Wanyonyi v Attorney General (Petition E192 of 2021) [2022] KEHC 12604 (KLR) (Constitutional and Human Rights) (27 July 2022) (Judgment)

Neutral citation: [2022] KEHC 12604 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E192 OF 2021

HI ONG'UDI, J

JULY 27, 2022

BETWEEN

CYPRIAN MASAFU WANYONYI ..... PETITIONER

AND

ATTORNEY GENERAL ..... RESPONDENT

JUDGMENT

1. The petition dated 24th May 2021 was filed under Articles 2, 3, 10, 20, 22, 23, 27(1) and (2), 159, 165(1)(3)(a)(b), 169(1)(d), 258 and 259 of *the Constitution*.

2. Accordingly the petition seeks the following orders: -

    a) A declaration that Rule 10(2) of the Arbitration Rules is unconstitutional null and void to the extent that it purports to vest the status of a High Court for any proceedings before an arbitrator(s) under the *Arbitration Act* 1995 or whatsoever and for fees proceedings before an arbitrator to be calculated in accordance with the scale fees applicable to the High Court.

    b) A declaration that an arbitral tribunal being a tribunal established under article 169(1)(d) of *the Constitution* of Kenya 2010, fees for any proceedings before the arbitral tribunal are to be calculated in accordance with schedule II of the Advocates Remuneration (Amendment) Order 2014 or as it shall be amended, the *Arbitration Act*, the Act setting up the Tribunal having not prescribed otherwise.

    c) A declaration that Section 40 of the *Arbitration Act* 1995 only gave the Chief Justice power to make Rules of Court and not Rules under the Act and in so

far as Rule 10(2) purports to be a rule under the Act to wit "All fees for any proceeding under the Act shall be calculated in accordance with the scale fees applicable to the High Court" is ultra vires the *Arbitration Act* and null and void and unconstitutional for elevating an arbitration tribunal to the status of the High Court contrary to Article 165 of *the Constitution*.

d) Such further other or appropriate relief as this Honourable Court may craft or fashion to meet the justice of the Petition.

e) Costs of this Petition be provided by the Respondent.

The Petitioner's case

3. The petition is premised on the petitioner's affidavit sworn on 24th May 2022. It revolves around the assessment of costs for proceedings before the arbitration tribunal. The petitioner deposes that section 40 of the *Arbitration Act* provides that the Chief Justice may make rules of Court with reference to the provisions of the Act. In line with this, former Chief Justice A. M. Cockar made the Arbitration Rules 1997.

4. He deposes that Rule 10(2) of the *Arbitration Rules 1997* provides that all fees for all proceedings in the Act are to be calculated in accordance with the scale fees applicable to the High Court. He deposes that advocates who undertake works before the Arbitral Tribunal are to charge their fees under the scale fees applicable to the High Court, a position he does not support since the Arbitral Tribunal is not a High Court.

5. He avers that Section 40 of the *Arbitration Act* 1995 gave the Chief Justice power to make rules of Court and not rules of Arbitral Tribunals. He therefore deposes that Rule 10 of the Arbitration Rules 1997 is ambiguous in its wording hence ultra vires. Likewise that it violates Article 165 of *the Constitution* since it purports to elevate proceedings before an Arbitral Tribunal to the status of the High Court which is unconstitutional.

6. The petitioner avers that the continued existence of the ambiguity and illegality is an affront to constitutional principles and undermines Article 159 of *the Constitution* on the administration of justice.

The Respondent's case

7. The respondent filed the following grounds of opposition dated 10th March 2022:

i. The petition does not disclose any constitutional violations to warrant this court to invoke its jurisdiction.

ii. Section 40 of the *Arbitration Act*, 1995 empowers the Chief Justice to make rules for all proceedings consequent or incidental to arbitral awards.

iii. The impugned rule is meant to give effect to Section 40 of the *Arbitration Act* aforesaid.

iv. The petitioner has not demonstrated with precision the unconstitutionality of Rule 10(2) of the Arbitration Rule 1997 to warrant grant of the orders sought. The said rule is firmly rooted on the provisions of the Law.

v. The petitioner has not rebutted the presumption of constitutionality enjoyed by Rule 10(2) of the Arbitration Rule 1997.

vi. The petitioner has not demonstrated that either purpose or the effect of the implementation of the impugned rule infringes any right guaranteed by *the Constitution*.

vii. The petition is frivolous and unmeritorious; the impugned Rule does not contravene *the Constitution*.

viii. The petition is otherwise incompetent, misconceived, misplaced and is an abuse of the process of this Honourable and the same ought to be dismissed with costs.

