



REPUBLIC OF KENYA



KENYA LAW
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**Omboga v Obuor & another (Constitutional Petition 4B of 2022)
[2023] KEHC 27509 (KLR) (23 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 27509 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CONSTITUTIONAL PETITION 4B OF 2022
RPV WENDOH, J
JANUARY 23, 2023**

BETWEEN

OCHIENG MICHAEL OMBOGA PETITIONER

AND

PAUL OBUOR 1ST RESPONDENT

FRED WAGORO 2ND RESPONDENT

JUDGMENT

1. The petitioner filed the petition dated 21/6/2022 supported by his affidavit of even date. The petitioner's claim is that the respondents fabricated a withdrawal notice purportedly drawn by himself and presented it to the Independent Electoral and Boundaries Commission (IEBC) to withdraw his candidature for the position of the Member of National Assembly, Rongo Constituency. The petitioner then seeks the following orders:-
 - i. A declaration that the conduct of the respondents of fabricating a withdrawal notice purportedly drawn by the petitioner and presenting the same to the IEBC without the knowledge and/or express authority of the petitioner and their conduct of attempting to withdraw the candidature of the petitioner for the position of the member of National Assembly without following due procedure and without informing the petitioner as stated above are unconstitutional and is in violation of his rights and freedoms, his supporters and the electorate of Rongo Constituency under Articles 10, 28, 35, 38, 48 and 50 (1) of *the Constitution* of Kenya.
 - ii. A declaration that the conduct of the 1st respondent is repugnant to the provisions of *the Constitution* more particularly chapter six of *the Constitution* and thus unfit to hold office as a member of National Assembly and/or run for the said office; an order disqualifying the 1st respondent from running for any public office.



- iii. An order against the 1st and 2nd respondents compelling them to unconditionally withdraw the withdrawal letter dated 10/6/2022 drawn by both of them purportedly on behalf of the petitioner and to offer a public apology both to the petitioner and the electorate of Rongo Constituency.
- iv. A declaration that the conduct of the 2nd respondent of drawing and presenting a letter allegedly on behalf of the petitioner when he had no instructions from the petitioner amounts to professional misconduct for which he should be struck off the roll of advocates.
- v. The court be pleased to order for compensation for general damages to issue for violation of the petitioners' rights and an inquiry into quantum be undertaken.
- vi. A declaration that the respondents are escapists and morbid.
- vii. Costs of this petition.

The petition was opposed. The 1st respondent filed a replying affidavit and a notice of preliminary objection all dated 30/6/2022 and submissions dated 5/7/2022.

2. The 2nd respondent filed a replying affidavit, a notice of preliminary objection, grounds of opposition all dated 30/6/2022 and submissions dated 6/7/2022.
3. The petitioner filed a notice of withdrawal of the petition dated 6/7/2022 under Rule 27 (1) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. This court in its ruling of 13/7/2022, declined to grant the withdrawal orders and directed that the petition be heard to its logical conclusion. The 1st respondent was not opposed to the withdrawal of the petition. This court will therefore consider the arguments of the 2nd respondent only.
4. The 2nd respondent's preliminary objection is based on the following grounds:-
 - Fundamental Rights and Freedoms set out in the Bill of Rights in *the Constitution* of Kenya 2010 can be enforced by a private individual by way of a Constitutional Petition as only against the State and State Organs and not by a private individual as against another private individual as sought by the petitioner.
5. The petitioner in his submissions stated that this court is vested with jurisdiction to determine the issues in relation to violation of rights and fundamental freedoms underpinned in *the Constitution*; that Article 258 of *the Constitution* allows any person to move the court challenging any contravention of *the Constitution*. The petitioner further submitted that the grounds of objection by the respondents are vague as they do not specify which section of the law, they are founded on to warrant their qualification as pure points of law; that the grounds can only be established during the hearing of the petition and evaluating the evidence adduced.
6. On whether the petitioner is entitled to the reliefs sought, it was submitted that Articles 38 (2) and (3) of *the Constitution* gives people the right to seek elective positions to any elective public body or office; that the respondents' action of fabricating a withdrawal letter stating that the petitioner has withdrawn from the Rongo's Parliamentary Seat race, without his knowledge and/or consent, infringed his entitlement under Article 38 of *the Constitution* and his rights were threatened and violated.
7. It was further submitted that the petitioner gave a sworn statement in the form of an affidavit and attached a copy of his clearance certificate and the letter presented by the 2nd respondent to the IEBC;



that the petitioner has therefore discharged the burden of proof placed on him and the orders should be granted.

