



REPUBLIC OF KENYA



**Musa v Attorney General & 3 others (Petition 323 of 2017) [2023] KEHC 1275 (KLR)
(Constitutional and Human Rights) (28 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1275 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION 323 OF 2017

HI ONG'UDI, J

FEBRUARY 28, 2023

BETWEEN

SUSAN WANGUI MUSA PETITIONER

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

NATIONAL POLICE SERVICE COMMISSION 3RD RESPONDENT

LIMURU BEER DISTRIBUTORS LTD 4TH RESPONDENT

RULING

1. The 3rd respondent filed the Notice of Preliminary Objection (P O) dated February 7, 2022 in opposition to the amended petition dated June 10, 2021. The objection was based on the following grounds:
 - i. The petition was filed out of time in that the cause of action arose on January 17, 2008 and petition filed on June 29, 2017. As such the delay is inordinate.
 - ii. The petition seeks to present a civil tort as a constitutional matter hence frivolous and an abuse of the court process.
 - iii. The petition as framed against the 3rd respondent is premised on a misapprehension of the *Constitution*, the *National Police Service Commission Act* and all other laws guiding the powers and operations of the 3rd respondent.
 - iv. The powers, functions and mandate of the 3rd respondent under article 246 of the *Constitution* does not extend to arrest and detainment of civilians and or individuals as the same is a



preserve of the National Police Service through the general command of the Inspector General under article 245 of the Constitution. In view of this that the petition purports to sue the 3rd respondent for actions out of its mandate since the shooting and killing of the petitioner's son is in the mandate of the 2nd respondent.

- v. The entire petition as framed against the 3rd respondent is misconceived and bad in law and so the claim against the 3rd respondent should be dismissed and its name expunged from the proceedings.
2. The petitioner in opposition filed her replying affidavit dated April 25, 2022. She deponed that she filed the petition on June 29, 2017 and effected service on the respondents in the same year, but the responses were only filed on January 15, 2022 and February 7, 2022, respectively. She further deponed that contrary to the 3rd respondent's argument, the suit was instigated on behalf of the estate of her son for the acts of the 1st, 2nd and 3rd respondents' agents which they are liable for, hence the matter is constitutional and not civil in nature.
3. The 1st and 2nd respondents did not oppose the P O, and so did not file any response nor submissions. The 4th respondent has so far not filed any documents in the matter.

The parties submissions

The 3rd respondent's submissions

4. The 3rd respondent filed written submissions dated February 7, 2022 through its legal counsel Brenda Opiyo. Counsel first submitted that the petition was time barred owing to section 4(2) of the Limitation of Actions Act which requires that tortious matters be brought before the end of 3 years from the date of the cause of action. Relying on the case of Peter Kagume and others v Attorney General (petition no 128 of 2006) she argued that the same applies in matters involving constitutional rights.
5. She further submitted that the Public Authorities Limitation Act under section 3(3)(a) states that the duration within which a claim in tort against the government can be made is 12 months. On this point she relied on the case of Samuel Kamau Macharia & another v Kneya Commercial Bank Limited & 2 others [2012] eKLR. Counsel as such argued that the petitioner had failed to justify the inordinate delay as required and appreciated in the case of James Kaniita Nderitu v Attorney General and another [2019] eKLR.
6. On the second issue, counsel submitted that the petitioner had framed a civil tort as a constitutional matter yet it ought to have been brought by way of an ordinary suit. In essence, counsel submitted that the petition was offensive to the doctrine of constitutional avoidance as discussed by the Supreme Court in the case of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (2014) eKLR. Also see John Miriti Mbarire v AG (2014) eKLR.
7. She further argued that the petition as framed against the 3rd respondent was premised on misapprehension of the powers and operations of the 3rd respondent as stipulated under article 246 of the Constitution. She stated that the 3rd respondent's mandate does not border on criminal investigations since the Constitution assigns this mandate to the 2nd respondent under article 245 of the Constitution.
8. In support reliance was placed on the case of Isinya Roses Limited v Zakayo Nyongesa [2016] eKLR where it was held that the claimant must show that the damage he suffered falls within the ambit of the statute mainly that it was of the type that the legislation was intended to prevent. Also see Republic v Deputy Inspector General of National Police & 32 others [2013] eKLR.



The petitioner's submissions

9. The firm of Njau Ngigi and Company Advocates on behalf of the 3rd respondent filed written submissions dated April 25, 2022. On the issue of inordinate delay, counsel submitted that this was not occasioned by the petitioner as she had issued all the requisite instructions to her former advocates, J M Njenga and Company Advocates who failed to file the petition in time. He urged the court not to visit the mistakes of an advocate on an innocent litigant as held in the case of *Edeny Adaka Ismail v Equity Bank Limited* [2014] eKLR.
10. He further submitted that a P O should be purely based on points of law and not facts as expressly explained in the case of *Francis Angueyah Ominde & another v Vihiga County Executive Committee Members Finance Economic Planning and 3 others; Controller of Budget and 10 others (interested parties)*[2021]eKLR. Counsel argued that the 3rd respondent's P O was based on factual issues which would require the court to verify the evidence to satisfy itself before making a determination.

