



**Nichani v Kenya Revenue Authority & another (Constitutional Petition E042 of 2021)
[2022] KEHC 13588 (KLR) (Constitutional and Human Rights) (30 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13588 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E042 OF 2021**

AC MRIMA, J

SEPTEMBER 30, 2022

BETWEEN

DEEPAK LALCHAND NICHANI PETITIONER

AND

KENYA REVENUE AUTHORITY 1ST RESPONDENT

DIRECTOR GENERAL OF IMMIGRATION SERVICES 2ND RESPONDENT

JUDGMENT

1. The petitioner herein, Deepak Lalchand Nichani, instituted these proceedings vide a petition dated February 4, 2021. He deposed that he is Kenyan and holder of national identity card No xxxx and Kenyan passport No xxxx.
2. The petitioner sought orders of judicial review on the allegation that the 1st respondent herein, Kenya Revenue Authority, had issued a departure prohibition order (hereinafter referred to as ‘the DPO’) against him thereby making him stranded and unable to travel from India back to Kenya.
3. The 1st respondent opposed the petition whereas the 2nd respondent did not participate in the matter.

The Petition:

4. On filing of the petition, the 1st respondent raised a preliminary objection on the jurisdiction of this court. the objection was heard and ruling No 1 rendered on August 25, 2021. The objection was dismissed.
5. The petitioner herein took issue in the manner in which a DPO was allegedly issued by the 1st respondent against him and in total contravention of the Constitution and the law.
6. In the main, the petition sought the following prayers: -



1. An order of *certiorari* to remove to this court and quash the decision of the 1st respondent in issuing a DPO against the Petitioner.
2. An order of *mandamus* do issue to compel the respondents to grant full customs and immigration access to the petitioner and his family upon re-entry into Kenya.
3. The petitioner be awarded costs of this petition.
4. Such further orders as the court may deem fit to grant.
7. The petitioner also filed an application by way of a notice of motion dated 4th February, 2021. It sought conservatory orders suspending the DPO.
8. In support to the petition and the application, the petitioner filed affidavits and written submissions.
9. In the end, the petitioner prayed that the petition be allowed as prayed.
10. By an order of this court, both the petition and the application were directed to be heard together.

The Response:

11. In opposing the petition, the 1st respondent filed grounds of opposition dated March 1, 2021 as well as written submissions dated November 10, 2021.
12. It opined that the petitioner had failed to furnish, for the benefit of this court, the DPO allegedly issued to him. In fact, the petitioner had failed to establish that it requested the 1st respondent to lift the DPO. As a consequence, the orders could not be granted since there was nothing to quash.
13. In light of the above, the failure by the petitioner to provide such particulars meant that the petitioner failed to demonstrate how his constitutional rights were violated.
14. Taking another angle in opposition to the petition, the 1st respondent submitted that the petitioner only adduced correspondence on a tax demand notice by Skyton Limited. Its interpretation of the complaints raised by the petitioner was that the issues gave rise to a tax dispute whose original jurisdiction lay in the Tax Appeals Tribunal. He had thus failed to demonstrate that he had exhausted all available avenues in seeking redress.
15. The 1st respondent urged this Court to dismiss the petition with costs awarded to it.
16. One of the issues raised by the 1st respondent was that it had never issued any DPO against the petitioner.
17. At the end of it all, the petitioner sought the dismissal of the petition with costs.

Analysis:

18. There is no doubt that the matter before court is premised on the alleged issuance of a DPO. In other words, if no DPO was ever issued as alleged, then the matter ends there.
19. The proceedings were instituted by way of a constitutional petition. Like other disputes, the conduct of constitutional petitions is generally governed by the *Constitution* and the law.
20. Article 159(2)(d) of the *Constitution* call upon courts and tribunals to administer justice without undue regard to procedural technicalities.



21. Speaking of the essence of article 159(2)(d) of the Constitution, the Supreme Court of Kenya in Law Society of Kenya v The Centre for Human Rights & Democracy & 12 others, Petition No 14 of 2013 held that: -

"Article 159(2) (d) of the Constitution is not a panacea for all procedural shortfalls."

22. And, in Patricia Cherotich Sawe v Independent Electoral & Boundaries Commission (IEBC) & 4 others [2015] eKLR the Supreme Court further held that: -

"Not all procedural deficiencies can be remedied by article 159...."

23. The practice and procedure in constitutional Petitions are further provided for under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (hereinafter referred to as 'the Mutunga Rules').

24. Rule 20(1) of the Mutunga Rules is on the manner in which constitutional petitions ought to be heard. Such petitions may be heard by way of affidavits or written submissions or oral evidence. Rule 20(3) of the Mutunga Rules provide that a court may upon application or on its own motion direct that the petition or part thereof be heard by oral evidence. Rule 20(4) and (5) of the Mutunga Rules provide for the summoning and examination of witnesses.

