



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO. 034 OF 2021

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

AND

**IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 27, 28, 29, 32, 33, 35, 36, 39, 50, 159, 165, 258 AND 259 OF THE
CONSTITUTION**

AND

IN THE MATTE ROF SIX SCHEDULE OF THE CONSTITUTION OF KENYA 2010

BETWEEN

SELLA ROSE ANYANGO.....PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT

NAIROBI CITY WATER AND SEWERAGE COMPANY.....3RD RESPONDENT

RULING

THE PETITION

1. The Petitioner through a Petition and Supporting Affidavit dated 18th May 2020 raises allegations that the malicious prosecution and incarceration of the Petitioner before she could raise bail at the behest of the 3rd Respondent violated her right to be treated with dignity as provided under **Article 28 of the Constitution**.
2. Furthermore, the Petitioner alleges that the malicious prosecution and incarceration of the Petitioner without any justification or reasons whatsoever by the 2nd Respondent violated the Petitioner's right to be treated with dignity as provided under **Article 28 of the Constitution of Kenya**. The Petitioner additionally claims that her rights under **Article 27 (1) (4) and (5), 29 (d) (f), 32, 33, 35, 39, and 157 (11) of the Constitution** were violated by the Respondents.

PRELIMINARY OBJECTION

3. The Application herein emanates from the 3rd Respondent's Preliminary Objection dated 1st March 2021. The 3rd Respondent contends that the entire Petition is *ex-facie* incompetent, fatally defective and an abuse of the court process as the cause of action herein sounds in tort and consequently the Petitioner ought to have approached the Court by way of an ordinary suit.
4. The 3rd Respondent seeks that the entire Petition to be struck out with costs.
5. The 1st Respondent also filed a Preliminary Objection dated 23rd February 2021 asserting that the Petitioner's claim is pegged on malicious prosecution which is a civil tort and not a constitutional issue. They claim that this Court lacks the jurisdiction to hear and determine the issues raised in the Petition and that the Petition ought to be dismissed.

PETITIONER'S RESPONSE

6. The Petitioner filed a Replying Affidavit dated 3rd March 2021 in response to the Preliminary Objection dated 1st March 2021. The Petitioner asserts that the 3rd Respondent's Preliminary Objection is incurably defective as the same does not raise a pure point of law. Furthermore, it does not meet the legal threshold as the 3rd Respondent through its Replying Affidavit dated 23rd February 2021 have disputed the facts as pleaded in the Petition and the Supporting Affidavit.

7. The Petitioner further contends that the 3rd Respondent's Preliminary Objection is a clear admission of liability of infringement of her constitutional rights by its officers. The Petitioner avers that the Respondent's Preliminary Objection is misconceived, malicious and an abuse of the process of the Court and should be dismissed with costs to the Petitioner.

3RD RESPONDENT'S SUBMISSIONS

8. The 3rd Respondent filed Submissions dated 13th April 2021 in support of its Notice of Preliminary Objection.

9. The 3rd Respondent submits that the Petitioner's claim for damages for wrongful arrests, false imprisonment and malicious prosecution is founded on the law of torts and can be adjudicated upon by filing ordinary suits.

10. It is further submitted that it is now settled that where there is an alternative remedy of filing a suit in the ordinary civil courts, a party ought not to invoke the jurisdiction of the High Court acting as a Constitutional Court. Furthermore, it is asserted that the remedies under the Bill of Rights in the Constitution should be reserved for appropriate and serious occasions. The 3rd Respondent's arguments are buttressed by the decisions in *Uhuru Muigai Kenyatta v Nairobi Star Publication Limited [2013] eKLR*; *Grays Jepkemoi Kiplagat v Zakayo Chepkoga Cheruiyot [2021] eKLR*; *Speaker of the National Assembly v James Njenga Karume [1992] eKLR*; *Bethwell Allan Omondi Okal v Telkom (K) Ltd (Founder) and 9 others [2017] eKLR*.

11. The 3rd Respondent submits that the petition does not meet the requisite legal threshold as to warrant this Honourable Court grant the orders sought. The Court is urged to strike out the Petition with costs.

PETITIONER'S SUBMISSIONS

12. The Petitioner through her Written Submissions dated 15th April 2021 identifies four issues for determination:-

I. WHETHER THE 1ST AND 3RD RESPONDENT'S PRELIMINARY OBJECTION HAS MET THE LEGAL THRESHOLD OF A PRELIMINARY OBJECTION.

13. The Petitioner under the above, first issue submits that the 1st and 3rd Respondents Preliminary Objections do not meet the three ingredients of a preliminary objection as enunciated in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696*. The Petitioner contends that the grounds raised by the 1st and 3rd Respondents are not pure points of law. This is supported by the decision of the Court in *Moses Naula & 358 others v Attorney General & 4 others [2014] eKLR*.

