REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CONSTITUTIONAL PETITION NO. 2 OF 2017

BENEDICT SABALA TENDWA.....1ST PETITIONER

ELIUD WITABA MUGANDA.....2ND PETITIONER

CEDRICK LIPUAMAH HEYI.....3RD PETITIONER

JOAKIM AKONYA PETER.....4TH PETITIONER

VERSUS

COUNTY GOVERNMENT OF KAKAMEGA.....RESPONDENT

JUDGMENT

1. What I am called upon to determine is a petition dated 7th March 2017, filed by Benedict Sabala Tendwa, Eliud Witaba Muganda, Cedrick Lipuamah Heyi and Joakim Akonya Peter, who I shall refer to hereafter as the petitioners. The petition has named the County Government of Kakamega as the respondent, and I shall hereafter refer to the said county government as such. The averments and prayers in the petition are not expressed in a language that is clear, but the gist of it appears to be that the petitioners are not satisfied with the creation of a certain administrative unit by the respondent on grounds that the same has resulted merge in the two Sub-Locations and that there was no public participation before the decision and action were taken.

2. The affidavit in support of the petition was sworn by the 1st petitioner on 9th March 2017. He avers that they, the petitioners, were residents of Shirulu Sub-Location, within Kakamega County. He states the respondent had created an administrative unit under the county government known as Lwamboko Village, which covered both the Shirulu and Museno Sub-Locations. He complains that they had sought to give their views to the respondent on the matter but to no avail. He asserted that under Constitution there was provision for public participation before critical decisions were made. He complains that once a decision is made without consultation their rights would be compromised and they would be exposed to irreparable loss. The decision in their view, he says, would deny them equitable access to services and resources allocated to the respondent by the national government. He states that they seek conservatory orders and public participation to be allowed. He urges that the merger of the two Sub-Locations must be done in a transparent manner and not in such a way as to take away their right to resources. He has attached to his affidavit documents that express their complaints and those of the local communities.

3. The respeondent replied to the petition through an affidavit sworn on 9th May 2017, by Moses Lukale Sande, who is its County Attorney. He has set out the legal framework that guides the exercise of creation of villages and community areas, and the formulae to be used in defining such areas. He avers that Shirulu SubLocation did not qualify to be a villahge unit, neither did Itumbu and Lugango qualify to be community areas based on the forumlae and criteria set out in the relevant law. He further avers that the revocation of manager for Lwamboka Village Boundary Adminsitartor was not tenable for no such office or portifolio existed. He asserts that there was public particpaltion based on documents that he has atatched to the affidavit.

4. Directions were given on 23rd October 2017. The petitioners were given time to respond to the replying affidavit. It was directed that the petition be disposed of by way of written submissions to be highlighted on 4th December 2017. I have perused the record before me, and I have not encountered any response by the petitioners to the reply by the respondent. The respondent did file its written submissions 8th July 2019, dated 5th July 2019, but the petitioners did not file any. I have perused through the written submission by the respondent and noted the arguments made therein. Although the matter was scheduled was the highlighting of written submissions on 4th December 2017, it was not listed, and, in any event, the written submissions had not yet been filed either of the two sides. The advocates for the respondent fixed the matter for hearing on 9th July 2019. Come that date none of the parties nor their advocates attended court, and I decided to determine the matter on the basis of the material on record, and I fixed a date for judgment.

5. Before I can consider the petition on it merits, I must first assess whether the constitutional petition herein passes muster. I have to evaluate whether the pleading before me, which is purported to be a constitutional petition, qualifies as such. I have a duty to consider the

responsibility that is placed upon a party who comes to court on a constitutional petition alleging a violation of constitutional provisions and who seeks redress from the court in respect of the violations alleged.

6. Article 165 of the Constitution, 2010, establishes the High Court and confers it with jurisdiction, which includes jurisdiction over constitutional matters. The relevant provisions are in Article 165(3)(b)(d), 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) …*
>
> *(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—*
>
> *(i) the question whether any law is inconsistent with or in contravention of this Constitution;*
>
> *(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;*
>
> *(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and*
>
> *(iv) a question relating to conflict of laws under Article 191 …"*

7. Under Article 165(3)(d) (ii) (iii), the High Court has jurisdiction to deal with any matter brought before it relating to the decisions and actions of county governments where questions arise as to whether anything done by such governments, under the Constitution or any other law, was inconsistent with or contravened the Constitution.

