived at in the interest of justice and was signed in good faith.
9. Mr. Kaumba, counsel for the 1st, 2nd and 5th respondents, also supported adoption of the consent to have the matter marked as settled. He relied on paragraphs 9 and 10 of his submissions in urging the court to adopt the consent. Mr. Kaumba argued that the subject matter of the petition would not suffer since there was satisfaction on both sides. The consent was also not an abuse of the court process by any of the parties.



10. Mr. Issa, counsel representing the 3rd respondent, also supported adoption of the consent. He relied on the Supreme Court decision in *Geoffrey Asanyo & others v Attorney General & others* [2018] KSC 15(KLR) (para 90-96) on the duty of superior courts to facilitate alternative dispute resolution. He again referred to *Geoffrey Asanyo & 3 others v Attorney General* [2020] KSC 62 (KLR) (para 38-42) and urged the court to adopt the consent.
11. Mr. Wetangula, counsel for the 4th respondent also supported adoption of the consent. He associated himself with the submissions made by his colleagues as well as the decisions in the Asanyo cases in urging the court to adopt the consent.
12. I have considered the arguments by counsel for the parties all supporting adoption of the consent to have the matter marked as settled in terms of the consent dated 14th October 2024.
13. The petition was filed in public interest and sought a declaration that the Road Maintenance Levy Fund (Imposition) Order, 2024 is unconstitutional, null and void; and an order prohibiting, restraining the respondents either themselves, their officers, agents, employees or other persons or entity acting under the respondents' instructions from implementing and enforcing the Road Maintenance Levy Fund (Imposition) Order, 2024.
14. The petition was amended on 30th September 2024 to include the Law Society of Kenya as the 2nd interested party and other averments in the petition. The prayers were not, however, affected. The Road Maintenance Levy Fund (Imposition) Order, 2024 was challenged on various constitutional and legal grounds.
15. Before the petition could be heard, parties signed and filed a consent dated 14th October 2024 in the following terms:

By consent of the parties, it is agreed that having received the responses from the Respondents and having read and understood the contents therein together with the annexures,

1. The petitioner has analysed and scrutinized the annexures public participation report dated 09th July 2024 together with the supporting materials and is satisfied that meaningful public participation was conducted prior to Gazettement of the Road Maintenance Levy (Imposition of Levy) Order 2024
2. The petitioner has analysed and scrutinized the annexed evidence of consultations between the First and Second Respondents as per the [Statutory Instruments Act](#) together with the Annexed Regulatory Impact Assessment Report together with proof of laying before Parliament for parliamentary scrutiny, the Road Maintenance Levy(Imposition) Order 2024 and is satisfied that the provisions of the [Statutory Instruments Act](#) were adhered to prior to Gazettement of the Order.
3. In light of 1 and 2 above the continued prosecution of the Notice of Motion dated 3rd September 2024 and the amended Petition dated 30th September 2024 would be a waste of judicial time and in the circumstances, the Notice of Motion dated 3rd September 2024 and Amended Petition dated 30th September 2024 be marked as settled with no order as to costs.



16. Rule 29 of Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, (The Mutunga Rules) provides that the parties may, with leave of the court, record an amicable settlement reached by the parties in partial or final determination of the case.
17. I have considered the arguments by parties and perused the consent. As seen, rule 29 of the Mutunga Rules allows parties, with leave of the court, to record an amicable settlement in partial or final determination of their case. The operative words are “with leave of the court.” This means that only the court can allow parties to record a consent taking into account that the rules deal with petitions presented to court under the constitution and, in particular, article 22 of the constitution. The court has to guard the rights and fundamental freedoms of the parties, ensure not only that the consent is in tandem with the constitution and the Bill of Rights, but also advances constitutional principles.
18. This petition was filed in public interest, contesting the constitutionality of the process leading to the enactment of the Road Maintenance Levy (Imposition of Levy) Order, 2024 on the basis that the process violated constitutional principles. Responses were filed and the court was expected to issue further directions on the hearing of the main petition. However, parties filed the consent reproduced above and have urged the court to adopt it and mark the petition as settled.
19. Rule 3(3) of the Mutunga Rules states that the rules shall be interpreted in accordance with Article 259(1) of the constitution and shall be applied with a view to advancing and realizing-(a) rights and fundamental freedoms in the Bill of Rights, and (b) values and principles in the constitution. Rule (4) adds that in exercising its jurisdiction under the rules, the court should facilitate the just, expeditious, proportionate and affordable resolution of cases. In other words, even when asked to adopt a consent, the court should take into account the intention of the constitution, namely, to protect rights and fundamental freedoms and realize and advance values and principles of the constitution. One of the constitutional principles is expeditious disposal of cases and alternative dispute resolution.
20. The consent filed states that the petitioner had analysed and scrutinized the documents on public participation and supporting materials and was satisfied that there had been meaningful public participation. Further, that the petitioner had analysed and scrutinized evidence of consultation between the 1st and 2nd respondents together with impact assessment report, its laying before Parliament and was satisfied that the law, the Statutory Instruments Act had been complied with. It was for those reasons that the parties want the court to adopt that consent
21. When a consent is adopted, it becomes the judgment and order of the court and a decree or order then issues bringing the matter to a conclusion.
22. In *Richard Nyagaka Tong’i v Chris Munga N. Bichage & 2 others* SC Petition No. 17 of 2014; [2015] eKLR, the Supreme Court after interrogating the existing legal regime namely: The Civil Procedure Act, the Appellate Jurisdiction Act and the Supreme Court Act as well as the prevailing caselaw on the meaning of judgment and concluded:
 - (45) From the foundation of current case law, we would hold that a ‘Judgment’ is a determination or decision of a Court, that finally determines the rights and obligations of the parties to a case, and includes any decree, order, sentence, or essential direction for the execution of the intent of the Court.
23. Adoption of a consent ultimately results into an order or decree of the court settling the case in terms of that consent and is, therefore, a judgment.



