



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

PETITION NO. E001 OF 2021

IN THE MATTER OF ARTICLES 22(1), 23(1), 40 AND 47 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 22(1), 23 (1), 40 AND 47 OF THE CONSTITUTION OF KENYA.

BETWEEN

GRACE MUTHONI GICHUKI.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

OCS PORT POLICE STATION MSA.....3RD RESPONDENT

Coram: R. Nyakundi, Judge

Angela Munyuny for state

Mr Gicharu Kimani Advocate for Applicant

RULING

The petitioner herein filed a petition together with a notice of motion application dated 22.02.2021 under certificate of urgency supported by an Affidavit sworn by the Petitioner on 23.02.2021. The application moved the Court for orders:

(i). Spent

(ii). Pending the hearing and determination of this application, a mandamus order do issue to compel the Respondents, by itself, its appointed agents and/or servants to issue proper cause and justification to the Petitioner/Applicant as to the seizure and continued holding of the Sulphuric acid drums and container currently held at Port Police Station Mombasa.

(iii). That in the alternative and without prejudice to the foregoing, pending the hearing of this Petition, a mandamus order does issue to the Respondent, by itself, its appointed agents and/or servants to release the Sulphuric acid drums and container currently held at Port Police Station Mombasa to the Petitioner/Applicant, if no proper notice is issued unless otherwise lawfully held.

(iv). That the Court be pleased to make any other order fit in the circumstances of this case.

(v). That costs be provided for.

The Application was grounded upon the grounds set out in the Supporting Affidavit of **Grace Muthoni Gichuki** dated 23.02.2021. The gist of the Application is that the Petitioner contends that she is the lawful and rightful owner of the Sulphuric acid drums and container currently held at Port Police Station Mombasa. The Petitioner alleges that she was handed over the Sulphuric acid drums and container after clearing the said consignment at the Port at the Port of Mombasa and made all relevant payments including but not limited to storage charges after getting all the necessary approvals on 19.01.2021. That she is fully entitled to the protection of the Constitution of Kenya and that she is likely to suffer irreparable damage and loss if the said orders of mandamus are not issued.

The Petitioner's Case.

The Petitioner herein is a resident of Kilifi within Kilifi County. The Petitioner alleges that she is the lawful and rightful owner of the Sulphuric acid drums and container currently held at Port Police Station Mombasa having imported the same from RA International, Mogadishu to the Port of Mombasa. That the said Sulphuric acid arrived at the Port of Mombasa on 23rd November, 2020 and on 19th January, 2021, the Petitioner cleared all the relevant payments including but not limited to storage charges and was desirous of ferrying the Sulphuric acid drums and container for delivery to the end user. She contends that immediately thereafter as the Petitioner was arranging for the transportation and/or delivery of the Sulphuric acid to the end user, the Respondents through its agent and/or employees raided the Petitioner and seized the said Sulphuric acid without proper notice and took it to Port Police Station Mombasa. She further alleges that she has been continually harassed by the Respondent with threats of arrest and despite incessantly follow up, the Respondents have refused, and/or neglected to give tangible reasons for the impoundment of the said shipment. She also alleges that the actions of the Respondent offend the provisions of Article 47 of the Constitution and that the Respondent's actions offend the provisions of Article 40 that pertain to ownership of property.

The Respondent's case.

The 2nd and 3rd Respondents opposed the said Application by filing a Replying Affidavit by one **G. I. Mithamo** sworn on 10.03.2021 and grounds of opposition dated 08.03.2021 and filed on 10.03.2021. The Respondents allege that on 19.01.2021, the 3rd Respondent received a letter from Kenya Ports Authority vide an e-mail issuing instruction on three feet containers number **MEDU 66454/20DV**, **DFSU 3075115/20DV** and **MEDU 1484860/20DV**. The Respondents allege that the containers were booked at the station vide **OB/No. 32/19/1/2021** for safe custody, the deponent of the Affidavit contended that the containers were previously destined to Somalia where the same was rejected for security reasons and that the importer diverted the same to Kenya. He alleges that upon arrival at Mombasa Port the containers were flagged as suspicious and a concern to public security by the relevant port authorities and security. The Respondents further allege that the Applicant has deliberately failed to enjoin the relevant Port Authorities who have the lawful mandate on the issues raised. They allege that the Applicant has not received clearance from the relevant Port Authorities and that she has approached this court with unclean hands and the orders sought ought to be denied. The Grounds of opposition by the Respondents are to the effect that the cause of action wholly arose at the Port of Mombasa and per Section 15 (a) and (c) of the Civil Procedure Act, the Applicant ought to have instituted this Suit where the Respondents reside. That the actions of the 2nd and 3rd Respondents were proper and within their powers and fully within their mandate to maintain of law and order as provided under Section 24 of the National Police Service Act of 2011.

