



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
CONSTITUTIONAL PETITION NO. 17 OF 2018

MARY ANYANGO SIDANDI RAINWATER.....PETITIONER

VERSUS

CO-OPERATIVE BANK OF KENYA LIMITED...1ST RESPONDENT

VINTAGE AUCTIONEERS.....2ND RESPONDENT

JUDGMENT

1. Through her petition dated 18th December, 2017 and amended on 18th May, 2018 the Petitioner, Mary Anyango Sidandi Rainwater, prays for orders as follows:-

- “a) A declaration that the Petitioner’s and all special mobility cars and assistive devices and other equipment to promote mobility of persons living with disabilities are exempted from attachment in execution of debts.**
- b) An order that the Respondent in attaching the special car of the Petitioner being registration number KBN 813U, Mazda Demio offended and or violated and or infringed upon the Petitioner’s rights under Article 27, 28, 48, 29 and 54 of the Constitution.**
- c). The 2nd Respondent in attaching the special car of the Petitioner offended Section 21 of the Persons with Disabilities Act, 2010.**
- d). The 2nd Respondent is vicariously liable for the acts of the 1st Respondent.**
- e). An order to issue compelling the Respondents to immediately and unconditionally return the Petitioner’s modified car registration Number KBN 813U under Article 23 of the Constitution.**
- f). In the alternative the Respondents be compelled to import a car of an equivalent value and prescription similar to the special car registration number KBN 813U Mazda Demio within two months for the Petitioner.**
- g) Aggravated damages and or compensation.**
- h). That the Respondents be restrained from selling, transferring and or disposing of the Petitioner’s car in the alternative.**
- i) That the motor vehicle Mazda Demio 813U a mobility car used by the Petitioner be released to the Petitioner immediately.**
- j) That the Respondents be restrained from selling, auctioning or disposing the car motor vehicle No. KBN 813U of a person living with disability.**
- k). The Petitioner be awarded costs.”**

2. The 1st Respondent, Co-operative Bank of Kenya Limited, and the 2nd Respondent, Vintage Auctioneers opposed the petition through a notice of preliminary objection dated 21st May, 2018 and a replying affidavit sworn on 6th September, 2018 by Hellen Waigwa, a Business Banker based at the 1st Respondent’s Upper Hill Branch.

3. The undisputed facts disclosed by the pleadings filed herein show that the Petitioner applied and was advanced a loan facility by the 1st Respondent in July, 2014. Among the household and business assets offered as security for the loan facility was the Petitioner's motor vehicle registration number KBN 813U.

4. The Petitioner initially serviced the loan facility but later defaulted leading to the issuance of a notice of proclamation of attachment followed by a notification of sale of moveable property by the 2nd Respondent pursuant to instructions issued by the 1st Respondent.

5. The Petitioner filed **Nairobi High Court Civil Suit No. 75 of 2017, Mary Sidandi Rainwater v Co-operative Bank of Kenya Limited and another**. The Petitioner at the same time filed a notice of motion application seeking a temporary injunction and interim orders against the advertisement and sale of her motor vehicle and asking for the release of the same to her. The application was heard by Serگون, J on 20th June, 2017 and dismissed on 6th October, 2017.

6. This is the appropriate stage to introduce the respondents' notice of preliminary of objection. Through the notice, they seek that the amended petition be struck out or dismissed on the grounds that:-

“a) The Petitioner has admitted to filing High Court Civil Cause No. 75 of 2017 Mary Sidandi Rainwater v Co-operative Bank of Kenya Limited & Another which is between the same parties and relates to the same transaction and the same issues arising as the current petition and the same is still pending before the High Court Civil Division.

b) The High Court's various divisions have jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened in any proceedings before it in line with Article 165(3) of the Constitution of Kenya 2010.

c) The current Petition is an attempt to steal a march on the Respondents herein and an underhand attempt to appeal out of time to a court of co-ordinate jurisdiction the ruling delivered by Honourable Justice Serگون on 6th October 2017 dismissing the Notice of Motion application dated 24th March 2017. This Honourable Court is therefore likely to be put in an embarrassing position of giving a ruling or judgment contradictory to that of a court of co-ordinate jurisdiction.

d) The Petitioner's Amended Petition dated 18th May 2018 is therefore an abuse of the court process in view of the above undisputed facts and thus should be struck out with costs to the Respondents.”

