



**Ndungu v County Government of Nyeri & another (Petition
3 of 2019) [2022] KEHC 247 (KLR) (29 March 2022) (Ruling)**

Neutral citation: [2022] KEHC 247 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

PETITION 3 OF 2019

A MSHILA, J

MARCH 29, 2022

**IN THE MATTER OF: SECTIONS 70, 74, 75 AND 84
OF THE CONSTITUTION OF KENYA (REPEALED)**

**IN THE MATTER: THE CONTRAVENTION OF ARTICLES 10, 19, 20,
21, 22, 23, 28, 29 AND 40 OF THE CONSTITUTION OF KENYA, 2010**

BETWEEN

JOSEPH MURIITHI NDUNGU PETITIONER

AND

COUNTY GOVERNMENT OF NYERI 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION 2ND RESPONDENT

RULING

1. The Petitioner filed the Petition dated 13th May, 2019, and invoked the provisions of Articles 10, 19,20,21, 22,23,28,29 and 40 of *the Constitution* seeking the following prayers;
 - a. A declaration that the petitioner's rights enshrined in the Bill of Rights, particularly Articles 28, 29 and 40 have been grossly violated and/or infringed by the respondents in the manner set out;
 - b. An order directing the Respondent to compensate the Petitioner for unlawful arrest, physical violence, wrongful detention, malicious prosecution, malicious damage to his property and subsequent loss of business and auctioning of his home or the violation of the petitioner's fundamental rights and freedoms as set out in the petition and
 - c. Costs of the petition.



2. The parties were directed to file and exchange written submissions. Hereunder is a summary of the parties rival submissions;

Petitioner's Case

3. Petitioner's case is that on 23/10/2003 he was arrested and subsequently charged by the Respondent with the offence of operating a business without a license in Nyeri Criminal Case No. 2999/2003. During the arrest the Petitioner's stock of green maize worth Kshs.35,000/- was confiscated by the Council askaris who also meted out violence on the petitioner causing him grievous bodily harm. Moreover, during the court proceedings the Petitioner produced a receipt showing he had procured a council license and was thus acquitted.
4. The Petitioner contends that since the maize stock was confiscated he was not able to resume his business and he was unable to pay the loan he had taken with Equity Bank to finance his maize trade causing the bank to auction his home in a bid to recover the loan. This rendered him and his homeless and destitute causing him immense economic loss and damage from which he has never been able to recover to date.
5. The Petitioner states that he wrote to then Ministry of Justice and Constitutional Affairs who in their letter dated 13/11/2007 advised the council to compensate the petitioner as follows;
 - i. Loss of maize
 - ii. Loss of business to be agreed between the Council and the petitioner
 - iii. Injury and body damage to be agreed between the council and the petitioner.
6. The Respondent through their letter dated 14/07/2008 wrote to the Petitioner asking him to quantify his claim and on 17/08/2008 the petitioner quantified his claim as follows;
 - i. Loss of maize Kshs.35,000
 - ii. Loss of maize 25 bags Kshs.87,500
 - iii. Loss of earnings for 3 months Kshs.1,260,000
 - iv. Injury and body damage Kshs 630,000Total Kshs.1,977,500
7. The Petitioner submitted that the Respondent has never Responded to his letter of quantification nor have they compensated him despite his numerous physical follow ups at the respondent's offices.
8. The Petitioner contends that the Respondent violated Article 10 of *the Constitution* his right to human dignity pursuant to Article 28 and his right to freedom and security of the person pursuant to Article 29. He further states that pursuant to Section 75 of *the Constitution* (repealed) his right of property was violated when the council confiscated his stock of maize during this unlawful arrest.
9. The Petitioner relied on Article 22 of *the Constitution* and on the case of *Kenneth Matiba vs AG Misc.App.No.666 of 1990* which was cited in *Kenya Bus Services Ltd & 2 Others vs Attorney General & 2 Others [2005] eKLR* and submitted that this court's jurisdiction is invoked when an Applicant's fundamental rights are infringed.
10. The Petitioner refuted the claims that there had been inordinate delay in bringing this petition and states that although the cause of action arose nineteen years ago, the petitioner has been pursuing other remedies against the defunct Ministry of Justice and Constitutional Affairs, the Municipal