Submissions.

The Petitioner filed her Submissions on the 18th of March, 2021 and has persuaded the court to hear the Petition and grant her the orders sought relying on the provisions of Article 165(3) (a) and (b), that the matter before this Honourable Court is clearly a petition to the High Court of Kenya for violation of a right and fundamental freedom as enshrined under the Constitution of Kenya. She relied on the Authorities of **Crossley Holdings Ltd v Nagendra Saxena & 3 Others (2008) eKLR** and that of **Nairobi Milimani Commercial & Admiralty Division Civil Case No. 711 of 2012 Samuel M. W' Njuguna v Benjamin Achode and 8 Others**.

The 2nd and 3rd Respondents filed their Submissions on the 17th day of March, 2021 and persuaded the Court to find that the matter filed before this Court is not properly before this case by virtue of Section 15 of the Civil Procedure Act. The Respondents opine that the Cause of action arose on 19.01.2021 at the Port of Mombasa and that in fact, at Paragraph 4 of the Petition, the Petitioner acknowledges that the issues relating to the Petition arose at the Port of Mombasa and that the Sulphuric acid containers which are the subject matters of the suit are being held outside the jurisdiction of this Honourable court. They relied on the Authority of **Willis Owiny v James Godwin Diang'ata Ketta (2019) e KLR** where the court examined the options provided under Section 15 of the Civil Procedure Act on where the suit can be filed and said:

Para 25 'The legislature did not give weight to the place where the Plaintiff is resident, when considering the court at which suit should be filed.'

The persuaded the Court to find that filing the Suit in Malindi offends the mandatory provisions of Section 15 of the Civil Procedure Act.

The Law, Analysis and Determination.

The applicable Section 15 of the Civil Procedure Act provides that inter alia,

"Subject to the limitations aforesaid in Section 12 and 13 of the Act every suit shall be instituted in a Court within the local limits of whose jurisdiction:

(a). The defendant or each of the defendants, where there are more than one, at the time of commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, or

(b). Any of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily

resides or carries on business or personally looks for gain, provided either the leave of the Court is given or the defendants who do not reside or carry on business or personally work or carry on business or personally work for gain in aforesaid acquiesce, in such institution or

(c). The cause of action wholly or in part arises the Court notes that section 15 dictates a cause of action to be the facts pleaded in the claim necessary for the claimant to prove on a balance of probabilities as against the defendant to succeed in that suit.

Mulla on the Code of Civil Procedure (2012) 18th ed. at p.391 explains the rationale on the defendant's actual and voluntary residence and place of work when considering section 20 (a) and 20 (b) of the Indian Code of Civil Procedure which is in *pari materia* with section 15 of the Civil Procedure Act of Kenya set out above, as follows:

a. ***Scope and principle of the Section.*** - *Clauses (a), (b) and (c) of s 20 are independent of each other.*

This is a general section embracing all personal actions. At common law, actions are either personal or real. Personal actions are also called transitory because they may occur anywhere, such as actions for tort to persons or to movable property or suits on contracts. Real actions are actions against the res or property and are called local because they must be brought in the forum where the immovable property is situated. An action may also be a mixed action being partly real and partly personal. Torts to immovable property such as trespass and nuisance are mixed actions and are referred to in s 16(e). Otherwise, s 16 deals with real and local actions, while ss 19 and 20 deal with personal or transitory actions.... The principle underlying s 20(a) and s 20(b) is that the suit is to be instituted at the place where the defendant can defend the suit without undue trouble.

