



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CONSTITUTIONAL PETITION NO. 25 OF 2017**

**IN THE MATTER OF ARTICLES 2, 3, 10(1)(b)(c), (2)(a)(b) & (c), 19, 20, 21 22 AND 23 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 31, 40, 27(1, 2), 28, 29(c), 43(1), 47(1, 2) AND 49 OF THE CONSTITUTION**

**AND**

**FRED BINAISA LWANDE.....1<sup>ST</sup> PETITIONER**

**KEN LWANDE.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE.....1<sup>ST</sup> RESPONDENT**

**PETER KINYUA T/A KINYUA & CO. AUCTIONEERS.....2<sup>ND</sup> RESPONDENT**

**DANIELE TERZI.....3<sup>RD</sup> RESPONDENT**

**ABDI NOOR GODANA..... 4<sup>TH</sup> RESPONDENT**

**RULING**

The petitioners filed a constitutional petition against the respondents dated 22<sup>nd</sup> November, 2017 and sought various declarations as premised on various articles of the Constitution. The petitioners also prayed for general damages and costs.

The 1<sup>st</sup> respondent filed grounds of opposition whereas the 2<sup>nd</sup> respondent filed a notice of preliminary objection to the entire petition seeking the striking out of the petitioners' petition for being res judicata. Further, that the petitioners should have proceeded by way of an appeal or review against the order of dismissal of suit in Malindi HCC. No. 72 of 2010.

At the hearing of this preliminary objection the petitioners were represented by legal counsel **K'Bahati**. The 1<sup>st</sup> respondent was represented by **Mr. Martin Munga** litigation counsel, the 2<sup>nd</sup> respondent was represented by **Mr. Otara** and the 3<sup>rd</sup> respondent by **Mr. Kiarie Kariuki**. Counsels for all the parties filed written submissions which was adopted as an approach of adjudicating the issues for this court's determination.

**The petitioners' submissions**

**Mrs. K'Bahati**, for the petitioners, submitted that there is no proper preliminary objection known in law as filed by the 2<sup>nd</sup> respondent. Learned counsel contended that the pleadings in the petition raises weight matters which amounted to a violation of the Constitution under various articles. More specifically Articles 49, 27, 28, 29(c), 43(1), 47(1)(2), 31 and 40.

Learned counsel in buttressing his submissions relied on the authorities of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd 1969 EA 696**, **Wilfred Korir v Faradun Suleimna Abdalla & 4 others 2012 eKLR** learned counsel concluded that the

court should have a glance and take cognizance on the nature of a violation and infringement of the fundamental rights against the petitioners as pleaded in paragraph 5 of the petition as evidence of cause of action under the Constitution.

### **The 1<sup>st</sup> Respondent's Submissions**

Learned counsel **Mr. Munga** for the 1<sup>st</sup> respondent submitted and contended that there is no proper preliminary objection as stated by the 2<sup>nd</sup> respondent to be considered as a correct objection on the assumption that there are no interested issues between the parties. He relied on the cases of **Mukisa Biscuit Manufacturing (supra), Jen Dok 2018 eKLR** and **Samuel Waweru v Geoffrey Muhoro Mwangi 2014 eKLR**.

Learned counsel prayed for the dismissal of the preliminary objection.

The 3<sup>rd</sup> Respondent's Submissions mentioned was dismissed for want of prosecution in terms of Order 12 Rule 3 of the Civil Procedure Rules.

**Mr. Kiarie Kariuki** counsel for the 3<sup>rd</sup> respondent's submissions argued in support of the 2<sup>nd</sup> respondent preliminary objection as the proper cause of action in this petition. He further submitted that the preliminary suit in HCCC. No. 72 of 2010 mentioned was dismissed for want of prosecution in terms of Order 12 Rule 3 of the Civil Procedure Rules.

As a result, there will be no fresh suit as set out in Order 6 Rule 2 of the said Rules. He placed reliance on the case of **Constitutional Petition No. 58 of 2008 – Rashid Ngolo & others v Attorney General & others**. For the general proposition that the petition is an abuse of the court process for not measuring the constitutional threshold.

### **The Law, Analysis and Determination**

It is now necessary to consider the preliminary objection by the 2<sup>nd</sup> respondent to state out the petition also supported by the 1<sup>st</sup> and 3<sup>rd</sup> respondents. The handwork authority for the submission as touched constitutes a preliminary objection is the case of **Mukisa Biscuit Manufacturing Co. Ltd (supra)** held:

**“A preliminary objection consists of a pointer of law which has been pleaded, or which arises by clear implications out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are burned by the contract giving rise to the suit to refer the dispute to a consideration**

**A preliminary objection is in the nature of which used to be a demeanor. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if and fact has to be ascertained or if which is sought is the exercise of judicial discretion. The improper raising of point by way of preliminary objection does nothing but unnecessarily increase cases and on occasion, confuse the issues. The court considers that other improper practice should stop.”**

As can be seen from the principles in **Mukisa case** the object of raising the preliminary objection on a pave of law if proper setout is meant to dispose of the suit without proceeding for trial on the merits.

