



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 306 OF 2019

IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL

FREEDOM UNDER ARTICLES 35 AND 48 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ARTICLES 10, 12(1), 20 (1), (2) & 24 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTE ROF SECTIONS 4 & 6 OF THE ACCESS TO INFORMATION ACT, 2016

AND

IN THE MATTER OF RULES 4, 10, & 13 OF THE CONSTITUTION OF KENYA (PROTECTION OF

RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RUES, 2013

BETWEEN

HENRY MACHARIA WAIRIA.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE PERMANENT SECRETARY, MINISTRYOF FOREIGN AFFAIRS.....2ND RESPONDENT

AND

IVY NDUTA MACHARIA.....INTERESTED PARTY

JUDGMENT

THE PETITION

1. The Petitioner through a Petition dated 29th July, 2019 supported by Petitioner's Supporting Affidavit of even date seek the following reliefs: -

- a) *A declaration that the Petitioner's rights under Articles 35 & 38 of the Constitution of Kenya, 2010 have been violated.*
- b) *Compensation for violation of the said rights.*
- c) *Costs of this Petition be borne by the Respondent*
- d) *Or that such other order(s) as this Honourable Court shall deem just.*

THE PETITIONER'S CASE

2. The Petitioner's wife Julia Mwashu Ingasiana, was aboard the ill-fated Ethiopian Airlines Flight 302 Boeing 737-8 Max from Addis Ababa Bole International Airport enroute to Nairobi Jomo Kenyatta International Airport, which aircraft crashed shortly after take-off at Bishoftu area on 10th March 2019, killing all the passengers and crew on board.
3. It is Petitioner's case that the 2nd Respondent in collaboration with the 1st Respondent and the Kenyan mission in Ethiopia engaged the families of the departed, offering support in processing the due diligence documentation for compensation and other appurtenant processes.
4. The Petitioner, through the Law Offices of Shakespeare N. Feyissa, PSC & Friedman Rubin in Seattle, Washington has sued the Boeing Company in the United States of America for damages for wrongful death of his late wife.
5. It is Petitioner's case that he has repeatedly approached the 2nd Respondent to be issued with the death certificate of his wife, without which the pursuit of justice for the wrongful death of his
6. The Petitioner in support of the Petition filed affidavits sworn by the Petitioner Henry Mwachania Wairia sworn on 23rd May 2019, and further Affidavit sworn on 27th November 2019.

THE 2ND RESPONDENTS' RESPONSE

7. The 2nd Respondents filed Replying Affidavit by James Waweru sworn on 19th September 2019.

RESPONDENTS' CASE

8. The Respondents response to the Petitioner's case is that following the crash of the Ethiopian Airlines Flight ET302 at Bishoftu, Ethiopia on 10th March 2019, the Petitioner and the Interested Party sought from the 2nd Respondent, the release of the death certificate of the late Julia Mwashu Macharia who had perished in the said air crash. Both the Petitioner and Interested Party claimed the release of the death certificate to their independent custody. It is averred that due to verbal altercations between the Petitioner and the interested party at the office and in the presence of officials of the 2nd Respondent on several occasions concerning the release of the death certificate, it became evident that it was disputed as to whom the death certificate should be released to.
9. The Respondents in light of the two competing claims and in order to absolve the 2nd Respondent from any potential claims, that could arise from issuing the death certificate to the wrong party, the 2nd Respondent advised the Petitioner and the Interested Party to agree to a written consent as to whom the death certificate should be released to and in the absence of an agreed consent, obtain an order of Court identifying the party to whom the death certificate should be released to.

INTERESTED PARTY'S RESPONSE

10. The Interested Party was enjoined into these proceedings as a necessary party following an application for joinder by the Respondent on 12/11/2019.
11. The Interested Party is opposed to the Petitioner's Petition through grounds of opposition dated 8th December 2020.
12. The Interested Party through the grounds of opposition contend that;

“i) There is no constitutional issue raised in the said Petition and is therefore a non-starter and misguided Petition?

ii) The Petitioner is forum shopping as a result has abused the Court process, brought the Petition with unclean hands and does not merit the orders sort.

iii) The Petitioner has concealed material and important facts from the Court to warrant dismissal of the application in its entirety?

