



**Luka v Mara Siana ConservationTust & 4 others (Constitutional Petition
E003 of 2024) [2024] KEHC 12066 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 12066 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CONSTITUTIONAL PETITION E003 OF 2024**

F GIKONYO, J

SEPTEMBER 30, 2024

**IN THE MATTER OF CONTRAVENTION OF THE RIGHTS OF PERSONS
WITH DISABILITY UNDER THE PERSONS WITH DISABILITIES
ACTS SECTION 4(2) OF THE LABOUR RELATIONS ACT, 2003**

BETWEEN

JIMMY PARNYUMBE LUKA PETITIONER

AND

MARA SIANA CONSERVATIONTUST 1ST RESPONDENT

MARA SIANA CONSERVANCY COMPANY LIMITED 2ND RESPONDENT

**MAASAI MARA WILDLIFE CONSERVANCIES ASSOCIATION 3RD
RESPONDENT**

DANIEL SOPIA 4TH RESPONDENT

JACKSON OLE MPARIO 5TH RESPONDENT

JUDGMENT

Background

1. The 3rd respondent vide a letter dated November 3, 2024 communicated to the deputy county commissioner that they will be overseeing the Mara Siana Conservancy Board of Trust elections on 27/03/2024 at different cluster locations of the conservancy which falls under the Siana location, Meguara, Nkoilale and Siana sub-locations.
2. The 3rd respondent provided a set of election guidelines which are meant to regulate how the elections are to be conducted alongside the trust deed dated January 1, 2020 which establishes the 1st respondent.



3. The petitioner stated that, the said guidelines particularly paragraph 2 and the trust deed aggrieve persons with disabilities by not reserving positions for them in contravention of Article 54 of the Constitution, the Persons with Disabilities Act, and the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).
4. The petitioner contends that failure to include PWDs in the election guidelines and trust deed amounts to a violation of PWD's right to dignity and non-discrimination under articles 27(4) and (5) of the Constitution.
5. The petitioner further contends that the said guidelines and trust deed do not disclose transparency of the elections to be held by the 3rd respondent.
6. The petitioner is apprehensive should elections be held without the participation of PWDs they will stand disenfranchised as they will have been locked out of participation yet they are land owners of Mara Siana Conservancy and members of the 1st to 3rd respondents thus violating their Constitutional rights which cannot be remedied by damages.

The petition

7. The petitioner in the petition dated 26/03/2024 sought the following orders;
 1. A permanent injunction restraining the respondents either by themselves or their servants, agents, officers, or any other person whomsoever is acting on their behalf from proceeding with the elections slated for 27th March, 2024 without the involvement and participation of persons with disabilities.
 2. A declaration that persons with disabilities are entitled to be included in electoral posts.
 3. That an order be issued compelling the respondents to come up with new election guidelines and to amend the trust deed to ensure inclusivity of persons with disability.
 4. Cost of the suit.
8. The petitioner filed three further affidavits sworn by Gilisho George Ntimoye, Nelson Njuiya Kyan Ole Sumara, and Andrew Siamanta Ole Kiu sworn on 23/04/2024.

The response

9. The 1st and 2nd respondents opposed the petition vide replying affidavit sworn by Moses Ole Sikona on 12/04/2024.
10. The 3rd, 4th and 5th respondents opposed the petition vide replying affidavit sworn by Daniel Ole Sopia on 11/04/2024.
11. The respondents contend that the petition is not supported by a supporting affidavit accordingly the averments therein are not supported by evidence and are unsubstantiated.
12. The respondents contend that the petitioner has not provided the name of or the registration document of the organization that he purports to represent. He also has not instituted these proceedings in the name of the organization he purports to represent to make these proceedings and the outcome thereof representative of and in the wider interest of persons with disabilities. instituting these proceedings in a personal capacity is for personal quest.



13. The 1st respondent contends that clause 10(a) of the trust deed makes a deliberate effort to make the trust's board of trustees as representative and inclusive as possible by providing that the trustee shall be elected from all the 13 sub-villages within mara Siana conservancy. The election of trustee clause does not exclude or in any way discriminate against persons with disabilities.
14. The 3rd respondent contends that MMWCA Conservancies elections guidelines do not exclude, or discriminate explicitly or impliedly any person or group of persons from eligibility to vie and participate in the election of landowner's leaders. Further, the guidelines do not reserve any seat for any person or group of persons. In any event, the obligation set out in Articles 27(8) and 54 of the Constitution is placed on state not private corporations. The petitioner has therefore not demonstrated that the respondents denied PWDs the opportunity or limited their ability to participate in the landowner's election of members of the 1st respondent's board of trustees.
15. The respondents contend that the petitioner is seeking the 1st respondent to offer him a free position or seat on its board of trustees without any lawful justification.
16. The 3rd, 4th, and 5th respondents contend that the prayers sought in this petition are not capable of being granted because they have been overtaken by events and would be ultra vires the powers of this court.