Council of Nyeri and finally the County Government of Nyeri. Additionally, the Petitioner submits that the petition would only be rejected if the delay was inordinate and no plausible reasons are advanced to explain the delay. The petitioner relies on the case of *Kiluwa Limited & Another Vs Commission Of Lands & 3 Others* to buttress his point.

11. The Petitioner submits that at the time of his arrest the applicable law was Section 72 of the repealed Constitution. He was held for three (3) days until he was released on cash bail as evidenced by the release papers produced in court contrary to the law which stipulates that a person should be produced in court within 24 hours of his arrest. The appellant relied on the cases of *Albanus Mwasia Mutua vs Republic Cr.App.No.120 of 2004* and *Ann Njogu & 5 Others vs Republic [2007] eKLR* to support his case.
12. The Petitioner states that he was arrested without just cause, beaten up and consequently his home was sold leaving him homeless. The petitioner relied on Article 28 of *the Constitution* and cited the cases of; *Harun Thungu Wakaba vs The Hon.Attorney General [2010] eKLR*, *Republic vs Minister for Home Affairs and Others ex-parte Sitamze NRB.HCCC No.1652 of 2004* and *Szocik vs England and Wales (Attorney General) 1480 2012 BCSC* to support his contention that the conduct of the Municipal Council askaris interfered with his personal integrity.
13. The Petitioner further submitted that his social and economic rights and his own property pursuant to Article 40 and 43 of *the Constitution* were infringed. The council askaris by their own admission by the Ministry are proof that the Petitioners maize was confiscated which led to the Petitioner losing his house which was repossessed by the bank after the municipality refused to compensate him despite the recommendations by the Ministry of Justice and Constitutional Affairs. As such, the petitioner stated that he had proved that his fundamental rights were infringed, the Petitioner prayed that the Petition be allowed with costs.

1st Respondent's Case

14. It was the 1st Respondents case that the cause of action as alleged by the Petitioner that is unlawful arrest, physical violence, wrongful detention, malicious prosecution and malicious damage to property occurred in 2003 and are based on torts law and are statute barred by dint of Section 3(1) of the *Public Authorities Limitations Act* as well as Section 4(2) of the *Limitations of Actions Act*.
15. The 1st Respondent stated that although there was no limitation period in seeking redress for the violation of fundamental rights and freedoms, Constitutional Petitions should not be used to circumvent the main cause of action. Case law referred to *James Kanyiita Nderitu vs Attorney General & Another [2019] eKLR* and *Johnstone Ogechi vs National Police Service [2017] eKLR*.
16. The 1st Respondent further contends that the Petitioner chose to bring the claims after over 16 years and explained the delay on pursuit of other administrative actions. In urging the court to find that the petitioner did not offer a justifiable explanation, the Respondent cited the case of; *Ochieng Kenneth Ogutu vs Kenyatta University HC Petition No.306 of 2012* cited with approval in *Joseph Migere Onoo vs Attorney General (2015) eKLR* which found that twelve (12) years delay to be inordinate. Moreover the inordinate delay is prejudicial to the 1st Respondent as most of the officers working with the then Municipal Council of Nyeri who are well versed with the facts of this matter are no longer employees of the Respondent as they have since left employment.
17. The Petition as drafted failed to meet the threshold of a Constitutional Petition as it did not cite with precision the manner in which the aforesaid Constitutional provisions were violated by the Respondent. The 1st Respondent cited the case of; *Anarita Karimi Njeru vs Republic (1979) KLR* quoted with approval in the case of; *Leonido Adhiambo vs Attorney General & Anor (2020) eKLR* to



support its contention. The petitioner alleges violation of Articles 28, 29 and 40. The attention of the court was brought to the additional rights and freedoms alleged to have been contravened by the Respondent such as Section 72 of the repealed constitution Article 47, Article 40 and 43 which the 1st Respondent urges this court to disregard as the sections were not pleaded by the Petitioner and it is trite law that parties are bound by their pleadings.