The Petitioner's submissions

8. The firm of Wekesa and Simiyu Advocates on behalf of the petitioner filed written submissions and a list of authorities dated 26th October 2021.Counsel identifies the following as the issues for determination:

i. Whether Rule 10(2) of *Arbitration Rules 1997* unconstitutionally elevates the Arbitral Tribunal to the status of the High Court;

ii. Whether Rule 10(2) of *Arbitration Rules 1997* impedes access to justice; and

iii. Whether Rule 10(2) of Arbitration Rules 1997 in so far as it purports and is interpreted as elevating the calculation of fees for any proceedings under the Act in accordance with the scale fees applicable to the High Court for matters that take place before the arbitral tribunal is ultra vires the powers vested upon the Chief Justice vide section 40 of the *Arbitration Act*, 1995.

9. On the first issue counsel submits an affirmative, answer to it, based on the fact that an arbitral tribunal fits the classification of courts under Article 169 of *the Constitution* which means it is a Subordinate court not a High Court. He goes on to submit that Rule 10(2) of the *Arbitration Rules, 1997* suggests that the costs for proceedings before the Arbitral Tribunal are to be calculated in accordance with the scale of fees applicable to the High Court. He contend that this is a manifest and deliberate effort to designate an Arbitral Tribunal as having the same status with the High Court contrary to *the Constitution*.

10. Furthermore Counsel submits that Schedule 11 of the Advocates (Remuneration) (Amendment) Order 2014 provides for the scale of fees to be charged for proceedings before the Arbitral Tribunal. Counsel notes that the Courts have applied Rule 10(2) of the *Arbitration Rules 1997* in taxing costs before courts for matters handled by and proceedings before Arbitral Tribunals thereby leading to the application of Schedule 6 of the Advocates (Remuneration) (Amendment) Order, 2014. This can be seen from the cases of M/S *Nyaundi Tuiyott Et Co.Advocates v Tarita Development Ltd* [2016] eKLR, *M/S Lubulellah Et Associates Advocates v N K Brothers Limited*[2014] eKLR *Liko & Anam Advocates v Easy Properties Limited & 2 Others* [2020] eKLR and *Alpha Grain Millers Limited & 7 Others v Ministry Of Agriculture, Livestock And Fisheries & Another* [2021] eKLR.

11. He submits that arbitration is not a proceeding under the *Arbitration Act* but a proceeding before the Arbitral Tribunal. As such he argues that Rule 10(2) of the *Arbitration Rules 1997* purports to elevate the proceedings before the Arbitral Tribunal to those of the High Court hence contravenes Articles 162 and 165 of *the Constitution*.

12. According to Counsel, a plain reading of Rule 10(2) can only be that if the proceedings emanating from the Arbitral Tribunal are filed in the High Court under Sections 6, 7, 11, 17, 28, 35, 36, 27, 39, their fees shall be calculated in accordance with the scale fees applicable to the High Court. He nevertheless argues that Section 40 does not grant the Chief Justice power to make such a Rule since Section 40 specifies the scope of his/her discretion to matters before the High Court and not before the Arbitral Tribunal.

13. To buttress his submission Counsel cites the case of *Mumias Sugar Company Ltd vs. Professor Tom Ojienda & Associates* [2019] eKLR where the Court observed that Section 8 of the Third Schedule to the Sugar Act did not elevate the status of the Sugar Arbitration Tribunal to the status of the High Court. He hence submits that Rule 10(2) of the *Arbitration Rules, 1997* is unconstitutional.

