



REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CONSTITUTIONAL PETITION NO. 16 OF 2018

IN THE MATTER OF ARTICLES 6(3), 169(1) AND 172(1)

OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF GOVERNMENT PROCEEDINGS

ACT CAP 40 LAWS OF KENYA

AND

IN THE MMATTER OF THE WHOLE OF PART II OF

THE SMALL CLAIMS COURT ACT 2016

AND

IN THE MATTER OF PART IV, SECTIONS 17, 18(1)(2)(3), 19(1)(2),

20 (1)(2)(3), 21(1)(2)(3), 22 (1)(a)(b)(c) OF THE SMALL CLAIMS COURT ACT

BETWEEN

EMMANUEL WAFULA OUNA.....PETITIONER

AND

THE HON. CHIEF JUSTICE.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

JUDICIAL SERVICE COMMISSION.....3RD RESPONDENT

RULING

By his petition dated 19th December, 2019, the petitioner seeks;

- a. A declaration that the Small Claims Court Act came into assent on 1st April, 2016 and its date of commencement was on the 21st April, 2016 and that to date, the respondents have bot complied with the whole of the provisions of part II of the act as stated in paragraph 11 and the respondents should therefore act with speed.**
- b. A declaration that the respondents have to date not formed Rules governing the Small Claims Court Act and should therefore act with maximum speed.**
- c. A directive as to whether the proceedings brought, filed and prosecuted by legal practitioners under the small claims court act are legal proceedings or are null and void.**

d. A declaration that there be structural offices to which the representatives referred to in Section 20(2) will be answerable to, in case of business gone wrong ranging from sub county level to the national level, other than the one established under part II of the Small Claims Court Act, to be headed by the petitioner in the meantime.

e. That each of the representatives referred to in Section 20(2) and those that shall be appointed under Section 5(1)(2)(a)(b) 6(1)(2) and 8 as Judicial Officers to deposit Kshs 2,000.00 in the petitioner's account number 0110947092927500 with Cooperative Bank of Kenya being contribution to the petitioner's costs for bringing up this petition before being allowed to represent and or occupy their respective offices.

The petitioner avers that the Act was assented to, the respondents have neither complied with the whole of part II nor formed the Rules governing the Small Claims Court. That despite the aforesaid shortcomings, legal practitioners have continued to file and prosecute matters in the Small Claims Court contrary to the provisions of Section 20(2).

The petitioner avers that the failure to operationalize the Small Claims Court Act has adversely affected many litigants since the usual courts have acted with a lot of resistance against the representatives mentioned in Section 20(2) due to non-operationalization of the Act which has already been assented into. He further avers that the respondents have not put in place the office mentioned in Section 20(2).

The 1st and 3rd respondents filed their amended response to the petition stating inter alia that the establishment of the Small Claims Court is dependent on the allocation of funds by the National Assembly and the National Government however in discharge of their mandate, the 1st and 2nd respondent have since caused the publication of the Small Claims Court Rules, 2019 on 23/8/2019 vide Gazette Number 145.

That the failure to recruit the adjudicators and put in place the requisite physical facilities has been caused by the failure of the national assembly to allocate sufficient funds to the judiciary and therefore the respondents' failure to operationalize the court has been caused by circumstances beyond their control.

The 2nd respondent on its part in opposition to the petition stated that the mere fact that the Small Claims Court Act has not been operationalized is by itself a violation of the petitioner's constitutional rights and freedoms. That the petitioner lacks *locus standi* to institute the petition, that the petitioner has not particularized how his fundamental rights and freedoms have been violated.

It is averred that the petitioner ought to have enjoined the Law Society of Kenya in light of prayer (c) and finally that the petitioner is not entitled to the orders sought as it is intended to benefit the petitioner personally.

The petition was disposed of by way of written submissions. Only the petitioner and the 2nd respondent complied by filing submissions. The court has carefully noted the submissions. The issues raised by the petition are;

- 1. Whether the petition meets the threshold of a constitutional petition.**
- 2. Whether the petitioner is entitled to the orders sought.**

Whether the petition meets the threshold of a constitutional petition

The 2nd respondent has urged this court to find that the petitioner has not invoked the specific Articles of the Constitution that have been infringed. That the petition does meet the condition set in *Anarita Karimi Njeru vs R (1979)eKLR* which propounded the principle that constitutional petitions ought to be set out with reasonable precision the rights that were violated and in what manner.

The principle was restated in *Leonard Otieno Vs. Airtel Kenya Limited (2018) eKLR* where Mativo J. held:-

It is fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the proposition he asserts to prove his claim. Decisions on violation of Constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the constitution an inevitable result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.

Having carefully perused the petition, the petitioner has set out a number of Articles of the constitution he alleges have been infringed. The Articles allegedly infringed are set out hereunder; Article 6(3) provides;

(3) A national State organ shall ensure reasonable access to its services in all parts of the Republic, so far as it is appropriate to do so having regard to the nature of the service.

Article 169(1)(d) on the other hand provides;

any other court or local tribunal as may be established by an Act of Parliament, other than the courts established as required by Article 162 (2).

Similarly, Article 172(1) states;-

The Judicial Service Commission shall promote and facilitate the independence and accountability of the judiciary and the

efficient, effective and transparent administration of justice and shall—

(a) recommend to the President persons for appointment as judges;

(b) review and make recommendations on the conditions of service of—

(i) judges and judicial officers, other than their remuneration; and

(ii) the staff of the Judiciary;

(c) appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary, in the manner prescribed by an Act of Parliament;

(d) prepare and implement programmes for the continuing education and training of judges and judicial officers; and

(e) advise the national government on improving the efficiency of the administration of justice.

The petitioner has not explained how his rights under the said Articles have been violated. It is not lost to this court that this court is mandated by Article 159 of the Constitution to administer substantive justice without undue regard to technicalities. This however is not a leeway for litigants to throw out of the window procedural dictates of the law.

In the circumstances of this case, it is not in dispute that the National Assembly enacted the Small Claims Court Act which had not been fully operationalized at the time of filing the petition. The Regulations and Rules had not been formulated either. The rules were published on 23/8/2019.

Failure to operationalize the court of course is indeed dependent on many factors as rightly contended by the 1st and 3rd respondents as including but not limited to the availability and or allocation funds to the Judiciary by the National Assembly. That does not however mean that failing to put in place structures to actualize the Act at the time it was assented to was unconstitutional. No material has been placed before this court to prove this fact.

It is therefore a finding of this court the petition as drafted has not set out with precision the specific Articles of the constitution allegedly infringed. The manner in which the Articles have been infringed has not also been explained. In sum total, the petition does not meet the threshold of a constitutional petition.

Having found as above, it is the inevitable finding of this court that the prayers sought are not tenable and not capable of being granted.

The petition is hereby dismissed with no orders to costs.

DATED AT BUNGOMA THIS 29TH DAY OF OCTOBER, 2021

S. N. RIECHI.

J U D G E.