Ouma v Orengo & another (Constitutional Petition E001 of 2023)
[2023] KEHC 3722 (KLR) (26 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3722 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CONSTITUTIONAL PETITION E001 OF 2023

RE ABURILI, J

APRIL 26, 2023

BETWEEN

EVERLINE AOKO OUMA ..... PETITIONER

AND

HON. JAMES ORENGO GOVERNOR COUNTY GOVERNMENT OF SIAYA ..... 1ST RESPONDENT

COUNTY ASSEMBLY OF SIAYA ..... 2ND RESPONDENT

JUDGMENT

1. The petitioner herein Everlyne Aoko Ouma who described herself as a registered voter in St. Theresa's Primary School, Yala Township Ward, Gem Constituency in Siaya County, filed her petition dated 6/1/2023 in which she sought the following orders;

    i. A declaration that in establishment and or appointment of the members of the Siaya County taskforce on audit of County Government systems and governance Reforms by the 1st respondent vide a letter dated 3rd October 2022 was unConstitutional therefore null and void.

    ii. A permanent injunction restraining the 1st respondent by himself and or through his lawful assignee from receiving and or making public and or acting upon the recommendations of the report of the Siaya County Taskforce on Audit of County Government Systems and Governance reforms.

    iii. A permanent injunction restraining the 2nd respondent by itself and or through his lawful assignee, and or employees from receiving and or making public and or considering and or debating and or acting upon the recommendations of the report of the Siaya County Taskforce on Audit of County Government systems and Governance reforms.

iv. An order that the 1st respondent do personally refund of all the expenses incurred and allowances received by the members of the Siaya County Taskforce on audit of County Governance Systems and governance reforms.

v. Costs of this petition be paid by the respondent.

vi. Any other further relief that this Honourable Court may deem fit.

2. It was the petitioner's case that the 1st respondent established and appointed members to a Taskforce that was to among other things carry out an audit of the County Government systems and further propose governance reforms. The petitioner further stated that the appointed members were never gazetted in the Kenya Gazette.

3. The petitioner stated that the mandate to audit staff establishment and or recommending reforms on governance structures and systems was vested in the Siaya County Service Board as provided in Section 59 (1) (h) of the County Government Act and any purported performance of this action by any other authority constituted a violation of the law and abuse of office.

4. The petitioner further stated that the establishment and appointment of the members of the taskforce by the 1st respondent contravened Article 232 of *the Constitution* of Kenya on values and principles of public service including efficient, effective, economic use of resources and accountability for administrative acts.

5. In response, the 1st respondent via a replying affidavit deposed on the 31st January 2023 by one Philip Richard Owade, the acting County Attorney, stating that the petition was frivolous, vexatious, incompetent and bad in law and ought to be dismissed.

6. It was the 1st respondent's case that the appointment of the Task Force was regular, procedural, open, transparent, accountable and within the powers conferred upon the governor by the law.

7. The 1st respondent further deposed that the terms of reference for the task force were not within the exclusive mandate of the Auditor General or Internal Auditor as purported by the petitioners and further that there was no law that expressly prohibited the governor from appointing a task force to carry out the mandate assigned to the task force.

8. It was the 1st respondent's case that it was trite law that the executive authority of a County Government was vested in the governor and that County Executive Committee and that the Governor was solely responsible to the people on the deployment and use of resources entrusted to him and as such there was no limitation on the governor on how the governor could exercise accountability to the people and could thus appoint a taskforce or any other body to facilitate accountable leadership.

9. The 1st respondent further deposed that the fact that an audit had been done by the Auditor General was not a bar to the appointment of the task force to undertake an audit with a view of appraising the governor and his administration of the state of affairs in the County and or recommending to him reforms in the existing governance structures.

10. The 1st respondent contended that the law did not prescribe a procedure for appointment of members of a task force and as such there was no obligation on the part of the governor for applications for consideration for appointment and further that the law did not vest exclusive authority on the Public Service Board to recommend reforms on the governance structures and systems of the County Government.

11. Further deposition was that there was no law that made it mandatory for the Governor to gazette a task force once the same has been established and thus the failure to gazette the task force did not render it illegal or un Constitutional.

12. On their its part, the 2nd respondent County Assembly of Siaya filed a replying affidavit on the 24th February 2023 sworn by one Erick Ogenga in which he contended that the task force submitted its final report to the 1st respondent on the 20th January 2023 and further that the report did not fall within the provisions of Article 229 (7) and (8) of *the Constitution* as read with sections 32 of the *Public Audit Act*, 2015 and thus it was not mandatory that the report be submitted to the 2nd respondent.

