



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CONSTITUTION PETITION NO. 6 OF 2019

IN THE MATTER OF ARTICLES 2, 3, 10, 12, 14 (1)-(3), 16, 19, 20 (1)-(4), 21, 22, 23, 24, 29, 47, 159, 165 (3), 238, 244, 245, 258 AND 259 OF THE CONSTITUTION AND ALL OTHER ATTENDANT RIGHTS

BETWEEN

DELAILA NASIMIYU WAFULA.....PETITIONER

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

THE DPP.....2ND RESPONDENT

THE JUDICIAL SERVICE COMMISSION.....3RD RESPONDENT

POLICE SERVICE COMMISSION.....4TH RESPONDENT

LSK.....5TH RESPONDENT

AUCTIONEERS LICENSING COMMISSION.....6TH RESPONDENT

AND

ROSE NAKHUNGU OLWOCHI.....1ST INTERESTED PARTY

YVET OLWOCHI.....2ND INTERESTED PARTY

SAMSON ITONDE TUMBO.....3RD INTERESTED PARTY

ANWAR AHMED.....4TH INTERESTED PARTY

RULING

1. Vide a Petition dated **25th April, 2019** the Petitioner, Delaila Nasimiyu Wafula, citing several violations of the Constitution with respect to destruction and attachment of her property with the alleged backing of the Court Order of breaking and attachment of the property which had been issued by Hon. C.A.S Mutai of Bungoma law courts who had earlier dismissed the Petitioner's suit for lacking jurisdiction.

2. The factual background as set out in the petition is that, the Petitioner in the month of October, 2018 had earlier rented business premises from the 2nd Interested Party, filled a suit against the 1st and 2nd Interested Parties herein in the Bungoma law courts vide suit number 450 of 2018. The 4th Respondent then acting for the 1st and 2nd Interested Parties filed an objection claiming the court didn't have jurisdiction to hear and determine the suit. The court ruled in favour of the 1st and 2nd Interested Parties in which the whole suit was dismissed on grounds that the court didn't have jurisdiction to hear and determine the said suit. That on 19th March, 2019 the 3rd Interested Party went to the Petitioner's business premises accompanied by two police officers from Bungoma Police station and over thirty goons with an order of breaking and attachment of property which had been issued by Hon. C.A.S Mutai of Bungoma law courts who had earlier dismissed the Petitioner's suit. The 2nd Interested Party had issued the Petitioner with an eviction notice which the Petitioner had objected to at the

Business Premises Rent Tribunal and hence there was a pending suit vide the said BPRT suit No. 12 of 2019 which was to come up for hearing in September 2019. The 3rd Interested Party finding the business premises open and business on going, directed the goons to get down to work and who demolished the business by damaging property and stealing some valuables while two police officers kept watch. The petitioner contends that the action of the 3rd Interested Party and the Police Officers action in forcefully evicting the Petitioner has denied her the right to be heard by the BPRT. The petitioner states that she brings her petition in the public interest and for the protection of the rule of law with respect to exercise of duties and functions. She avers that her right to be heard both in Bungoma law courts and the Business Premises Rent Tribunal was violated according to Article 22 and 258 of the Constitution of Kenya. She further avers that the National Police Service did not adhere to Article 244 of the Constitution when handling the issue.

3. The constitutional foundation for the petition is said to be Articles 2, 3, 10, 12, 14 (1) -(3), 16, 19, 20 (1) -(4), 21, 22, 23, 24, 29, 47, 159, 165 (3), 238, 244, 245, 258 and 259.