The question I pause is whether the 2<sup>nd</sup> respondent has satisfied the criteria for the preliminary objection to be upheld by this court what is said and argued by **Mr. Otara** for the 2<sup>nd</sup> respondent is that the petition is bad in law and an abuse of the court process in view of the decree in **Malindi HCC. No. 72 of 2010**. Further that this court lacks the jurisdiction to entertain the subject matter of the petition. It was also his contention that the petitioner is before the wrong forum given the procedural history of the matter in HCC. No. 72 of 2010.

The other respondents on the other hand, argued that there is no merit on the preliminary objection and its worthy for dismissal. In answer to the preliminary objection,, the 3<sup>rd</sup> respondent argued in support of the 2<sup>nd</sup> respondent assertions and grounds to have the preliminary objection upheld.

In deciding between these conflicting arguments and submissions I have to have regard to what was said in **Mukisa case (supra)**. Has the 2<sup>nd</sup> respondent brought himself when the ambit of the clear articulated legal principles in the above cited authority (**Mukisa supra**)?

To answer this question one has to look at the petition and the nature of the reliefs claimed by the petitioners. In short, first the petitioners aver in the various paragraphs impugning the conduct of the respondents in carrying out the eviction presumably pursuant to the orders of the court in HCC. No. 72 of 2010 at Malindi. The issues raised in the petition are as already set out in extensor that the eviction from the suit property LR 2740 Malindi, was unlawful against an existing order. The petitioners are asserting this court to pay special regard of interpretation and effect of the .....Articles in terms of Articles 40, 27(1), 29, 47, 49, 31, 43 and 25 of the Constitution.

According to the petitioners all matters arising out of the petition were some in excess of the powers conferred upon the respondents.

As to whether the respondents' action constituted substantive violation or breach of the fundamental rights and freedoms as provided for under Article 23 of the Constitution, the High Court shall have exclusive original jurisdiction. In light of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in their arguments, I contend that the jurisdiction of the court should not be invoked by the petitioners.

It seems to me that they have not discharged the burden to demonstrate that the petitioners have improperly invoked the jurisdiction of this

court. The onus in this case rests, in the events which happened to the petitioners, to establish that a preliminary point of law is in place to determine the petition conclusively by striking it out with or without costs.

It is my view from the analysis of the facts as alluded to by the petitioners, there is a cause of action capable of being highlighted before this court. The other prerequisite fulfilled by the petitioners instituting the petition is that of locus standi to the respondents by way of a petition. This contentment right is provided for under Article 22 of the Constitution.

As per the scheme of the Constitution, Article 22 has since been applied as a statutory procedure to challenge or defend the Constitution by the writ of the petition. By virtue of Article 22 no objection as to jurisdiction shall be allowed by this court unless such objection was taken in reference to Article 162(2) and 165(4) of the Constitution.

After careful consideration of the arguments on both sides, I am unable to uphold the 2<sup>nd</sup> Respondent preliminary objection as supported by the 3<sup>rd</sup> respondent for failure to satisfy that this court has no territorial or pecuniary, and subject matter jurisdiction of the petition, by reason of the provisions of the statute or Constitution.

In addition, it is useful to state that the underlying doctrine of res judicata under Section 7 of the Civil Procedure Act whose general principles are well settled does apply to the preliminary objection raised in this matter. What the 2<sup>nd</sup> respondent is alleging is that the parties in HCC No. 72 of 2010 at Malindi, and the questions at issue are identical in subsequent proceedings in petition 25 of 2017. There is no evidence that the subject matter of the petition was raised and argued before the court in HCC. No. 72 of 2010 such that it cannot be re-opened again in this court for fresh proceedings. The central question under the doctrine of res judicata is that the final judgement must be on the merits.

In the case of **DSV Sino-Und v MBH v Owners of the Sennan & 13 other ships 1985 1WLR 4090-494** Lord Brundon stated:

**“Looking at the matter regularly, a decision on procedure alone is not a decision on the merits. Looking at the matter positively collusion on the merits is a decision which establishes certain facts proved or not in dispute, states what are the relevant principle of law applicable to such facts and expresses a conclusion with regard to the effect of applying those principles to the factual subsection concerned”**

On consideration of the above principles, interlocutory decisions or interim orders by implication do not have the force of law on res judicata on the main suit of petition to raise jurisdiction or act as a bar to further proceedings. The facts being referred to by the 2<sup>nd</sup> respondent relate to dismissal of suit for no-attendance under Order 12 Rule 3 of the Civil Procedure Rules. That formed the basis of an interim order by the respondents.

For these reasons I would dismiss the preliminary objection, with cases. Accordingly the scope of the petition being maintained. The petitioners do file sub missions in connections with the petition within 14 days from today’s date. Cumulatively, the respondent could have 14 days from the date of service to file their respective submissions on the petition. A conference to take directions before the Deputy Registrar on 16<sup>TH</sup> September, 2019.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 20<sup>TH</sup> DAY OF SEPTEMBER, 2019.**

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**R. NYAKUNDI**

**JUDGE**