



**Speaker of the County Assembly of Siaya County v Standard Group Limited
(Constitutional Petition E246 of 2021) [2022] KEHC 14533 (KLR)
(Constitutional and Human Rights) (28 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14533 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E246 OF 2021**

M THANDE, J

OCTOBER 28, 2022

BETWEEN

SPEAKER OF THE COUNTY ASSEMBLY OF SIAYA COUNTY PETITIONER

AND

STANDARD GROUP LIMITED RESPONDENT

JUDGMENT

1. In a Petition against May 28, 2021, against Standard Group Limited, (the Respondent), The Speaker of the County Assembly of Siaya County, (the Petitioner), seeks the following reliefs:
 - a. A declaration that any allegation that the County Assembly of Siaya paid its members per diems for a trip that never materialized are unfounded, baseless, misleading and untrue.
 - b. Permanent injunctions barring the Respondent and its agents from continuing publishing misleading publications in print, online or any other medium linking the County Assembly of Siaya or its members to the alleged corruption originating from paid per diems for an inexistent visit to Uganda.
 - c. In the alternative to the foregoing, an order to the Respondent to offer the Petitioner an apology in the same media, print and prominence that published the impugned publication and to offer the Petitioner a right to reply in their respective print and digital platforms and be published with similar prominence as the untrue and misleading allegations; and
 - d. Costs of the Petition.



2. The Petition is supported by the affidavit of George Okode dated May 28, 2021. The Petitioner's claim against the Respondent is that on March 2, 2020, it published in its newspaper, The Standard, a story titled 'Concern as Siaya loses Ksh 2.8 billion in corrupt deals' in print and its digital platform, <http://www.standardmedia.co.ke/nyanza/article/2001362506/siaya-loses-sh2-b-to-corruption-since-2013>. The Petitioner further claimed that in the same publication, the Respondent made the following allegations with regard to MCAs of Siaya County:

"The commission's Western Kenya regional deputy head, Danstan Aura, described the state of corruption in the county as worrying, saying 313 corruption cases have been reported to the commission since 2013...

But Aura blamed top politicians and leaders in the county, whom he did not name, for intimidation and interference. which he said frustrated corruption investigations.

He cited the case of Siaya ward reps who pocketed allowances despite not going for a trip to Uganda. He said the commission had recommended that the money be recovered from the ward reps."

3. It is the Petitioner's case that the allegations contained in the publication were unfounded, utterly false and misleading, aimed at painting the County Assembly of Siaya as a corrupt enterprise that illegally paid its Members of County Assembly (MCAs) for a trip they never attended and allowances to which they were not entitled. In spite of the Petitioner and the MCAs seeking deletion/rectification of the publication vide letters addressed to the Respondent, dated June 4, 2020 and November 17, 2020 the Respondent did act as requested.
4. The Petitioner accused the Respondent of malice, the particulars of which are, publishing false and misleading information about the Petitioner and its members; failing to accord the Petitioner or the MCAs the right to reply; failing to delete/rectify the misleading publications despite the notice by Petitioner, and willful failure to adhere to Regulations 4 and 5 of the Code of Conduct for the Practice of Journalism at the time of publishing the news item.
5. In grounds of opposition dated November 22, 2021 the Respondent contended that the Petition and Supporting Affidavit are incompetent and fatally defective on grounds that the Petitioner lacks the requisite locus to institute the proceedings on behalf of the County Assembly of Siaya in enforcement of the Bill of Rights under the [Constitution of Kenya, 2010](#); there is no demonstration of how the Petitioner's rights and fundamental freedoms were violated by the Respondent; without pleading specifics on the alleged breach of rights and fundamental freedoms, the Petition does not meet the threshold established in [Anarita Karimi Njeru v the Republic](#) (1976-1980) KLR as such, the Court lacks the requisite tools and material to determine the Petition; the reliefs sought are an affront to the Respondent's freedoms enshrined in Articles 32 and 33 of the [Constitution](#).
6. Parties filed their written submissions as directed by the Court. Having considered the submissions, I find that the issues for determination are:
- i. Whether the Petition is incompetent.
 - ii. Whether the reliefs sought can be granted.

Whether the Petition is Incompetent

7. In its grounds of opposition, the Respondent contended that the Petition is incompetent on grounds that the affidavit in support of the Petition is defective, evidence deficient and that the Petitioner has no *locus standi* to file the Petition.