13. The petition was canvassed by way of written submissions

The Petitioner's Submissions

14. It was submitted that no evidence had been adduced to prove that the establishment and appointment of the Siaya County Taskforce on Systems Audit and Governance Reforms by the 1st respondent was gazetted and this failure contravened the requirements of section 30 (2) of the County Government Act 2012.

15. The petitioner further submitted that the establishment and appointment of the members of the taskforce by the 1st respondent contravened Article 232 of *the Constitution* on values and principles of public service including efficient, effective, economic use of resources and accountability for administrative acts as the taskforce usurped the role of the Auditor General and the Siaya County Public Service Board as was evident in the findings and recommendations made by the task force in their final report to the 1st respondent issued on the 20th January 2023.

16. It was submitted that the 1st respondent violated Article 10 of *the Constitution* that sets out the national values and principle of governance that binds all state officers, state organs, public officers by establishing and appointing members of the task force.

The 1st Respondent's Submissions

17. It was submitted that the petition was frivolous, vexatious, incompetent and bad in law as it did not meet the established threshold for a Constitutional petition as set out in the case of David Gathu Thuo v Attorney General & Another [2021] eKLR as well as the case of Anarita Karimi Njeru v The Republic [1976-1980] KLR 1272 where the court in both instances held inter alia that Constitutional violations must be pleaded with a reasonable degree of precision.

18. The 1st respondent submitted that the petitioner had failed to plead with sufficient precision the provisions of the law or Constitution that she alleged had been breached and similarly failed to provide evidence of any violation or breaches of *the Constitution* to warrant grant of the reliefs sought.

19. It was further submitted that the petitioner had prematurely filed the instant petition having failed to exhaust all remedies available in law for the resolution of the dispute specifically by moving to the County Assembly as provided in Section 15 of the *County Governments Act*. Reliance was placed on the case of Speaker of the National Assembly v James Njenga Karume [1992] eKLR where the Court held interalia that where there is a clear procedure for the redress of any particular grievance prescribed by law, that procedure should be strictly followed.

20. The 1st respondent submitted that the failure to gazette the task force as provided in section 30(2) (1) of the *County Governments Act* did not render it illegal and unConstitutional as the county gazette did not exist and the same was yet to be established. It was submitted that the petitioner had not pleaded and or

demonstrated how the failure to gazette the said taskforce had breached or violated her Constitutional rights and further that there was no need for gazettement as the task force did not need input of the public.

21. The 1st respondent submitted that the petitioner's prayer seeking to declare the establishment and appointment of the taskforce as unConstitutional was untenable as the petitioner had failed to plead and or demonstrate any breaches or violations of *the Constitution* on the part of the 1st respondent and further that the prayers for permanent injunction being sought were untenable as the task force had already completed its work and the report issued.

The 2nd respondent's Submissions

22. It was submitted that in seeking injunctive relief against the respondents, the petitioner failed to establish a prima facie case or likelihood of irreparable damage to warrant the grant of sought orders. The 2nd respondent further submitted that the petitioner had not established any right that required protection by the court.

23. The 2nd respondent relied on the case of Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR where the Court of Appeal set out the conditions precedent for the grant of injunctive relief.

Analysis and Determination

24. I have considered the petition, the grounds and supporting affidavit as well as the annextures thereto, the legal and constitutional provisions, the responses by the respondents and the respective parties 'written submissions. The issues for consideration in this petition are:

    i. Whether the provisions of Section 15 of the County Government Act oust this court's jurisdiction to determine the petition.

    ii. Whether the Petitioner's petition was pleaded with reasonable precision as per the required standard in Constitutional Petitions

    iii. Whether the petitioner discharged her burden of proof

    iv. Whether the prayers sought ought to be granted

    v. who should bear costs of the petition

Whether the provisions of Section 15 of the County Government Act oust this court's jurisdiction to determine the petition.

25. The 1st respondent submitted that the petitioner had prematurely filed the instant suit having failed to exhaust all remedies available in law for the resolution of the dispute specifically by moving the County Assembly as provided in Section 15 of the *County Governments Act*. In essence, the 1st respondent was questioning this court's jurisdiction to entertain this petition.

26. Jurisdiction is a fundamental issue and should be disposed of whenever raised. Where a court is convinced that there is want of jurisdiction to entertain any matter before it to finality, that court has no option but to down its tools. This was held by Nyarangi JA in the case of Owners of the Motor Vessel 'Lillian' "s" v Caltex Oil (Kenya) Ltd [1989] KLR 1, where he succinctly held thus:

> " Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court had no jurisdiction, there would be no basis for a continuation of proceedings pending

other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. ....."

27. In Samuel Kamau Macharia & Another v Kenya Commercial Bank & 2 Others, Application No. 2 of 2011 [2012] eKLR, the Supreme Court pronounced itself thus, on the question of jurisdiction:

> "(68) A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law..."

