



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 47 OF 2019

ANTHONY OTIENDE OTIENDE.....RESPONDENT/PETITIONER

VERSUS

THE ATTORNEY GENERAL.....OBJECTOR/RESPONDENT

KIRINYAGA CONSTRUCTION COMPANY (K) LTD.....INTERESTED PARTY

RULING

1. This ruling addresses the Attorney General's Notice of Preliminary Objection dated 8th April, 2019. The notice seeks the termination of the petition filed by Anthony Otiende Otiende on the grounds that:-

- “a) THAT the Application offends the mandatory provisions of Section 6 of the Civil Procedure Act.**
- b) THAT the Petitioner lacks the locus standi to institute the petition and therefore should be struck off with costs.**
- c) THAT under Article 24 of the Constitution of Kenya, 2010 fundamental rights and freedoms including the right to information are not absolute in an open democratic society based on the factual circumstances of the suit.**
- d) THAT the issues and complaints raised in the Notice of Motion and Petition are unmerited, frivolous and violates provisions of Article 31(d) of the Constitution of Kenya, 2010 thereof.**
- e) THAT the petition thereof is an abuse of the court process, incompetent, incongruous, inept and vexations and ought to be forthwith dismissed.”**

2. The Interested Party, Kirinyaga Construction Company (K) Limited, supports the notice. The Petitioner, however, opposes it.

3. A perusal of the notice of preliminary objection discloses that only grounds 1 and 2 merit consideration on a preliminary basis. If any of the grounds are upheld, the petition will stand dismissed. All the other grounds in the notice of preliminary objection can only be determined after the full hearing of the petition. In the circumstances I will only consider grounds 1 and 2 of the preliminary objection. I will also confine myself to the submissions made on the two grounds.

4. The Attorney General filed submissions dated 30th September, 2019. In support of the assertion that the petition is *sub judice*, the Attorney General submitted that the issues raised by the Petitioner herein are actively before court in **Nairobi HCCC No. 885 of 2009 Kirinyaga Construction Company (K) Limited v Hon. Attorney General**. According to the Attorney General, the Petitioner was aware of the existence of such a suit as evidenced by exhibit A002 annexed to the affidavit in support of his notice of motion dated 8th February, 2019. It is the Attorney General's case that in **Nairobi HCCC No. 885 of 2009 Kirinyaga Construction Company (K) Limited v Hon. Attorney General**, the Attorney General has sought by way of a counter-claim a refund of approximately Kshs. 446,000,000 being part of the payment already made to the Interested Party. Further, that the judgement in the civil suit was slotted for delivery on 30th July, 2019.

5. It was submitted for the Attorney General that the Petitioner having been aware of the existence of the civil suit ought to have sought to be enjoined as a party thereto. Counsel for the Attorney General termed this petition an abuse of the court process which is likely to end in the issuance of conflicting decisions resulting in the embarrassment of the courts. Further, that the suit contravenes Section 6 of the Civil Procedure Act which lays down the rule on *sub judice*. The decisions in the cases of **Thika Min Hydro Co. Ltd v Josphat Karu Ndwiga [2013] eKLR** and **Barclays Bank of Kenya Ltd v Elizabeth Agidza & 2 Others [2012] eKLR** were cited as explaining the doctrine of *sub judice*.

6. The Attorney General contended that this matter is *sub judice* because the Interested Party and the Respondent in this case are the plaintiff and the defendant respectively in the civil case. Further, that the Interested Party's claim against the Respondent in the civil suit is for the sum of Kshs. 321,986,586.94, and one of the orders sought by the Petitioner herein is in respect of that money.

7. The Attorney General did not make any submission on the allegation that the Petitioner has no *locus standi*. The Interested Party submitted that the Petitioner lacks *locus standi* to institute the petition. The decision in **Priscila Nyokabi Kanyua v Attorney General & Another [2010] eKLR** was cited as stating the principle of *res judicata*. It is the Interested Party's case that the relationship between it and the Attorney General arose from a private contract and the relationship does not therefore fall within the public arena. Reliance was placed on the decision in the case of **Humphrey Makokha Nyongesa & Another v Communication Authority of Kenya & 2 others [2018] eKLR** for the proposition that a contractual relationship involving a government does not fall in the public arena. Further, that as was held in the said case, even if the applicants had demonstrated their interests under Articles 22 and 258 of the Constitution they would still have had no *locus standi* in the matter. The court was therefore urged to dismiss the petition.