So while the convenience of the parties and their witnesses is to be considered in accordance with Order 47 rule 6 of the Civil Procedure Rules first principles indicate that it is the convenience of the defendant that should be given paramount consideration to avoid undue hardship on his part in defending the suit.

Further consideration must be of the undesirability of multiple suits over the same subject matter being considered by different courts of concurrent jurisdiction with the possibility of conflicting decisions over the same subject matter. No authority is necessary for this obvious consideration of judicial policy which goes to promoting public confidence in the judicial system. Moreover, Article 159 of the Constitution and section 1A of the Civil Procedure Act require of the courts that the dispute resolution process be fair, expeditious and cost effective with proportionate use of judicial resources. Engaging two courts of concurrent jurisdiction to deliberate on the same or similar issues is not proportionate utilization of judicial resources but rather wasteful duplication which is bound to create uncertainty as to the binding effect of either court's decision in the event of conflict.

In the present case, the Respondents have taken objection to the place of suing. The Applicant has opted to sue the Respondents in Malindi but the Respondents are of the view that the cause of action arose at the Port of Mombasa and that the Applicant ought to have instituted the Suit where the Respondents reside and carry on their business. The Respondents insist that Mombasa was the appropriate place to file the Petition.

From the reading of Section 15 of the Civil Procedure Act, the place where the cause of action arose is an important consideration in deciding the place of suing. It is not disputed that the 3rd Respondent as well other key stake holders mentioned in the Petition carry on Business in Mombasa, that is both the Kenya Ports Authority as well as the Kenya Revenue Authority carry on business in Mombasa. The cause of action arose in Mombasa and it is also important to note that the goods in question which are the subject of this Petition are not under the jurisdiction of this Court. The jurisdiction of filing a suit is limited to where the Respondents domicile. In the current case, it is obvious that all the three Respondents have legal representation at the jurisdiction where the cause of action arose, where the Respondents carry on their business as well as the place where they are domiciled.

In considering the appropriate order, the Court must bear in mind the purpose of Section 15 *vis-à-vis* the unlimited jurisdiction of the High Court and whether there was bad faith or improper motive in the suit been filed in the wrong place.

The High Court of Kenya not only has unlimited original jurisdiction in civil matters but also countrywide jurisdiction. However, the stations of the High Court are distributed giving regard to the need to facilitate reasonable and equitable access of the services of the Court (Section 12 of the High Court (Organization and Administration Act). For purposes of civil cases the places where stations of the High Court have been set up and registries outside opened Nairobi are in the schedule to appendix 9 of the Civil Procedure Rules or as from time to time amended by the Chief Justice.

Amongst the objectives for the provisions on place of suing is to ensure that suits are filed in as much as possible where the cause of action arose or where the subject matter is situate or in some instances where the Respondent resides. Suits should not be instituted in places that causes unnecessary hardship to the Respondents and which may hinder access to justice. Again suits should not be lumped in one station when they could be heard elsewhere as this may lead to clogging up of some Courts in a way that flies in the face of equitable access to justice.

In light of the above the Court has given a careful consideration to the preliminary objection raised by the respondents in rebuttal to the application seeking an order of mandamus. The question that falls for determination as a preliminary objection is not a question of fact but a point of Law. The principles enunciated in **Shahida Abdul Hassanah Kasam v Mahed Mohamed Gulamah Civil Application No. 42 of 1999**, the Court expressed itself as follows:

“the aim of a preliminary objection is to save the time of the Court and of the parties by not going into the merits of an application because there is a point of Law that, will dispose of the matter summarily”

That in view of the foregoing the Court finds merit in the 2nd and 3rd Respondents' Objection and orders as follows;

a) That the nearest court with territorial jurisdiction to the suit is Mombasa High Court.

b) That this Court lacks Jurisdiction to entertain this Petition.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 18TH DAY OF MARCH 2021

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R. NYAKUNDI

JUDGE

In the presence of:

1. Mr Gicharu advocate for the Petitioner

2. Angela Munyuny for State