28. The High Court derives its jurisdiction from Article 165 of *the Constitution*, 2010 which provides that;

> "(3) Subject to clause (5), the High Court shall have —
>
> (a) unlimited original jurisdiction in criminal and civil matters;
>
> (b) ....
>
> (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
>
> (i) the question whether any law is inconsistent with or in contravention of this Constitution;
>
> (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
>
> (iii) any matter relating to Constitutional powers of State organs in respect of county governments and any matter relating to the Constitutional relationship between the levels of government; and
>
> (iv) a question relating to conflict of laws under Article 191; ..."

29. It is not in dispute that *the Constitution* confers on this Court unlimited jurisdiction in civil matters. However, the court has to consider before it exercises its jurisdiction, whether the Petitioner was required to exhaust all other avenues of dispute resolution before approaching the court. In Speaker of National Assembly vs Karume (Supra) the Court of Appeal held that:

> "Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

30. In Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others [2015] eKLR the Court of Appeal further restated this position in stated as thus: -

> "It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last

resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution."

31. Article 159 (2) (c) of *the Constitution* of Kenya, 2010 provides: -

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

32. It was the Respondents contention that section 15 of the County Government Act (CGA) provide for alternative mechanisms for review of the Respondent's decisions or actions and, that the said sections form the basis of the ousting the jurisdiction of this court.

33. Section 15 (1) of the County Government Act provides that:

" A person has a right to petition a County Assembly to consider any matter within its authority, including enacting, amending or repealing any of its legislation."

34. In this instance, at the time of bringing this petition, there was nothing to present before the County Assembly for discussion, and in the alternative, the petitioner was raising issues with the Constitutionality of appointing the task force and allowing it to carry out its mandate.

35. I find that this court is well clothed with jurisdiction to address issues of Constitutionality of actions carried out by other state organs and officers and the county governments.

Whether the Petitioner's petition was pleaded with reasonable precision as per the required standard in Constitutional Petitions;

36. It is now a well-settled principle that in Constitutional litigation, a party that alleges violation of his or her rights must plead with reasonable precision in regard to the manner in which there has been such alleged violation. This proposition was enunciated in the case of Anarita Karimi Njeru vs The Republic (1976-1980) KLR 1272 where the court stated that:

" Constitutional violations must be pleaded with a reasonable degree of precision."

37. The Articles of *the Constitution* which entitles rights to the Petitioner must be precisely enumerated and the claim pleaded to demonstrate such violation with the violations being particularized in a precise manner. Furthermore, the manner in which the alleged violations were committed and to what extent must be shown by way of evidence based on the pleadings.

38. The Court of Appeal in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR set the standard of proof in Constitutional Petitions. The Court of Appeal judges stated as follows:

" ...The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in Constitutional petitions is an extension of this

principle. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:

"The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing."

The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19,20 and 73 of *the Constitution* in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown *the Constitution*, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of *the Constitution* and the rule of law, without any particulars.

We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (Supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the "epitome of precise, comprehensive, or elegant drafting," without requiring remedy by the 1st respondent..."

39. Lenaola J. in Dr. Rev. Timothy Njoya vs The Hon. Attorney General and Kenya Review Authority HC Constitutional and Human Rights Division Petition No. 479 of 2013 citing the Anarita Karimi and Mumo Matemu Cases stated that:

> " The Petitioner cannot come to court to seek facts and information he intends to use to prove the very case that he is arguing before the court. He must also plead his case with some degree of precision and set out the manner in which *the Constitution* has been violated by whom and even state the Article of *the Constitution* that has been violated and the manner in which it has been violated."

40. I find the Dr. Timothy Njoya case (Supra) by Lenaola J. persuasive while that of Mumo Matemu (Supra) being a Court of Appeal decision is binding on this court.

41. Examining the Petitioner's pleadings, the evidence as well as the submissions of the parties, it is my considered view that the Petition has not fulfilled the requirements of a Constitutional Petition. Although the Petitioner has pleaded provisions of *the Constitution*, she has not demonstrated to the required standard how her individual rights and fundamental freedoms were violated, infringed or threatened by the respondents. She has not adduced any evidence to demonstrate the alleged violations. I therefore find and hold that the petition herein does not meet the test in the Anarita Karimi Njeru case.

Whether the petitioner discharged her burden of proof

42. The conduct of Constitutional Petitions is also guided by various laws. For instance, the *Evidence Act* applies to matters generally relating to evidence. The *Evidence Act* is clear on its application to Constitutional Petitions and affidavits in Section 2 thereof which provides that:

> (1) This Act shall apply to all judicial proceedings in or before any Court other than a Kadhi's Court, but not to proceedings before an arbitrator.
>
> (2) Subject to the provisions of any other Act or of any rules of Court, this Act shall apply to affidavits presented to any Court.