7. The preliminary objection raises a jurisdictional issue and the same should be addressed before the substantive issues raised in the petition can be considered. In their submissions dated 7th June, 2018, the respondents cited the case of **Mercy Kirito Mutegi v Beatrice Nkatha Nyaga & 2 others [2013] eKLR** and submitted that jurisdiction for a court of law is everything and without it a court of law will as a matter of course down its tools. They proceeded to submit that this court has no jurisdiction because the petition herein arises out of a loan facility advanced to the Petitioner by the 1st Respondent in which the Petitioner offered her motor vehicle as security and the matter is therefore strictly commercial as opposed to constitutional.

8. Another reason proffered in support of the preliminary objection is that the petition violates Section 6 of the Civil Procedure Act, Cap. 21 (CPA) for being *sub judice* **High Court Civil Suit No. 75 of 2017, Mary Sidandi Rainwater v Cooperative Bank of Kenya Limited & another** which is pending determination before the Civil Division of this Court.

9. Reference was made to the decisions in the cases of **Munawar Shuttle v County Government of Kilifi & 2 others [2018] eKLR; Nguruman Limited v Jan Bonde Nielsen & another; and Benja Properties Limited v Savings and Loans Ltd [2005]** as explaining the purpose of Section 6 of the CPA and requiring that a suit *sub judice* other pending proceedings should be stayed.

10. Through her submissions dated 25th March, 2019, the Petitioner submitted on the issue of jurisdiction as follows:-

“The Petitioner's case is brought under [Articles] 19, 20, 21(3), 22, 23(1), 27, 28(3)(b), 31(b), 40(a), 43, 47, 54(e), 258 [and] 159(2)(d) of the Constitution of Kenya. The court has jurisdiction to determine the petition under Article 165 of the Constitution.”

11. The question therefore is whether this court has jurisdiction to hear and determine the petition in light of the undisputed existence of **Nairobi High Court Civil Suit No. 75 of 2017, Mary Sidandi Rainwater v Co-operative Bank of Kenya Limited & another**.

12. In my view, the respondents' objection to my jurisdiction squarely rests on Section 6 CPA. The relevant part of that Section provides that:-

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

13. In my decision in **Munawar Shuttle** (supra) I noted the objective of the cited provision as follows:-

“47. The purpose of Section 6 is to stop the filing of a multiplicity of suits between the same parties or those claiming under

them over the same subject matter. It is meant to avoid abuse of the court process and diminish the chances of courts with competent jurisdiction issuing conflicting decisions over the same dispute. When two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed. The conditions to be met by a party who seeks to stay suit (*res sub judice*) under Section 6 of the CPA is that there must be two suits or more. One suit should have been instituted previously and the other instituted subsequently. Both suits should be pending before courts of competent jurisdiction and must be between the same parties or their representatives. The subject matter of the suits should be same.”

14. The parties and the subject matter in the case before the Civil Division are the same in this petition. The matter before the Civil Division was filed before this petition. Proceeding to hear and determine this petition in view of the existence of the civil case may lead to an embarrassing situation where this court may end up issuing a judgment contradictory to that of a judge of co-ordinate jurisdiction.

15. Whatever constitutional issues the Petitioner has could as well have been raised in the civil case. The High Court is clothed with jurisdiction by Article 165(3)(d)(ii) of the Constitution to hear any question respecting the interpretation of the Constitution including the determination of the question whether anything said to be done under the law is inconsistent with, or in contravention of the Constitution. The Constitution has not vested the power to interpret the Constitution on a particular judge or judges. A party who desires to raise constitutional issues in whatever genre of case should do so in that case. The emerging practice where parties split issues between various divisions of the High Court is unnecessary and in most cases amount to an abuse of the court process. Without saying more, I find merit in the respondents' preliminary objection.

16. Rule 6 CPA requires that this suit be stayed awaiting the determination of the civil case which was filed earlier. The respondents have asked for the dismissal or striking out of the petition. I wonder what a stay of this matter will achieve. The Petitioner can move the court in the civil case to amend her plaint and incorporate any constitutional issues she may have in that matter. Sustaining this matter will only lead to the piling up of unnecessary and unsustainable cases in the courts. As such, I enter judgment in favour of the respondents by dismissing the petition with no order as to costs.

Dated, signed and delivered at Nairobi this 23rd day of January, 2020.

W. Korir,

Judge of the High Court