



REPUBLIC OF KENYA



**Faraj & 3 others v Police & 2 others (Constitutional Petition
165 of 2020) [2022] KEHC 287 (KLR) (27 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 287 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION 165 OF 2020**

JM MATIVO, J

APRIL 27, 2022

BETWEEN

**ALI SALIM FARAJ 1ST PETITIONER
ANWAR SALIM FARAJ 2ND PETITIONER
FATMA ASHUR ABED 3RD PETITIONER
AHMED SALIM FARAJ 4TH PETITIONER**

AND

**INSPECTOR GENERAL OF POLICE 1ST RESPONDENT
OCS MAKUPA POLICE STATION 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT**

JUDGMENT

1. The Petitioners' grievance as gleaned from the Petition dated 11th December 2020 is that on the night of 10th December 2020, at around 10pm or thereabouts, the electricity supply to their house was disconnected from the pole by the Kenya Power and Lighting Company technicians who did not provide any reasons.
2. They Petitioners state that at around 1.30am the Petitioners were woken up by shouts, banging and sounds of crashing metal and as group of over 30 men descended on their Swahili house erected on LR No Mombasa Block XV/319 who under the watch of about 10 police officers dismantled the house and took their loot in a truck. They aver that an attempt by the 2nd Petitioner to salvage some items were thwarted by the goons under the watch of the police who also chased him.
3. The Petitioners state that the dispute over the ownership of their house was the subject of court proceedings in Mombasa ELC No. 302 of 2016, Islam Mohamed Faraj and another v Adnan Salim



Faraj and 9 others which culminated in a judgment against the Petitioners on 6th May 2019. They aver that they were never given notice to vacate nor was there a court bailiff present or aware of the midnight demolition. They contend that the exercise was undertaken contrary to the law and with the condonation of the 2nd and 3rd Respondents.

4. The Petitioners contend that they were exposed to vagaries of COVID 19 while the 3rd Petitioner who is hypertensive only woke up in the wee hours of the morning at a neighbour's house having fallen unconscious at the sight of seeing her home of 40 years being demolished. They contend that they had legitimate expectation that the state has positive obligation under the constitution to uphold, defend and protect the rights and fundamental freedoms of its citizens, but instead by its officers under the command of the 3rd Respondent, they participated and condoned a blatant violation and infringement of their rights under Articles 27(1), 28 and 29 of the Constitution which have caused them to suffer violence, torture, cruel and inhuman and degrading treatment. Further, they contend that the actions by the police go against the spirit of the National Police Service Act.¹
5. As a consequence of the foregoing the Petitioners pray for: -
 - a. A declaration that their right to equality before the law and equal protection of the law as guaranteed under Article 27(1) of the *Constitution* has been infringed as result of the actions and omissions by the agents of the 2nd and 3rd Respondent.
 - b. A declaration that their right to inherent dignity and right to have that dignity respected and protected as guaranteed under Article 28 of the Constitution has been infringed as a result of the actions and omissions by the agents of the 2nd and 3rd Respondent.
 - c. A declaration that the Petitioners' right to freedom and security of the person as guaranteed under Article 29 of the Constitution has been infringed as a result of the actions by the agents of the 2nd and 3rd Respondent.
 - d. A declaration that the Petitioners' right to accessible and adequate housing and to reasonable standards of sanitation as guaranteed under Article 43 (1) (b) of the Constitution, accessible and adequate housing and to reasonable standards of sanitation guaranteed under Article 43 (1) (b) of the Constitution have been violated.
 - e. A declaration that they are entitled to the payment of damages and compensation for the violations and contraventions of their rights and fundamental freedoms under the aforesaid provisions of the Constitution.
 - f. Costs of this Petition
 - g. Interests on (e) and (f) above at court rates.
6. The Respondents filed grounds of opposition dated 4th February 2021 stating inter alia that the Petitioners have failed to demonstrate how the enforcement of a court order arising out of Mombasa ELCC No. 302 of 2016, Islam Mohamed Faraj & another v Adan Salim Faraj & 9 others infringed their constitutional rights because the Respondents oversaw enforcement of a court order regarding Mombasa Block XV/319.
7. They also stated that the Petitioners despite having been notified of the date and time for the demolition, they acted in defiance and stayed in the house despite the structure being demolished. Further, that they are misleading the court by contending that the Respondents oversaw the demolition yet they were aware of the valid court order. Also, they state that the Respondents are

¹ Act No. 11A of 2011.



constitutionally mandated to serve and protect lives and property and that the Petitioners have failed to demonstrate how section 49 of the National Police Service Act has been violated. Lastly, that the Petitioners had sufficient time to carry out their valuables since they had been given notice.

