



**Kinyanjui & 5 others v Director of Public Prosecutions; Mwangi
 (Interested Party) (Judicial Review Miscellaneous Application 644 of 2016)
 [2025] KEHC 11924 (KLR) (Judicial Review) (8 August 2025) (Ruling)**

Neutral citation: [2025] KEHC 11924 (KLR)

**REPUBLIC OF KENYA
 IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
 JUDICIAL REVIEW
 JUDICIAL REVIEW MISCELLANEOUS APPLICATION 644 OF 2016
 RE ABURILI, J
 AUGUST 8, 2025**

BETWEEN

**DAVID KIMANI KINYANJUI 1ST APPLICANT
 JOSEPH MUCHAI MUIRURI 2ND APPLICANT
 AMOS NJENGA MUTHAMA 3RD APPLICANT
 PETER KIMANI 4TH APPLICANT
 PAUL NJUGUNA MBURU 5TH APPLICANT
 BENJAMIN NJOMO NDERITU 6TH APPLICANT**

AND

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

AND

SIMON PETER MWANGI INTERESTED PARTY

RULING

1. A brief background of this matter is that the respondent herein filed an application dated 10th June 2024 seeking for review and setting aside of this court’s orders of 26th July 2017 awarding half costs of these proceedings to the applicants. The respondent’s case was that the said orders were issued by mistake given the background of the case. The applicants had a criminal case where they were the accused while the interested party was the complainant in a malicious damage of property criminal case before Kibera Chief Magistrate’s Court.



2. The respondent Director of Public Prosecutions argued that the parties reconciled and the matter was communicated to him and upon reviewing the case, he withdrew the same under section 176 of the *Criminal Procedure Code*.
3. According to the respondent, when the criminal case was withdrawn, the parties also agreed to have this case withdrawn with no orders as to costs. However, that when counsel for the ex parte applicants appeared in court on 26th July 2017, in the absence of the respondent, he never informed the court of the agreement to have the matter withdrawn with no orders as to costs, and that as a result, the court awarded the applicants half (½) costs.
4. This Court delivered its ruling determining the respondent's application on 14th May 2025 setting aside the orders of 26th July 2017, the ruling on taxation, certificate of costs and all consequential orders including the certificate of order against government dated 12th April 2022.
5. The Court in the ruling directed that parties appear on 10th June, 2025, to argue orally whether the costs were payable in this matter and if so by who. These two issues are the subject of this ruling.
6. During the oral submissions by the parties Mr. Ondabu counsel for the applicants submitted that the decision to terminate proceedings at Kibera courts were made by the Director of Public Prosecutions, even if the complainant and the accused agreed to reconcile.
7. Mr. Maatwa counsel for the respondent argued that it is settled under the law that the issue of costs is in the discretion of the court as provided under section 27 of the *Civil Procedure Act*. According to counsel, costs should not be awarded as the applicant and the interested party were members of the same church. That the applicants allegedly stole property of the interested party and hence the charges. According to Mr. Maatwa, it was the applicant that informed the court of the ongoing negotiations motivated by the reconciliation by members of the same church.
8. Prosecution Counsel also submitted that on 26th July, 2017, Mr. Ondabu who was in court in the absence of counsel for the respondents withdrew the judicial review case herein. It was submitted that it is unfair to condemn the respondent to pay costs when the interested party prompted the withdrawal of the criminal case in favour of reconciliation and that it also against the spirit of Article 159 of the *Constitution*.
9. Ms. Swaka on behalf of the interested party stated that the criminal case was withdrawn under section 176 of the *Criminal Procedure Code* hence in the interest of reconciliation and harmony of the church and its members, no costs should be paid by any party. Further, that counsel can claim his costs from his clients but not from the respondent.
10. The Prosecution Counsel also submitted that Mr. Ondabu had not asked for costs before Odunga J and that the dispute was about property in land which was resolved and that an order for costs will disturb peace in the church and its leadership.
11. In his rejoinder Mr. Ondabu submitted that they were seeking party and party costs which were made by Odunga J after Mr. Ondabu had asked for them. He also submitted that he had a duty to inform the court that the criminal proceedings were terminated. Also, that it is the prosecutor who informed the court that parties were negotiating and the charges were withdrawn. It was submitted that there is no affidavit of how negotiations were conducted and that no evidence has been tendered to support any of the matters stated before the court. According to Mr. Ondabu, the matter was still at the leave stage but the respondents had filed grounds of opposition.



