



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL PETITION NO. 186 OF 2018

IN THE MATTER OF: ARTICLE 22 AND ARTICLE 258(1) & (2) (C) OF THE CONSTITUTION

**IN THE MATTER OF: ALLEGED THREAT OF VIOLATION OF ARTICLES 3 AND 10 OF THE CONSTITUTION OF KENYA
2010**

**IN THE MATTER OF: ALLEGED THREAT TO AND CONTRAVENTION OF ARTICLES 11, (2) (a), 19, 20, 21, 22, 23, 24, 27, 33,
40 (5) AND 47 OF THE CONSTITUTION OF KENYA 2010**

IN THE MATTER OF: THE COUNTY GOVERNMENT ACT, NO. 17 OF 2012

IN THE MATTER OF: THE PHYSICAL PLANNING ACT CAP 286 LAWS OF KENYA

BETWEEN

SLEEK LADY COSMETICS LIMITED.....PETITIONER

VERSUS

1. COUNTY EXECUTIVE, TRANSPORT, INFRASTRUCTURE AND

PUBLIC WORKS, COUNTY GOVERNMENT OF MOMBASA

2. COUNTY GOVERNMENT OF MOMBASA..... RESPONDENTS

RULING

1. The Petitioner is a limited liability company duly registered to transact business as such under the Companies Act 2015. At all material times relevant herein the Petitioner has business premises along Digo Road within Mombasa County.

Application

2. Together with the Petition dated 4/7/2018, the Petitioner filed a Notice of Motion of even date under Certificate of Urgency, and sought the following orders: -

1. Spent

2. Spent

3. That this honourable Court does issue temporary injunction restraining the Respondents jointly and severally, either acting on their own and or through its agents, employees, servants, Kenya Police force and or any other person acting and or purporting to Act under their instructions and or orders from implementing the impugned enforcement notice subject matter herein until the hearing and determination of this Petition.

4. That a conservatory order be and is hereby issued staying the implementation and enforcement of the decision of the 1st Respondent contained in the impugned Notice until the hearing and determination of this Application and the Petition.

5. That the cost of this Application be granted.

3. The Application is premised on the grounds set out therein, and is supported by affidavit sworn on 4/7/2018 and a Further Affidavit sworn on 31/8/2018 by **Peter Njoroge Karanja** who is the Petitioner's director.

4. The Petitioner states that the Respondents issued an enforcement notice directing all owners of buildings within the jurisdiction of the County Government of Mombasa to paint their buildings in white with Olympic/Oceanic blue border on the edges and windows above without any sign written on the walls or canopy. Following the implementation of the notice, the Petitioner's employee was charged by the 2nd Respondent for failure to adhere to the said impugned order vide case No. 4320 of 2018.

5. The Petitioner states that it has been in business under the trademark "BESTLADY" for over 15 years using the "pink" colour in all its branches in Mombasa, Nakuru, Nairobi, Bungoma, Kitale, Maua, Nyeri, Karatina, Kitui, Machakos, Kericho among others and the pink colour has since become synonymous with the Petitioner's business and it is a means of ease of identification by the Petitioner's customers. Therefore, the implementation of the impugned notice will deny it the right to use its trademark and or branding which will inevitably lead to a loss of customers, business earnings and automatically lead to job losses.

6. It is the Petitioner's case that the impugned order violates its rights guaranteed under Article 11, 19(2), 31, 33, 40(5), and 43 of the Constitution, and the said impugned notice also violates the founding objectives of devolution as County Governments are prohibited from adopting legislations and/or policies that inhibit economic growth and tranquility of its residents.

The Respondents' Case

7. The Respondents opposed the application vides Grounds of Opposition dated 19/7/2018 and Replying Affidavit sworn on the 19/7/2018 by **Tawfiq Balala** who was the Respondents' County Executive Member Transport Infrastructure & Public Works. The Respondents' case is that the deponent has no capacity to institute the Petition, as he has not annexed any authority of Board of Directors authorizing either filing of this Petition or that the deponent should swear the present Affidavit on behalf of the Petitioner.