13. It is Interested Party's case that the deceased Julia Mwashu, died on 10th March 2019, aboard the ill-fated, Ethiopian Airlines Plane Boeing 737 at Bishoftu outside Addis Ababa, Ethiopia. That Prior to her death she lived with her two daughters Ivy Nduta Macharia the Interested Party herein and Joy Ayuma at their home in Jamhuri Estate.

14. The Interested Party contend that she was immediately contacted being the next of kin and informed of the heart wrenching news about the demise of their loved one and subsequently what followed next has been a series of events culminating with the Petition before this Court seeking inter alia; A declaration that the Petitioner's rights under **Article 35 & 38 of the Constitution of Kenya, 2010** have been violated.

15. The Interested Party states further a dispute between the Petitioner (a father) and the Interested Party (a daughter) over the administration of the estate of the deceased, the Late Juliah Mwashu has arisen. The Petitioner wishes to be granted sole access to the death certificate of the deceased to the exclusion of the Interested Party or any other person, which the Interested Party is opposed to.

ANALYSIS AND DETERMINATION

16. I have carefully considered the pleadings, Parties rival submissions and authorities in support, and from the aforesaid, I find that the following issues arise for consideration:-

a) Whether the Petitioner's rights under Article 35 and 38 of the Constitution have been violated.

b) Whether there is a Constitutional issue raised in the Petition to warrant granting reliefs sought.

A. WHETHER THE PETITIONER'S RIGHTS UNDER ARTICLE 35 AND 38 OF THE CONSTITUTION HAVE BEEN VIOLATED.

17. The Petitioner contends in his Petition that the 2nd Respondent has arbitrary and without lawful justification refused to release his deceased wife's death certificate to him. The 2nd Respondent has admitted that it did not give the death certificate to the Petitioner but states that it directed the Petitioner and the Interested Party to settle the issue by consent or furnish it with a Court order directing who should get the death certificate. The issue is therefore pending between Petitioner and Interested Party as to who should be issued with the deceased death certificate.

18. The Petitioner on the right to access information held by the state, relies on **Article 35 of the Constitution of Kenya** which provides thus:-

“35(1) every citizen has the right of access to:-

a) Information held by the State; and

b) Information held by another person and required for the exercise of protection of any right or fundamental freedom.

19. The access to **Information Act No. 31 of 2016 Laws of Kenya (herein after known as “the Act”)** was enacted to give effect to **Article 35 of the Constitution**. It provides a framework for public entities and private bodies to proactively disclose information they hold and to provide information on request in line with the constitutional principles.

20. **Section 2 of the Act** further described information to include *all records held by a public entity or a private body, regardless of the form in which the information is stored, its source or the date of production*. I find that this definition can be purposively interpreted as to include documents such as a death certificate as in the case herein.

21. **Article 260 of the Constitution** defines the term ‘State’ as ‘the collectivity of offices, organs and other entities, comprising the Government of the Republic of Kenya. **Section 3 of the Interpretation and General Provisions Act, Cap 2 laws of Kenya** defines a public body/entity as follows:-

“a) The Government or any department, institution or undertaking thereof; or

d) any authority, board, commission, committee or other body, whether paid or un paid, which is invested with or is performing, permanently or temporarily, functions of a public nature.”

22. In view of the aforesaid I find the Respondents are therefore public bodies and/or entities within the meaning of the aforementioned **Interpretation and General Provisions Act** and are therefore bound by the provisos of **Article 35 of the Constitution of Kenya**.

23. It follows therefore that access to information is a critical governance, transparency and accountability tool. It is clear that without access to information, higher values of democracy, rule of law and social justice as the path the Petitioner is pursuing cannot be achieved. This position was succinctly captured in **Famy Care Ltd vs. Public Procurement Administrative Review Board and others, High Court Pet. 43 of 2012[2013] eKLR** where it was held:-

“The right of access to information is one of the rights that underpin the values of good governance, integrity, transparency and accountability and the other values set out in Article 10 of the Constitution. It is based on the understanding that without access to information, the achievement of the higher values of democracy, rule of law, social justice set out in the preamble of the Constitution and Article 10 cannot be achieved unless the citizen has access to information.”

24. **Section 4 of the said Act** further provides that access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost. More important is the wording of **sub-section (4)** which provides that the Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under **Section 6 of the Act**.

25. The 2nd Respondent in paragraph 8 – 11 of its Replying Affidavit dated 16th September 2019 has averred that it declined to release the death certificate to the Petitioner due to the compelling interest by the Petitioner's daughter; the Interested Party, herein.