8. In their submissions, the Petitioners submitted that their rights under Article(s) 27 (1), 28, 29, 40, 43(b) and 48 of the Constitution were violated, infringed and or threatened as a consequence of which they suffered immense loss of property and damages. They submitted that they are not disputing the validity of the eviction order, but what is in dispute is the manner in which the enforcement of the order was carried out. They argued that the court bailiff has distanced himself from the manner in which the eviction was done.
9. They submitted that they are aggrieved by the violations of their constitutional rights and fundamental freedoms under the Bill of rights. Specifically, they argued that the Respondents failed to exercise their authority as mandated under Articles 156 (4) & (6), 244(c), and 245 (2) (b). They cited breach of Articles 27 (1), 28, 29 and 43 (1) (b) of the Constitution. They submitted that they have pleaded with specificity the Articles violated and the nature of the violations as set out in *Anarita Karimi Njeru v Republic*.² Additionally, they relied on *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others*³ and submitted that they have met the standard of proof in Constitutional Petitions and urged the court to find that the Petition is meritorious.
10. It is the Petitioners' submission that the demolition is undisputed. They argued that the respondents acted unreasonably by condoning and supervising an eviction in the middle of the night, in total disregard to their rights under Article 27 (1), 28, 29 and 43 (1) (b) of the Constitution. They also submitted that Article 43 of the Constitution imposes on the State a positive obligation to ensure access by its citizens to social economic rights. Additionally, they cited Article 21(1) of the Constitution which obligates every state organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.
11. The Petitioners argued that there is an obligation on the state to "observe, respect, protect, promote and fulfil" socio-economic rights and in particular, the right to adequate and accessible housing, and that, the state has a duty to refrain from interfering directly or indirectly with the enjoyment of the right. They submitted that the state not only has a positive duty to fulfil the rights guaranteed under Article 43 by taking positive steps to ensure access by citizens, but it also has a negative obligation not to do anything that impairs the enjoyment of these rights. To fortify their argument, they cited *Mitu-Bell Welfare Society v Attorney General & 2 others*⁴ and argued that the 2nd and 3rd Respondents actions were unlawful and unconstitutional. They submitted that the failure by the Respondents to come to their aid when their house was being demolished and their household goods being carted away, demonstrates a callous disregard for their rights.
12. In support of the reliefs sought, they cited *Kenya Human Rights Commission & another v Non-Governmental Organizations Co-ordination Board & another*⁵ arguing that the court in the said case pronounced itself on grant of reliefs under Article 23 of the Constitution. They urged the court to award damages for the violation of their rights.

² (1976-1980) KLR 1272.

³ [2013] e KLR

⁴ [2013] e KLR,

⁵ [2018] e KLR.



13. The Respondents submitted that the Petitioners failed to disclose that the eviction was served upon them. They argued that allowing the Petition is tantamount to punishing them for performing their constitutional duties. They submitted that the Petitioners have not proved their loss and questioned why the Petitioners failed to enjoin the owners of the property.
14. The Respondents also submitted that the Petitioners admit there was there was a judgment against them on 6th May, 2019 pursuant to which the Eviction Order was subsequently issued on 6th June 2020. They submitted that the Petitioners had over 18 months to move out of the property in question but they decided to stay put in contravention of the judgment against them. Additionally, they argued that the Petitioners and their advocate were served with the said order and urged the court to find that their rights were not violated as alleged.
15. The Petitioners counsel also submitted that the Petitioner’s rights were not violated so they are not entitled to the orders sought nor have they supported their alleged claim but instead they have annexed an inventory without any proof whatsoever to support the claim. Additionally, they submitted that the orders sought will only amount to punishing them for obeying the court orders and undertaking their duties under the law. Further, they submitted that if the Petitioners have any claim, it should be against the proprietary owners of the parcel of land and not the law enforcement agencies. Lastly, counsel relied on *Alois S. K. Kalaa v Attorney General & another*⁶ in support of the holding that Petitioner cannot benefit from their-none compliance with the court orders.
16. For starters, Article 22(1) provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. The operative words in this Article are: - “denied, violated or infringed, or is threatened.” A Petitioner bears the burden to demonstrate thar his rights have been denied, violated, infringed or threatened. It is not enough to enumerate Articles of the Constitution of make unsupported allegations.
17. The burden of proof in a constitutional Petition was addressed by the Supreme Court in *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others*⁷ 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 v 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.”
18. “Burden of Proof” is a legal term used to assign evidentiary responsibilities to parties in litigation. The party that carries the burden of proof must produce evidence to meet a threshold or “standard” in order to prove their claim. If a party fails to meet their burden of proof, their claim will fail. In

⁶ [2017] e KLR.