8. The Respondents further state that the impugned Notice was issued pursuant to the Provisions of Regulations/Rules 55 and 65 of The City Buildings By Laws, 1968, among other by-laws of the County Government of Mombasa, that the same is not ambiguous, and that the 2nd Respondent shall prosecute any "owners of buildings" within its jurisdiction who do not comply with the impugned notice. Nevertheless, the Petitioner not being an owner of any building and having not demonstrated ownership of any building within the 2nd Respondent's jurisdiction, it cannot be subjected to the impugned notice. Therefore, the Petitioner cannot rely on the enforcement notice.

9. In response to the allegation by the Petitioner of being charged for violation of the impugned notice, the Respondents state that the cash bail receipt of Kshs. 5,000/= was issued to one **Joseph Kabera Mungai** in criminal case No. 4320 of 2018 and the charges therein have nothing to do with either painting or enforcement of the impugned notice. Instead, the accused person therein was charged with the offence of "**branding wall of a building for advertisement without a permit**", and that the Petitioner has not disclosed the relationship between the deponent and the accused **Joseph Kabera Mungai**. Therefore, no relationship exists between the complainant and the Petitioner.

10. The Respondents state that the Petitioner has no existing trademark over any colour as it purports to, since the subject trademark in the "**Best Lady Cosmetics Shop**" and not the Petitioner was issued for a period of 10 years with effect from 22/3/2007, and the same existed up to 22/3/2017. The said trademark has never been renewed thereafter. Further, the trademark protected was the Name "**Best Lady Cosmetics**", which has nothing to do with colour "Pink" and/or painting.

The Rejoinder

11. The Petitioner in response to the Replying Affidavit by the Respondents filed a Further Affidavit sworn on the 31/8/2018 by **Peter Njoroge Karanja**. The deponent states that he has authority to act under Article 22 of the Constitution, and from the Petitioner's Board of Directors not only to swear affidavits but to prosecute this suit.

12. The Petitioner states that by virtue of the lease agreement entered between Larch Investments Limited and the Petitioner it has been conferred exclusive proprietary rights over the leased property as against the entire world, and that it therefore has the locus to institute the current Petition. Further, Regulation/Rule 55 and 65 of the City Buildings By Laws 1968, deals with thickness and permeability of the walls and/or resistance to penetration of rain which has nothing to do with painting as prescribed by the Respondent.

13. The Petition states that its business name is Sleek Lady Cosmetics Limited but it trades in its trademark "**Bestlady**" and that Best Lady Cosmetic Shop Limited is currently transferring and consolidating its business to and trading in the name Sleek Lady Cosmetics limited. A copy of transfer of business agreement was annexed and marked "PMK-5". Further, the Petitioner states that the subject trademark existed up to and including 22/3/2017, and the same was renewed from the said date for a period of 10 years and this Court ought to consider that the pink colour has become part and parcel of the Petitioner's business brand and as such, the Petitioner has acquired customary rights over it and the registered trademark has become synonymous with Pink color.

Submissions

14. **Mr. Lesaigor** Learned Counsel for the Petitioner reiterated the content of the Application dated 4/7/2018 and the Further Affidavit sworn on the 31/8/2018 and submitted that the Respondents lacked the powers to issue the impugned notice as the same is not anchored in any law.

15. Counsel submitted that the Petitioner is entitled to the right to artistic creativity; fair administrative action; the right to privacy; social economic and cultural rights; consumer protection rights; property right and that the aforementioned rights can only be limited in accordance to Article 24 of the Constitution.

16. Counsel further submitted that Article 258 allows the Petitioner to approach this Court. Therefore, the Petition is properly before this Court and the issue of *locus standi* does not arise. Further, Counsel submitted that ownership of business premises could be via leasehold, which gives the Petitioner herein proprietary interests over the leased premises. Therefore, the Petitioner falls within the definition of commercial building owner and consequently, the impugned notice violated their right guaranteed under Article 40(2) of the Constitution.

17. **Mr. Buti** Learned Counsel for the Respondent reiterated the contents of the Respondents' Grounds of Opposition and Replying Affidavit both dated and sworn on the 19/7/2018 and submitted that there was no notice issued to the Petitioner and that the notice issued by the Respondents is not addressed to the Petitioner who is a tenant but to landlords.