4. The Petitioner seeks the following reliefs:

a) A declaration that the earlier orders issued in the suit no. 450 of 2018 are NULL and VOID as the said court declared itself without jurisdiction.

b) A declaration that the act of 1st, 2nd, 3rd and 4th Interested Parties to forcefully evict the Petitioner, by demolishing, damaging and stealing her valuables was a criminal offence and they be prosecuted for the same.

c) A declaration that the Petitioner's constitutional right to equality before the law, human dignity, fair administrative action and fair hearing as guaranteed by Article 25 (c), 27, 28, 29, 47 and 50 of the Constitution were violated and/or threatened to be violated by the 4th Interested Party.

d) A declaration that the police officers turning a proclamation order to an eviction order leading to damage of property and stealing was unlawful.

e) An order directing the 2nd interested party to refund the petitioner's deposit and rent to the tune of Kshs 12,500 with interest at court rates.

f) A declaration that the 4th interested party's action of ignoring the law to satisfy the interest of his clients was malicious and a direction to the 5th respondent to take disciplinary action upon him as per their rules and regulations.

g) An order directing the 6th respondent to take disciplinary action against the 3rd interested party for incompetence and irregularities as per their rules and regulations.

h) An order that the 1st 2nd 3rd and 4th interested parties do pay the petitioner damages for forceful eviction and damage to property.

i) General damages consequential upon the declarations of violation of the fundamental rights.

j) That the costs and interest of this petition be provided for.

k) Such further, other and consequential orders this honourable court may deem fit to grant.

5. Upon being served, the 1st and 2nd Interested Parties filled their response to the Petition through replying affidavits and in addition raised a notice of preliminary objection dated 1st September, 2021 on point of law seeking the dismissal of the Petition with costs to the Petitioner, on the grounds that:

i. The Petition raises no bonafide constitutional issue.

ii. The Petition goes to the principle of Constitutional avoidance.

iii. The Petitioner has not demonstrated the violation of her constitutional rights.

iv. The Petitioner's claim can be addressed in an ordinary civil suit and this court lacks jurisdiction to entertain this petition.

v. The issues raised in the Petition are contentious issues that cannot be dealt by a constitutional petition.

vi. The petition is an abuse of court process.

6. Directions were given on 22nd November, 2021 which were to the effect that the preliminary objection raised herein be dealt with first and that the same be canvassed by way of written submissions. I have, before me, written submissions filed by the Petitioner and the 1st and 2nd Interested Parties. The rest of the parties did not file any submissions regarding the said preliminary objection dated 1/9/2021.