25. The conduct of constitutional petitions is also guided by various laws. For instance, the Evidence Act applies to matters generally relating to evidence. The Evidence Act is clear on its application to constitutional petitions and affidavits in section 2 thereof. The provision provides as follows: -

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

26. Sections 107(1), (2) and 109 of the Evidence Act are on the burden of proof. They state as follows:

107 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

and

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

27. The burden of proof on a petitioner in a constitutional petition was addressed by the Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR as follows: -

Although article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision



in *Anarita Karimi Njeru 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.

28. Turning back to this matter, the petition was heard by way of reliance on the petition, affidavit evidence and written submissions.
29. It is on record that despite the position taken by the 1st respondent that it never issued any DPO as against the petitioner, there was nothing of substance that was put forth by the petitioner in answer thereto.
30. This court says so since despite averring, the petitioner did not avail evidence of the alleged DPO. The petitioner did not as well adduce any evidence of his inability to travel out of India or to enter Kenya on the basis of the alleged DPO. Not even any correspondence from the 1st respondent and/or the immigration offices in India or Kenya was availed in support of the allegation. The allegation is not even corroborated by any of the said members of the petitioner's family who are also alleged to have been restricted in their movement as a result of the DPO.
31. The upshot is, therefore, that the allegation by the petitioner that the 1st respondent issued a DPO against him is just, but a bare one. This court has, hence, been called upon to adjudicate on an imaginary dispute.
32. In consolidated Petitions NRB Pet No E090 of 2022, NRB Pet No E168 of 2022, NRB Pet No E221 of 2022, NRB Pet E230, NRB Pet E234 of 2022, NRB Pet E249 of 2022, MSA Pet No E017 of 2022, MSA Pet No E019 of 2022 and ELD Pet No E010 of 2022 *Okiya Omtatab Okoiti & 15 others v The Hon Attorney General & others* the High Court recently had the following to say on the above issue as it dismissed several petitions: -
 - "74. Courts exist to resolve actual disputes. They are not in the business of engaging in academic or abstract discourse that is not anchored in disputed facts. That is why the *Constitution* does not confer upon this court the jurisdiction to issue advisory opinions. The Court in *John Harun Mwau and 3 others v Attorney General* [2012] eKLR, held that it could not deal with hypothetical issues and that the jurisdiction to interpret the *Constitution* under article 165(3) (d) does not exist in a vacuum and is not exercised independently in the absence of a real dispute. The court explained that the jurisdiction is exercised in the context of a controversy.
 75. The aforesaid position is encapsulated in the principles of mootness, ripeness and justiciability as explained by Onguto J., in *Wanjiru Gikonyo and others v National Assembly of Kenya and 4 Others* Petition No. 453 of 2015 [2016] eKLR as follows:
 27. Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases. The court is not expected to engage in abstract arguments. The court is prevented from determining an issue when it is too early or simply out of apprehension, hence the principle of ripeness. An issue before the court must be ripe, through a factual matrix, for determination.
 27. Conversely, the court is also prevented from determining an issue when it is too late. When an issue no longer presents an existing or live controversy, then it is said to be moot and not worthy of taking the much sought judicial time.



76. The application of the aforementioned principles depends on the facts of each case. In the Wanjiru Gikonyo Case (*supra*), the learned Judge, again stated:
- (34) There is settled policy with clear arguments as well as out of repetitive precedent that courts and judges are not advise-givers. The court ought not to determine issues which are not yet ready for determination or is only of academic interest having been overtaken by events. The court ought not to engage in premature adjudication of matters through either the doctrine of ripeness or of avoidance. It must not decide on what the future holds either.
- (35) It is however to be noted that the court retains the discretion to determine whether on the circumstances of any matter before it still ought to be determined."
33. In this case, since there is no evidence of issuance of any DPO, then the alleged dispute can only be imaginary.
34. In that case, there is no dispute capable of determination by this court at the moment.
35. Coming to the end of this judgment, I must profusely apologize for its late delivery. The delay was mainly occasioned by the number of election-related matters which were filed in the Constitutional and Human Rights Division from December 2021. From their nature and given that the country was heading to a general election, the said matters had priority over the rest, hence, the delay.
36. Consequently, the following final orders do hereby issue: -
- a. The petition and the notice of motion dated February 4, 2021 are hereby struck out.
 - b. The petitioner shall shoulder the costs thereof.
- Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 30TH DAY OF SEPTEMBER, 2022.

AC MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Miss Mac' Oriwa, learned counsel for the petitioner.

Miss Gitau, learned counsel for the 1st respondent.

Kirong/Benard – court assistants.

