



REPUBLIC OF KENYA



KENYA LAW
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**Njau v Wangai & 6 others; National Police Service Commission & 2 others (Interested Parties)
(Constitutional Petition E006 of 2021) [2023] KEHC 2813 (KLR) (27 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2813 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CONSTITUTIONAL PETITION E006 OF 2021**

**F GIKONYO, J
MARCH 27, 2023**

BETWEEN

SIMON CHEGE NJAU PETITIONER

AND

HON. MARY NJOKI WANGAI 1ST RESPONDENT

**PETER MUNGAI ALIAS MUHOHO, POLICE CONSTABLE NAROK POLICE
STATION 2ND RESPONDENT**

**DENNIS NAMIANYA SIFUNA POLICE CONSTABLE NAROK POLICE
STATION 3RD RESPONDENT**

**FRANCIS KAIRU, INSPECTOR OF POLICE, OFFICER IN CHARGE OF
CRIME NAROK POLICE STATION 4TH RESPONDENT**

**JUSTUS NJERU CHIEF INSPECTOR OF POLICE OCS NAROK POLICE
STATION 5TH RESPONDENT**

INSPECTOR OF POLICE 6TH RESPONDENT

THE ATTORNEY GENERAL 7TH RESPONDENT

AND

NATIONAL POLICE SERVICE COMMISSION INTERESTED PARTY

**INDEPENDENT POLICING OVERSIGHT AUTHORITY INTERESTED
PARTY**

DIRECTOR OF PUBLIC PROSECUTION INTERESTED PARTY



RULING

1. The 1st Respondent has filed a Notice of Preliminary Objection dated February 21, 2022 raising the following preliminary objections; -
 - i. That the honourable court lacks jurisdiction to hear and entertain the said petition as against the 1st respondent as the same is expressly ousted by the constitution of Kenya and by virtue of the rule in *Kenya Bus Service Ltd & 2 Others Vs The Attorney General & 2 Others [2015] eKLR* where it was held that fundamental rights and freedom set out in the bill of rights are enforceable by a private individual by way of a constitutional reference only as against the state and state organs and not by a private individual as against another private individual and that if any party had a claim against another then the parties should pursue such action under private law, that the applicant herein ought to sue the respondent vide a civil suit and that lawful causes of action is no bar to a party who alleges a contravention of his rights under the constitution.
 - ii. That the petition as against the 1st respondent contravenes article 21 of the *Constitution* of Kenya 2010 which provides that it is the fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the bill of rights and that the same cannot be violated by a private individual.
 - iii. That the rights and duties of individuals and between individuals are regulated by private law and not by public law.
 - iv. That the petitioner lacks the locus standi to pray for reliefs sought as the petitioner is not the registered owner of the motor vehicle registration number Toyota probox registration number xxxx as the same motor vehicle has been separately claimed by the registered owner being one Stephen Waweru.
 - v. That the petition is an abuse of the court process and that the cause of action against the 1st respondent was obviously and almost incontestably bad.
 - vi. That in the circumstances, therefore, the petition filed in court as against the 1st respondent is incompetent and fails to comply with the mandatory provisions of the law and this honourable court should take cognizance of the glaring illegality strike it off in limine.
 - vii. That the costs of the application and the suit be borne by the plaintiff/applicants.

1st respondent's written submissions

2. The 1st respondent submitted that the petitioner lacks the locus standi to bring the suit herein as framed against the 1st respondent herein. The petition is an abuse of the court process and that the cause of action against the 1st respondent was obviously and incontestably bad this court has an obligation to uphold the values and principles of the constitution.
3. The 1st respondent submitted further that the petitioner ought not to invoke the jurisdiction of the high court acting as a constitutional court; the remedies under the bill of rights in the constitution should be reserved for appropriate and serious occasions.
4. The 1st respondent submitted that the petitioner is not the registered owner of the motor vehicle hence has no colour of right to pray for damages against the 1st respondent.



5. It was the 1st respondent submission that the petitioner should bear the costs of the preliminary objection be borne by the petitioner.
6. The 1st respondent has relied on the following authorities;
 - i. *Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors Ltd (1969) EA 696*
 - ii. High Court *Constitutional Petition Number 187 Of 2012 Hon Uhuru Muigai Kenyatta Versus the Nairobi Star Publications Limited.*
 - iii. *Re Application by Bahadur [1986] IRC (Cost) 297 At 298*, Trundad and Tobago
 - iv. Kenya Bus Service Ltd & 2 Others Vs the Attorney General & 2 Others (2005) eKLR
 - v. *Teitiwangang and Ariong & Others [1987] IRC Const 517 At Page 599*
 - vi. [*Gabriel Mutave & 2 Others Vs Managing Director, Kenya Ports Authority \[2016\] eKLR*](#)
 - vii. *Benard Murage Vs Fineserve Africa Ltd & 3 Other [2015] eKLR*
 - viii. [*Law Society of Kenya Vs Commissioner of Lands & Other, Nakuru High Court Civil Case No 464 Of 2000*](#)
 - ix. [*Samuel Kamau Macharia Vs KCB And Others \[2012\] eKLR*](#)
 - x. [*The Owner of The Motor Vessel 'Lilian 'S' V Caltex Oil Kenya Ltd \[1989\] KLR1*](#)
 - xi. Misc. Civ Application No 19 Of 2015 Quoting the Case of *Republic Vs Rosemary Wairimu Munene Ex Parte Applicant V's Ibururu Dairy Farmers Co-Operatives Society Ltd.*
 - xii. Owners Of Motor Vessel Lilian' S' Vs Caltex Oil (Kenya) [1989] eKLR