26. The Respondents on their part urge that the right of access to information as provided for under **Article 35** and right to political choices as provided for under **Article 38 of the Constitution** are not absolute rights. **Article 24** clearly provides for limitation of rights and fundamental freedoms and **Article 25** specifically identifies the rights which under no circumstances can be limited as follows;

27. **Article 25 of the Constitution** provides: -

“Despite any other provision in the constitution the following rights and fundamental freedoms shall not be limited.

(a) Freedom from torture and cruel, inhuman or degrading treatment or punishment;

(b) Freedom from slavery or servitude;

(c) The right to a fair trial; and

(d) The right to an order of habeas corpus.”

28. A clear reading of **Article 24 of the Constitution** provides that a limitation of rights and fundamental freedoms in the Bill of rights must be provided for in law. Relevant to this Petition is **Article 24(1)(d)** which recognizes that a limitation of right should take into account among other factors, the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others.

29. **Section 6 of the Access to Information Act No. 31 of 2016 (herein the AIA)** provides for instances where the limitation of the right of access to information may apply. Pertinent to this Petition is **Section 6(1)(b) of the AIA** which provides as follows:-

“6.(1) Pursuant to Article 24 of the Constitution, the right of access to information under Article 35 of the Constitution shall be limited in respect of information whose disclosure is likely to-

(b) impede the due process of law;”

30. Upon perusal of the Replying Affidavit of James Waweru, the reasons as to why the death certificate could not be issued to either the parties claiming it has been evidentially demonstrated. Suffice to say, the withholding of the death certificate was necessitated by the two competing claims lodged by the Petitioner and the Interested Party, who due to the nature of their relationship with the deceased, the Petitioner objected to the release of the death certificate to the Interested Party and the Interested Party objected to the release of the death certificate to the Petitioner. I note that in light of the objections manifested by both claimants, it was evident that the release of the death certificate to either of the parties without a written consent or a certified order of Court identifying the party/parties to whom the death certificate should be released to, would be prejudicial to the due process of the law in the proceedings for which the certificate was being obtained for, and the 2nd Respondent would have to bear any potential legal consequences occasioned by the release of the death certificate to the improper claimant, hence the caution taken by the 2nd Respondent.

31. The Interested Party on her part contend that the dispute is purely family law despite, that ought to be heard and determined by the Family Law Division of the High Court. That it is indeed true that the Petitioner has filed another case known as **Nairobi High Court Family Division Succession Cause No. 716 of 2019** citation cause to accept or refuse letters of administration intestate.

32. It is stated by the Interested Party that the Petitioner has equally objected and caused an injunction to be placed on the remains of the deceased from being given a final send off. This was made in **Kiambu Chief Magistrates Court P & A 185 of 2019 Henry Macharia Wairia**. Further the Interested Party aver that the 2nd Respondent being the government agency charged with the responsibility of ensuring the remains of the deceased were well taken care of and all processes thereafter were followed to the latter. As a result the 2nd Respondent were to keep the original death certificate of all the persons involved in the airplane crash.

33. The Interested Party contended that the 2nd Respondent has not denied the Petitioner his right to information but has merely retained the same documents pending determination of the succession cause on who should be the rightful administrator of the estate of the late Juliah Mwashii. It is Interested Party's contention that the deceased and the Petitioner had three children; Ivy Nduta Macharia – the Interested Party – Joy Ayuma Macharia and David Wairia Macharia – also Deceased. The said union it is urged was characterized with countless bouts of physical violence, verbal and emotional abuse, alcoholism, substance abuse and the list goes on and on all of which were all orchestrated by the Applicant.

34. The Interested Party proceeds on to state that she recalls spending long nights listening to her father – the applicant – persistently abusing and beating up her mother – the deceased – after coming home drunk. The situation persisted to the point whereby the deceased could not take any more, as it was damaging the upbringing of her children and she ran out of excuses as to why she was limping and had a black eye from a previous night of violence meted on her by the Petitioner. At this point the union had broken down beyond redemption. It is Interested Party's averment that the deceased decided to move out of the already broken down union and start a new life with her children, which she did in the year 2010 and with merge earnings she ventured into the unknown if only to save her children from a man whom they called a father but was a hopeless drunk who was going to subject them to a life of trauma and fear. The deceased was a hard working woman. She toiled for her children with the help of relatives who would help baby sit her young children while she was busy working in order to fend for her family.