18. Counsel further submitted that the deponent in the Petition has not exhibited an authority and/or a resolution from the Petitioner's Board of Director sanctioning the instituting of the Petition.

Determination

19. I have carefully considered the motion and submissions of parties. In my view the following issues arise for determination.

a) Whether the Petitioner herein has the locus standi to institute the Petition.

b) Whether the Petitioner is entitled to order of injunction and/or conservatory orders.

(a) Whether the Petitioner herein has the *locus standi* to institute the Petition.

20. From the onset, it must be remembered that this is a constitutional Petition and that **Article 22** of the **Constitution** provides as follows:

“22. Enforcement of Bill of Rights

(1) 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.

(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”

21. Further, Article 258 of our Constitution 2010 provides: -

“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 on 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 it's members”.

22. These provisions in the Constitution allow anyone to bring a matter to Court including the Petitioner herein. In **Joshua Karianjahi Waiganjo vs. Attorney-General and 4 Others [2013] eKLR**, in dealing with Article 22, the court said.

“I appreciate that Article 22(1) and (2) has expanded the horizons of locus standi in matters of enforcement of fundamental rights and freedoms, but even where one purports to enforce the rights of another there must be a nexus between the parties particularly where a case has direct effect on the person whose rights are affected. After all, Article 22(2)(a) entitles a person to act, “on behalf of another person who cannot act in his own name.”

23. In this instance, the Petitioner has argued that the impugned notice directing all owners of buildings within the jurisdiction of the County Government of Mombasa to paint their buildings in white with Olympic/Oceanic blue border on the edges and windows above without any sign written on the walls or canopy will deny the Petitioner who has been using the “pink” colour, and other building owners the right to use

long time trademark and/or branding which will inevitably lead to loss of customers and business earnings.

24. From the foregoing petition and submissions it is apparent that the impugned Notice is likely to affect the Petitioner's business by requiring the Petitioner to abandon the "Pink" colour with which the Petitioner has become synonymous in its business all over the country. Further the deponent in the Petition has proved the nexus between the Petitioner and himself by stating that he is a director of the Petitioner, and he has been duly authorized to Act on its behalf. The Petitioner has also annexed a lease agreement between Larch Investment limited and the Petitioner to demonstrate that it has exclusive proprietary rights over the leased premises to counter the argument by the Respondent that the Impugned notice was never addressed to tenants. Lastly, on the issue of there being no authority from the Petitioner's Board of Directors to institute the Petition this Court finds that the issue can only be raised by the insiders of the Petitioner Company, and not the Respondents herein. See **Siokwei Tarita Ltd V Dr. Charles Walekwa [2012] eKLR** where the court held:

“(a) It is not the law and there is no requirement that a Plaint filed by a company must be filed with a resolution evidencing that the company authorized the institution of the suit.

“(b) The appropriate officer to swear an affidavit is that authorized by a Company's Articles of Association, a matter which is internal to the company, and which can only be raised by an insider of the company unless there is evidence tabled that the person who has sworn the Affidavit was not so authorized by the company to swear the affidavit.

“(c) There is no requirement and it is not the law that an affidavit sworn by an agent of a company needs to bear the company seal.”

This court is therefore satisfied, and I hold that the Petitioner has the locus to file the petition here (b) **Whether the Petitioner is entitled to issue of conservatory orders.**

25. The Petitioner seeks conservatory orders, which this Court is empowered to grant pursuant to Article 23 (3) of the Constitution, which states:

“(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.”

26. In order for the Court to grant the orders sought, it must be satisfied firstly, that the Petitioner has demonstrated a *prima facie* case with a probability of success; and secondly, that they stand to suffer prejudice if the prayers sought are not granted. **Musinga J** (as he then was) observed in the case of **Centre for Right Education and Awareness (CREAW) & 7 Others vs. Attorney General [2011] eKLR** that:

“It is important to point out that the arguments that were raised by counsel and that I will take into account in this ruling relate to the prayer for a Conservatory order.....