Directions of the Court

17. The petition was canvassed by way of written submissions.

The Petitioner's Submissions

18. The petitioner submitted that he acts in the public interest on behalf of PWDs living within the Mara conservancy and therefore has the requisite locus standi. The petitioner relied on the card issued by the national council for persons with disability and a certificate for election as chairman for PWDs in Narok County, Mumo Matemu case, and Article 258 of the Constitution.
19. The petitioner submitted that the Constitution binds both public and private entities. The Mara Conservancy was created for the benefit of the landowners, the local community, and the public at large. The petitioner contends that the representation of PWD in the respondent's trust is a matter of private company affairs. The petitioner relied on the National Gender and Equality Commission v Independent Electoral and Boundaries Commission & another [2013] eKLR.
20. The petitioner urged this court to find that the elections were null and void for failure to include a position for PWD and the same should be nullified upon granting the orders sought herein. The petitioner relied on Republic Ex Parte Chudasama v the Chief Magistrate's Court, Nairobi HCCC No 473 of 2006 [2008] 2 EA 311.

The Respondents' Submissions

21. The respondents submitted that the petitioner has not pleaded with particularity and specificity which of the respondents' actions or decisions are discriminatory against persons with disabilities to wit specific clauses or paragraphs in the 1st respondent trust deed, the 3rd respondent's elections guidelines, and the articles in the Constitution of Kenya 2010. The respondents contend that the Constitution provides for modalities of protecting specific groups of people for example the youth, minorities and marginalized groups, and the elderly without requiring any private corporation and or entity to reserve positions for them in their boards of directors or boards of trustees. The petitioner cannot therefore claim that the protection provided to persons with disability under article 54 of the Constitution. The respondents relied on Uasin Gishu Memorial Hospital Limited v Moi Teaching and Referral Hospital



Board and two others, article 54(1) and (2) of the Constitution, Martha Karua v Radio Africa T/A Kiss F.M. Station and 2 others, Matiba v Attorney General High Court Miscellaneous Application Number 666 of 1990.

22. The respondents submitted that the petitioner is attempting to use and/ or abuse the process of the court to get the court to compel the 1st respondent to offer him a free or automatic seat in the 1st respondent's board of trustees without any lawful justification.
23. The respondents submitted that the petitioner has not sought a declaration that the elections of trustees held on 27/03/2024 are unconstitutional in the petition. The petitioner has also not sought an order for the nullification of the said elections of trustees held on 27/03/2024 in the petition. Accordingly, these orders cannot be granted.
24. The respondents further submitted that it would be manifestly unfair and unjust to nullify the elections of those elected to the board of trustee on 27/03/2024 when they are not parties to these proceedings and without giving them an opportunity to be heard and to defend themselves before a decision is made.

Analysis And Determination.

25. This court has considered the petition, the further affidavits, the replying affidavit, and the respective parties' submissions.

Issues

26. The main issue for determination: -
 - i. Whether the election regulations and trust deed for election of trustees for 3rd respondent discriminate against persons living with disabilities. Reservation of positions for persons with disabilities in its board of trustees will also be discussed and determined.
27. But, the issue of standing has arisen too which is usually determined in limine.

Locus standi

28. The petitioner's standing to sue on behalf of PWDs has been questioned. According to the respondents, although article 258 permits a person to institute a constitutional petition in the interest of the public, this is not one such case.
29. The court takes the view that, standing in institution of constitutional petitions has been enlarged by article 258 of the Constitution which provides that: -

258.

- (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.
- (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
 - (a) a person acting on behalf of another person who cannot act in their own name;
 - (b) a person acting as a member of, or in the interest of, a group or class of persons;
 - (c) a person acting in the public interest; or



(d) an association acting in the interest of one or more of its members.

30. The petitioner is claiming that the Constitution has been contravened, or is threatened with contravention. Thereby, bringing himself within 'every person' in article 258(1) of the Constitution, and has the right to institute court proceedings in that respect.
31. In his petition, he has also stated the parties for whom the petition is brought are persons living with disabilities.
32. The petition is competent. But, proof of the alleged violations is a different thing altogether.