35. The Interested Party described the deceased as a hard working woman who toiled for her children with the help of relatives who would help baby sit her young children whenever she was busy working in order to feed for her family. The Interested Party contend the deceased and the children did not have any contact with the Petitioner until her death. The Petitioner upon information, the Interested Party urges that in his violent and abusive character moved into the deceased's family house and super imposed himself together with his mother and sister demanding to be allowed access to the family's private information. Little did the Interested Party know, that he was after a kill, the compensation from the Boeing Airplane crash.

36. The Respondent on the instances where the limitation of the right of access to information may apply further places reliance in the case of *Mercy Nyawade vs. Banking Fraud Investigations Department & 2 others [2017] eKLR* (also relied upon by the Petitioner at paragraph 27 of his submission), the High Court further to the provisions of **Article 24** and **Section 6 of the AIA** adopted the three part test developed by the UN Special Rapporteur on Freedom of Opinion and Expression, in his report to the 2000 Session of the United Nation as Commission on Human Rights (E/CN.4/2000/63), which further provides for the limitation of access to information as follows:

“i. the information relates to legitimate interests protected by the law,

ii. disclosure of the information threatens to cause substantial harm to that interest,

iii. the harm to the interest is greater than the public interest in receiving the information.”

37. Looking at the averments contained in the Respondents' Replying Affidavit and the grounds raised by the Interested Party, I find that both satisfy the constitutional and statutory threshold for limitation of the right of access to information as well as the above stated conditions borrowed from International practice. In the instant Petition, I find that there are two legitimate interests whose fulfilment is tied to the release of the death certificate, i.e. compensation for death and application for letters of administration. It is of paramount importance that the death certificate be released to the right party/parties, upon determination of the suits pending in Family Division as alluded to by the Interested Party.

38. Considering the Respondents Replying Affidavit and the Interested Party's clear averments as to why the death certificate could not be released to either the Petitioner or the Interested Party, I find that the Respondents have demonstrated that they did not violate the rights of the Petitioner as alleged but rather seek to have the right party to whom the death certificate can be released identified so as to enable the 2nd Respondent undertake its duty faithfully and justifiably.

39. It is on the other hand, Interested Party's contention that the instant Petition, does not carry the helmets of Constitutional Petition for violation or infringement or threatened infringement of Petitioner's rights. In support of this proposition the Interested Party sought reliance on the case of *Kemrajh Harrikisson vs. The Attorney General of Trinidad and Tobago (1980) c. 265*, which many Kenyan Court have referred to with approval. It is not always the case that whenever there is a failure by a person to fulfill an obligation the offended party will invoke the Bill of Rights claiming that his fundamental rights or freedoms have been infringed. Further, now that the Petitioner has pending Succession Petition under *The Law of Succession Act Cap 150*, he can rely on that matter for recourse. It was not necessary to file this Constitutional Petition when all he is fighting for is to have the Respondent issue him with a death certificate, of the deceased with whom he had parted ways over 10 years prior to her demise.

40. Similarly reliance is placed in the case of *Godfrey Paul Okitoyi vs. Habil Olaka & Another Nairobi HC Petition No. 457 of 2015* where the Court observed that:-

“ 65. It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and therefore, a breach of such rights being a breach of an ordinary statute is redressed through an ordinary statute is redressed through a court of law in the manner allowed by a particular statute or in an ordinary suit as provided of by procedure. It is not every failure to act in accordance with the statutory provisions that should give rise to a constitutional petition. A party should only file a constitutional Petition for redress of a breach of the Constitution or denial, violation or infringement of, or threat to a appropriate forum and in the manner allowed by the applicable law and procedure.”