14. The Petitioner further argues that the 3rd Respondent through its Replying Affidavit contests the facts as pleaded in the Petition. In that regard, the 3rd Respondent's Preliminary Objection lacks the second ingredient which demands that there be a demonstration that all facts pleaded by the other side are correct and subsequently it fails the legal test.

15. Concerning the final ingredient of a preliminary objection, the Petitioner avers that the 1st and 3rd Respondents' P.Os are anchored on whether the Petitioner's petition has met the requisite legal threshold to be a Constitutional Petition. This issue requires more evidence and further interrogation by this Honourable Court which cannot be determined at this preliminary stage. The Petitioner claims that the 1st Respondent's P.O. does not meet the legal threshold as they lack some ingredients. Reliance is placed on the holding in *Attorney General & another v Andrew Maina Githinji & another [2016] eKLR*.

II. WHETHER THE PETITIONER OUGHT TO HAVE INSTITUTED A SUIT CLAIMING DAMAGES FOR MALICIOUS PROSECUTION AS OPPOSED TO A CONSTITUTIONAL PETITION

16. The Petitioner on the second issue submits that her Petition is not wholly about malicious prosecution, as it is also about the violation of her fundamental rights and freedoms before the actual prosecution in total contravention of the Constitution. The Petitioner raises the concept of 'constitutional torts' and relies on the holding of Justice M. Mativo in *John Atelu Omila & another v Attorney General & 4 others [2017] eKLR*; to argue that this Court has the requisite jurisdiction to hear and determine the issues raised in the Petition.

III. WHETHER THE PETITIONER'S PETITION AS DRAFTED MEETS THE LEGAL THRESHOLD OF A CONSTITUTIONAL PETITION.

17. The Petitioner on the 3rd issue contends that her Petition has met the threshold to be a constitutional petition. The Petitioner submits that with precision she has identified the constitutional provisions that were violated by the Respondents and the manner of those violations. Furthermore, she asserts that it is in the precise manner in which she has identified the constitutional provisions that were violated that has enabled the 3rd Respondent to respond to the Petition. The Petitioner asserts that there is no other avenue for redress for her. Reliance is placed on the decision in *Elias Mwangi Mugwe v Public Procurement Administrative Review Board & 5 others [2016] eKLR*.

IV. WHETHER THIS HONOURABLE COURT IS CLOTHED WITH THE REQUISITE LEGAL JURISDICTION TO HEAR AND DETERMINE THE ISSUES RAISED BY THE PETITIONER IN HER PETITIONER.

18. The Petitioner on the fourth issue contends that the 3rd Respondent in its submissions has cited authorities to buttress the point that there is parallel redress which is available to the Petitioner to get remedies, however, those authorities are distinguishable and do not address the issues raised by the Petitioner. The Petitioner submits that the authorities may not assist this Honourable Court in making a fair and just determination of the objection.

ANALYSIS AND DETERMINATION

19. Upon consideration of the pleadings and rival submission I find that the following issues arises for determination:-

- a) *Whether the Petition meets the threshold for a constitutional Petition.*
- b) *Whether the 3rd Respondent's preliminary objection meets the legal threshold for preliminary objection.*
- c) *Whether the Court has the requisite jurisdiction to hear and determine the issues in the Petition herein.*

A. WHETHER THE PETITION MEETS THE THRESHOLD FOR A CONSTITUTIONAL PETITION.

20. On the enforcement of the Bill of Rights **Article 22(1) of the Constitution** clearly provides that 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.

21. The ingredients of a Constitutional Petition was clearly formulated in the case of **Anarita Karimi Njeru vs. Republic (1979) eKLR** where it was partly stated as follows:-

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

22. Similarly in the case of **Mumo Matemo v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** the Court stated that:-

*“(42) However, our analysis cannot end at that level of generality. It was the High Court's observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting.” Yet the principle in **Anarita Karimi Njeru (supra)** underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under section 1A and 1B of the Civil Procedure Act (Cap 21) and section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the Court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in **Anarita Karimi Njeru (supra)** that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of **Thorpe v Holdsworth (1876) 3 Ch. D. 637 at 639** holds true today:*

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

(43) The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the Constitution, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the Constitution and the rule of law, without any particulars.