24. The parties in this petition urged the court to adopt the consent, arguing that the court has a duty to encourage alternative dispute resolution. They relied on *Asanyo & 2 others v Attorney general & others* [2018] eKLR.
25. In that decision, the Supreme Court considered an appeal where the Court of Appeal had declined to adopt a consent that had been entered into by parties and filed in that court. The Supreme Court reiterated what it had stated in *In the matter of the principle of gender representation in the National Assembly and the Senate (Advisory Opinions Application 2 of 2012)* [2012] KESC 5 (KLR), (WM Mutunga, CJ & P dissenting), that in applying a rule of procedure, the same should not be so applied and/or interpreted so as to derogate from the spirit of the constitutional principles it relates to. The court then stated:
- [90] In the above context, we repeat that Article 159 of the constitution is the foundation of the exercise of judicial authority as donated by the people. This Article outlines principles that guide any person/body who or which exercises that delegated judicial authority. Alternative Dispute Resolution is one such principle as provided by Article 159(2)(c).
26. The Supreme Court again referred to the decision in *Council of County Governors v. Lake Basin Development Authority & 6 others Petition No. 280 of 2017*; [2017] eKLR, among others, regarding Alternative Dispute Resolution as a constitutional principle under article 159(2)(c), all of which speak to the duty of the court to facilitate alternative dispute resolution.
27. This petition was brought by a federation through its elected representatives in the interested of all consumers and in the interests of the people of Kenya. The petitioner has no ability to analyse and scrutinize documents, evidence, the law and make legal conclusions there was meaningful public participation or that the constitution or the law was complied with.
28. Further, the way the consent is crafted, it is intended to ask the court, in adopting it, to validate the Road Maintenance Levy (Imposition) Order, 2024 as having been enacted in compliance with the requirements provided for in the constitution and the *Statutory Instruments Act*.
29. A party may analyse evidence, scrutinize documents and materials presented to court and served on him, her or it, and take a view on the matter. The party cannot however, conclude that a respondent complied with the constitution or the law and ask the court to adopt a consent in those respects. Even where a party is of that view, a consent cannot be drawn in a manner that would appear to validate a legislation or act. The best a party can do, is apply to withdraw the petition.
30. My reading of rule 29, is that the court has discretion on whether to adopt a consent as drawn by parties or give directions on the issue, otherwise there would be no need for seeking leave of the court. The court retains power to control proceedings brought before it, apply the rules to facilitate access to justice, protect rights and fundamental freedoms with a view to advancing and realizing values and principles of the constitution.
31. Adopting consent is judicial exercise in facilitation of alternative dispute resolution. However, adopting the consent as drawn and filed, will have the singular effect of validating the petitioner's opinion that its analysis and scrutiny of the evidence and materials presented in the respondent's pleadings demonstrably proves that the respondents complied with the constitution and the law, something the court will not have had the opportunity to do without the petition being heard and the court having not applied its independent mind on the matter and come to its own conclusion.
32. That is what the Supreme Court had in mind when it stated in *Asanyo & 3 others v Attorney General*, [2020] KSC 62 (KLR), that:



- [40] Adoption of a consent by a Court is a process, in the course of which a Court discharges the duty of evaluating the clarity of the consent placed before it by parties, and giving directions on the manner of adoption. This circumvents the risk of an unlawful Order, and validates the mode of adoption and compliance. Thus, a consent by parties becomes an Order of the Court only once it has been formally adopted by the Court.
33. The court does not have to adopt a consent as drawn by parties. It can direct parties to craft a suitable consent for adoption or give any other directions that would further the desire of the parties to the case. That was why in the Nigerian decision cited by the Supreme Court, (*Star Paper Mill Ltd & Anor V. Bashiru Adetunji & Ors* (2009) 7 iLAW/SC.292/2002), the Court of Appeal of Nigeria had declined to adopt terms of settlement. The Supreme Court of Nigeria remitted the matter back to the Court of Appeal with directions to adopt new terms of settlement. This means that a court may for good reason, decline to adopt the terms of settlement agreed by parties and direct parties to agree on suitable terms for purposes of adoption by the court.
34. In the circumstances of this case, having perused the amended petition, the consent and considered arguments by parties, I am of the view, that it will not be proper to adopt the consent as drawn by parties. However, what is clear to this court is that parties have resolved not to prosecute this petition. For that reason, the best course for the court to take in exercise of its discretion, is to allow parties to withdraw the petition.
35. Consequently, the petition dated 3rd September 2024 and amended on 30th September, 2024 together with the Notice of Motion dated 3rd September 2024 is marked as withdrawn with no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY 2025.

E C MWITA

JUDGE