Alleged Violation

33. The Petitioner's case rests on the non-inclusion of People Living with Disabilities into the board of trustees of the 3rd respondent. The petitioner alleges violation of a host of rights under Article 54, 27(4) and (5) of the Constitution.
34. It is the Petitioner's case that, no seats have been reserved for people living with disability in the board of trustees of the 3rd respondent despite some living in the Siana location, Meguara, Nkoilale, and Siana sub-locations.
35. The 3rd respondent contends that MMWCA Conservancies elections guidelines do not exclude, or discriminate explicitly or impliedly any person or group of persons from eligibility to vie and participate in the election of landowner's leaders. Further, the guidelines do not reserve any seat for any person or group of persons. In any event, the obligation set out in Articles 27(8) and 54 of the Constitution is placed on state not private corporations.

Proof of violation

36. In constitutional litigation, a party who alleges violation of his or her rights must plead with reasonable degree of precision the provisions violated and the manner of the alleged violation (Anarita Karimi Njeru v The Republic [1976-1980] KLR 1272)
37. The reliefs must also be properly grounded in the specific Articles of the Constitution and the law.
38. Proof is by way of evidence, based on the pleadings.
39. The petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, the petitioner alleged discrimination against persons with disabilities without providing the particulars of the persons with disabilities who resided in the respondent conservancy and were denied the opportunity or necessary accommodations to vie or vied for the trustee positions but were deprived of the post. No particulars were stated in respect of these important but foundational elements of this claim.
40. The petition fails the threshold established in Anarita Karimi Njeru (*supra*).
41. That notwithstanding, the petition must pass the test of the burden of proof; on balance of probabilities. It is trite law that he who alleges must prove his claim. See Leonard Otieno v Airtel Kenya Limited [2018] eKLR where Mativo J. held that: -

“It is fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the proposition he asserts to prove his claim. Decisions on violation of Constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Constitution an inevitable result in ill-considered opinions.



The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.”

42. The petitioner claimed that the 3rd respondent provided a set of election guidelines which are meant to regulate how the elections are to be conducted alongside the trust deed dated 01/01/2020 which establishes the 1st respondent.
43. According to him, the said guidelines particularly paragraph 2 and the trust deed aggrieve persons with disabilities by not reserving positions for them in contravention of Article 54 of the Constitution, the Persons with Disabilities Act, and the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).
44. The petitioner contends that failure to include PWDs in the election guidelines and trust deed amounts to a violation of PWD's right to dignity and non-discrimination under articles 27(4) and (5) of the Constitution.
45. The petitioner further contends that the said guidelines and trust deed do not disclose transparency of the elections to be held by the 3rd respondent.
46. The petitioner is apprehensive should elections be held without the participation of PWDs they will stand disenfranchised as they will have been locked out of participation yet they are land owners of Mara Siana Conservancy and members of the 1st to 3rd respondents thus violating their Constitutional rights which cannot be remedied by damages.
47. The 3rd respondent contends that MMWCA Conservancies elections guidelines do not exclude, or discriminate explicitly or impliedly any person or group of persons from eligibility to vie and participate in the election of landowner's leaders. Further, the guidelines do not reserve any seat for any person or group of persons. In any event, the obligation set out in Articles 27(8) and 54 of the Constitution is placed on state not private corporations.
48. Upon consideration of the evidence adduced, the Petitioner did not provide evidence to support that the election guidelines and the trust deed excluded-directly or indirectly- or prevented People Living with disabilities from participating in the elections. There is also no proof that the said esteemed persons are not represented in the trust.
49. It bears repeating that, the petitioner alleged discrimination against persons with disabilities without providing the particulars of and proof that, the persons with disabilities who resided and were land owners in the respondent conservancy and or were denied the opportunity or necessary accommodations to vie or vied for the trustee positions but were deprived of the post. No particulars were stated or evidence adduced in respect of these important but foundational elements of this claim.
50. Looking at the Petitioners' pleadings, the evidence as well as the submissions of the parties, although the Petitioner has pleaded provisions of the Constitution, he has not demonstrated on a balance of probabilities, how individual rights and fundamental freedoms of PWDs were violated, infringed, or threatened by the respondents.
51. In the upshot, this court finds that the petition, neither meets the threshold of a constitutional petition, nor passes the standard of proof on a balance of probabilities. It fails. The Petition dated March 26, 2024 is hereby dismissed with no orders as to costs given the nature of proceedings.
52. Orders accordingly.



DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS APPLICATION, THIS 30TH DAY OF SEPTEMBER, 2024.

F. GIKONYO M

JUDGE

In the presence of: -

Petitioner

Ms. Omamo for Oyomba for respondent

Otolo C/A