7. In their written submissions, the 1st and 2nd Interested Parties based their arguments on six points. The first point relates to want of bonafide constitutional issues and lack of jurisdiction of this court to determine the petition, on account of Articles 162 of the Constitution and section 13 of the Environment and Land Court Act, 2011. Counsel relied on the case of *CNM v. WMG (2018) eKLR*.
8. With regard to the second point, it is submitted that the Petition goes counter to the principle of Constitutional avoidance as the issues raised can be canvassed by an ordinary civil suit founded on land law. Counsel relied on the case of **Council of County Governors V. Attorney General & 12 Others (2018) eKLR** amongst others.
9. On point three, it is submitted that the Petitioner has not demonstrated the violation of her constitutional rights. Counsel relied on the cases of **Francis Kimolo Kimatu & 58 others v. Attorney General & 3 Others** and **Purity Kanini Mugo & 52 others (Interested Parties) (2021) eKLR**.
10. On the fourth point, it is argued that the issues raised in the petition can be addressed in an ordinary civil suit and thus this court lacks jurisdiction to determine this petition.
11. On the fifth point, it is argued that the issues raised in the petition are contentious and cannot be dealt with by a constitutional petition. Counsel relied on the case of **Bandari Investment Company Limited v. National Police Service & 22 Others (2018) eKLR**.
12. On the sixth point, about the petition being an abuse of court process., based on the argument that the totality of the other points meant that the petition was filed in abuse of process, and ought to be struck out.
13. Finally, it is argued that since the petitioner was not acting in good faith and not in public interest and hence ought to be condemned to pay costs.
14. The petitioner on her part submitted on a single issue namely, the trial court's lack of jurisdiction. It was submitted that a court that pronounced itself to have no jurisdiction to continue receiving evidence and issuing orders for it to proceed to allow one party to enjoy jurisdiction at the expense of the other was a clear violation of the rights of the other party who was not given audience. Thus, the Petitioner's contention that her constitutional rights be heard in Bungoma law courts was violated by the 3rd respondent, 1st, 2nd and 4th Interested Parties.
15. Although the Interested Parties have split their preliminary objection to six points, there is really only one substantive issue raised in the preliminary objection, and that is whether this court has jurisdiction to hear and determine the petition before me. The interested parties argue that it has no jurisdiction over the matter.
16. Jurisdiction of the High Court, generally, is explicitly stated in Article 165 of the Constitution. Under Article 165(3), the High Court has unlimited original jurisdiction in criminal and civil matters; jurisdiction to determine questions as to whether a fundamental right or freedom in the Bill of Rights has been denied or violated or infringed or threatened; jurisdiction to hear appeals from decisions of constitutional tribunals set up to remove a person from office, save for that set up under Article 144; jurisdiction to hear questions relating to interpretation of the Constitution; and any other original or appellate jurisdiction conferred by the Constitution. A variety of statutes have also conferred both original and appellate jurisdiction on the High Court, and there could be some that have restricted the jurisdiction of the High Court over certain matters. Article 165(5) of the Constitution has set out areas where the High Court has no jurisdiction, and that is with respect to matters reserved for the exclusive jurisdiction of the Supreme Court and the courts envisaged in Article 162(2) of the Constitution.
17. The matter before me is a petition, brought under a variety of constitutional provisions, which I have recited in paragraph 3 of this ruling. The preliminary objection, as framed, in my view, is challenging the jurisdiction of the High Court to entertain a constitutional petition.
18. I have reiterated above the jurisdiction of the High Court as vested by Article 165 of the Constitution. What is of relevance, at this stage, is jurisdiction relating to constitutional petitions. That is what Article 165(3)(b)(d) is about: that is the jurisdiction to hear and determine questions relating to fundamental rights and freedoms, and with respect to interpretation of the constitution.
19. The constitutional provisions upon which the petition before me is premised are Articles 2, 3, 10, 12, 14 (1) -(3), 16, 19, 20 (1) -(4), 21, 22, 23, 24, 29, 47, 159, 165 (3), 238, 244, 245, 258 and 259 of the constitution.
20. Articles 2 and 3 are located in Chapter One of the Constitution, which covers sovereignty of the people and supremacy of the Constitution. Article 2(1) states that no person may claim or exercise State authority except as authorized under the Constitution; while Article 3(1) states that every person has an obligation to respect, uphold and defend the constitution. Article 2(1) underlines the supremacy of the constitution, and the fact that State authority, usually claimed by institutions created by the constitution, such as the respondents, is to be exercised under the constitution. Under Article 3(1), an obligation is given to any person, including the petitioner to defend the constitution.
21. Article 10 is located in Chapter Two of the Constitution, which declares and defines what makes up the Republic of Kenya. Article 10 articulates the national values and principles of governance that that underpin the Republic of Kenya. The values and principles include patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized; good governance; and sustainable development. It is declared that these national values and principles of governance bind all State organs, State officers, public officers and all person whenever any of them applies or interprets the constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.
22. Articles 258 and 259 are in Chapter Seventeen of the constitution, which carries general provisions. Article 258 is on enforcement of the constitution, and it gives every person a right to institute civil proceedings, claiming that the constitution has been contravened or threatened by the intervention. It also states that the person seeking enforcement of the constitution may be acting on behalf of another who cannot act

in their own name; or acting as a member of or in the interest of a group or class of people; or acting in public interest; or an association acting in the interest of one or more of its members. Article 259 is about construction of the constitution. Article 259(1) states that the constitution should be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law and human rights and the fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance.

23. The cause before me is, in my view, framed as a constitutional petition, as it is properly anchored on constitutional provisions. Articles 2(1) and 3(1) are cited to underline the supremacy of the constitution, and the fact that all persons and institutions have a duty to protect, defend, respect and honour it. Articles 258 and 259(1) are cited to support the case that the petitioner was entitled, under the constitution, to bring a constitutional petition, to allege its contravention or a threat of contravention. They are also meant to urge that in construing its provisions, the court ought to be bound to promote its purposes, values and principles; advance the rule of law, human rights and fundamental rights and freedoms; permit development of the law; and contribute to good governance.