⁷ [2014] eKLR.



*Stellenbosch Farmers Winery Group Ltd & Another v Martell & Others*⁸ the South African Supreme Court of Appeal explained how a court should resolve factual disputes and ascertain as far as possible, where the truth lies between conflicting factual assertions. It stated: -

“To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equiposed probabilities prevail.”

19. From the above dicta, the lesson that comes out is that where versions collide, the three aspects of credibility, reliability and probability are intermixed, and all three must be examined. This endeavor is not to be equated with box-ticking but to underscore the breadth of the field to be covered. The focal point of the exercise remains to find the truth. Talking about establishing the truth, the eviction/demolition was undertaken pursuant to a court order. The Petitioner contend, rightly so, that every person has an obligation to uphold the Constitution. But they have forgotten that they too have an obligation to observe the Constitution. One of the core values I Article 10 of the Constitution is the Rule of Law. A Key component of the Rule of Law is the administration of justice. The due administration of justice obligates all to obey, respect and comply with court orders. The Petitioners lost the case and a valid order was issued. They failed, refused and neglected to obey. Simply put, they were in flagrant breach of the court order. They have no moral authority to come back to cry to this court by purporting to blame the police whose role was to provide security.
20. They claim their house was demolished. However, they failed or omitted to avail t this court the court order at least to demonstrate the ambit and scope of the order. They left the court in the dark as to whether the order had decreed demolition or vacant possession. In any event, if the demolition/eviction was contrary to the court order, the right forum to seek remedy is the issuing court not a constitutional Petition.
21. Additionally, if any looting was done, again, the remedy lies not as against the police whose role was to provide security but against those alleged to have looted. I should also mention that the language of the court order (which the Petitioners failed to exhibit) would should show whether vacant possession meant removing everything from the premises. By choosing to disobey a court order, the Petitioners

⁸ 2003 (1) SA 11 (SCA) at para 5.



must bear the consequences of its enforcement. In a nutshell, a reading of the facts as presented leave no doubt that the Petitioners have not demonstrated the alleged breach of rights. On this ground alone this Petition collapses.

22. The other important issue which works against the Petitioners is that the eviction was undertaken pursuant to a court order. It follows that the eviction was lawful. The Petitioners admit the existence of the court order. To my mind, they had only two options. To challenge the said order by way of appeal or comply with the order and submit vacant possession of the premises. They defied the court order, so, they must bear the consequences. They cannot defy a court order and purport to blame the Respondents for their eviction. A litigant should not benefit from his own mischief. Again, on this ground, the Petition fails.
23. The Petitioners claim that they suffered loss as a result of the demolition. As stated above the demolition was undertaken pursuant to a court order. They are now faulting the police who were not parties to the case but their role was to provide security which is their mandate. Even if the Petitioner's suffered any loss as a result of the enforcement of the court order, their claim is hopelessly misguided. Their claim (if any) lies against those who allegedly took their belongings (if at all) not the Respondents. Simply put, the Petitioners claim is misguided and far-fetched. Even if they have a claim against the Respondents, a claim of this nature cannot be proved by providing an inventory. Oral evidence is required to establish the claim. This being the position, the proper thing for the Petitioners to do, if at all they had any claim would have been to file a civil suit as opposed to a constitutional Petition. A civil suit was the proper forum instead of framing a constitutional Petition. There are no constitutional issues at all disclosed in this Petition.
24. My above observation brings to fore two important and closely interrelated concepts. These are the doctrine of ripeness and the doctrine of avoidance. Just like *res judicata* or the doctrine of exhaustion, these two doctrines can preclude a court from entertaining a case. Constitutional avoidance has been defined as a preference of deciding a case on any other basis other than one which involves a constitutional issue being resolved.⁹ As a principle, constitutional avoidance has been linked to the doctrine of justiciability.¹⁰ In broad terms, justiciability governs the limitations on the constitutional arguments that the courts will entertain. It encompasses three main principles which are standing, ripeness and mootness.¹¹ The doctrine of avoidance was fortified in *Sports and Recreation Commission v Sagittarius Wrestling Club and Anor*¹² in which Ebrahim JA said the following: - ———

“...Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights..”

⁹ S Woolman & M Bishop, *Constitutional Law of South Africa* (2013) 3-21.

¹⁰ I Currie & J De Waal *The Bill of Rights Handbook* (2013) 72.

¹¹ *Ibid*, Page 72.