18. On Articles 28 and 29 of *the Constitution* the 1st Respondent stated that the Petitioner had not demonstrated how the Respondent wrongfully arrested, detained and inflicted injury on the Petitioner. In his supporting affidavit, the Petitioner admits that he was detained at the police station and not by the 1st Respondent. On Article 40 of *the Constitution* the Petitioner failed to demonstrate how the 1st Respondent violated his property rights, as he has not demonstrated how the 1st Respondent confiscated the petitioners stock of maize. Further the 1st Respondent relied on the case of *Leonido Aloo Adhiambo vs Attorney General & Another (2020) eKLR* and submitted that these violations ought to have been addressed in a civil court as the Petitioner had not drafted the Petition with reasonable degree of precision as required in a constitutional petition.

Issues For Determination

19. After reading the Petition, the response and the written submissions this court has framed the following issues for determination;
- i. Whether the petition meets the threshold for a constitutional petition;
 - ii. Whether the delay in lodging the claim is inordinate and inexcusable?

Analysis

Whether the petition meets the threshold for a constitutional petition;

20. It is trite law that for a constitutional petition to be sustainable it must satisfy a basic threshold; it must with some reasonable degree of precision identify the constitutional provisions that are alleged to have been violated and the manner of the violation and/or threatened violation. This principle was enunciated in *Anarita Karimi Njeru vs Republic* (1979) KLR where the court held as follows;

‘If a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with precision that of which he complains the provisions said to be infringed and the manner in which they are alleged to be infringed.’

21. The principle in *Anarita Karimi* (supra) was further enunciated in *Mumo Matemu vs Trusted Society of Human Rights Alliance (2014) eKLR* the court held;

‘We cannot but emphasize the importance of precise claims in due process substantive justice and the exercise of jurisdiction by the court.

The principle in *Anarita Karimi Njeru* underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of *the Constitution*. Procedure is also a handmaid of just determination of cases and cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party; The principle in *Anarita Karimi Njeru* that established the



rule that requires reasonable precision of framing of issues in Constitutional Petitions is an extension of this principle.’

22. It is clear from the above case law that it is not sufficient to merely cite constitutional provisions. One must provide the particulars of the alleged infringement to enable the Respondent to be able to respond and/or answer the allegations and complaints.
23. In this instance, the Petitioner invoked the provisions of the Articles 10, 19, 20, 21, 22, 23,28, 29 and 40 of *the Constitution* 2010 and Sections 70, 74, 75 and 84 of the repealed constitution. Notably, the Petitioner had invoked the said provisions of *the constitution* but has provided little and in some instances no particulars as to the allegations thereunder and the manner of infringement; The Petitioner invoked the following provisions.
24. Article 28 - which provides that
‘Every person has inherent dignity and the right to have that dignity respected and protected.’
25. Article 29 - provides;
‘Every person has the right to freedom and security of the person, which includes the right not to be-
 - a. Deprived of freedom arbitrarily or without just cause;
26. Article 40 provides:
‘Subject to Articles 65 every person has the right, either individually or in association with others to acquire and own property-
 - a. of any description; and
 - b. in any part of Kenya
 3. The State shall not deprive a person of property of any description, or of any interest in, or right over property of any description, unless the deprivation.....’
27. The Petitioner, apart from citing Articles 29 and 40 of *the Constitution*, does not specify which sub article has been infringed and there are no pleadings specifying the nature of the complaint and the infringement. The allegations are too generalized.
28. Additionally, the Petitioner has introduced Articles 43 and 47 of *the Constitution* in his submissions although he has not pleaded to their infringement in his Petition. As argued above, it is well settled law that the pleadings in a Constitutional Petition must be precise and clear to enable the other party to ably respond. As such, introducing the infringement of Articles 43 and 47 in his submissions and not pleading the same in his petition, he is therefore estopped from invoking the said Articles.
29. This court is satisfied that the petition does not meet the threshold for a constitutional petition.

