



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 5 OF 2019

**IN THE MATTER OF ARTICLES 1, 2, 3(1), 10, 19, 20, 21, 22, 23, (1), 23(2), 27, 28, 29,
31, 40, 47, 48, 50(1), 165(3) (a) (b) AND 258 (1) 2(d) OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF RULES 4, 8, 10, 11, 13, 14, 20, 21 AND 23 OF THE CONSTITUTION OF KENYA
(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) AND PROCEDURE RULES, 2013**

AND

IN THE MATTER OF SECTION 152E, 152F AND 152G OF THE LAND LAWS (AMENDMENT ACT, 2016)

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 2(1), 3(1),
10, 27, 29, 31, 40, 50(1) AND 157(1) & (2) OF THE CONSTITUTION OF KENYA, 2010**

BETWEEN

ANNE NZAUMI MUNYAKA.....PETITIONER

-VERSUS-

OLIVER NZEKI MUNYAKA &

CHRISTOPHER KINYATTA MUNYAKA

(as the Legal Rep' of the Estate of George Munyaka Kavulu).....RESPONDENTS

RULING

1. By a petition dated 4th March, 2019, the petitioner herein seeks the following orders:

- 1) A declaration that the Respondents action to evict the Petitioner from her residential land parcel No. Mitaboni/Kathiani/390 contravenes Articles 28, 29(a) (c) (f), 31 and 40 of the constitution of Kenya 2010, hence unconstitutional and consequently illegal.
- 2) A declaration that the said eviction was in clear contravention of Section 152E, 152F AND 152G of the Land Laws(Amendment) Act, 2016 hence illegal and unlawful.

3) An order for immediate compensation at cost estimated Kshs. 670,414/=.

4) An order for resettlement and/or placement of applicants' social and economic position prior to the said eviction. Alternative an order for alternative accommodation.

5) An award for exemplary and general damages for pain, suffering and loss of amenities.

6) Cost of this petition be borne by the Respondents.

7) Any other order or relief as this Honourable court deem fit for the end of justice and restore Honour and integrity, to the Petitioner.

2. In paragraphs 1 and 2 of the petition, the petition described the parties to the petition while in paragraph 3 thereof, the petition stated the capacity in which the petition was brought. From paragraphs 4 to 19, the petitioner set out the various constitutional provisions on the basis of which the said petition was brought. Paragraph 20 then set out the petitioner's constitutional rights which she felt were violated.

3. Clause 10(2)(b) of *The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*, popularly known as *The Mutunga Rules* provides that the petition shall disclose the facts relied upon. A perusal of the petition herein reveals that it is not an epitome of impeccable, elegant or paragon drafting. Absence the affidavit filed with the petition and the petition would be simply a skeleton or shell without any flesh in it.

4. Mercifully with the petition was filed a supporting affidavit. In the said affidavit, it would seem that what provoked the petition were the sentiments of **Kemei, J** in Machakos High Court Succession Cause No. 5 of 2018 – In the Matter of George Munyaka (Deceased) a cause in which the Petitioner herein filed an objection seeking that the orders of demolition of the premises situate on LR Title Mitaboni/Kathiani/390 issued in that cause on 4th May, 2018 be set aside and that an order of mandatory injunction be issued restoring her to the occupation and possession of LR Title Mitaboni/Kathiani/390 and compensation for the loss she incurred as a result of the said eviction. By his ruling delivered on 7th February, 2018 **Kemei, J** allowed the Petitioners prayer for interlocutory injunction but dismissed the other prayers. At paragraph 13, the judge declined to set aside the ex-parte orders for demolition on ground that the said orders had already been carried out and setting them aside was not efficacious. On the issue of declaration for violation of the Petitioners constitutional right, the court opined that the Petitioner herein could still proceed to institute a constitutional petition for redress while at the same time participate in that cause regarding her objection to making of grant.

5. In this petition, the petitioner's case is based on the allegation that she was married to the deceased in the aforesaid succession cause, **George Munyaka**, with whom she lived for more than 10 years as man and wife on the suit parcel of land together with her children from a previous marriage whom the deceased agreed to support and whom he recognised as his.