14. On the second issue Counsel notes that *the Constitution* provides under Article 48 that every person has a right to access justice. This principle was affirmed by the Supreme Court as key to administration of justice in the case of *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* [2019] eKLR. As such Counsel submits that one of the ways to access justice is through alternative dispute resolution methods. He notes that one of these methods is arbitration which is not limited to commercial disputes as seen in the case of *Dock Workers Union Limited v Messina Kenya Limited* [2017]eKLR.

15. In view of this Counsel submits that Rule 10(2) of the Arbitration Rules, 1997 seeks to limit the right to access justice. This is by elevating the costs before an Arbitral Tribunal by equating it to a High Court. It is argued that this is unreasonable and not justifiable in an open and democratic society as espoused under Article 24 of *the Constitution*.

16. He contends that the core tenets of arbitration which is an expeditious and efficient way of delivering justice should not be done at the expense of real and substantive justice as held by the Supreme Court in the cases of *Synergy Industrial Credit Limited vs. Cape Holdings Limited* (2019) eKLR and *Nyutu Agrovet Limited vs. Airtel Networks Kenya Limited Chartered Institute of Arbitrators - Keya Branch (Interested Party)* (2019) eKLR. In essence Counsel submits that an expeditious and efficient way of delivering justice designed to be alternative to the High Court cannot attract the same scale of legal charges as the High Court. Otherwise it negates its core tenets. Additional reliance was placed on the case of *Attorney General v Kituo Cha Sheria & 7 Others* (2017) eKLR.

17. Counsel further submits that the principles of taxation were set out in the case of *Premchand Raichand Ltd v Quarry Services of East Africa Ltd* & [1972] EA 162 where it was held that costs should not be allowed to rise to levels as to confine access to the courts to the wealthy. Further that a successful litigant ought to be fairly reimbursed for the costs that he has had to incur, that the general level of remuneration of advocates must be such as to attract recruits to the profession and that so far as practicable there should be consistency in the awards made.

18. It was therefore counsel's submission that costs should not be allowed to rise to such a level as to confine access to the courts to the wealthy. His argument is that Rule 10(2) of the *Arbitration Rules, 1997* allows costs to rise beyond what a party would expect as costs before a tribunal.

19. In support reliance was placed on the case of *Oscar Otieno Odongo T/A Odongo Investment Auctioneers v Sukari Industries Limited* (2019)eKLR where it was observed that the Court is under a duty to ensure that costs of litigation are possibly minimized since uncushioned high costs can impede access to justice. Additional reliance was placed on the case of *G. N. M. alias G. K VD. R. K* [2012] eKLR, *Joseph Njoroge Kimondo & Another v (A Minor Suing Through Her Next Friend And Father JWM)* (2018)eKLR.

20. Moving to the third issue Counsel submits that the court referred to in the *Arbitration Act*, 1995 is the High Court. He argues that Section 40 of the Act, refers to the Rules applicable to Arbitration proceedings that flow to the High Court from the Arbitral Tribunal and not arbitration proceedings before the Arbitral Tribunal. As such Counsel submits that the Chief Justice acted beyond his powers when he enacted Rule 10 (2) to apply to any proceedings under the Act, while the Act states that the rules apply to all proceedings in courts under the Act.

21. Counsel submits that in applying the principles of statutory interpretation the ejusdem generis rule states that where a statute, or other document, enumerates several classes of persons or things, and immediately following and classed with such enumeration the clause embraces 'other' persons or things - the word 'other' will generally be read as 'other such like', so that the persons or things therein comprised may be read as ejusdem generis with, and not of a quality superior to, or different from, those specifically enumerated as held in the case of *Republic v Chief Land Registrar & 3 Others Ex-Parte Sidian Bank Limited (Formerly Known As K- Rep Bank Ltd) [2016]*eKLR. Similar reliance was placed in the case of *Spentech Engineering Limited v Methode Limited & 2 Others* [2017]eKLR.