12. The Petitioner filed submissions dated 26th September, 2019 in opposition to the preliminary objection. On the allegation that this petition is *sub judice* the civil suit, the Petitioner submitted that he is not a party to civil suit, which in any event is a dispute that is commercial in nature. He contended that the interests subsumed in the civil suit are exclusively for the benefit of the parties therein whereas this petition is perched on public interest, as success of the Interested Party in the civil suit has a direct negative pecuniary impact on the taxpayers. According to the Petitioner, abridgement of his rights and those of the public in the manner complained of in the petition is not a matter in issue in the civil suit. The Petitioner asserted that he seeks the intervention of the court on the basis of Articles 22, 23, 165(3) and 258(1) of the Constitution and his case is on a higher pedestal than Section 6 of the Civil Procedure Act.

13. On the claim that he lacked the *locus standi* to file the petition, the Petitioner submitted that Articles 22 and 258 of the Constitution empower every person, whether corporate or non-incorporated, to move the courts, contesting contravention of the Bill of Rights, or the Constitution in general. The case of **John Wekesa Khaoya v Attorney General, Petition No. 60 of 2012; [2013] eKLR** is cited as supporting this assertion. The Petitioner contended that this petition raises constitutional questions and falls into the category of public interest litigation. He submitted that in **John Wekesa Khaoya v Attorney General, High Court Petition No. 60 of 2012** the court set out parameters to guide the filing of causes in the public interest. The parameters require that the intended suit must be brought in good faith in the public interest and the suit should not be aimed at giving any personal gain to the applicant. It is the Petitioner's case that his petition has met these conditions.

14. The Petitioner's submission is that Article 258(1) of the Constitution takes away the notion of *locus standi*, which meant that only an aggrieved party, demonstrating damage or harm, can approach the court seeking legal remedy. Further, that public interest cases encompass more than just the parties to a particular matter since public interest litigation is meant to benefit the wider public and not just the individual directly affected by the issues raised in the litigation.

15. The Petitioner also contended that Article 22(1) & (2) of the Constitution is explicit that any person can institute proceedings in this court, claiming the violation of rights and fundamental freedoms, even on behalf of another person or in the public interest. Further, that pursuant to Article 22(3)(b), formalities relating to the proceedings, including commencement of the proceedings, are to be kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation.

16. According to the Petitioner, a purposive reading of Articles 22, 258 and 260 of the Constitution, leads to the logical conclusion that they enlarge *locus standi* by allowing any person including a person acting in the public interest to move a court of law contesting infringement of the Bill of Rights or the Constitution as a whole. He dismissed the Interested Party's reliance on the case of **Humphrey Makokha Nyongesa & Another v Communications Authority of Kenya & 2 Others [2018] eKLR** stating that the decision is irrelevant as it dealt with a dispute falling under a private employment contract in which some second-year students of law at the University of Nairobi's Parklands Campus had felt aggrieved that an officer of the Communications Authority of Kenya had been sent on compulsory leave. According to the Petitioner, the students' application for leave to commence judicial review proceedings was rejected on the ground that there would be no disadvantage to the public if the officer remained on compulsory leave considering that his duties would be adequately covered by the person appointed to act in his position.

17. The question that arises therefore is whether the Petitioner lacks *locus standi* hence requiring the termination of his petition at this stage. Also to be addressed is the question as to whether this petition is *sub judice* owing to the existence of **Nairobi HCCC No. 885 of 2009 Kirinyaga Construction Company (K) Limited v Hon. Attorney General**.

18. I will start with the claim that the Petitioner lacked *locus standi* to bring this petition. *Locus standi* simply means the right or capacity to institute proceedings in a court of law. Although it is the Attorney General who alleged that the Petitioner lacked *locus standi*, no submissions were made to explain why the Petitioner did not have the legal capacity to file this petition. The interested Party's position is that this petition intrudes into a private contract between the Interested Party and the Attorney General.

19. I have carefully considered the submissions of the Interested Party and the Petitioner on the question of *locus standi*. A perusal of the case of **Humphrey Makokha Nyongesa & another v Communications Authority of Kenya & 2 others [2018] eKLR** confirms that leave to commence judicial review proceedings was denied because the court reached the conclusion that no public interest issue was involved. The court observed that:-

“In the present case, the applicants have stated that their interest in this application is that they have an obligation to respect, uphold and defend the constitution whenever it is under attack, in their capacity as “good Samaritans” and “on behalf of the greater public interest.” The foregoing begs the question whether the issue before the court is in the public interest or falls within the private law arena.