43. Sections 107(1), (2) and 109 of the *Evidence Act* are on the burden of proof. They provide that:

> 107(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> and
>
> 109. Proof of particular fact
>
> The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

44. The burden of proof on a Petitioner in a Constitutional Petition was addressed by the Supreme Court in Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others [2014] eKLR as follows:

> Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru vs. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the Constitutional process of dispute settlement.

45. Even assuming that I am wrong on my findings above, and that this petition is competent, the question is whether the petitioner discharged her burden of proof of the allegations in the petition to the required standard. The petitioner herein pleaded that the mandate to audit staff establishment and/or recommend reforms on governance structures and systems was vested in the Siaya County Public Service Board as provided for in Section 59 (1) (h) of the County Government Act and thus any purported performance of this action by any other authority constituted a violation of the law and abuse of office and therefore the establishment and appointment of the members of the taskforce by the 1st respondent contravened Article 232 of *the Constitution* of Kenya on values and principles of public service including efficient, effective, economic use of resources and accountability for administrative acts.

46. I however note that a governor is empowered by Section 31 (d) of the County Government Act to carry out actions necessary for the execution of his duties. The specific section provides that:

> " 31. Powers of the governor
>
> The governor—
>
> (d) shall have such powers as may be necessary for the execution of the duties of the office of governor."

47. Was the governor thus wrong in appointing the task force? In my opinion, Not at all. The governor being a new governor coming into office was in my mind exercising his powers in a manner that was necessary for the execution of his duties as provided for in section 31 (d) of the County Government Act. It is also reasonable that the new governor would wish to be briefed on the state of governance of the county so as to be in a position to carry out his mandate better. For that reason, the alleged usurpation of duties of the County Public Service Board by the taskforce as alleged by the petitioner does not rise.

48. Article 73 of *the Constitution* provides that authority assigned to a State Officer is a public trust which ought to be exercised in a manner that is consistent with the purposes and objects of *the Constitution*. The authority vests in the State officer the responsibility to serve the people rather than the power to rule them. One of the guiding principles of leadership and integrity is accountability to the public for the decisions and actions taken. Under Article 174, one of the objectives of devolution is to promote democratic and accountable exercise of power.

49. In my view, the act of the Governor appointing the task force was an act of auditing whether previous holders of power at the County exercised their power accountably to the people and further seek how the same could be improved or adopted as recommended by the taskforce. The fact that the former Auditor General was the person appointed to chair the taskforce in issue was in my view, not proved to prejudice the petitioner or at all. Furthermore, the experience of the former Auditor General would add value to the process. It is also not in doubt that activities of the taskforce would involve public expenditure. It was not demonstrated that such expenditure was a waste of public resources.

50. It is trite law that he who alleges must prove his claim. The claim must be propounded on an evidentiary foundation. In Leonard Otieno v Airtel Kenya Limited [2018] Mativo J. stated 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."

51. In my humble view, it was not shown how the petitioner's rights were violated or threatened with violation by the 1st respondent appointing the taskforce to audit the resources of the County. In my view, the petitioner should be agitating for accountability and transparency, key governance principles or values espouse din Article 10 of *the Constitution* and not opaqueness in public affairs. I find and hold that the petitioner failed to discharge her burden of proof

DIVISION - Whether the prayers sought ought to be granted

52. On prayers (i) and (iv), I find that the 1st respondent exercised his powers in accordance with the law as enumerated herein above and thus the said prayers are not merited.

53. On prayers (ii) and (iii) in which the petitioner seeks permanent injunction restraining the respondents from receiving and/or making public and/or acting upon the recommendations made by the task force and further debating and/or acting upon the recommendations of the report, it is my opinion that these prayers have been overtaken by events as the report was given to the 1st respondent on the 20th January 2023.

54. Further, it is noteworthy that a permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Plaintiff in order for the rights of the Plaintiff to be protected. The petitioner did not demonstrate that she warrants grant of the orders sought of permanent injunction.

55. As regards prayer (v) on costs, Section 27 of the *Civil Procedure Act* provides that costs follow the event. Further, the issue of costs is at the discretion of the court and meant to compensate the successful party for the trouble taken in prosecuting or defending the case and not to penalize the losing party. (see the cases of Republic v Rosemary Wairimu Munene (Ex parte Applicant) v. Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review Application No. 6 of 2004 and Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another [2016] eKLR).

56. This matter being an individual against public and state officers and offices, I find it appropriate to order that each party bear their own costs of the dismissed petition.

57. This filed is closed.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 26TH DAY OF APRIL, 2023

R.E. ABURILI

JUDGE