22. Accordingly Counsel submits that the above interpretation leads to the conclusion that Section 40(d) which empowers the Chief Justice to make rules relating to generally all proceedings in courts under the Act refers to rules applicable to arbitral proceedings flowing to the High Court from the Arbitral Tribunal. In this way it is argued that the proceedings referred to in Section 40 refer to proceedings in the High Court.

23. Counsel further submits that the Rules of procedure to be adopted before the Arbitral Tribunal are to be determined by the parties according to Section 20 of the Act. In light of this provision he contends that this Section provides guidance on the rules of procedure to be adopted before an Arbitral Tribunal. In this way, it cannot be said that Arbitration Rules, 1997 were intended to apply to the proceedings before an Arbitral Tribunal.

24. He submits that it is trite law that a provision of any subsidiary legislation that conflicts with that of the parent Act is *ultra vires* as observed in the case of *Alfred Nganga Mutua & 2 Others v Wavinya Ndeti & another* [2018] eKLR. Similar reliance was placed on the case of *Sdv Transami Kenya Limited and 19 others v Attorney General & 2 others & another* [2016] eKLR. As a consequence Counsel submits that Rule 10(2) of the Arbitration Rules, 1997 conflicts with Section 40 *Arbitration Act*, 1995 and is therefore, *ultra vires* and void ab initio.

25. Counsel finally submits that proceedings before the Arbitral Tribunal are to be calculated in accordance with Schedule 11 of the Advocates (Remuneration) (Amendment) Order 2014.

The Respondent's Submissions

26. The respondent through Litigation Counsel L. Wawira filed written submissions dated 30th March 2022. She identifies the issue for determination to be:

Whether Rule 10(2) of the Arbitration Rules 1997 is unconstitutional

27. Counsel submits that there is a general presumption that every Act of Parliament is constitutional and thus the onus of proof lies on the person challenging the legislation. To support this view she relied on the cases of *Ndyanabo v Attorney General* [2001] EA 485, *Hambardda Wakhana v Union of India Air* [1960] AIR 554 and US vs. Butter, 297 USI (1936).

28. Counsel notes that Article 259 of Constitution enjoins this Court to adopt an interpretation that is purposive and does not clash with the constitutional values, purposes and principles as held in the

case of *Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others* [2018] eKLR. In like manner she submits that while interpreting a statute the Court is to interrogate the object and purpose of the impugned law as well as make consideration of the direct and inevitable effect of such a law as observed in the case of *Council of County Governors vs Attorney General & another* [2017] eKLR. Similar reliance was placed on the case of *Haki Na Sheria Initiative vs Inspector General of Police & 3 others* [2020] eKLR, *Robert Alai vs The Hon Attorney General & another* [2017] eKLR and *Olum & another vs Attorney General* [2002] 2 E. A.

29. She further submits that Section 40 of the *Arbitration Act* 1995 grants the Chief Justice power to make rules of Court in respect to all proceedings in the court under the Act. In line with this, the Chief Justice enacted Rule 10(2) of the *Arbitration Rules 1997*. She notes that Section 40 of the Act does not stipulate the principles to be considered in making such rules hence donating discretionary power to the Chief Justice in this regard.

30. She goes on to submit that the Chief Justice in making the Rules was well within his power as granted by the Act. Likewise Counsel submits that the petitioner has failed to demonstrate whether the Chief Justice in exercising this discretion misdirected himself.

31. For this reason it is submitted that the language of Section 40 of the Act and Rule 10(2) of the *Arbitration Rules 1997* is plain and unambiguous. She qualifies this by submitting that the plain intention of the impugned law is to give effect to the values and principles of *the Constitution* in ensuring equality before the law, uniformity and order in the administration of justice before Arbitral Tribunals.

Analysis and Determination

32. I have carefully considered the pleadings, submissions and cited authorities and the law. I find the issue falling for determination to be:

Whether Rule 10(2) of the Arbitration Rules, 1997 is unconstitutional

33. The petitioner's central assertion is that the Chief Justice erred in purporting to elevate the status of an Arbitral Tribunal to that of the High Court by enacting the impugned provision to intimate that all fees for all proceedings in the *Arbitration Act* 1995 are to be calculated in accordance with the scale fees applicable to the High Court. Accordingly it is argued that the impugned provision has violated the right to access justice as provided under Article 48 of *the Constitution*.