*(44) We wish to reaffirm the principle holding on this question in **Anarita Karimi Njeru (supra)**. In view of this, we find that the Petition before the High Court did not meet the threshold established in that case. At the very least, the 1st Respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the Petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting,” without requiring remedy by the 1st Respondent.”*

23. It should be noted the case of **Anarita Karimi Njeru (supra)** has been relied upon from time and time again to demonstrate the threshold of a successful Constitutional Petition. It should be appreciated the requirements for a successful Constitutional Petition are simple and are thus:- the Petitioner should set out the Constitutional provisions, which he believes have been violated or threatened, and the manner in

which the Respondent(s) have violated those provisions. It is not enough for the Petitioner to just list the Constitutional Provisions without demonstrating how they were infringed upon.

24. I have taken time to read through the Petition dated 18th May 2020 and in particular, the section titled “**Constitutional provisions violated**”. Paragraph 36 to 44 of the Petition and upon consideration of the same, it is clear to me that the Petitioner has laid out the actions by the Respondents which she believes were wrong and unconstitutional as well as the provisions of the Constitution which the Petitioner belief were violated. Further I have found that the Petitioner has clearly provided “**who**” “**what**” and “**why**” to this Court and as such I find that the Petition as drawn and filed meets the threshold for a Constitutional Petition as clearly enumerated in the *Anarita Karimi Njeru case (supra)*.

B. WHETHER THE 3RD RESPONDENT’S PRELIMINARY OBJECTION MEETS THE LEGAL THRESHOLD FOR PRELIMINARY OBJECTION.

25. The 3rd Respondent preliminary objection dated 1st March 2021 raises the following ground of objection.

“a) We wish to put in the submissions hereunder in support of the 3rd Respondent’s Notice of Preliminary Objection dated 1st March, 2021.

b) The Notice of Preliminary objection is to the effect that the entire Petition is ex-facie incompetent, fatally defective and an abuse of the Court process as the cause of action herein sounds in tort and consequently the Petitioner ought to have approached the Court by way of an ordinary suit.

c) On the basis of the foregoing, the 3rd Respondent seeks to have the entire Petition struck out with costs.”

26. The Preliminary Objection was clearly defined in the case of *I.N. & 5 others v. Board of Management St G. School Nairobi & another (2017)*

pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.... A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion.... The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence." (Emphasis added)

13. Thus, a preliminary objection may only be raised on a "pure question of law." To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.

14. In law, a question of law, also known as a point of law, is a question that must be answered by applying relevant legal principles to interpretation of the law. Such a question is distinct from a question of fact, which must be answered by reference to facts and evidence as well as inferences arising from those facts.

15. In law, a question of fact, also known as a point of fact, is a question that must be answered by reference to facts and evidence as well as inferences arising from those facts. Such a question is distinct from a question of law, which must be answered by applying relevant legal principles. The answer to a question of fact (a "finding of fact") usually depends on particular circumstances or factual situations."

27. In response to the 3rd Respondent's statutory objection, the Petitioner on her part urges that the 3rd Respondent has not met the threshold for what comprises of a preliminary objection. It is contended that the 3rd Respondent has not met all of the requirements provided for under the precedents provided. It is no doubt that, in order for a preliminary objection to be successful three elements must be satisfied. The preliminary objection must raise a pure point of law; all facts pleaded by the other side should be correct and agreed upon and that there should be no facts that need to be ascertained.

28. The Respondent has not met all the requirements. On the first element, the Respondent claim that the Petition is an ordinary suit disguised as a Constitutional Petition. I agree with the holding in *Moses Naula & 358 others v. Attorney General & 4 others [2014] eKLR (Supra)* as raised by the Petitioner, that in order to determine such a question there must be an investigation into the facts of the case. This therefore fails the first test. On the second element, the Respondent having filed a Replying Affidavit dated 23rd February 2021 denying the allegations made by the Petitioner in her Petition, the second test similarly fails. On the final requirements, I have already determined that certain facts must be ascertained in order to determine whether the Petition meets the Constitutional threshold. I therefore find the preliminary objection fails the final test.

C. WHETHER THE COURT HAS THE REQUISITE JURISDICTION TO HEAR AND DETERMINE THE ISSUES IN THE PETITION HEREIN.

29. The authority of Courts to uphold and enforce the Bill of Rights is provided for under *Article 23 of the Constitution* which provides:-

"23. (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(2)

(3) In any proceedings brought under Article 22, a Court may grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review."

30. The jurisdiction of the High Court is clearly spelled out under *Article 165(1)(3)(b) of the Constitution* which provides:-

“(1) there is established that High Court, which

a)

b)

(2)

(3) Subject to clause (5), the High Court shall have—

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.”