What does the public stand to suffer because the Interested Party has been sent on compulsory leave? In the view of the court, the only person who is affected by the compulsory leave is the Interested Party. As the letter sending him on

compulsory leave states, he was to hand over his office to the Director/General Compliance and Standards who was appointed to act while the Interested Party is on leave. This means there would be no disadvantage to the public while the Interested Party is away on compulsory leave, as his duties would be adequately covered by the person appointed to act in his position....

That this being a matter of private contract, even if the applicants had demonstrated their interest under Article 22 and 258, they would still have no *locus standi* in view of the action taken by the 1st respondent falling under private employment contract.”

20. In my view, the doctrine of *locus standi* in litigations touching on issues of public interest has, as a consequence of the various provisions of the Constitution, been reduced to an impotent defence. It lost its sheen upon the elevation of public interest litigation by the Constitution. This observation finds footing in the case of **Mumo Matemo v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR** in which the Court of Appeal held that:-

“(27) Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the constitution by necessity and logic broadens access to the courts. In this border context, this Court cannot fashion nor sanction an invitation to a judicial standard for *locus standi* that places hurdles on access to the courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the petition was filed before the High Court by an NGO whose mandate includes the pursuit of constitutionalism and we therefore reject the argument of lack of standing by counsel for the appellant. We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1st respondent had the *locus standi* to file the petition. Apart from this, we agree with the superior court below that the standard guide for *locus standi* must remain the command in Article 258 of the Constitution.”

21. The Court of Appeal went ahead to state that:-

“(28) It still remains to reiterate that the landscape of *locus standi* has been fundamentally transformed by the enactment of the Constitution in 2010 by the people themselves. In our view, the hitherto stringent *locus standi* requirements of consent of the Attorney General or demonstration of some special interest by a private citizen seeking to enforce a public right have been buried in the annals of history. Today, by dint of *Articles 22 and 258* of the Constitution, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in the public interest. Pursuant to *Article 22 (3)* aforesaid, the Chief Justice has made rules contained in Legal Notice No. 117 of 28th June 2013 – *The Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013*—which, in view of its long title, we take the liberty to baptize, the “*Mutunga Rules*”, to *inter alia*, facilitate the application of the right of standing. Like *Article 48*, the overriding objective of those rules is to facilitate access to justice for all persons. The rules also reiterate that any person other than a person whose right or fundamental freedom under the Constitution is allegedly denied, violated or infringed or threatened has a right of standing and can institute proceedings as envisaged under *Articles 22 (2) and 258* of the Constitution.”

22. A perusal of the petition dated 8th February, 2019 shows that the Petitioner is questioning the manner in which the Attorney General exercised his powers in respect of a civil dispute between his office and the Interested Party. The issue raised is of interest to the public. The doctrine of *locus standi* cannot be allowed to stand on the way of such an issue. I therefore find no merit in the Attorney General’s assertion that the Petitioner had no legal capacity to file the petition.

23. The *sub judice* rule is found in Section 6 of the Civil Procedure Act, Cap. 21 which provides that:-

“Stay of suit

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

***Explanation.*—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.”**

24. As already pointed out, the Petitioner is through these proceedings questioning the payment of public funds pursuant to the Respondent’s contract with the Interested Party. The civil case will determine if the money is payable. The issues raised by the Petitioner will still need to be considered and a decision made on them. The issues raised by the Petitioner are not the same with the issues in the civil case. The rule of *sub judice* does not therefore apply to the circumstances of this case. This ground of preliminary objection also fails.

25. In conclusion, I find that the Attorney General’s notice of preliminary objection dated 8th April, 2019 fails in so far as it alleges that the petition offends the mandatory provisions of Section 6 of the Civil Procedure Act and that the Petitioner lacks the *locus standi* to institute the petition. The other grounds raised in the notice of preliminary objection will be dealt with after the petition is heard. The preliminary objection on the two identified grounds is therefore dismissed. Costs shall abide the outcome of the petition.

Dated, signed and delivered at Nairobi on 28th November, 2019.

W. Korir,

Judge of the High Court