6. It was therefore the petitioner's case that as a result of the acts of demolition carried out through the respondents both her rights and those of her children were violated as no notice was issued to her before the said action was undertaken.

7. In opposing the petition, the Respondent averred that the registered proprietor of LR Title No. Mitaboni/Kathiani/390, the suit property is **George Munyaka Kavulu** who is deceased having passed away on the 20th September 2017 and the Respondents are related to the deceased by virtue of being his biological sons and are Personal Representatives to his Estate by dint of Letters of Administration Intestate granted by the High Court at Machakos in Succession Cause No. 5 of 2018, in the Matter of the Estate of George Munyaka Kavulu (Deceased.).

8. According to the Respondents, the suit property is a parcel of land measuring approximately 2.5 acres and which the deceased used as a coffee farm, and which house therein was used as a farmhouse where the deceased and/or his children amongst them the Respondents herein would occasionally visit while supervising farm activities and which was used as a store for farm inputs. According to the Respondents, in the years prior to the deceased's untimely death, he and his Children amongst them the Respondents herein had noticed some structural integrity concerns of the farmhouse as it had developed huge cracks on the wall which were widening up, the foundation of the house was sinking and the roof was collapsing. At the time, the deceased was desirous of renovating the house but was however very aged and frail from deteriorating health that he was unable to repair the same. At the said time, and at all material times to this Petition, the said Kathiani House which was in a dilapidated state, was vacant and no one from the deceased family lived on the said property.

9. It was averred that in the course of the Succession Cause, the Respondents together with other beneficiaries of the Estate contracted the services of an expert from the Department of Public Works and Housing in Machakos County, Kathiani Sub-County Works Offices to advise them on whether the said House could be renovated and/or repaired. The after visiting the premises condemned the house and advised the Respondents and other beneficiaries, through a report dated 22/2/2018 that the only viable option was to demolish the house because in the state it was it would likely cause serious injuries or loss of life especially to the people at Kathiani Shopping Center who used to pass by the said house. Soon thereafter around the time when the March April long rains had started and in light of the circumstances giving rise to concerns of public safety the Respondents together with the beneficiaries of the Estate agreed to take drastic measures to preserve the Estates property by moving court through a Notice of Motion Application for orders seeking lawful demolition of the House. According to the Respondents, this was also agreed because the house was not insured therefore in case of injury which could have arisen out of it, the Estate would suffer prejudice by being forced to pay large sums of monies which were out of the reach of beneficiaries and which would have been detrimental to the Estate. Accordingly, the Respondents moved court for orders on the 12th day of April 2018 whereupon the court granted them orders on the 4th of May 2018 giving the Respondents leave to demolish the house with the supervision of members of the Kenya Police who were also required to take inventory of the goods therein. The lawful demolition was carried out on the 7th day of May 2018 in the presence of the Police who recorded an inventory of all furniture and household goods found in the premises at the time.

10. According to the Respondents, during the demolition exercise, the house was vacant and was not occupied by any person and it was not

until the 25th day of July 2018, 2 months and 15 days down the line, that the Petitioner filed an Application before Court seeking to set aside the orders granted on the 4th of May 2018. However, the Court, in its ruling, dismissed the Petitioners' Notice of Motion Application seeking to set aside the demolition orders noting that the Petitioner had failed to prove possession and/or occupation of the premises, had not complained to any relevant authority, a professional report had recommended demolition of the premises and lastly the fact that the Police supervised the demolition. Dissatisfied with the said decision, the Petitioners then instituted the instant petition.

11. According to the Respondents the Succession Court, in its ruling, dismissed the Petitioners' Notice of Motion Application seeking to set aside the demolition orders noting that **the Petitioner had failed to prove possession and/or occupation of the premises, had not complained to any relevant authority, a professional report had recommended demolition of the premises and lastly the fact that the Police supervised the demolition.**

12. **It was contended that the Petitioner failed to disclose that she** has appealed the ruling of the Succession Court Cause No. 5 of 2018 and at the same time filed this Petition which is tantamount to another appeal against that ruling through the back door and this Court being a Court of concurrent jurisdiction ought not entertain this Petition as the same would occasion competing decisions on the same subject.