31. In determining the 3rd Respondents’ preliminary objection I am called upon to consider what is otherwise referred to as the concept of constitutional “**Tort**” which was considered in the case of *John Atelu Omilia & Another v. Attorney General & 4 others [2017] eKLR* where the Court stated:-

“The concept of constitutional "Tort"

The question that follows is whether or not the petitioners ought to have instituted a suit claiming damages for malicious prosecution as opposed to a constitutional petition. It is important for the court to address its mind to the question of the ambit of the courts' duty to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights as intended in our transformative constitution to ensure that the normative value system created by the Constitution permeates the common law.

Michael Wells [17] argues that:-

"officers may harm persons in many ways. When an official inflicts a physical injury, causes emotional distress, publishes defamatory statements, or initiates a malicious prosecution, the victim's traditional recourse is a tort suit brought under common law or statutory principles. But an alternative to ordinary tort may also be available. The growth of damage remedies for constitutional violations in the decades following Monroe v. Pape' has encouraged litigants to frame their cases as breaches of the Constitution. These litigants may sue for damages....., or assert the damages cause of action implied from the Constitution In either case the Court's task is to fix the boundary of constitutional tort. It must determine whether the plaintiff has a good claim for breach of a substantive constitutional right, or instead must sue under ordinary tort law."

32. So what does constitutional tort refer to A “**Constitutional tort**” refers to a private civil suit brought to redress a constitutional violation.

[18] Constitutional torts are violation of one's constitutional rights by a government servant. "Constitutional tort" actions are an avenue through which individuals can directly appeal to the Constitution as a source of right to remedy government-inflicted injury. This sort of access is a recent phenomenon. Before the twentieth century, the Constitution primarily served a structural function, with litigation focused on the limits of government power. Suits seeking to hold government liable for individual injuries were brought in state courts pursuant to the common law. It was not until the U.S. Supreme Court decisions in Monroe vs. Pape

[19] and Bivens vs. Six Unknown Named Agents of Federal Bureau of Narcotics

[20] that individuals began arguing that the Constitution entitled them to damages for wrongful injury.”

33. Further when “**Constitutional tort**” is examined as an individual remedy, it becomes clear that the “**constitutional tort**” action has had more than a narrowing influence on rights. By shifting the attention of the courts to the injury suffered by individuals, “**constitutional tort**” actions have influenced courts, encouraging the establishment of constitutional rights that both protect individuals from governmental injury and regulate the discretion of the government to inflict injury. As a result, the concept of individual harm is now incorporated into the substance of many constitutional rights. Instead of having a wholly negative effect on the scope of constitutional rights, the “**constitutional tort**” remedy contributes to a broader process of rights definition where abstract constitutional provisions are translated into terms relevant to individuals’ injuries. Regardless of whether or not one can justify monetary awards for constitutional rights violations on compensation or deterrence grounds, as an individual remedy, the “**constitutional tort**” action serves a unique role in the range of remedies courts use to enforce the Constitution. **The “constitutional tort”** action sets and enforces limits on governmental discretion in a way that structural injunction and other remedies cannot.

34. The clear purpose of the “**Constitutional tort**” actions are to compensate and deter Constitutional rights violations. It serves the purpose of remedying an individual’s injury with a damage award which enforces the Constitution and sets adequate monetary disincentives to unconstitutional action. “**Constitutional tort**” actions are not only about rights protecting individuals from certain forms of injuries but also about norms that regulate government action; a court determines both that the plaintiff has a right rooted in the law and that a defendant has a correlative duty to the plaintiff to avoid violating that right. Thus, a protective right in a sense imposes a correlative duty on the government.

35. It therefore follows that a Court must bear in mind constitutional norms when deciding whether the case before it is in principle one in

which the wrong doer should be held liable. The principles themselves, are embodied in a test, focusing on the subjective question as to whether the conduct complained is consistent with constitutional norms. The particular question to be decided in this matter is the liability of the state for acts committed by its agents while on duty.

36. I find in considering a matter such as this one that the principles of liability for malicious prosecution, has been developed to accord more fully with the spirit, purport and objects of the Constitution. This means that the existing principles of common-law of tort have to be understood and applied within the normative framework of the Constitution.

37. The Respondent claim that the only avenue for redress available to the Petitioner herein is a civil claim for wrongful arrest, false imprisonment and malicious prosecution. I however do not agree nor find this to be entirely correct since there is an established concept known as “*constitutional tort*”, as I have stated hereinabove. Thanks to the concept, a litigant can pursue a state actor for acts resulting in the violation of the constitutional rights and freedoms. I find that the Petitioner herein is well within her constitutional rights to file a Petition against the Respondents for violation of the constitutional rights as a constitutional tort.

38. The upshot is that the preliminary objection is without merits. It is dismissed with costs. The Petition may be set down for hearing and determination on merits.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF OCTOBER, 2021.

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J. A. MAKAU

JUDGE OF THE HIGH COURT OF KENYA