8. The Respondent submitted that the affidavit by George Okode is defective in that does not state the commissioner before whom the oath was taken. Notably, the Petitioner did not speak to this issue in its submissions.
9. The making of Affidavits is governed by the *Oaths and Statutory Declarations that Act*. Section 5 provides:

"Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made."
10. An affidavit is defined in *Black's Law Dictionary* Tenth Edition as:

"A voluntary declaration of facts written down and sworn to by a declarant, usu. before an officer authorized to administer oaths."
11. The elements of an affidavit are that first, the contents therein are facts declared by the deponent. Second, the declaration of facts is voluntary. Third, it must be sworn before an officer authorized to administer oaths. It is the jurat in an affidavit elevates the declaration of facts to the status of a statement on oath. An affidavit that does not contain the name of the person who administered the oath, the place and date is thus defective.
12. The Supreme Court had occasion to consider an affidavit that did not comply with the requirements of Section 5 in the case of *Gideon Sitelu Konbellah v Julius Lekakeny Ole Sunkuli & 2 others* [2018] eKLR and stated:

"(8) We have no hesitation in finding that the purported Replying Affidavit filed by the 1st Respondent is fatally defective as the same contravenes all the legal requirements for the making of an affidavit. Hence it has no legal value in the matter before us. We have checked all the eight copies of the Replying Affidavit as filed in the Court Registry and confirmed that none of the copies was signed, commissioned and dated. Consequently, as the same is defective, it is deemed that there is no Replying Affidavit on record filed by the 1st Respondent."(emphasis added).
13. The affidavit signed by George Okode although dated, does not state the place where it was made and more critically, it was not signed in the presence of a person authorized to administer oaths. Accordingly, the purported affidavit is a mere statement and not an affidavit at all. It is fatally defective and has no legal value in the matter before me. In sum, there is no affidavit in support of the Petition.
14. The Respondent also challenged the Petition on the ground that the same is evidence deficient on account of the defective affidavit and lack of annexures.
15. The Petitioner submitted that the Petition was filed in compliance with Rule 10 which provides:
 1. An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.
 2. The petition shall disclose the following—
 - a. the petitioner's name and address;
 - b. the facts relied upon;



- c. the constitutional provision violated;
 - d. the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;
 - e. details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;
 - f. the petition shall be signed by the petitioner or the advocate of the petitioner; and
 - g. the relief sought by the petitioner."
3. Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.
 4. An oral application entertained under sub rule (3) shall be reduced into writing by the Court.
16. The Court notes that the Petition was indeed filed in compliance with the relevant provisions of Rule 10. It which is duly signed by the Petitioner contains the name and address of the Petitioner, and sets out the facts relied on. The Petition also cites the constitutional provision violated and the nature of injury caused by the actions of the Respondents.
17. Going back to the impugned affidavit which the Court has found is no affidavit at all, does lack of an affidavit in support of a petition render such petition incompetent? The answer lies in Rule 11 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* which provides:
1. "The petition filed under these rules may be supported by an affidavit.
 2. If a party wishes to rely on any document, the document shall be annexed to the supporting affidavit or the petition where there is no supporting affidavit."
18. The Petition herein is filed under Article 22 of the *Constitution*. A reading of Rule 11 indicates where a petition is filed under Article 22, there is no mandatory requirement that such petition be supported by an affidavit. Sub-rule 2 however provides that if a party seeks to rely on any document, such document shall be annexed to the supporting affidavit and where there is no such affidavit, to the petition itself. This is couched in mandatory terms.
19. In the present case, the Petitioner claims that the Respondent published a defamatory story about the Petitioner and its MCAs in the print and digital version of The Standard. From the averments of George Okode, it is evident that the Petitioner intended to rely on the documents annexed to the impugned affidavit to support the averments of fact in the Petition. In paragraph 13 of George Okode averred:
- "That it is not the first time the respondent is reporting on the same matter without seeking clarification and or comments from the Assembly or the Speaker of the Assembly. (Annexed and marked GO are the copies of the previous publications by the respondent)."



20. No documents were however annexed to the impugned affidavit. In any event even if they were so annexed, they cannot be admitted in evidence given that finding of the Court that the affidavit is fatally defective.
21. In the case of *Isaac Aluoch Polo Aluochier v National Alliance and 542 others* [2016] eKLR, Muriithi, J considered a petition that was not supported by an affidavit setting out the facts of the case and had this to say:
- "10. Under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedures Rules, 2013, for the enforcement of the Bill of Rights and which by the practice of the Court have been used for all constitutional litigation, there is no requirement that a petition be supported by an affidavit on the facts. In *Bryson Mangla v AG & Ors Nairobi Pet No 284 of 2016*, this Court held that:
- "13 The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedures Rules, 2013 do not require that a petition must be supported by an affidavit, see Rule 11 thereof in these terms:
- "11. Documents to be annexed to affidavit or petition
- (1) The petition filed under these rules may be supported by an affidavit
- (2) If a party wishes to rely on any document, the document shall be annexed to the supporting affidavit or the petition where there is no supporting affidavit."
14. It is conceivable that a petition which challenges, for example, constitutionality of a particular legislative text may not require an affidavit. Where however, a petition relies on matters of evidential fact, this must be proved by affidavit or oral testimony as the court may direct."
11. So where, as here, it is sought to rely on matters of fact a suitable affidavit with documentary annexures ought to be filed in discharging the burden of proof of a plaintiff in terms of section 107, 108 and 109 of the Evidence Act, which provide as follows:"
22. I associate with the reasoning of Muriithi, J. that where a petitioner wishes to rely on matters of fact, documentary evidence must be annexed either to an affidavit or the petition itself, in order to discharge the burden of proof set out in Sections 107, 108 and 109 of the *Evidence Act*.
23. The learned Judge went on to state:
- "12. The liability of the respondents, which is sought by the Petitioner herein depends on the proof of the facts that the respondents breached the Constitution and statute as pleaded on the Petition. The petitioner, therefore, has the general burden of proof (ss 107 and 108 of the Evidence Act) and of