34. The respondent on the other hand opposed this assertion arguing that the impugned law's language is plain. Nevertheless, Counsel submitted that a statute enjoys the presumption of constitutionality which the petitioner had failed to rebut. She went on to urge the Court to be guided by the Constitutional principles under Article 259 of *the Constitution* in interpreting the impugned provision.

35. Both parties placed reliance on numerous authorities that contain the now well settled principles on the topic of interpretation of a statute by the Court. The petitioner on this point relied on the cases of Republic v Chief Land Registrar & 3 others (*supra*) and Spentech Engineering Limited (*supra*).

36. On the flipside, the respondent supported its case with the following authorities: Council of County Governors (*supra*) Ndyanabo v Attorney General of Tanzania (*supra*) Hambardda Wakhana (*supra*) among others.

37. This Court stands guided by the cited authorities and their opines on the principles of statutory interpretation. In a nutshell, the authorities implore this Court to be guided by a number of principles

namely that; until the contrary is proved, legislation is presumed to be constitutional. Likewise, the purpose and effect of a Statute are relevant in determining the constitutionality of a statute. An unconstitutional purpose or an unconstitutional effect can invalidate legislation. Further that one of the key elements in construing a Statute is to ascertain the intention of Parliament as expressed in the Act. Lastly, in the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive in its plain meaning.

38. In the matter before this Court, the challenged provision is the subsidiary legislation to the parent Act. Correspondingly in order to make such a determination author P. M. Bakshi in his article Subordinate Legislation: Scrutinising the Validity (1994), Journal of the Indian Law Institute) Vol. 36, No. 1 states that in order that the exercise of delegated legislative power may be valid, certain conditions have to be satisfied. According to him the principal conditions to be fulfilled are:

    i. The parent Act (under which the power to make subordinate legislation is exercised) must be valid.

    ii. The delegation clause in the parent Act must be valid.

    iii. The statutory instrument so made, must be in conformity with the delegation clause, in point of

        a. substance;

        b. procedure; and

        c. form.

    iv. The statutory instrument must not violate certain general norms laid down by judicial decisions such as those that ouster court jurisdiction.

    v. The statutory instrument must not violate any of the fundamental rights guaranteed by *the Constitution*.

39. It is reasonable to infer that the authority to which legislative power is delegated and subsidiary legislation is enacted must be within the limits espoused in the parent Act and be in line with constitutional principles. As a starting point it is necessary to examine the impugned provision and interpret it as guided by the stated principles.

40. The impugned provision bears it origin from the *Arbitration Act* Cap 49 which divulges its purpose in the preamble as follows:

> " An Act of Parliament to repeal and re-enact with amendments the *Arbitration Act* and to provide for connected purposes."

41. Section 40 of the Act provides one of these purposes as follows:

    Rules The Chief Justice may make rules of Court for—

    (a) the recognition and enforcement of arbitral awards and all proceedings consequent thereon or incidental thereto;

    (b) the filing of applications for setting aside arbitral awards;

    (c) the staying of any suit or proceedings instituted in contravention of an arbitration agreement;

(d) generally all proceedings in court under this Act.

42. The Chief Justice in line with this provision enacted the *Arbitration Rules, 1997* to give effect to Section 40 of the Act. The impugned Rule 10(2) provides as follows:

> "(2) All fees for any proceedings under the Act shall be calculated in accordance with the scale of fees applicable to the High Court."

43. Evidently, the main contention in this matter is the scale of fees to be applied for proceedings before the Arbitral Tribunal. The respondent argued that Section 40 of the Act only refers to proceedings in court and specifically the High Court. My interrogation of the Act and Section 40 makes it clear that the Act does not define court as the High Court. According to Counsel for the petitioner the wording of Rule 10(2) implies that an Arbitral Tribunal is of the same status as the High Court owing to the applicable scale of fees. I humbly disagree with Counsel's interpretation of the impugned provision, in relation to the issue of status.