¹² 2001 (2) ZLR 501 (S)



25. As the Constitutional Court of Zimbabwe held in *Chawira & Ors v Minister of Justice Legal and Parliamentary Affairs & Ors*¹³:-

“As we have already seen, in the normal run of things courts are generally loathe to determine a constitutional issue in the face of alternative remedies. In that event they would rather skirt and avoid the constitutional issue and resort to the available alternative remedies.”

26. Also relevant is the decision in *S v Mhlungu*¹⁴ which laid out constitutional avoidance as a general principle in the following terms: -

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

27. 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. In that regard, the Supreme Court stated in *Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others* (at para 256) that the principle of avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis. In the South African case of *S v Mhlungu* (supra) Kentridge AJ, stated in the dissenting opinion respecting the principle of avoidance (at paragraph 59), that he would lay 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. And in *Ashwander v Tennessee Valley Authority*¹⁵ 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. Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of rights.¹⁶ Currie and de Waal¹⁷ opine that the principle of constitutional avoidance is of crucial importance in the application of the Bill of Rights. The author's state: -

“When applying the Bill of Rights in a legal dispute, the principle of avoidance is of crucial importance. As we have seen, the Bill of Rights always applies in a legal dispute. It is usually capable of direct or indirect application and, in a limited number of cases, of indirect application only. The availability of direct application is qualified by the principle that the Bill of Rights should not be applied directly in a legal dispute unless it is necessary to do so.”

28. An important and critical issue arises from the above statements by Currie and de Waal. It is the fact that every legal dispute is capable of either direct or indirect application of the Bill of Rights. Every dispute is essentially a constitutional issue when one looks at it. This arises necessarily because of the

¹³ CCZ 3/17

¹⁴ 1995 (3) SA 867 (CC) 59.

¹⁵ 297 U.S. 288, 347 (1936).

¹⁶ See also *Zantsi v Council of State, Ciskei & Ors* 1995 (4) SA 615 (CC).

¹⁷ I Currie & J De Waal *The Bill of Rights Handbook* (2013) 72.



principle of constitutional supremacy.¹⁸ One needs to be aware however of the singleness of the legal system. This is embodied in the fact that the supremacy of the Constitution does not detract from the usefulness of the rest of the body of law. In essence all other laws give full expression to the ideals of the Constitution until found to be inconsistent to it.

29. The doctrine of ripeness and constitutional avoidance gives credence to the concept that the Constitution does not operate in a vacuum or isolation. It has to be interpreted and applied in conjunction with applicable legislation together with other available legal remedies. Where there are alternative remedies the preferred route is to apply such remedies before resorting to the Constitution. The possibility of the elevation of any dispute to a constitutional issue is what is sought to be averted by the doctrines of ripeness and constitutional avoidance. It is borne out of a realisation that all legislative or common-law remedies are part of the legal system.

30. In the United States of America, and as long back as 1885, *Liverpool, New York and Philadelphia Steamship Co v Commissioners of Emigration*¹⁹, Matthews J said:

“(N)ever...anticipate a question of constitutional law in advance of the necessity of deciding it;...never...formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.”

31. In summation, the doctrines of ripeness and constitutional avoidance shun to deal with a constitutional issue where there exists another legal course which can give the litigant the relief he seeks. In other words, a constitutional issue is not ripe for determination until the determination of the constitutional issue is the only course that can give the litigant the remedy he seeks. Both constitutional avoidance and ripeness avert the determination of the constitutional issues until it becomes very necessary to the extent that it is the only course available to assist the litigant’s cause. The exceptions to the application of the doctrine of constitutional avoidance are: -

- (i) where the constitutional violation is so clear and of direct relevance to the matter,
- (ii) in the absence of an apparent alternative form of ordinary relief and
- (iii) where it is found that it would be a waste of effort to seek a non-constitutional resolution of the dispute.²⁰

32. A reading of the issues presented in this Petition leave no doubt that the Petitioners’ grievance if any can effectively be addressed in a civil suit. The issues raised involve contested issues of fact which can best be proved by way of oral evidence. It is not clear how the Petitioners expected to prove such allegations by way of affidavits in this Petition. To me, this is a proper and fit case for this court to invoke the doctrine of constitutional avoidance and decline to entertain the matter as I hereby do. Having concluded as I have herein above on the issues discussed, I find and hold that this Petition is a non-starter. I dismiss it with no orders as to costs.

Orders accordingly.

SIGNED, DATED, DELIVERED VIRTUALLY AT MOMBASA THIS 27TH DAY OF APRIL 2022.

JOHN M. MATIVO

¹⁸ See Article 2 (4) of the Constitution.

¹⁹ 113 US 33 (1885) at 39.

²⁰ Currie & De Waal above.



JUDGE