24. The case by the petitioner, as I understand it, is not so much about violation of fundamental rights and freedoms, or human rights, but that the Respondents acted in a manner that did not measure up to the constitutional values and principles required of public bodies by the constitution. That is to say that they violated the constitution itself in the process of doing whatever they were required to do by the relevant legislation. I am of the persuasion that the petition before me is properly anchored in the constitution, and to a large extent it meets the standard of what a constitutional petition should be about. Whether it meets the standard set in **Anarita Karimi Njeru vs. Attorney General (1979) KLR 154, Meme vs. Republic [2004] eKLR**, in terms of meeting the minimum test for pleadings in this realm, is something that I shall revert to at the very tail end of this particular ruling. The court in **Anarita Karimi Njeru vs. Attorney General (1979) KLR 154**, which I believe is still the *locus classicus* in this area, despite more recent decisions, and the criticisms it has evoked, stated:

“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 reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

25. As stated above, Articles 10, 29, and 48 are about values and principles of governance generally, fair administrative action and in relation to freedom and security, which would bring the petition within the realm of Article 165(3)(ii), with respect to jurisdiction to interpret the constitution, and specifically in relation to determining questions whether anything said to be done under the constitution, or any law, was consistent with or contravention of the constitution. In my view, the matters raised in the petition bring the same within the jurisdiction of the High Court.

26. The Respondents herein are created by the constitution of Kenya, 2010. They are bound by the values and principles articulated by the constitution, and they are under an obligation to act fully in accordance with its provisions. They are accountable under the constitution. Any person, who is aggrieved by any of the acts of the Respondents, whether done under the constitution or any other law, has a right to challenge the said conduct under Article 165(3)(b)(d), by dint of Article 258, where the Respondents have conducted themselves in a manner inconsistent with or in contravention of the provisions of the constitution. That is what the petitioner alleges in her petition, and, in that respect, the High Court has jurisdiction to entertain the petition.

27. There is the argument that the dispute arises with respect to an eviction issue that can be dealt with by any Environment and Land Court, and that the High Court, by dint of Articles 162(2) and 165(5) of the constitution, has no jurisdiction over the matter, given that it falls generally over an area of law that has been reserved for the courts envisaged under Article 162(2) of the constitution. I find the argument in the case of **United States International University (USIU) vs. Attorney-General [2012] eKLR**, compelling, that the jurisdiction vested in the High Court by Article 165(3) is not absolute, and is subject to Article 165(5), which forbid the High Court from exercising jurisdiction over matters falling within the jurisdiction reserved for the courts envisaged in Article 162(2) of the said constitution. I agree, Article 165(3) does not give the High Court exclusive jurisdiction over constitutional matters, and that jurisdiction can also be exercised by the other courts, within the context of the matters falling within the jurisdiction of those courts. However, with due respect, I am not persuaded that Article 165(5) expels the jurisdiction of the High Court when it comes to matters reserved for the courts envisaged in Article 162(2). The jurisdiction granted under 162(2) (b), to the Environment and Land Court, relates to hearing and determining disputes relating to the environment and the use and occupation of, and title to, land. The jurisdiction under Article 165(3) is to determine the constitutionality, or otherwise, of acts or conduct of public officers and institutions. The fact that the underlying dispute falls under Article 162(2), does not, in my view, take away the jurisdiction of the High Court to exercise jurisdiction under Article 165(3). The use of “subject to clause 5” in Article 165(3), in my understanding, simply raises the flag, that when the High Court exercises jurisdiction under Article 165(3), on the constitutionality of some action or conduct of or by a state officer or institution, where the underlying dispute falls under Article 162(2), must be alive to the fact that its realm is limited to the constitutional question, and that it has no jurisdiction to look at anything else beyond that. It is indeed a fine line. I am not persuaded that the High Court does not have jurisdiction with respect to such matters, nor that diving into such matters in regards to constitutional questions would amount to exercising supervisory jurisdiction over the courts contemplated under Article 162(2) of the constitution. I may add that the Environment and Land Court would have complementary jurisdiction. In fact, its jurisdiction would be broader than that of the High Court, it can address the environment and the use and occupation of, and title to land aspects of the dispute, as well as the constitutional aspects. In that sense, the petitioner herein would be better off before the Environment and Land Court, but that is not the same as saying that the High Court lacks jurisdiction.

