



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

PETITION NO. 3 OF 2017

IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF CONSTITUTION RIGHTS AND FUNDAMENTAL FREEDOM

AND

IN THE MATTER OF THE INFRINGEMENT OF THE CONSTITUTIONAL

RIGHTS AND DENIAL OF FUNDARMENTAL FREEDON CONTRARY TO

THE PROVISIONS OF ARTICLES 19(2) AND (3) 20; 22;23;27, 29;31;40;47

& 48 OF THE KENYAN CONSTITUTION

LAOPETITIONER

VERSUS

POO.....RESPONDENT

JUDGMENT

1. The Petitioner and the Respondent married under the Luo Customs sometimes in 1996 and were blessed with six children. In 2015 the Respondent filed **Migori Chief Magistrates Court Divorce Cause No. 30 of 2015** against the Petitioner. The marriage was eventually dissolved in 2016 and the Respondent was granted custody of the children.

2. The Petitioner thereafter filed a Petition in this Court *inter alia* on grounds that the Respondent evicted her from their matrimonial home in Kamagambo and their residential house in Oruba Estate and prayed for the following orders: -

- (a) **A declaration that the acts of the Respondent are unconstitutional.**
- (b) **Access to the Petitioner Residential house at Oruba Estate and/or Matrimonial home.**
- (c) **Compensation for the sufferings she has been subjected to by the acts of the Respondent.**
- (d) **Costs of the suit and**
- (e) **Any other Relief that could be granted by the Court.**

3. After settling twin interlocutory applications the parties proposed to deal with the main Petition by way of written submissions where the parties were to comply within set timelines. As that did not happen the parties instead requested the Court to render judgment on the main Petition upon consideration of the Petition and the response.

4. I have carefully considered this matter which reveals accusations and counter-accusations by the respective parties. That being so the question which now begs an answer is whether the Petition was duly prosecuted. Most of the factual matters raised by the Petitioner were denied by the Respondent and the matter ended there. No evidence was tendered and the parties were not subjected to examinations on their respective pleadings. The Court was only called to render a decision based on the contents of the Petition and the Response. I respectfully find that the Petition was not prosecuted to yield into a judgment as the same was anchored on controverted factual issues which called for resolution by way of evidence.

5. Of equal importance is whether the Petition raised any constitutional issues. Whereas constitutional petitions are generally not bound by the strict rules of form and procedure there are however basic requirements which make them holding so as to be rendered for determination. In the late 1970's the High Court dealt with this issue in the case of Anarita Karimi Njeri –vs- The Republic [1976-1980] KLR 1272 and came up with precise principles in dealing with constitutional petitions where it is required of a Petitioner to: -

i. Specifically set out the provisions in the Constitution that have been allegedly violated;

ii. Provide the particulars of the alleged violations;

iii. Provide particulars in which the Respondent has purportedly infringed their rights.

6. **Lenaola, J.** (as he then was) in the case of Stephen Nyarangi Onsoma & Another –vs- George Magoha & 7 Others [2014] eKLR in revisiting the principles in Anarita Karimi's case said as follows: -

.....This Court has in the past expressed its concern about the manner in which parties coming before the Court and alleging a violation to constitutional rights have presented their cases. As a basic minimum a Petitioner is required to cite the provisions of the constitution which have allegedly been violated and the remedy which he seeks, for the violation. In demonstrating the manner in which they have been violated, a Petitioner should present before the Court evidence of the factual basis upon which the Court can make a determination whether or not there has been a violation.

7. Indeed, the need of precise pleadings in constitutional Petitions was re-emphasized in the case of Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others (2013) eKLR as under: -

We cannot but emphasize the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims.

8. None of the above minimum requirements in petitions was attained in this case. The Petition does not cite any single provision of the Constitution allegedly contravened neither does it attempt to demonstrate how such provisions were infringed. It is clear that the matters contained in the petition were issues on distribution of property upon dissolution of marriage and nothing more. Those issues are to be handled in the normal civil litigation where evidence of contribution and access would be considered. The petition therefore did not raise any constitutional issue for due consideration.

9. The upshot is that the Petition cannot stand and the same is hereby struck out. Each party do bear its own costs with costs.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 30th day of May 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open court and in the presence of: -

Mr. Odingo Counsel instructed by the firm of Messrs. Odingo & Co. Advocates for the Petitioner.

Mr. Sam Onyango Counsel instructed by the firm of Messrs. Sam Onyango & Company Advocates for the Respondent.

Evelyne Nyauke – Court Assistant