At this stage, a party seeking a Conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as result of the violation or threatened violation.”

27. The issue for determination is whether on the evidence and material placed before this Court, the Petitioner has satisfied the conditions upon which a conservatory order can be granted.

28. The principles to consider in granting equitable remedies were laid down in **East African Industries vs. Trufoods [1972] EA 420** and **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358**. In **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR** where the Court restated the law as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

(a) establish his case only at a *prima facie* level,

(b) demonstrate irreparable injury if a temporary injunction is not granted, and

(c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.”

29. Similarly, in the case of **Kenya Small Scale Farmers Forum vs. Cabinet Secretary Ministry of Education High Court Petition No. 399 of 2015 eKLR**, the Court stated the guidelines and principles applicable as follows:

“the applicant ought to demonstrate a prima facie case with a likelihood of success and that he is likely to suffer prejudice as a result of the violation or threatened violation if the conservatory order is not granted: see Centre for Rights Education and Awareness & 7 Others vs The Attorney General HCCP No. 16 of 2011. It is not enough to show that the prima facie case is potentially arguable but rather that there is a likelihood of success: see Godfrey Mutahi Ngunyi vs The Director of Public Prosecution & 4 Others NBI HCCP No. 428 of 2015 and also Muslims for Human Rights and Others vs. Attorney General & Others HCCP No. 7 of 2011.

· The grant or denial of the conservatory relief ought to enhance Constitutional values and objects specific to the rights or freedoms in the Bill of Rights: see Satrose Ayuma & 11 Others vs Registered Trustees of Kenya Railways Staff Benefits scheme [2011] eKLR and also Peter Musimba vs The National Land Commission & 4 Others (No. 1) [2015] eKLR.

· If the conservatory order is not granted, the Petition or its substratum will be rendered nugatory: see Martin Nyaga Wambora vs speaker of the County Assembly of Embu & 3 Others HCCP No. 7 of 2014.

· The Public interest should favour a grant of the conservatory order: see the Supreme Court of Kenya’s decision in Gatarau Peer Munya vs Dickson Mwenda Githinji & 2 Others [2014] eKLR.

· The circumstances dictate that the discretion of the court be exercised in favour of applicant after a consideration of all material facts and avoidance of immaterial matters: See Centre for Human Rights and Democracy & 2 Others vs Judges and Magistrates Vetting Board & 2 Others HCCP No. 11 of 2012 as well as Suleiman vs. Amboseli Resort Ltd [2004] 2 KLR 589.”

30. The gravamen of the Petitioner’s Petition herein is that the impugned notice is purportedly issued pursuant to Section 38 of the Physical Planning Act and the Provisions of Regulation /Rules 55 & 65 of the City Building by Laws 1968 by the Respondents. However, the said impugned Notice is not supported by the purported regulations it is anchored on.

31. At this stage, this Court ought to be merely satisfied that the Petitioner has a *prima facie* case and whether based on available evidence, it would be prudent to issue interlocutory conservatory orders. Going deep into the merits of either party’s case will be avoided. After considering the Application, and rival submissions, it is my view that the issuance, interpretation and the enforcement of the impugned notice raises constitutional issues, which ought to be determined in the Petition.

32. In the upshot, I am satisfied that the Petitioner has met the threshold for issuance of conservatory orders pursuant to their Notice of Motion dated 4/7/2018. Having held that the Petitioner has met the threshold for issuance of conservatory orders, I find and hold that the Respondents’ Application dated 18/7/2018 that sought to discharge and/or set aside the ex-parte orders issued on the 12/7/2018 in favour of the Petitioner is spent. Accordingly, I allow the application and make the following orders:

(1) That conservatory orders are hereby granted staying the implementation and enforcement of the decision of the 1st Respondent contained in the impugned notice pending the disposal of Constitutional Petition No. 186 of 2018 or until such other or further orders of this Court.

(2) The costs of this application shall be in the cause.

It is so ordered.

Dated, Signed and Delivered at Mombasa this 23rd day of July, 2020.

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Mr. Buti for Respondent

No appearance for Applicant

Mr. Kaunda Court Assistant