Petitioner's submissions

7. The petitioner submitted that the petition raises several constitutional issues for interpretation thus this court has jurisdiction to hear the matter.
8. The petitioner submitted that the petition as presented complies with the Mutunga rules and thus there exists no grounds for dismissal. That the preliminary objection herein raised by the 1st respondent does not meet the threshold and should be dismissed with cost. That the issues raised by the 1st respondent are fact based and as such do not fit within the ambit of a preliminary objection. Further that the 1st respondent by virtue of being a member of the Narok county assembly is a public officer as per the Public Officer Ethics Act and thus cannot purport to be wrongfully enjoined as a private individual. It is trite law that a suit should not in principle be struck out for mis-joinder or non-joinder of a party except when there is a legal bar to maintainability of a suit.
9. The petitioner submitted that costs follow the cause.
10. In the end the petitioner submitted that the grounds raised as preliminary objection fall short of meeting what is a threshold of a pure point of law likely to dispose of the petition. Some respondents have since agreed with the facts as presented by the petition and thus the court should proceed to hear the petition on merit.
11. The petitioner relied on the following authorities;
 - i. Article 165, 23(3) of the Constitution.



- ii. *AOO & 6 Others V Attorney General & Another [2017] eKLR*
 - iii. *Mukisa Biscuits Co Ltd Vs West End Distributors Ltd [1996] EA 696*
 - iv. *Avatar Singh Bharmra & Another Vs Oriental Commercial Bank, Kisumu High Court Civil Case No 53 Of 2004.*
 - v. [*David Nyekorach Matsanga & Another Vs Philip Waki & 3 Others \[2017\] eKLR*](#)
 - vi. *Independent Electoral & Boundaries Commission Vs Jane Chepe Renger & 2 Others [2015] eKLR*
 - vii. Rules 3(8), 5(B), (C),(D) And € And 18 Of The Mutunga Rules
 - viii. [*Joseph Oduor Anode Vs Kenya Red Cross Society, Nairobi High Court Civil Suit No 66 Of 2009; \[2012\] eKLR*](#)
 - ix. Mr Justice (Rtd) Richard Kuloba In *Judicial Hints On Civil Procedure 2nd Ed*(Nairobi: Law Africa, 2011) P 94
 - x. *Chamilabs Vs Lalji Bhimji and Shamji Jinabhai Patel*, High Court of Kenya, Civil Case No 1062 Of 1973.
12. On February 22, 2023 M/s Robi advocate for the 2nd – 7th Respondents stated that they shall not participate in the preliminary objection.

Directions of the court

13. The preliminary objection was canvassed by way of written submissions.

Analysis And Determination

Issues

14. From the preliminary objection and submissions before this court, I discern two points of objection to be; i) misjoinder of the 1st respondent; and ii) lack of locus standi of the petitioner to sue. The overall test is;
- a. Whether these objections meet the threshold for a preliminary objection.

The threshold for preliminary objection

15. According to *Mukhisa Biscuits Manufacturing Co Ltd V West End Distributors Ltd [1969] EA 696*:
- ' A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.
16. See also *Hassan Ali Jobo & Another –vs- Suleiman Said Shabbal & 2 Others [2014] eKLR*
17. In addition, a preliminary objection does not involve probing of evidence.

Law governing constitutional petition

18. Constitutional petitions for breach or violation of the Bill of Rights are governed by Article 165 3 (b) as read together with Articles 22 and 23 of the Constitution.



19. Article 22 (3) directs the Chief Justice to formulate rules to govern the institution and hearing of constitutional petitions and sub-article 3 (b) provides that formalities related to the proceedings to be kept to bare minimum and where necessary the court shall entertain proceedings on basis of informal documentation.
20. Sub-article 3 (2) requires the court to observe the rules of natural justice and shall not unreasonably be restricted by procedural technicalities.
21. The Mutunga Rules 2013 enacted thereunder regulate the form, contents and manner of the filing, service, amendments and the mode of hearing of a constitutional petition.
22. Rule 10 thereof governs the form of a petition which includes the description of parties, facts relied upon, articles of the bill of rights (freedoms) infringed, particulars of the breaches, pending suits relating to the matter and reliefs sought.
23. Rule 3 (8) grants the court inherent powers to make such orders as may be necessary for the ends of justice while Rule 5 grants the court power to order joinder, substitution and striking out of parties.

Misjoinder of parties

24. Under Rule 5 (b) (c) (d) and (e) of the Mutunga Rules, the court has wide powers to ensure a petition is not defeated on account of misjoinder or non-joinder of parties or where there is a mistake made in good faith, and where it is necessary for the determination of the matter in dispute the court may order with or without application of either party, require a party whose presence is necessary to enable the court to adjudicate upon and settle a matter be added.
25. In light thereof, misjoinder or non-joinder of parties is not indomitable objection in the sense of a preliminary objection. It has never the potency of decimating a proceeding.
26. In any case, the general principle is that a proceedings should not be struck out for misjoinder or non-joinder of a party except when there is a legal or statutory bar to maintainability of a suit (*Chief Land Registrar & 4 Others –vs- Nathan Tirop Koech & 4 Others [2018] eKLR.*)
27. I therefore reject the objection.

Locus standi

28. Locus standi in instituting constitutional proceedings for enforcement of the Bill of Rights has been greatly enlarged (art 22(1) & (2), and 258 of the Constitution). Therefore, a challenge on the locus standi of the petitioner is a matter for factual evaluation to prove. Accordingly, the objection thereto is not a true preliminary objection. It is incapable of decimating the petition herein
29. The upshot is that the preliminary objection herein fails and is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 27TH DAY OF MARCH, 2023.

F GIKONYO M

JUDGE

In the presence of:

Ms. Nkurrurah for Petitioners

Ms. Njihia for Tuya for 1st Respondent



Ms. Robi for all other Respondents - absent