the particular facts (s 109 of the Evidence Act) of the respondents' positions as state officers and party officials and of their nominations in breach of the law. There was no evidence that the named respondents alleged to have been state officers were also officials of political parties while they held those state offices."

24. The Petitioner claimed that the Respondent published a defamatory story about the Petitioner and MCAs in the print and digital version of The Standard thereby violating their rights. The Petitioner has thus moved to this Court for redress. Under Section 107 of the Evidence Act, the Petitioner was obligated to prove the allegations in the Petition by placing the said publication before the Court. Section 108 lays the burden of proof on the Petitioner because the Petition would fail if no evidence at all were given on either side. Without any documentary evidence to support the allegations that the Respondent breached the Constitution and violated the Petitioner's and MCAs' rights as pleaded in the Petition, the said allegations remain mere unsubstantiated allegations and the Petition fails on this score.
25. I now turn to the contention by the Respondent that the Petitioner lacks the locus standi to bring this Petition. It was submitted that the Petitioner as an office established under Article 178 of the Constitution and Section 9A of the County Governments Act, 2012 cannot enforce the Bill of Rights for himself or the County Assembly of Siaya.
26. To buttress its submissions on the Petitioner's lack of locus standi, the Respondent relied on the case of Speaker, Nakuru County Assembly & 46 others v Commission on Revenue Allocation & 3 others [2015] eKLR in which the speakers of all county assemblies filed a petition against the Commission on Revenue Allocation and the Controller of Budget challenging circulars issued by the respondents prescribing mandatory ceilings to financial allocations to the county assemblies in county budgets for the Financial year 2014/2015. Lenaola, J (as he then was) stated:

"I am in agreement with the learned judge and I adopt his reasoning in the instant Petition. I do so because the Petitioners are not private individuals but officers serving in a public office as defined in Article 260 of the Constitution. The Respondents are also officers and offices in the same public office and it is inconceivable how one can violate the other's rights in the context of the Bill of rights. In any event, in the circumstances of the Petition before me, any differences regarding the fiscal and budgetary processes between affected State Organs should not be such as to attract this Court's intervention under the Bill of Rights. Those differences are to be settled in the manner envisaged by Article 189(4) of the Constitution and not by litigation predicated on the Bill of Rights. In addition, the dispute at hand concerns the powers of the 1st and 2nd Respondent in revenue allocation, budgetary processes and budget implementation."

27. Reliance was also placed on the case of Meru County Government v Ethics & Anti-Corruption Commission [2018] eKLR

"We respectfully agree with the sentiments expressed in that case. State organs can indubitably file suit inter se to protect various rights, capabilities, competencies and privileges accorded to them by the Constitution. What they cannot in and of themselves do, is to purport to claim for themselves and enforce for themselves qua State organs, the rights enumerated in the Bill of Rights. Such rights as we have stated, and the Kisumu Bench as well, belong only to individuals as natural persons who only can enforce or protect them in person or through any other persons be they natural or juristic.



Now, had the various officers of the appellant or any one of them, on behalf of whom the appellant went to court, been co-petitioners claiming that their rights as individual natural persons had been or were in danger of being violated or infringed, the petition before the learned Judge would have been competent. They were not joined, however, and the claim as it stood was to the effect that the appellant, a juristic person and a State Government at that, had been a victim of violation of various postulates of the Bill of Rights. We think that in principle the petition as presented was making impossible claims and was factually contradictory and so incompetent. This finding is on all fours with the pronouncement of this Court in the Cholmondley (*supra*) case which we have referred to earlier in this judgment and with which we are in full concurrence: the Bill of Rights affords protections and guarantees for natural persons as individuals and that protection does not extend to the State or its organs such as national and county governments."

28. To counter the Respondent's submissions, the Petitioner submitted that the County of Assembly of Siaya falls within the definition of person under Rule 2, with the locus standi to institute a petition like the one before Court. Reliance was placed on Articles 20 and 22 of the Constitution.