41. I now turn to consider whether the principle of constitutional avoidance can be applied in the instant Petition. The Supreme Court in its decision in the case of *Communication Commission of Kenya & 5 others vs. Royal media Services & 5 others, Petition No. 14, 14A, 14B and 14C of (2014) eKLR at paragraph 256* set out the principle of law and explained Constitutional Avoidance as follows:-

“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- Mhiungu, 1995 (3) S.A. 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, which is the course which should be followed,”

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

42. The issue at hand in this matter is the refusal of the 2nd Respondent to provide Petitioner with his deceased wife's death certificate. The Petitioner has already filed a *Succession Cause No. 719 of 2019*. The Interested Party, deceased daughter, claim that the Petition raises no Constitutional question. The instant Petition arises as between the Petitioner and the Interested Party as regards the actual administrator and

beneficiaries of the deceased estate. In the Petition, as observed there are two legitimate interest whose fulfilment is tied to the relevance of the death certificate. It is further related to issue of compensation and application for letters of administration of the deceased estate. There are as observed pending Petitions in the Family Division being **Nairobi High Court Family Division Succession Cause No. 716 of 2019** citation cause to accept or refuse letters of administration intestate and **Kiambu Chief Magistrate Court P & A 185 of 2019 Henry Macharia Wairia**.

43. In view whereof I find the issue as to who should be issued with deceased death certificate is an issue that can be decided in a Civil division without reaching a Constitutional issue, and which I am satisfied is the proper cause which the parties should follow in respect of the pending Petitions before Family division.

44. I now turn on alleged violation of **Article 38 of the Constitution** on Political rights. Upon perusal of the Petitioner's pleadings, it is clear that the Petitioner seeks a declaration that the Petitioner's right under **Article 35 & 38 of the Constitution** would be violated. However from the Petition, it is clear that the Petitioner has not pleaded violation of his rights under **Article 38**. Further I note, save for the Petitioner alleging that his rights under **Article 38** has been violated, there is no observation of the principles for enforcement of claims alleging violation of fundamental rights and freedoms as clearly established in the case of **Anarita Karimi Njeru vs. Republic (No.1) [1979] 1 KLR 154** and augmented by the Court of Appeal in the case of **Mumo Matemu vs. Trusted Society of Human Rights Alliance Civil Appeal No. 290 of 2012 [2013] eKLR**. The principles enunciated in both cases are:-

i. Constitutional Violations must be pleaded with a reasonable degree of precision.

ii. The Articles of the Constitution which entitles right to the Petitioner must be precisely enumerated and how one is entitled to the same.

iii. The violations must be particularized in precise manner.

iv. The manner in which the alleged violations were committed and to what extent.

45. From clear observation from the Petition, the Petitioner has neither provided particulars of the alleged violation nor the manner or extent to which the alleged rights were violated. In view whereof I find that the alleged violation of **Article 38 of the Constitution** has not been proved and must fail.

46. In the instant Petition, the Respondents have demonstrated that they have not declined or refused to release the death certificate. They are ready and willing to release the death certificate once provided either with a consent from the Petitioner and the Interested Party identifying the person (s) to whom to release the death certificate or a certified order of Court identifying the person (s) to whom the death certificate ought to be released to. I find that the Respondents in their action have not violated the Petitioner's rights as alluded to.

47. The upshot is that the Petition is without merits. The same is dismissed.

48. On issue of Costs the Petitioner and Interested Party seek costs to be awarded to each of them.

49. The general rule as to costs according to **Section 27 of the Civil Procedure Act** is that costs of and incidental to all suits are in the discretion of the Court or judge. In determining the issue of costs, this Honourable Court is entitled to look at elements such as the subject of litigation, the circumstances which led to the institution of the legal proceedings, the relationship between the parties and the need to promote reconciliation amongst the disputing parties pursuant to **Article 159(2)(c) of the Constitution**.

50. In addition thereto the Court is required to consider the intent of **Articles 22 and 23 of the Constitution** is to ensure that persons have free and unhindered access to this Honourable Court for the enforcement of their fundamental rights and freedoms. Imposition of costs would constitute a deterrent to the enforcement of the Bill of Rights.

51. The Respondents on their part contend that he Petitioner having failed to establish violation of his rights, the Respondents in a show of good faith will not labour the Petitioner with a prayer for costs occasioned in defence but pray for an order that each party bears its own costs.

52. I am guided further by **Rule 26 of the Mutunga, Rules, 2013** in which it is provided that the award of costs is at the discretion of the Court and in exercising the discretion to award costs, the court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms. Imposing of costs in matters brought under **Article 22 and 23 of the Constitution** will deny majority of deserving persons access to justice. In such situations it is fair for Court to balance issues of access to justice and costs and ensure justice is not denied in determining issue of costs.

53. On costs and in view of the aforesaid I direct that each party bears its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF FEBRUARY, 2022.

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J. A. MAKAU

JUDGE OF THE HIGH COURT OF KENYA