Whether the delay in lodging the claim is inordinate and inexcusable;

30. Upon perusal of the petition, it is clear that the main cause of action set out by the petitioner are unlawful arrest, physical violence, wrongful detention, malicious prosecution and malicious damage to property which are based on torts.



31. Section 3(1) of the Public Authorities Limitation Act provides as follows;
- ‘No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.’
32. Section 4(2) of the Limitation of Actions Act provides;
- ‘An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued.’
33. Having perused the proceedings in Criminal Case No.2999 of 2003 where the petitioner was charged with operating a business without a council licence contrary to Section 265 of the Laws of Kenya. The court acquitted the Petitioner on 29th April, 2004 under Section 215 of the [Criminal Procedure Code](#) of the charge and even found that the Charge Sheet was defective as it did not disclose the section under which the Petitioner was charged with; and with all due respect this court opines that, the petitioner ought to have filed a case for damages under the law of torts after his acquittal and pursued his right for compensation.
34. It is noted that the Petitioner was charged and convicted in 2003 and his case concluded in 2004 during the era of the repealed constitution. This constitution provided for compensation in civil suits where a person’s rights were proved to have been violated or infringed. The petitioner had a right to claim for compensation in a civil court on the tort of malicious prosecution after he was acquitted in 2004 and also ought to have sought damages for malicious damage to his property. Instead he filed this petition in 2019 which translates to a period of 15 years after his acquittal rendering the claim time barred.
35. Case law relied upon is [Bernard Murage vs Fineserve Africa Ltd & 3 Others \[2015\] eKLR](#) where it was held;
- ‘Where there exists an alternate remedy through statutory law, then it is desirable that such statutory remedy be pursued first.’
36. The Petitioner herein failed to claim his right and it is tantamount to an abuse of the due process of the court by bringing forth a constitutional petition fifteen (15) years after his acquittal; in the case of [James Kanyiiita vs Attorney General and Another](#) NRB Petition No.180 of 2011 the court observed as follows;
- ‘Although there is no limitation period for filing proceedings to enforce fundamental rights and freedoms, the court in considering whether or not to grant relief under Section 84 of [the Constitution](#) is entitled to consider whether there has been inordinate delay in lodging the claim; the court is obliged to consider whether justice will be served by permitting a respondent, whether an individual or the State in any of its manifestations should be vexed by an otherwise stale claim; Just as the petitioner is entitled to enforce its fundamental rights and freedoms a respondent must have a reasonable expectation that such claims are prosecuted within a reasonable time.’
37. The Petitioner has justified filing this Petition fifteen (15) years later on the basis that he was exhausting other remedies that is the Ministry of Justice and Constitutional Affairs, the Municipal Council of Nyeri and the County Government of Nyeri. The explanation given is found to be unreasonable and unsatisfactory as nothing prevented the petitioner from seeking civil compensation after he was acquitted in 2004.



38. This court finds that the delay to be inordinate and inexcusable in filing the claim and also finds that the Petitioner failed to firstly exhaust other alternative remedies.

Findings & Determination

39. For those reasons this court makes the following findings and determinations;

- i. This court finds that the petition does not meet the threshold for a constitutional petition and finds that it is devoid of merit;
- ii. This court finds that there was inordinate delay in filing the claim;
- iii. The petition is hereby dismissed with no order as to costs.

Orders Accordingly.

DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 29TH DAY OF MARCH, 2022.

HON.A.MSHILA

JUDGE

In the presence of;

Macharia for the 1st Respondent

No appearance for 2nd Respondent

Wangechi for the Petitioner

Lucy-----Court Assistant

