



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CONSTITUTIONAL PETITION NO. 27 OF 2015

VIRGINIA MARTI VEITH.....PETITIONER

VERSUS

EVERRET JONES.....1ST RESPONDENT

KENNEDY MAKANJI.....2ND RESPONDENT

KENNEDY BOMJI.....3RD RESPONDENT

JUDGMENT

1. The petition herein, dated 29th October 2015, was brought by Virginia Marti Veith, to be known hereafter as the petitioner. The petitioner is a citizen of the United States of America. The respondents are not defined in the petition, the petitioner has gone straight into making allegations against them without so much as describing them or even giving their addresses for service.

2. The factual background to the matter is set out in the body of the petition. The petitioner had founded an entity known as Kakamega Mission to the Fatherless Charitable Institution, with her late husband, sometime in 1993, and a branch at Oyugis in 2002, with an intent to take care of orphans and destitute children. She avers that she and her husband invested in their resources towards the growth and development of the institutions, for the benefit of the children. They invited the first respondent, who is also a citizen of the United States of America, to assist them fundraise for the institutions. The petitioner and her late husband invested 2/3 of their own funds in the institutions, to buy the land on which the institutions were established; and the land, Kakamega Municipality/ Block 1/547, was registered in the name of Mission to the Fatherless, while the Oyugis institution was established at West Kasipul/Kasimba/457.

3. The case against the respondents is that they conspired to dispose of the institution's land and buildings for unknown reasons. It is averred that the first respondent advised the third respondent to relocate the children in the Kakamega home to the Oyugis institution, and that was done in 2014. The children had to be taken out of school for that purpose, and were only returned to Kakamega on court orders. She accuses the first respondent of failing to send funds for maintenance of the children at the institution.

4. The legal and constitutional foundations of the petition are set out in the petition, to be Articles 50(1) and 53(1) (b) (d) of the Constitution of Kenya, alleging violation of the right to free and compulsory education and subjecting the children to inhumane treatment and unwarranted punishment.

5. The petitioner contends that the respondents acted unconstitutionally in relocating the children without giving them a right to a hearing, failing to take the best interests of the children into account, violating the children's rights to basic nutrition shelter and health care by conspiring to sell their home, and of conspiring to unlawfully close the institution by sending them to the wilderness.

6. The petitioner therefore seeks the following reliefs:

(1) a declaration that the respondents have violated the constitutional rights of the children admitted at the Kakamega facility by relocating them to Oyugis;

(2) a declaration that the attempted sale of the Kakamega property was an unconstitutional act;

(3) a declaration that the property at Kakamega and Oyugis belonged to orphans and other destitute children and was therefore incapable of being sold, in order to facilitate the achievement of the constitutional rights of the children;

(4) a declaration that the respondents were unfit to manage the institution ;

(5) a declaration that the constitution known as Mission of the Fatherless USA Board was not applicable in Kenya as the entity was not registered in Kenya; and

(6) a declaration that the decision by USA Board's under the presidency of the first respondent stop funding or supporting the Kenyan mission for one year and three months was inhuman, violent and a violation of the Constitution of Kenya regarding the rights of children.

7. The petition is supported by an affidavit, sworn by the petitioner, on 29th October 2015. She avers that after she relocated to the United States of America after her husband's demise and her own illness, she learnt, in August 2014, that the respondents were dismissing her staff in Kenya, and had attempted to sell off the institution's property. She also avers that the first respondent had also employed a managing director for the institution without recourse to her. She also got information that the children in the institution had been relocated to Oyugis without a court order. The children were later on returned to Kakamega after a court order issued in Kakamega CMCCC No. 222 of 2014. She argues that efforts to sell of property of a charitable organization was unconstitutional. She avers that she and her husband raised the funds that were used to acquire the land at Kakamega. She states that she filed the petition in public interest, to protect the property meant for the poor and vulnerable in society.

8. Although it is averred in the affidavit that there are annexures to the supporting affidavit of the original petitioner, no documents are attached to that affidavit. .

9. The principal response to the petition is through an affidavit that the first respondent swore on 5th November 2015. He concedes that the petitioner had established the institution in question in Kenya, after registering the Mission to the Fatherless in Kenya. He gives a background relating to the trustees of the institution and also gives the principal objectives of the organization. He explains where the funds used to buy land in Kenya and put up structures came from. He avers that the children at the Kakamega institution were at one time temporality relocated to the Oyugis facility to facilitate the renovation and repair of the Kakamega facility, based on direction from the Children's Department and Ministry of Health. The children were subsequently returned to the institution after the repairs. He explains that some staff were dismissed over financial mismanagement. On the alleged proposal to sell the land, he refers to an issue with a neighbour, but the issue was dropped. He avers that the petitioner had since resigned from the mission and set up another one under her name. He avers further that the dispute herein is also before other courts in other suits, being Kakamega CMCCC No. 222 of 2014 and HCCA No. 134 of 2014. He has attached several documents to his affidavit to support his case. The other respondents swore a joint affidavit on even date to associate themselves with the averments in the affidavit of the first respondent.