28. Let me head back to **Anarita Karimi Njeru vs. Attorney General (1979) KLR 154** case and ask myself whether the petitioner has set out, with 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. I have dealt with aspects of this elsewhere. The provisions have been identified, and the manner of the alleged infringement has also been set out. Indeed, the factual background to the petition has been set out. The facts of the case do form the foundation of the petition, and without them the legal arguments would hang in the air. What is alleged to be a narration of that factual background of the case is incredibly sketchy, as set out in the petition with no affidavit in support. Indeed, the petition only talks about the trial court issuing orders in favour of the 1st and 2nd Interested Parties despite ruling on lacking the jurisdiction to determine the matter. There is a supporting affidavit but there is no averment as to how the 1st, 2nd and 4th interested parties approached the court to seek the contentious orders or attachment of the relevant orders. No documents have been attached to support the actions or conduct of the Respondents and Interested Parties as is complained about, and which forms the basis for the petition. All these were needed to be availed so

as to ensure that the petition as framed and with precision could easily be seen by the court to which it has been presented.

29. A party is bound by his/her pleadings. The foundation of the petitioner's case ought to be the facts upon which the petition is founded. A cause without a factual foundation or basis has no legs to stand on. A spectacular legal or constitutional basis cannot save it, for the constitutional or legal basis is, itself, supposed to be founded on a well-tailored factual background. Lack of a supporting affidavit with the relevant contentious court rulings and orders embarrasses the Respondents and Interested Parties, in terms of what exactly they are expected to respond to; and to this Honourable court in terms of understanding the actual or real issues in dispute. Parties should always be alive to the fact that they may, both sides, be privy to all the facts in the matter at hand, but the court is never privy to the same. It should not be expected that the court would somehow get to discover or unearth those facts.

30. It is not up to the court to dig out the facts. It is up to the parties to bring them out, so as to assist the court do justice based on those facts. Where facts are not fully disclosed then there is a gap, a deficiency, and it would be pretentious to assume that the court would do justice when it only has half of the facts. In this case, the six Respondents are accused of violating the constitution by enabling the four Interested Parties to forcefully and unlawfully evict the Petitioner causing theft and damage of her property. Yet these facts are not coherently pleaded, if at all, and there is no documentary material placed before the court to support the fact of the alleged conduct or action by the Respondents. The case is not just about eviction, theft and damage of property but also violation of the Petitioner's constitutional right to a fair hearing and to be heard. The petitioner should have done more, in terms of pleading on these matters, and supporting those pleadings with relevant documentary material, relating to the damage, theft and eviction.

31. In view of the above, it is my finding that the petitioner has not set out, with a reasonable degree of precision, that of which she complains. The basic standard, set in **Anarita Karimi Njeru vs. Attorney General (1979) KLR 154**, has not been met. There is no logical factual background that can provide basis for allowing the petition herein to go for hearing. Further, I shall not uphold the preliminary objection, on the grounds articulated, as i am not persuaded that the High Court has no jurisdiction to entertain the petition, but i will strike out the petition, which I hereby do, on the ground that it does not meet the threshold set in **Anarita Karimi Njeru vs. Attorney General (1979) KLR 154**.

32. This being a constitutional matter, there shall be no order as to costs.

33. It is so Ordered.

DATED AND DELIVERED AT BUNGOMA 16TH THIS DAY OF DECEMBER, 2021.

D. KEMEI

JUDGE

In the presence of:

No appearance Petitioner

No appearance for 1st Respondent

Miss Mulianga for 2nd Respondent

No appearance for 3rd Respondent

No appearance for 4th Respondent

No appearance for 5th Respondent

No appearance for 6th Respondent

Sichangi for Anwar for 1st Interested Party

No appearance for 2nd Interested Party

No appearance for 3rd Interested Party

No appearance for 4th Interested Party

Wilkister Court Assistant