Determination

13. From the foregoing it is clear that the Petitioner's case herein is based on her relationship with the deceased which according to her was that of husband and wife. The Petitioner, rightly in my view, moved the Succession Court for the determination of *inter alia* her status in the estate of the deceased. Though she did not get all the orders she was seeking some of which the court found had already been overtaken by events, the issue of her status still remains unresolved. It is also contended that the Petitioner, being aggrieved by the decision of the Succession Court has commenced appellate proceedings. In **General Plastics Limited vs. Industrial Property Tribunal & Another [2009] eKLR, Wendoh, J** expressed herself as hereunder:

“The only conclusion I can arrive at is that, it seems the Applicant is dissatisfied with the decision of the Respondent and that being so, their recourse lies in filing an appeal to the High Court under S. 115 (1) of the Industrial Property Act. And indeed the Applicants did file Appeals C/A 590/05 which is from the ruling of the Tribunal in 15/26 of 2002, CA 586/05 in respect of the Tribunal's ruling in 16/27 of 2002 and CA 589/05 in respect of the ruling of the Tribunal in 17/28 of 2002. That is the remedy they should pursue in addition to the revocation proceedings that are yet to be determined. In my considered view the Applicants have abused the court process by unnecessarily protracting this matter and making what is not a constitutional issue into one and in the meantime, the Applicant is benefiting from interim orders against the disputed design. The statute under which the 1st Respondent is created provides procedure for a party aggrieved by that decision, that procedure must be followed instead of camouflaging every such grievance as a constitutional issue. The court must prevent abuse of its process by disallowing such applications. (See Ben Kipeno & Others vs. AG Pet 15/07 and Bahadur vs. AG (1986) LRC Const 297 where the court said;

“The constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can find a claim under substantive law, the proper cause is to bring the claim under that law and not under the Constitution.”

In Speaker of National Assembly vs. Njenga Karume (1990-1994) Ea 546 the Court of Appeal reiterated the above principle, that where the Constitution or A Statute provides a certain procedure to be followed, that procedure must be adhered to. In this case, failure to follow the procedure set out in the Regulations disentitles the Applicant to the Constitutional remedy sought herein. See also Harrikisson vs. AG (1979) 3 WLR 63. The Applicant sought orders that the decisions of the Respondent be set aside and the causes 15/26 of 2002 be heard afresh. As earlier ruled in this judgment, the 1st Respondent acted within its mandate under Rule 24(8) of the Rules made under the Act. This court cannot purport to substitute the decision of the Tribunal with its own decision as it would be usurping that Tribunal's mandate and therefore overstepping its jurisdiction and would be sitting as an appellate court. The Applicant has a remedy of appeal under S. 115 of the Act which they should pursue. Setting aside the order and eventually ordering a rehearing would mean a further delay in resolution of the said dispute. Both parties have a right to a speedy disposal of this matter and the rights should not be seen to favour one party. In addition to the earlier observations that this application is an abuse of the court process, none of the orders sought in the petition are available to the petitioner and this petition is dismissed with costs to the Respondent and Interested Party.”

14. Mwita, J in **Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) vs. Habil Olaka – Executive Director (Secretary) of the Kenya Bankers Association Being sued on behalf of Kenya Bankers Association) & Another [2018] eKLR** held as follows:

“65. It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a Court of law in the manner allowed by that particular statute or in an ordinary suit as provided for by procedure. It is not every failure to act in accordance with a statutory provision or where an action is taken in breach of a statutory provision that should give rise to a constitutional petition. A party should only file a constitutional petition for redress of a breach of the Constitution or denial, violation or infringement of, or threat to a rights or fundamental freedom. Any other claim should be filed in the appropriate forum and in the manner allowed by the applicable law and procedure. In that regard, it is worth remembering the warning sounded by Lord Diplock in the case of Harrikisson V Attorney General of Trinidad and Tobago [1980]AC 265 where he decried the tendency of people rushing to institute constitutional petitions alleging violation of fundamental freedoms where there was none stating;

“The notion that wherever there is a failure by an organ of government or a public officer to comply with the law this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed for individuals by...the constitution is fallacious. The right to apply to the High Court...for redress when any human right or fundamental freedom

is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action...the mere allegation that a human right of the applicant has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the Court...if it is apparent that the allegation is frivolous, vexatious or abuse of the process of Court as being made solely for the purpose of avoiding the necessity of applying the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

15. Similarly, in Benard Murage vs. Fine Serve Africa Limited & 3 Others [2015] eKLR the Court stated that:

“Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first.”