8. The 2nd respondent submitted that it did not author the letter and therefore the court cannot compel him to withdraw the same; that the letter was signed by the petitioner himself and the documents accompanying the letters are those which the petitioner can be a custodian; that the letter therefore can only be withdrawn by the petitioner; that in regards to prayers e, f and g, there is no evidence that has been presented that the 2nd respondent purported to act in any manner on behalf of the 1st respondent; that the allegations against the 2nd respondent are therefore wild and unsubstantiated and do not meet the constitutional threshold of a competent petition.
9. Further, it was submitted that fundamental rights and freedoms as set out in the Bill of Rights can be enforced by a private individual against the State organs and not by a private individual against another private individual; that the police abstract OB No. 2/13/6/22 is a complaint of defamation whose remedy lies in a civil suit; that it is the police to investigate the forgery claims and if there is substance in them, forward the file to the ODPP for criminal prosecution. The 2nd respondent argued that the alleged violations are not constitutional violates and their remedy (if proved) lies in a civil suit or criminal prosecution.
10. Having read and considered the petition, the responses to the petition and the rival submissions. The issues for determination are:-
 - i. Whether private individuals can allege violation of their constitutional rights against another private individual.
 - ii. Whether the 2nd respondent violated the petitioner's fundamental rights and freedoms as alleged.
 - iii. Whether the petitioner is entitled to the reliefs sought.
11. Article 2 of *the Constitution* provides that *the Constitution* being the Supreme law of the land, binds all persons and all State Organs at both levels of the Government. Article 20 (1) stipulates that the application of the Bill of Rights applies to all law and binds all State Organs and all persons. The word "persons" is defined under Article 260 as "including a company, association or other body of persons whether incorporated or unincorporated." My understanding of the above Articles therefore is that the dictates of *the Constitution* do not exempt non - state actors from being bound by the provisions of *the Constitution*. A person who allegedly violates the rights of another person outlined in *the Constitution* is liable. It therefore means that persons are entitled under Article 22 to institute claims alleging violation of their rights against private citizens or the State and the court can grant appropriate reliefs under Article 23.
12. In *Law Society of Kenya vs Betty Sungura Nyabuto & 2 Others* (2012) eKLR Majanja J departed from the finding that application and enforcement of Bills of Rights only relates to State Organs as against private individuals as it was held in the case of *Richard Nduati Kariuki v Leonard Nduati Kariuki* Nairobi Misc. Civil App. No. 7 of 2006 (Unreported) and held as follows: -

I am constrained to depart from the reasoning stated above as there is nothing in *the Constitution* that draws this distinction or limits the application of the Bill of Rights in such a manner. The Bill of Rights applies to all persons and binds everybody. However, the nature and extent of a particular right may be limited in scope to apply to the state and not a private individual."



13. A similar finding which was upheld by the Court of Appeal in the case of *B.A. & Another v Standard Group Limited & 2 Others* (2012) eKLR where Mumbi Ngugi J (as she was then) held as follows:-

The Constitution contemplates both vertical and horizontal application of the Bill of Rights. It is not just the state which is under an obligation to observe and respect human rights. *The Constitution* requires all persons as well as the state to respect its provisions generally and the provisions of the Bill of Rights in particular. Article 2(1) of *the Constitution*...Article 20 (1), it is provided that ‘The Bill of Rights applies to all law and binds all State organs and all persons.’ These provisions of *the Constitution* read together with the definition of ‘person’ in Article 260 make it clear therefore that the provisions of the Bill of Rights are intended to be binding on all persons, whether natural or legal, incorporated or unincorporated. The 1st and 2nd respondents are therefore bound by the Bill of Rights and would be liable if found to have violated the rights of the petitioners.”

14. This court is convinced by the aforementioned arguments and findings of the different courts and finds no reason to depart from the same. There is nothing in *the Constitution* which differentiates the application of the Bill of Rights vertically (between the State Organs and Private Individuals) and horizontally (between Private Individuals). The Bill of Rights applies to everyone and each case should be evaluated individually. It is therefore my finding that the notice of preliminary objection dated 30/6/2022 is without merit.
15. The question now is whether the alleged acts of the respondents violated the petitioner’s right. The petitioner alleged that the 2nd respondent acting under the directions of the 1st respondent purportedly submitted a letter dated 10/6/2022 withdrawing his candidature from the Rongo Parliamentary Seat race in the concluded General Elections of August 2022. As a result, the petitioner alleged that his rights under Articles 10, 28, 35, 38, 48 and 50 (1) of *the Constitution* were violated.
16. In support of the aforesaid allegations, the petitioner annexed “OMO 5” a letter dated 10/6/2022 which was purportedly addressed to the IEBC by himself withdrawing his candidature. Looking at the face of the letter, there is no signature appended to it. The letter contains very private details like the Identity Card and the Voter Card Numbers of the petitioner. Although, those to me, are very personal details which the petitioner can only be in possession of, it is not impossible for one to obtain such details of an individual. The petitioner has not denied that those are his details. The only aspect which may cast doubt on the authenticity of the letter is the absence of the petitioner’s signature on the letter. There is no evidence that the 2nd respondent was the author of the letter. Anybody could have authored it.
17. In addition, the petitioner has sensationally claimed that the 2nd respondent was acting as an agent of the 1st respondent as his Counsel and that the 2nd respondent was the author of the said letter. The petitioner, however, has not told this court why he believes that the 2nd respondent was Counsel to the 1st respondent. There is also no evidence presented to this court like a retainer agreement or letter of instruction between the 1st and 2nd respondents. The petitioner did not conclusively prove that the 2nd respondent was in fact acting on behalf or receiving instructions from the 1st respondent.
18. The petitioner lodged a formal complaint with the police under OB No. 12/13/06/22 alleging defamation and impersonation. There is no accompanying statement from the Police Station to indicate to whom exactly the claims of defamation and impersonation were being made against. In my view, again the petitioner failed to prove who allegedly defamed or impersonated him or who the report was about. I find that the petitioner did not lay any basis for the alleged violation of his rights by the 1st and 2nd respondents against him. It is the finding of this court that the respondents did not violate



the petitioner's fundamental rights and freedoms as alleged. The petitioner would not be entitled to any reliefs.

19. In the circumstances, I find no merit in the petition dated 21/6/2022 and the notice of preliminary objection dated 30/6/2022, both are dismissed. Since the petitioner had shown intent in withdrawing the petition but the 2nd respondent insisted on proceeding with it, each party will bear their own costs.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 23RD DAY OF JANUARY, 2023.

R. WENDOH

JUDGE

Judgement delivered in the presence of;

No appearance for the Petitioner.

No appearance for the 1st Respondent.

Mr. Ouko holding brief for Mr. Awino for the 2nd Respondent.

Nyauke - Court Assistant.

