



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

CONSTITUTIONAL PETITION NO. 10 OF 2019

IN THE MATTER OF: ARTICLES 1,2,3,10,19,20,21,22,23,24,25,27,28,35,43,48

50,52, 55, 118, 164, 165,201, 232,258,259 and 260 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 25, 27,28, 35 43, 48 & 50 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: THE INTERPRETATION, IMPLEMENTATION AND ENFORCEMENT OF ARTICLES 1,2,3,10,19,20,21,22,23, 24, 25, 27, 28, 35, 43, 48,50,52,55,118, 164, 165, 201, 232, 258, 259 & 260 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: SMALL CLAIMS COURT ACT 2018

AND

IN THE MATTER OF: SECTION 20 AND 38 OF THE SMALLCLAIMS COURT ACT 2016

BETWEEN

MOMBASA LAW SOCIETY.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE NATIONAL ASSEMBLY.....2ND RESPONDENT

JUDGMENT

1. On the 1st day of April, 2016, the President assented to the Small Claims Court Act forwarded to him by the 2nd Respondent. The Petitioner has cited the Act as unconstitutional due to some provisions that the Petitioner alleges contravene the provisions of the constitution.

The Petition

2. The Petitioner a registered society established under the Societies Act Cap 108 Laws of Kenya filed a Petition dated 29th January, 2019 later amended on 11th June, 2019. The Petition was filed against the Attorney General whose mandate includes being the legal advisor to the government of Kenya and representing the national government in all legal proceedings. The petition is also against the National Assembly, an institution established under Article 95 of the Constitution of Kenya mandated to enact legislation in the Republic of Kenya.

3. The Petitioner avers that sections 20(2) and 38 of the Small Claims Court Act contravene the provisions of the constitution; that these sections deny, violate, infringe and threaten various provisions, rights and fundamental freedoms under the constitution.

4. The Petitioner states that Section 20(2) of the Small Claims Court Act contravenes the national values and principles of governance which include non-discrimination, human dignity and equality. That having a court that handles same matters as other sub-ordinate courts is a waste of public resources which is against the principle of good governance.

5. The Petitioner further argues that section 20(2) of the act which excludes legal advocates from representing litigants in Small Claims Court is unconstitutional for the following reasons:

a) Being discriminative against legal representatives thus infringing article 27 of the Constitution that upholds equality and freedom from discrimination. The national Assembly had the mandate to ensure that no person was discriminated against in the Act.

b) Being against legal practitioners economic rights by preventing legal practitioners from earning a living through their professional qualifications. The said section has interfered with the ability of the legal practitioners to work and earn a living to meet their economic and social needs.

c) Being against the right of access to justice as per article 48 of the Constitution, by limiting the litigant's choice of representation thus hindering the right to a fair trial

6. The Petitioner states that section 38 of the Act which provides that an Appeal from the small claims court shall be lodged to the High Court and the High Court's decision shall be final is unconstitutional. That this Section contravenes Article 48 on the right of access to justice and article 50(1) on the right to fair hearing by barring a litigant from escalating an appeal to the Court of Appeal.

7. Further the Petitioner states that Section 38 of the Act limits the jurisdiction of the High Court on appeal to matters of law. This contravenes Article 164 (3) of the constitution which gives the Court of Appeal jurisdiction over appeals emanating from High Court.

8. The Petitioner further claims that the Small Claims Court Act was never subjected to public participation; that the procedure leading to its enactment was not in accordance with the standing orders of the national assembly particularly order 127 of the parliamentary standing orders which together with article 10 and 118 of the constitution require parliament to facilitate public participation in the legislative process. That this requirement was not satisfactorily met during the consideration of the bill.

9. Based on the above facts, the petitioner sought the following orders:

a) A declaration that Section 20(2) of the Small Claims Court Act 2016 is unconstitutional, null and void for violating, infringing and threatening the constitutional provisions and the Petitioner's fundamental rights and freedoms individually or in association with others as provided under articles 1,2,3,10,19,20,21,22,23,24,25,27,28,35,43,48,50, 52, 55, 118, 164, 165, 201, 232, 258, 259 and 260 of the constitution

b) A declaration that Section 38 of the Small Claims Court Act 2016 is unconstitutional, null and void for violating, infringing and threatening the constitutional provisions and the Petitioner's fundamental rights and freedoms individually or in association with others as provided under articles 1,2,3,10,19,20,21,22,23,24,25,27,28,35,43,48,50, 52, 55, 118, 164, 165, 201, 232, 258, 259 and 260 of the constitution

c) A declaration that the Small Claims Court Act, 2016 is unconstitutional, null and void for contravening the principles of good governance and of public service which require prudent, efficient, effective and economic use of public resources as provided under article 10 and 232 of the constitution.

d) A declaration that the Small Claims Court Act 2016 is invalid for lack of public participation as provided under Article 10 and 118 of the constitution

e) Costs of the Petition

f) Any other relief that this Honourable court deems fit and just to grant

The 1st Respondent's Response

10. The 1st Respondent opposed the Petition vide grounds of opposition filed on 9th October, 2019. The 1st Respondent avers that the petition is misconceived, frivolous, vexatious and an abuse of the court process and that the petitioner has failed to meet the test for challenging the constitutionality of the said Act.

11. The 1st Respondent avers that the bill was enacted in accordance with the constitution and does not infringe any article of the constitution.

The 2nd Respondent's Response

12. The 2nd Respondent opposed the application vide a Replying Affidavit sworn by Michael Sialai EBS on 28th March, 2019.

13. The 2nd Respondent's case is that the Small Claims Court Act was enacted in accordance with the constitution, the National assembly standing orders and the law. That the bill was read for the first time in the National Assembly and was immediately committed to Justice & Legal Affairs committee for scrutiny.

14. The deponent states that the Justice and Legal Affairs committee facilitated public participation. Members of the public were notified by way of advertisements in two newspapers of nationwide circulation, and were required to submit memorandum on the bill. A copy of the advertisement is attached and marked "MS-1"

15. The 2nd Respondent states that the Petitioner did not present any views or reservations on the bill to the Legal Affairs committee and therefore the petitioner has demonstrated lack of good faith.

16. Further the 2nd Respondent's case is that the objective of the Small Claims Court Act in general and Sections 20 and 38 in particular is to provide for dispute resolution informally, inexpensively and expeditiously in accordance with the principles of law and the rules of natural justice; that advocates are not barred from representing parties where appeals are lodged against decisions of the small claims court in accordance with the provisions of that Act. The 2nd Respondent avers that the Petitioner has failed to meet the test for challenging the constitutionality of the Act in contention.

17. In a supplementary Affidavit sworn by the same Michael Sialai EBS on 19th October, 2020, the deponent states that there is a Small Claims Court (Amendment) Bill of 2020 assented to by His Excellency the president on 30th April, 2020. That one of the amendments was the deletion of Section 20(2) of the principal statute to allow legal practitioners to practice before the small claims courts. Therefore, the Petitioner's challenge of that provision fails.

18. The 2nd Respondent further states that the National Assembly facilitated extensive public participation prior to the enactment of the said amendments to the Act. Various members of the public including the Law Society of Kenya, the Judiciary and Mr. Ngugi Wachira presented their views to the committee, but the petitioner herein did not submit any views to the committee. The 2nd Respondent urged the court to dismiss the Petition as being baseless and frivolous.

Determination

19. I have carefully considered this Petition, the response, the submissions by counsel and the authorities relied on. This petition raises two issues for determination.

(i) Whether **sections 38** of the Act is unconstitutional

(ii) whether there was public participation before the enactment of the Act

20. In **U.S vs Butler, 297 U.S. 1[1936]**, the Court expressed the duty of a Court in determining the constitutionality of a provision of a statute in the following terms:

"When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty: to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the Court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This Court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends."
(Emphasis added)

21. Justice Mwita in **Josephat Musila Mutua & 9 others v Attorney General & 3 others [2018] eKLR** stated that:

"....it is important to remind ourselves the principles of constitutional interpretation. First, Article 259(1) states that the Constitution should be interpreted in a manner that (a) promotes its purposes, values and principles, (b) advances the rule of law and the human rights and fundamental freedoms in the Bill of rights, (c) permits the development of the law and (d) contributes to good governance.

Second that the entire Constitution should be read as an integrated whole and no particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness and not one provision destroying another. That is the Constitution should be given a holistic interpretation and read as one entity to give value to the aspiration of the people, that constitutional provisions ought to be interpreted broadly or liberally and that constitutional provisions must be read to give values and aspirations of the people

Third, the Court should look at both purpose and effect to ascertain the Constitutional validity of a statute or statutory provision. That is a statute or provision of a statute challenged should be laid against the constitutional provision said to have been violated to enable the Court determine whether that is the Case.

Fourth, a constitutional provision containing a fundamental human right is a permanent provision intended to cater for all times to come and therefore should be given a dynamic, progressive, liberal and flexible interpretation keeping in view the ideals of the people, their socio economic and political, cultural values so as to extend the same to the possible maximum"

(i) Whether section 38 of the Small Claims Court Act is unconstitutional

22. The Petitioner contends that Section 38 of the Act is unconstitutional for being contrary to Articles 48, 162, 164, 165 of the Constitution. The Section provides that;

(a) A person aggrieved by the decision of the court may appeal against that decision or order to the High court on matters of law

(b) An appeal from any decision or order referred to in section (1) shall be final

23. Article 48 of the Constitution provides that the state shall ensure access to justice to all persons, while article 164 (3) provides that the Court of Appeal has jurisdiction to hear appeals from the High Court; article 165 (3)(a) provides that the High has unlimited original jurisdiction in criminal and civil matters; and article 165 (3)(e) provides that the High court has any other jurisdiction, original or appellate, conferred on it by legislation

24. The impugned law provides that if a person is aggrieved by the decision of the Small Claims Court, the person shall appeal to the High Court on matters of law. This provision, according to the Petitioner is a contravention to Article 165 (3) of the constitution. The second part of the impugned law provides that a decision from an appeal to the High Court shall be final. The Petitioner has argued that the appellate jurisdiction of the High Court and Court of Appeal over civil and criminal matters is not conferred or limited by statute but by the constitution.

25. The 1st Respondent's argument on the unconstitutionality of Section 38 is that any aggrieved party has a right to seek legal redress at the Small Claims Court at their own free will. It is optional for an aggrieved party to seek legal redress at the small claims Court or seek legal redress at the other courts of competent jurisdiction. That access to the Small Claims Courts runs parallel to other courts. So if a party opts to seek redress to those Small Claims Courts they limit themselves to that avenue, and therefore there is no discrimination since freedom of choice of court is still open.

26. Further, it is has argued that section 38 does not oust the supervisory jurisdiction of the High Court under Articles 165(6) and (7) of the constitution. That the section instead emboldens the High Court by granting it appellate jurisdiction from decisions of Small Claims Courts.

27. The Supreme Court of Canada in **R vs Big M Drug Mart Ltd., [1985] 1 S.C.R. 295** enunciated this principle as follows:

“Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation’s object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation’s object and thus the validity.”

28. One of the objectives of the Small Claims Court Act is to see that small claims are disposed off using the least expensive method. This is probably because the small claims, as the name suggests, are claims whose subject is of a much lower value. Most likely for that reason, the law makers felt that the cost of Appeal to the High Court then to the Court of Appeal would be much higher than the small claim.

29. In **R vs Big M Drug Mart Ltd (supra)**, the Court stated that both purpose and effect are important in determining constitutionality. The purpose of the Small Claims Court Act is to deal with matters of a lower subject value in a cost effective way. In all rationality, the costs of appealing to the Court of Appeal would defeat the purpose of the Act in question. My view is that the Act has not limited the right of a litigant to Appeal to the Court of Appeal, instead it has considered the economic right of a common citizen.

30. In the 1979 case of **Njeru Vs Republic**, Miller JA and Wicks CJ held that ***“It is well established that there is no right of appeal apart from statute, either it is expressly granted by statutory authority or it is not. There is no right of appeal by mere implication or by inference.”***

31. In my view, Article 164(3) of the Constitution does not provide a right of appeal to the appellant; it merely confers jurisdiction on the Court of Appeal to hear appeals from the High Court; indeed, there is no right of appeal save for that which is conferred by statute; hence there is no right of appeal subsumed in Article 164(3) of the 2010 Constitution.

32. From the foregoing, it is my view that Section 38 of the Small Claims Act is not unconstitutional.

(ii) Whether there was public participation before the enactment of the Act

33. Public participation and stake holder engagement during legislative process is a constitutional requirement. Laws are enacted to serve the society and therefore members of the public have a right to participate and give their input prior to legislation. This is a constitutional requirement that cannot be overlooked since it is one of the values and principles of our Constitution.

34. Article 10 is clear that these national values and principles of governance bind all state organs, state officers, public officers and all persons wherever they apply or interpret the Constitution, enact, apply or interpret any law, or make or implement public policy decisions. The national values and principles of governance under Article 10 of participation of the people cannot be undermined.

35. In undertaking its legislative mandate, the national Assembly is required to follow the principles articulated in Article 10(2) (b) of the Constitution on public participation. Under Article 118(1) (b) of the Constitution it is mandatory that parliament shall facilitate public

participation and involvement in the legislative and other business of Parliament and its committees.

36. In **Diani Business Welfare Association and others v County Government of Kwale [2015] eKLR**, the court emphasized the principle that public participation is attained when the members of the public and the interested parties are given reasonable opportunity to know about the issue at hand and to have an adequate say.

37. On legislative matters, public participation is not an option. The national Assembly is under a constitutional obligation to facilitate public participation. In the 2nd respondent's submissions, counsel stated that there was public participation. The evidence attached on the 2nd Respondent's Replying Affidavit at page 22 of **MS-1** is a Standard Newspaper extract notifying the public about The Small Claims Court Bill. The notice *inter-a-lia* required the public to submit Memoranda on the said Bill.

38. The Petitioner has argued that the period given by the 2nd Respondent to the public to submit their memoranda was not sufficient.

39. Whereas the National Assembly had a duty to inform the public, be open, accountable and invite the stakeholders for public participation, it did not have the mandate to compel stakeholders to submit their opinion and memoranda. The Petitioner herein did not submit any opinion to the National Assembly before the Small Claims Court Bill was passed into law. The same Act was amended, and during the amendment process, the 2nd Respondent called for opinions and memoranda on the Amendment bill from the public. There was positive response from different stakeholders including the Law society of Kenya; the Petitioner did not deem it fit to submit its opinion.

40. It cannot now claim that the right was taken away. The Small Claims Act is now operational and rules thereunder have since been promulgated and gazette. It would be a drawback if this Court were to declare the Act unconstitutional.

41. The upshot is that the Petition is not proved, lacks merit, and is dismissed with no orders on costs.

Orders accordingly.

Dated, Signed and Delivered at Mombasa this 29th day of April 2021.

E. K. OGOLA

JUDGE

Mr. Gikandi for Petitioner

Ms. Rukia for Hon. Attorney General

Mr. Mohamed Court Assistant