16. It must be appreciated that not each and every litigation that makes reference to the Constitution merits being litigated as a constitutional cause. It was accordingly held in Rapinder Kaur Atwal vs. Manjit Singh Amrit Petition No. 236 of 2011 that:

“All the authorities above, would point to the fact that the Constitution is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within administrative processes. In this case, the former must be true... I must add the following; our Bill of Rights is robust. It has been hailed as one of the best in any constitution in the world. Our courts must interpret it with all the liberalism they can marshal. However, not every pain can be addressed through the Bill of Rights and alleged violations thereof.”

17. In the same vein, in John Harun Mwau vs. Peter Gastrow & 3 Others [2014] e KLR the opined that the Constitution only ought to be invoked when there is no other recourse for disposing of the matter with the court holding that:

“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition to a breach of the other declaration of rights...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 a statute only when it is necessary for the decision of the case to do so.”

18. In NM & Others vs. Smith and Others (Freedom of Expression Institute as Amicus Curiae) 200(5) S.A 250 (CC) the Constitutional Court of South Africa stated:

“It is important to recognise that even if a case does raise a constitutional matter, the assessment of whether the case should be heard by this Court rests instead on the additional requirements that access to this court must be in the interests of justice and not every matter will raise a constitutional issue worthy of attention.”

19. Similarly in Minister of Home Affairs vs. Bickle & Others (1985) L.R.C. Cost.755, Georges, CJ held as follows:

“It is an established practice that where a matter can be disposed off without recourse to the Constitution, the Constitution should not be involved at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so (Wahid Munwar Khan vs. The State AIR (1956) Hyd.22)...Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; 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.”

20. In Uhuru Muigai Kenyatta vs. Nairobi Star Publications Limited [2013] eKLR, Lenaola, J held that:

“Where there is a remedy in Civil Law, a party should pursue that remedy and I say so well aware of the decision in Haco Industries (supra) where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in AG vs S.K. Dutambala Cr. Appeal No.37 of 1991 (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions.”

21. In my view, the pending Succession Cause is however the right forum for determining the relationship between the Petitioner and the Deceased since this Petition is based on the assumption that the Petitioner and the deceased were in a relationship. That issue cannot be properly determined in these proceedings and without its determination, this court would not be able to properly determine this petition. Since the petitioner is pursuing her interests in the Succession Cause, it is only proper that her relationship with the deceased be determined first before this petition can be determined. To make a determination as to the petitioner’s rights in this petition would have the effect of rendering the succession proceedings superfluous. As the Respondents rightly submit, the determination of the issues raised herein is likely to overturn the decision made or to be made in the succession cause.

22. It is therefore my view that to proceed and determine this petition would have the effect of rendering the said proceedings superfluous. To my mind, to start legal proceedings and abandon the same midstream without terminating the same and proceed to commence fresh proceedings amounts to abuse of the process of the Court. To entertain these proceedings, in my respectful view amount to this Court abetting abuse of its process since that would amount to playing lottery with the due process. I have read the decision of **Kemei, J** referred to above as an advisory opinion but I do not take it that the court advised the petitioner to commence these proceedings. What I understand the

learned judge to have been saying was that the petitioner's allegations of violation of her rights were better ventilated in a constitutional petition. However, those rights can only be ventilated once the petitioner's status as regard the estate of the deceased has been established.

23. In the premises the order which commends itself to me and which I hereby grant is that this petition is stayed pending the hearing and determination of the petitioner's claim in Machakos High Court Succession Cause No. 5 of 2018 – In the Matter of George Munyaka (Deceased).

24. The costs will be in the cause.

25. Orders Accordingly.

Ruling read, signed and delivered in open Court at Machakos this 24th day of October, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

Miss Mbuvi for Mr Ndolo for the Petitioner

Mr Mulu for Mr Nyamu for the Respondent

CA Geoffrey