8. 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 provisions state 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."*

9. Article 165(6) of the Constitution is also relevant. It confers a supervisory jurisdiction on the High Court over subordinate courts, and other bodies or persons or entities, that exercise a judicial or quasi-judicial function. Traditionally, the High Court exercised that supervisory jurisdiction through the judicial review process as provided for under sections 8 and 9 the Law Reform Act, Cap 26, Laws of Kenya, and Order 53 of the Civil Procedure Rules, and occasionally under the inherent powers of the court saved under section 3A of the Civil Procedure Act, Cap 21, Laws of Kenya. For avoidance of doubt, Article 165(6) states:

> *"(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court."*

10. In addition, there is Article 47 which makes a right to fair administrative action, which is expeditious, efficient, lawful, reasonable, and procedurally fair, a constitutional and human right. Parliament passed the Fair Administrative Action Act of 2015 to give effect to Article 47 of the Constitution. Article 47 states as follows:

> *"47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*
>
> *(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.*
>
> *(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—*

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration."

11. The presence of these provisions in the Constitution on the supervisory jurisdiction of the High Court over subordinate tribunals and bodies, and of the right to fair administrative action, have opened avenues for litigation at the High Court over these issues, often through constitutional petitions. The petition before me should, therefore, be seen in that context. The petitioners have a right to move the High Court under Articles 22, 47, 165(6) and 258 for the remedies set out in Article 23 of the Constitution, among others. The petition herein is, therefore, properly before court.

12. The only question then for me to consider at this stage is 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.

13. There is ample judicial precedent that a person who seeks redress under the Constitution must 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. In *Anarita Karimi Njeru vs. Attorney General* (1979) KLR 154, the court stated the position in the following terms:

"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."

14. In *Meme vs. Republic* [2004] eKLR, the court stated:

"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."

15. The decisions that I have cited above were founded on the retired Constitution. There are more recent decisions under the new Constitution, which state the same principle in similar terms. In *Trusted Society of Human Rights Alliance vs. AG. & 2 others* [2012] eKLR it was said that:

"*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."

16. And in *Mumo Matemu vs. Trusted Society of Human Rights Alliance and others*, Nairobi Civil Appeal No. 290 of 2012, it was stated that:

"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. However, we also note that precision is not conterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point ... Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice as they give fair notice to the other party. The Principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle."

17. My understanding of the principles stated therein is that a party petitioning the High Court 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.

18. Have the petitioners met the test set out in those authorities? I have perused through the petition closely. One remarkable thing about it is that, although it is tituled a constitutional petition, in its body it makes no reference whatsoever to the Constitution. It cites no constitutional provisions, neither does it identify the violations or contraventions of the Constitution upon which it is supposed to be focused on. The prayer sought in the petition is also fashioned in a manner that renders it totally unclear as to what exactly the petitioners are seeking. It is the affidavit in support of the petition that sheds some light on the matter, by mentioning the Constitution, and referring to the requirement for public participation, and alleging that no public participation exercise was carried out, and that enforcement of the decisions complained of was likely to adversely affect them and to expose them to irreparable damage and loss.

19. Can it be said that the petitioners have satisfied the test set in the principle in question? The petition, as fashioned, is in a language that does not clearly bring out or articulate violations or contraventions of the Constitution. A court working with such a pleading can only make fairly broad presumptions of what the petitioners are complaining about. There is some clarity provided by the supporting affidavit. I am, however, alive to the fact that an affidavit is not, strictly speaking, a pleading, for it merely elaborates what is averred in the principal pleading. Am alive too to the spirit of the Constitution, as stated in Article 159, with regard to technicalities. I am prepared to hold that the petition and the affidavit are one, to the extent that they both state the petitioners' case. I am persuaded that the issues raised can be raised in a constitutional petition.

20. The challenge, however, is that the petition on record raises issues that are, in my view, so attenuated as to make it impossible for me to concretely appreciate the violations alleged. The pleadings are so bare and thin on the facts, and do not give a fair amount of detail of the facts surrounding the decision and actions in question, nor is there any elaboration of the damage and loss that the petitioners claim they would suffer should the respondent continue with implementation of the decision in question.

21. The respondent, in its reply to the petition, has done a better job of giving clear and cogent facts around the exercise that the petitioners complain about, complete with an outline of the law that guided the process. It is averred that the requirement for public participation was met, to the extent that meetings were held and the respondent evidences such meetings by annexing documents with attendance lists signed by those who were present. It is pleaded that the petitioners were wholly misguided as to the said process. Although the petitioners were given an opportunity, fourteen (14) days, on 20th July 2012, to respond to the reply, and that period was extended by a further fourteen days on 23rd October 2017, the petitioners did not file a rejoinder to controvert the contents of the reply by the respondent. Neither did they file any written submissions on their petition, despite being directed to do so by the court on 23rd October 2017. It would mean that the explanations given in the reply remain unchallenged.

22. Overall, I am not persuaded that the petition is for granting, and I hereby dismiss the same for the reasons given above. Each party shall bear their own costs.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 25TH DAY OF OCTOBER, 2019

W MUSYOKA

JUDGE