44. The main principles of constitutional interpretation is that *the Constitution* must be interpreted in a purposive and broad manner. This means that a technical and restrictive interpretation goes against that principle. In my view the petitioner's Counsel has adopted a limited and narrow interpretation of the impugned Rule and Section 40 of the Act. The reason for finding so is first because the term 'court' is not defined as suggested by the petitioner.

45. *The Constitution* largely defines the term 'court' to include tribunals. Secondly, the wording of Rule 10(2) makes it clear that the applicable scale of fees is to be applied to 'all' proceedings under the Act. This clearly informs that the Chief Justice's intent was to have the payment of fees take on a standardized and uniform mode for all arbitral proceedings regardless of the forum.

46. The Court in the case of *Alpha Grain Millers Limited & 7others v Ministry of Agriculture, Livestock and Fisheries & another* [2021] eKLR speaking to the impugned Rule also noted as follows:

> "20. My finding is that a simple reading of Rule 10(2) shows that it clearly refers to any proceedings under the *Arbitration Act* and goes on to state that the same shall be calculated according to the scale applicable to proceedings before the High Court. My further finding is that if the intention of the lawmakers was to make Rule 10(2) of the Arbitration Rules only applicable to proceedings specified under Section 40 of the Act, nothing would have been easier than to state as much in the said Rule. To the contrary, the Rule refers to all fees for any proceedings under the Act. In the instant case, I find that the proceedings before the Arbitral Tribunal fell within the purview of proceedings under the Act for which the applicable scale of fees is the scale applicable in High Court which is Schedule 6 of the Advocates Remuneration Order.
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> 21. I further find that there is no inconsistency between the provisions of Section 40 of the Act and Rule 10(2) of the Rules as Rule 10(2) simply clarifies the applicable scale in calculating costs in any proceedings under the Act."

47. In addition, nothing in the impugned Act or Rule suggests that the Arbitral Tribunal in light of the fees assumes the status of the High Court as suggested. It is my considered view that this is a misconceived understanding of the impugned provision. The language of the Act and Rule is clear in this regard with no ambiguity articulated. I find that the Rule is in line with the purpose of the Act as enshrined in the preamble.

48. The petitioner also fails to demonstrate how the administration of the applicable fees as provided hinders all classes of persons from accessing justice. He also fails to show how the Chief Justice considered irrelevant factors in enacting the impugned Rule. It is rational to state that the difficulty in complying with a law cannot be a ground for nullifying a statute and it's enabling subsidiary legislation.

49. At this point I find myself in agreement with the observation of the Court in the case of *Jacob Nyandega Osoro v Chief Justice of Kenya & another* [2018] eKLR as follows:

> " 31. As a principle of statutory construction it is the duty of the court where possible, to construe a statute or statutory provision (including rules and regulations) in a manner that brings them in harmony with *the constitution*, and only declared them inconsistent or invalid where the court is unable to reconcile them with *the constitution* or the statute."

50. The standard of proof as set out in the case of *Anarita Karimi Njeru vs The Republic* (1976-1980) KLR 1272 places the onus of proof on the petitioner. The petitioner is required to prove the elements that constitute the violation of the said rights which includes sufficient facts to justify a finding that the said rights were indeed violated. He had with some reasonable degree of precision to identify the constitutional provisions that are alleged to have been violated and the manner in which the said provisions were violated.

51. What becomes apparent from the material placed before this Court is that there is nothing to show that the set scale of fees inhibited members of the public from accessing justice thus violating their rights as a result. From the foregoing analysis I come to the conclusion that the petitioner has failed to discharge his burden of proof to the effect that Rule 10(2) of *Arbitration Rules, 1997* is unconstitutional and that the Chief Justice acted *ultra vires* his powers in enacting the provision.

52. The upshot is that the petition lacks merit and is dismissed. Considering the nature of this matter, I will not condemn the petitioner to pay costs.

Orders accordingly.

DELIVERED, VIRTUALLY, DATED AND SIGNED THIS 27TH DAY OF JULY 2022 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT