



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**CONSTITUTIONAL PETITION NO. 52 OF 2021**

**MUSLIMS FOR HUMAN RIGHTS(MUHURI).....PETITIONER**

**VERSUS**

**KENYA FERRY SERVICES LIMITED**

**CABINET SECRETARY MINISTRY OF TRANSPORT & INFRASTRUCTURE**

**ATTORNEY GENERAL.....RESPONDENTS**

**RULING**

**Introduction**

1. By a Notice of Motion dated 15/4/2021 the Petitioner herein prays for the following orders:

**i. Spent**

**ii. That pending the hearing and determination of this petition this honourable court be pleased to restrain the 1<sup>st</sup> Respondent, by itself, its servants and or agents or otherwise howsoever, from imposing payment toll charges for the said crossing via the sole payment platform of Safaricom's Mpesa, as opposed to other forms of cashless payments and or cash/Kenyan currency.**

**iii. That pending hearing and final determination of the petition herein, this honourable court be pleased to issue orders compelling the 1<sup>st</sup> Respondent, by itself, its servants and or agents or otherwise, howsoever to accept all acceptable forms of cashless payments [and NOT only mpesa] and cash in respect of payment of toll charges payable at the said ferry crossing.**

**iv. That the cost of this application be provided for.**

**Petitioner's Case**

2. The application is pegged on the facts that on 18/2/2021 while heading to the southern mainland on official business a member of the Petitioner was forcibly compelled to cut short his journey after failing to pay for toll charges vide the cashless Mpesa payment mode. The application is supported by an affidavit sworn by one **Khelef Khalifa** on 15/4/2021. The petition is alleged to be brought in the public's interest under Article 22[2] of the constitution and pleads an infringement of certain rights of the Petitioner. In summary the Petitioner stated that the 1<sup>st</sup> Respondent had launched a cashless payment system as mode of toll collection at the Likoni Ferry crossing to the exclusion of cash payments including other acceptable cashless payment systems. That the said actions were oppressive, discriminative and unfair and contrary to the bill of rights as enshrined in the constitution. The petitioner stated that the cashless payment vide Mpesa curtailed the freedom of movement as envisaged under article 36 of the constitution and the refusal to accept cash payments constituted an illegality.

3. The Petitioner in the submissions filed in court on 13/5/2021 submitted that online payment of ferry toll charges at the Likoni Ferry Channel were unconstitutional and a gross violation of the Petitioners rights. That the said violations were an infringement of articles 10,27,36,43 and 201 of the constitution 2010. It was further submitted that the use of Mpesa cashless payment to the exclusion of other acceptable modes of cashless payment was unconstitutional and oppressive. They prayed for the court to grant the orders sought in the notice of motion and placed reliance on **Law Society of Kenya Vs The Head Of Public Service And Judicial Service Commission Nairobi HC**

**Respondents' Case**

4. It is the Respondents case that before the cashless system was launched, lawful procedures involving the relevant stake holders were undertaken. That public awareness campaigns were conducted and the information provided on the mode of payment that was to be initiated. The Respondents allege that sometime in February, 2021 a member of the Petitioner was arrested and charged with creating disturbance at the ferry channel after being informed that payment for toll charges would only be made through the cashless system via Mpesa. That it was after the said ordeal that the petition before court was filed. It is the Respondents take that the petition was made in retaliation of the arrest made and the charges preferred against the Petitioner in the criminal court.

5. The 1<sup>st</sup> Respondent submitted that the application did not meet the principles outlined for the grant of conservatory orders as was expressed in **Board Of Management Of Uhuru Secondary School Vs City County Director Of Education & 2 Others [2015] eKLR**. It was further submitted that a prima facie case had not been established against the 1<sup>st</sup> Respondent on how the Petitioner would suffer any prejudice and danger by the cashless mobile payment system. That the system had been lawfully and properly procured with public participation and engagements and consultations from various stakeholders.

6. Mr. Kitur, learned counsel for the 1<sup>st</sup> Respondent further submitted that the application had been instituted for the ulterior motives after a member of the Petitioner was arrested for creating disturbance over payment at the ferry and consequently charged. That the petition is incompetent and full of bare allegations. The Respondent prayed for the application to be dismissed for failure to discharge the burden of proof of alleged violations.

7. In their submissions filed before court on 10/6/2021 the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents curved out two issues for determination;

**a. Whether the application and petition should be dismissed for material non-disclosure of facts and**

**b. Whether the motion was proved by sufficient evidence.**

8. On the first issue for determination, it was submitted that the Petitioners omitted facts that on 18/10/2021 the chairperson of the Petitioner and a member created disturbance in a manner likely to cause a breach of peace by blocking the road and bringing operations at the ferry to a standstill. That after being arraigned in court on the said charges they then filed the instant petition, a clear indication that it was not for public interest but to defend personal interests.

9. M/s Njau, learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents further submitted that any party coming to court ought to disclose all material facts before being granted orders sought. Reliance was placed on the holding in **Aviation & Airport Services Workers Union v Kenya Airports Authority & Another [2014] Eklr**. Counsel further cited **Ruaha Concrete Co Ltd v Paramount Universal Bank HCC 430/2002** on jurisprudence on non-disclosure. They prayed for the application to be dismissed for material non-disclosure of facts.

10. On the 2<sup>nd</sup> issue for determination, it was submitted that no evidence had been presented by the Petitioner to warrant the orders sought. That no proof of loss and damages incurred as a result of use of the cashless system had been submitted and further that the court had not been furnished detailed report demonstrating the alleged unfairness as a result of the use of cashless system. It was submitted that the Petitioners had failed in demonstrating the impact of the alleged discrimination and unfairness on them as was held in **Pevans East Africa Limited v Betting Control and Licensing Board and 2 Others [2019] eKLR**. Further reliance on lack of sufficient evidence was placed on **Ahmed Mohammed Noor v Abdi Aziz Osman [2019] eKLR** and **Leonard Otieno v Airel Kenya Limited [2015]**. It was prayed that the court ought to dismiss the application with costs.

**The Determination**

11. After consideration of the grounds upon which the application is premised and the parties submissions, I raised the following issues for determination:

**Whether the Petitioner has demonstrated a prima case with a likelihood of success so as to secure the orders sought.**

12. The principles for grant of mandatory injunctions are well settled in **Kenya Breweries Ltd & Another v Washington Okeyo[2002]** where the court held as follows:

**“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff”.**

13. On whether the Petitioner has established a prima facie case, the court of appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR** defined a prima facie case as follows;

**“A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”**

14. In the present case the Petitioner alleges that the introduction of cashless payment of the toll charges at the ferry are a violation of their rights under Articles 10,27,36,43 and 201 of the constitution. The evidence by the Respondents is that the provision of cashless system using Mpesa and integrated revenue collection by National Bank were entered into procedurally. It was further evidenced that public awareness campaigns were conducted in all radio stations and branded messages on billboards across the ferry.

15. The Petitioner has stated that effective February 2021 motorists, persons and entities liable to pay toll charges in order to use the ferry were requested to use cashless payment to the exclusion of all other payment methods some of which were also cashless. That the said payment method has greatly inconvenienced the users and thrown their lives into jeopardy and that they are likely to suffer irreparable loss and damage.

16. In my view the allegations by the Petitioner have not been well substantiated. No evidence has been presented before the court in demonstration of the losses and damage likely to be suffered by the Petitioners. The application did not set out clearly the rights that are being violated and the manner in which the same are being violated. It is clear that the application falls short of the threshold set out in Anarita Karimi Njeru v The Republic [1976-1980]KLR 1272 and in Mumo Matemu v Trusted Society Of Human Rights Alliance & 5 Others[2013] eKLR where both courts held that:

**“constitutional violations must be pleaded with a reasonable degree of precision”.**

17. In as much as the orders made in this motion may substantively mirror possible argument for the petition, it is my finding that the application herein lacks merit and is hereby dismissed. Parties shall bear own costs.

It is hereby ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2021**

**E. K. OGOLA**

**JUDGE**

Ruling delivered via MS Teams in the presence of:

Ms. Chaka holding brief Kazungu for Petitioner

Mr. Kitur for Respondents

Ms. Peris Court Assistant