10. The petition was heard orally on 5th November 2019, a date that had been given in open court on 23rd October 2019, by Njagi J. The respondents were served with a hearing notice, through their the advocates on record, and an affidavit for return of service was filed in court on 5th November 2019, sworn on 4th November 2019. The advocates for the respondents did not attend court despite service, but the matter nevertheless proceeded as there was evidence of proper service.

11. Directions were taken, by consent, on 25th March 2019, for disposal of the petition by way of written submissions. Both sides have filed written submissions complete with the authorities that they rely on. I have read through them and noted the arguments made.

12. Let me assess first whether the petition herein meets the threshold for a constitutional petition.

13. The High Court is established under Article 165 of the Constitution, 2010, and conferred with jurisdiction, over, among other things, constitutional matters. The relevant provisions for the purpose of these proceedings are Article 165(3)(b) which state as follows:

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

(a) ...

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

(c) ...

14. Then there is Article 258 of the Constitution, which deals with enforcement of the Constitution, and states the right of every person to institute court proceedings claiming that the Constitution has been contravened or is likely to be contravened. The provision states as follows:

“258. (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.”

15. The matter before me is no doubt anchored on Article 165(3) (b) and 258 (2)(a) of the constitution.

16. I note that the dispute before me is between private individuals. I have it on the authority of *Rose Wangui Mambo & 2 others vs. Limuru Country Club & 17 others* [2014] eKLR, *Isaac Ngugi vs. Nairobi Hospital & 3 others* [2013] eKLR and *Satrose Ayuma & 11 others vs. Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others* [2013] eKLR, that the Bill of Rights can be enforced as against a private citizen and a public or government entity, since it binds all persons and all state organs. Consequently, I shall hold that the instant petition is properly before me.

17. The next hurdle is to consider whether there is material in the petition upon which I can exercise the discretion given to me by the Constitution to redress its violations or contraventions.

18. Case law requires that a person who seeks redress under the Constitution has to state his or her claim with precision and demonstrate the provisions of the Constitution that he alleges to have been violated or infringed, and the manner of the alleged violation. It was stated in *Anarita Karimi Njeru vs. Attorney General* (1979) KLR 154 , that:

“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.”

19. In *Meme vs. Republic* [2004] eKLR, the Court of Appeal said:

“Where a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important that he should set out with a reasonable degree of precision that of which he complains, the provisions said to have been infringed and the manner in which they are alleged to have been infringed and that the applicant's instant application had not fully complied with the basic test of constitutional references, as it was founded on generalised complains without any focus on fact, law or Constitution, hence it had nothing to do with the constitutional rights of the appellants.”

20. In *Trusted Society of Human Rights Alliance vs. AG. & 2 others* [2012] eKLR the same position was restated under the Constitution as follows:

“We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication; a person claiming constitutional infringement must give sufficient notice of the violations to allow her adversary to adequately prepare her case and to save the court from embarrassment on issues that are not appropriately phrased as justiciable controversies. However we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are too insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged.

The test does not demand mathematical precision in drawing constitutional Petitions. Neither does it require talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.”

21. The principles stated in the above authorities require that a party moving the High Court by way of a constitutional petition for relief arising from a contravention or violation of the Constitution must state their case in such terms as would assist the court fashion a relief suitable to the facts and circumstances of the case.

22. Has the petition in the instant cause met that test? There is no doubt a clear narrative in both the petition and the affidavit in support about the dispute between the petitioners and the respondents over the institution at Kakamega. I am told that the property was being sold, I have not seen any material pointing in that direction. To whom was it being sold, and for what consideration. Secondly, I am told the institution had been closed and the children relocated elsewhere. Whereas the respondents have offered an explanation, with some evidence, that the structures at Kakamega had to be repaired or renovated as required by some state agencies, and that there was, therefore, need to move the children temporarily to allow that, the petitioners have not placed any material before me to demonstrate that there was any such relocation, and that the same was intended to be permanent. No pleadings were placed me as evidence that the petitioners ever moved to court to stop the relocation and they got orders to have the children brought back. Copies of pleadings and courts orders came from the respondents, but none of them turned on the question of the children being relocated from Kakamega.

23. Whereas there is a narrative to provide a background to the dispute, however, there is no documentary backing of that narrative. That background is critical to demonstrating how the rights of the children were being infringed. Without the supporting documents, a report say from a children’s officer or some order by the court, or something similar, I cannot say that there is sufficient background upon which I can exercise discretion. The petition and the affidavit supporting it are more about allegations without sufficient documents to prove the allegations. The documents attached by the petitioners are more about the power struggle between the two parties, rather than on the children on whose behalf this litigation has been initiated.

24. It should be emphasised that law is applied to facts, and in the absence of sufficient facts, there would be no basis at all to purport to be applying any law to make orders.

25. From the material before me, I do not think that there is sufficient ground for me to grant the orders sought in the petition. The same is

hereby dismissed. Each party shall bear their own costs. Any party aggrieved by the dismissal is at liberty to move the Court of Appeal appropriately within the timelines allowed in law.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 30TH DAY OF APRIL, 2020

W. MUSYOKA

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic, and in light of the directions issued by His Lordship, the Chief Justice, on 15th March 2020, this ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

W. MUSYOKA

JUDGE