



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CONSTITUTIONAL PETITION NO. E1 OF 2020

LEONIDA ALOO ODHIAMBO.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

OFFICER IN-CHARGE OF STATION SIAYA POLICE STATION.....2ND RESPONDENT

JUDGMENT

1. The Petitioner **Leonida Aloo Odhiambo** filed the instant Petition seeking to have the respondents release the confiscated/listed properties to her physically or by way of monetary compensation as well as costs of the petition.
2. It is the petitioner's case that on the 23rd June 2010, the petitioner, a widow organised a death anniversary celebration in remembrance of her late husband but before the activities kicked off, police officers from Siaya Police station arrived at the scene, chased away visitors, confiscated movable properties in the form of furniture, utensils and foodstuffs from the scene. She further stated that the police officers arrested her and 3 other persons who were in attendance.
3. It is the petitioner's case that she was subsequently charged alongside 3 others in Criminal Case No. 880 of 2010 and later acquitted on the 6th February 2012 after which she moved court to have her confiscated goods released to her which was ordered by the court wherein she was charged on the 16th February 2012. It is the petitioner's case that the respondents have not released the goods to her to date.
4. In response to the petition, Chief Inspector Fridah Karegi the current 2nd respondent office holder swore a replying affidavit admitting that the previous OCS had indeed confiscated goods as alleged by the petitioner but that both the previous OCS and the arresting officers had since died and therefore there was no one who could shed light on the whereabouts of the items.
5. The 2nd respondent further deposed that some of the items claimed by the petitioner were perishables and as such it was impossible to return them at this juncture 10 years after the fact. She further deposed that the matter was statute barred and therefore the orders being sought could not be granted.
6. It was further deposed that the value of the goods as itemized was grossly overstated and that the petitioner had provided no proof as to the value of each of the items and further that the petitioner could not prove that the items rightfully belonged to her as she claimed that some of them belonged to neighbours.
7. The petitioner filed a reply to the petitioner's replying affidavit dated 18th November 2020 stating that the 2nd respondent's assertion that the suit was statute barred was a misplacement of fact as the petitioner had followed up the matter from 1st October 2012 through to 8th July 2013 with no success.
8. The Petition was canvassed by way of written submissions.

Petitioner's Submissions

9. It was submitted by the petitioner, reiterating the facts in the petition and further affidavit that the petitioner had clearly demonstrated her claim over the items that were confiscated by the police from Siaya Police Station in line with provisions of Article 40 of the constitution.

Respondents' Submissions

10. It was submitted that the petition was incompetent as it failed to particularize the alleged constitutional rights allegedly violated and further that the petitioner did not plead any known infringement or violation of the Constitution and thus the court ought to dismiss the petition. Reliance was placed on the cases of **Anarita Karimi Njeru v Republic (1979) KLR 154** and **Mumo Matemu v Trusted Society of Human Rights Alliance [2014] eKLR**.

11. It was further submitted that the claim before the court was only disguised as a constitutional petition but was in reality a claim in tort. The respondents further submitted that where a claimant had adequate remedies in other areas of law then a constitutional petition should not be used to ventilate the said claims. Reliance was placed on the case of **Uhuru Muigai Kenyatta v Nairobi Star Publications Limited [2013] eKLR**.

12. It was submitted that the petitioner had a recourse under section 4 of the Government Proceedings Act which provided the opportunity and procedure for an individual to sue the government.

13. It was submitted that there was no evidence that the petitioner ever took steps to ventilate her claims and that her rights had become extinguished by law as provided under section 4 (2) of the Limitation of Actions Act which provides for three years as the time within which to bring a cause of action founded on tort.

Analysis & Determination

14. This court's task in this constitutional petition is to address itself to the issue of fundamental rights and freedoms. **Articles 22 and 165** of the Constitution guarantees every person the right to move the High Court to enforce fundamental rights and freedoms contained in the Bill of Rights. These rights are very specific and a petitioner who comes before the court must set out with some level of particularity the specific right and how it is violated. This principle was established in the case of **Anarita Karimi Njeru (supra)** and augmented by the Court of Appeal in the case of **Mumo Matemu (supra)**.

15. Of course, in a petition of this nature, the Court tries its best to understand the petitioner's case and discern what rights protected by the Bill of Rights has been violated. This is consistent with the Court's duty to promote access to justice and to promote and protect individual rights as guaranteed by the Constitution. In this case, the petitioner claims that she was deprived of her property.

16. The petitioner in her petition did not, however, specify what Article of the Constitution was infringed. In her written submissions, she quotes Article 40. Article 40 of the Constitution deals with the protection of the right to property and Article 40 (2) (3) provides that the state shall not deprive anyone of property of any description or interest unless it arises out of acquisition of land and in accordance with Chapter 5 of the Constitution or is in public interest.

17. There is no dispute that the petitioner's goods were confiscated by the 2nd respondent. However, this Court's jurisdiction under **Article 165(3)(b)** of the Constitution, when moved under **Article 22** is to adjudicate on specific allegations of violation of human rights and fundamental freedoms protected under the Bill of Rights. The petitioner has not discharged her burden of proving that her rights were violated. Resolution of her grievances lie elsewhere, in a civil court.

18. Further, it is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be invoked at all. The court will pronounce on the constitutionality of an action only when it is necessary for the decision of the case to do so and that if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, **a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights**. See the case of **Uhuru Muigai Kenyatta (supra)**.

19. In light of the foregoing, I find and hold that the instant petition is without merit. It fails to meet the threshold for a constitutional petition as espoused in the **Anarita Karimi Njeru] supra]** case. The petition is therefore hereby dismissed with no orders as to costs.

20. Orders accordingly.

Dated, Signed and Delivered at Siaya this 16th Day of December, 2020

R.E. ABURILI

JUDGE

In the presence of:

The Petitioner

Respondents absent