Analysis and Determination

12. From the above rival positions and arguments, this Court is called upon to determine the issue of costs in the present matter, following the directions issued on 26th July 2017, when the matter was marked as compromised and the applicants were awarded half costs.
13. The directions of Odunga J(as he then was) which are central to the dispute on the issue of costs were as follows:

“It is contended that the respondent withdrew the subject criminal charge. Though the respondent were served within 10 days to date there is no appearance. Accordingly, this matter is marked as compromised with half the costs to the applicants.”
14. A perusal of the Court record shows that the applicants had filed these judicial review proceedings seeking to challenge criminal charges that had been preferred against them following a complaint by the interested party. It is not disputed that the applicants and the interested Party later engaged in negotiations and reconciliation, resulting in the withdrawal of the criminal case by the Director of Public Prosecutions, under section 176 of the *Criminal Procedure Code*.
15. This position of negotiations was confirmed in Court by Mr. Kirimi counsel for the interested party and Mr. Ongwae counsel for the applicants and Miss Kihara counsel for the respondent when they appeared before Odunga J (as he then was) on 8th March,2017. The same was never controverted by counsel for the applicants.
16. On 23rd May, 2017, Mr. Nyangau holding brief Mr. Ondabu for the applicants informed the court as follows:

“The resolution to record settlement arising out of negotiations between applicant and interested parties with respect to the pending criminal case. I am informed the same has since been withdrawn and I request for mention to enable the parties file the consent.”
17. On 26th July, 2017, the date the matter came up for mention and the directions on costs were made, only counsel for the applicants was present. Counsel for the respondent or interested party did not attend, and as observed by this Court in its ruling of 14th May,2025 although counsel alluded to service upon the respondent having been effected, there was no affidavit of service on record to confirm that the respondent had been properly served with a mention notice for that date. It is further noted that the applicants did not make a formal request for costs on the said date.
18. This court is satisfied that the circumstances have since materially changed and that additional information including the nature of the reconciliation between the applicants and the interested party is now on record. Accordingly, this Court considers it just to exercise its discretion under Section 27 of the *Civil Procedure Act* to reexamine the issue of costs afresh.
19. This Court takes into account that the criminal proceedings were withdrawn not because of a finding of impropriety on the part of the respondent, but as a result of a mutually agreed reconciliation between the applicants and the interested party, who are members of the same church congregation. It has been represented before this court that the spirit of reconciliation has brought peace among the church members and the church leadership and that any adverse costs ordered could undermine that progress.
20. While the applicants had a legitimate basis to file these proceedings and may have done so in good faith to protect their rights, this Court is also mindful of the need to avoid disrupting the peace and



reconciliation now prevailing between the parties who are members of the same church congregation and in the spirit of Article 159 of the *Constitution* which promotes reconciliation as an alternative to Court determinations.

21. That said, it is clear that the criminal charges against the applicants were instituted by the respondent in response to a complaint by the interested party, and not arising from an independent or spontaneous investigative initiative by the DPP. Accordingly, if any party were to be held liable for costs, the interested party would have borne the primary responsibility, as the proximate initiator of the criminal proceedings through the DPP that prompted the judicial review proceedings.
22. In view of the above, I order that each party shall bear their own costs of these proceedings, in the interest of finality and to preserve the prevailing peace and harmony within and amongst the church congregation between the ex parte applicants and the interested parties.
23. It is so ordered.
24. This file is closed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 8TH DAY OF AUGUST 2025

R.E ABURILI

JUDGE