Analysis and determination

11. Having considered the P O, the submissions, and the authorities cited by the parties, I find that the only issue for determination is:

Whether the P O dated February 7, 2022 is merited.

12. The threshold of a P O was set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co Limited v West End Distributors Limited* (1969) EA 696 as follows:

“...a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit.”

13. Likewise, the court in the case of *Dismas Wambola v Cabinet Secretary, Treasury & 5 others* [2017] eKLR opined as follows:

“...A preliminary objection must first, raise a point of law based on ascertained facts and not on evidence. Secondly, if the objection is sustained, that should dispose of the matter. A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but must be on pure points of law.

It may be noted that preliminary objections are narrow in scope and cannot raise substantive issues raised in the pleadings that may have to be determined by the court after perusal of evidence....”

14. The court went further to state that:

“...a preliminary objection may only be raised on a “pure question of law.” To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are *prima facie* presented in the pleadings on record.

In law, a question of law, also known as a point of law, is a question that must be answered by applying relevant legal principles to interpretation of the law. Such a question is distinct from a question of fact, which must be answered by reference to facts and evidence as well as inferences arising from those facts.



In law, a question of fact, also known as a point of fact, is a question that must be answered by reference to facts and evidence as well as inferences arising from those facts. Such a question is distinct from a question of law, which must be answered by applying relevant legal principles. The answer to a question of fact (a "finding of fact") usually depends on particular circumstances or factual situations."

Also see *Oraro v Mbaja* [2005] KLR 141.

15. The P O in this case is premised on a number of factors, namely; that the petition was filed out of time, it is premised on a civil tort and is a misapprehension of the mandate of the 3rd respondent. As a consequence, the 3rd respondent sought to have the claim against it dismissed and its name expunged from the record. The petitioner opposed the P O arguing that it was not a pure point of law.
16. As has been discussed in the foregoing paragraphs preliminary objections revolve around questions of law. These questions are determined by the application of the pertinent law and interpretation of legal principles. It therefore follows that this Court is required to only determine the P O based on the law and not on contested facts, and that is what I will proceed to do.
17. The only point of law I find due for determination is whether the issue at hand is a constitutional one or a civil one. From the pleadings the deceased whose constitutional right to life is being pursued met his death on January 17, 2008 and an inquest conducted vide Senior Principal Magistrate's Court Limuru Inquest No 10 of 2008. A ruling was delivered on November 27, 2009 by Hon A O Aminga Resident Magistrate. The finding was that the death occurred as a result of negligence and carelessness by the handler of the rifle. There was no malice afterthought exhibited as per the magistrate's ruling.
18. It is not denied that a life was lost as a result of the police officer's carelessness and negligence. Where are cases in respect of carelessness and negligence filed and at what point do they become constitutional issues?
19. The 3rd respondent supported by the 1st & 2nd respondents have argued that the petitioner's claim is one based on the law of tort and is therefore of a civil nature. Counsel cited the Supreme Court decision of *Communication Commission of Kenya (supra)* in respect of constitutional avoidance.
20. The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved.
21. In the *Communication Commission* case (*supra*) the Supreme Court stated thus at Para 256:

[256] The appellants in this case are seeking to invoke the "principle of avoidance", also known as "constitutional avoidance". The principle of avoidance entails that a court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59:



“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

[257] Similarly the U S Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (*Ashwander v Tennessee Valley Authority*, 297 U.S. 288, 347 [1936])

[258] From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd respondents’ claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright- infringement claim, and it was not properly laid before that court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court.

22. In *Ashwander v Tennessee* 297 U S 288, 347 [1936], the U S Supreme Court held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of.
23. What the petitioner is seeking is compensation and damages for the loss of the life of the deceased. The issue of the loss of life was already determined through the inquest no 10 of 2008 (*supra*). Hers is a pure civil case based on the law of Tort, but camouflaged as a Constitutional Petition. This is clear from the pleadings dispositions and the annexures.
24. The petitioner filed this case in 2017 long after the decision in the Inquest file. What she ought to have done was to seek Leave from the appropriate court to file her claim out of time, instead of filing this petition.
25. From the foregoing I am persuaded that the preliminary objection has merit in terms of ground no. (ii) and I allow it. The petition is hereby struck out with no order as to costs.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 28TH DAY OF FEBRUARY, 2023 IN OPEN COURT AT MILIMANI, NAIROBI.

H I ONG’UDI

JUDGE OF THE HIGH COURT