29. Article 20 provides:

- "1. The Bill of Rights applies to all law and binds all State organs and all persons.
2. Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom."
3. ..."

And Article 22 provides in part as follows:

- "1. 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.
2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
 - a. a person acting on behalf of another person who cannot act in their own name;
 - b. a person acting as a member of, or in the interest of, a group or class of persons;
 - c. a person acting in the public interest; or
 - d. an association acting in the interest of one or more of its members.

30. The Petitioner further argued that it is now settled law that a county assembly can sue or be sued through the Speaker, its titular head, as was found in the case of Simon Wachira Kagiri v County Assembly of Nyeri & Others [2013] eKLR where Abuodha, J stated:

"On the issue of whether the County Assembly may be sued in its own name the court takes the view that the County Assembly as a distinct institution in the County Government



carrying out public duties as mandated by the Constitution and the County Government Act, is capable of suing or being sued in the absence of an express statutory provision. However such suit ought to be brought through its titular head - the Speaker."

31. The office of speaker of a county assembly is established under Article 178 of the *Constitution*. The question this Court must ask itself is whether the Petition has been brought by the Speaker on behalf of the County Assembly of Siaya. The Petitioner claims that the publication which he terms as malicious, false, unfounded and misleading painted the Petitioner and the entire County Assembly as a corrupt enterprise. The Petitioner would want this Court to believe that this is a public interest litigation brought on behalf of the County Assembly. A careful perusal of the Petition however indicates that complaint against the Respondent is that it published a story claiming that the MCAs pocketed allowances despite not going for a trip to Uganda. Allowances for travel or for any other purpose are paid, not to a county assembly, but to individual MCAs. The publication related to the MCAs in their personal capacity and not to the Siaya County Assembly. In any event as stated by the Court of Appeal in the case of *Meru County Government v Ethics & Anti-Corruption Commission (supra)*, the protections and guarantees under the Bill of Rights apply to natural persons as individuals and do not extend to the State or its organs such as national and county governments which would also include county assemblies.
32. The *Constitution* defines "person" in Article 260 to include a company, association or other body of persons whether incorporated or unincorporated. Rule 2 defines "person" to include an individual, organisation, company, association or any other body of persons whether incorporated or unincorporated. The use of the word "include" in the definition of person means that the list is not exhaustive. My view is that the definition can extend to a state organ such as the speaker of a county assembly.
33. Article 22(2) provides that a person acting as a member of, or in the interest of, a group or class of persons may institute proceedings under Article 22(1). The speaker of a county assembly is a member of such county assembly. Article 177 sets out the members of a county assembly and provides that the speaker is an ex officio member thereof. This being the case, my finding is that the Petitioner herein as an ex officio member of the County Assembly of Siaya has the requisite capacity to file a petition on behalf of his fellow members of the Assembly.

Whether the Reliefs Sought Can Be Granted

34. The Court has made a finding that the affidavit in support of the Petition is defective and as guided by the Supreme Court in the case of *Gideon Sitelu Konchellab v Julius Lekakeny Ole Sunkuli (supra)*, a defective affidavit is no affidavit at all. The Court has also found that the averments of fact in the Petition are not backed by evidence. In the case of *Peter Ngari Kagume & 7 others v Attorney General [2009] eKLR*, Nyamu, J (as he then was) considered a petition that was not backed by evidence and stated:

"Turning to the alleged violation as aforementioned, it is incumbent upon the petitioners to avail tangible evidence of violation of their rights and freedoms. I have gone through the petitioners' affidavits which have horrifying allegations. The Respondent has denied all those allegations. The allegations of violations could be true but the court is enjoined by law to go by the evidence on record. The petitioners' allegations ought to have been supported by further tangible evidence such as medical records, witnesses or rather oral evidence capable of being subjected to cross examination to test its veracity. The Petitioners did not provide such evidence except the averments of what transpired to them. It is most probable that in the prevailing circumstances then, the petitioners were subjected to physical



beating, torture, detention without trial among other violations but the court is deaf to speculation and imaginations and must be guided by evidence of probative value. When the court is faced by a scenario where one side alleges and the rival side disputes and denies, the one alleging assumes the burden to prove the allegation. I have gone through the entire court record and there is absolutely nothing to support the allegations made by the petitioners."

35. I agree with the learned Judge's reasoning, which was affirmed by the Court of Appeal that the court of law is deaf to speculation and must be guided by evidence of probative value. There is nothing in the Petition herein to support the petitioner's allegations. Without any tangible evidence, I am unable to make a finding in favour of the Petitioner and grant the reliefs sought.
36. In the end and in view of the foregoing, I find that the Petition dated May 28, 2021 is lacks merit and the same is hereby dismissed with costs to the Respondent.

DATED AND DELIVERED IN NAIROBI THIS 28TH DAY OF OCTOBER 2022

M. THANDE

JUDGE

