



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.197 OF 2019

IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ALLEGED VIOLATION OF ARTICLES 179, 181, 186, 195 AND 196 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 18 OF THE COUNTY ASSEMBLIES POWERS AND PRIVILEGES ACT, 2017

AND

IN THE MATTER OF STANDING ORDER 94 ON MATTERS OF SUB-JUDICE

BETWEEN

GITHUNGURI NJIRU FARM (1666) LTD.....PETITIONER

AND

NAIROBI CITY COUNTY ASSEMBLY.....1ST RESPONDENT

OFFICE OF THE CLERK

NAIROBI CITY COUNTY.....2ND RESPONDENT

COMMITTEE ON PLANNING AND HOUSING.....3RD RESPONDENT

RULING

Petitioner 's Case

1. The Petitioner through a petition dated 24th May 2019 seeks the following reliefs:-

- a) A declaration be and is hereby issued that the purported summons issued by Sectoral Committee on Planning and Housing dated 16th May, 2019 and summons to witness issued by the clerk of the County Assembly of Nairobi City County is null and void ab-initio.
- b) A declaration that such summons and invitation to provide documents which are subject to High Court Elc. Case No. 368 of 2015 is unconstitutional and contempt of court to clear interprets orders of the court.
- c) An order of the court be issued to remove and quash meetings with the Sectoral Committee on Planning and Housing dated 16th May, 2019 and Summons to Witness under Section 18 of the County Assemblies Power and Privileges Act, 2017.

d) That the costs of this Petition against the Respondents be borne by the Respondents.

2. The petitioner also filed Notice of Motion simultaneously with petition dated 24th May 2019 seeking conservatory orders of injunction to be issued against the 1st Respondent from summoning the petitioner herein as the matters for which it is being summoned for are *sub-judice* as there are court orders forbidding so in High Court Elc No.368 of 2015. The petitioner further sought an order to issue against the Respondents from further summoning the petitioner and sought for Respondents to be cited for contempt of court orders issued on 14th December 2015 and clarified on 20th July 2017 by Hon. Lady Justice Gitumbi.

Respondent's Case

3. The Respondents filed Replying Affidavit sworn on 17th June 2019 by Jacob Ngwele Muvengi.

4. Further to filing a Replying affidavit the Respondents filed a Notice of Preliminary Objection on points of law seeking to strike out the petitioner's petition dated 24th May 2019 on the following grounds:-

i) That the law empowers the County Assembly or any of its Committees under Article 195 of the Constitution of Kenya 2010 and section 14(b) and 18 of the County Assemblies Powers and Privileges Act, 2017 to summon any person for purposes of giving any information or evidence.

ii) That the Petitioner has not invoked any Article of the Constitution nor does the Petition raise any Constitutional question which the Respondents have breached as required under Article 22(1) of the Constitution of Kenya 2010 and Rule 4 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules.

iii) That the Petitioner has not invoked any Article of the Constitution on the Bill of Rights and Fundamental Freedoms that has been breached by the Respondents as required under Article 22(1) of the Constitution of Kenya 2010 and Rule 4 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules.

iv) That Article 196 of Constitution of Kenya 2010 and Section 11 of County Assemblies Powers and Privileges Act, 2017 provides immunity to the Clerk of the County Assembly from any legal proceedings.

v) That this Honourable Court lacks the requisite jurisdiction to cite the Respondents for contempt of Court Orders pursuant to the Orders made on 17th December 2015 by Honourable Justice Gitumbi.

vi) That the Petition as drawn is incompetent and bad in law in that it does not conform to the mandatory requirements of drawing up Constitutional Petitions in that the Petitioner has not fully described the parties to the Petition.

vii) That the Petitioner's Petition is frivolous, vexatious, defective and an abuse of this Honourable Court's process.

Analysis and Determination

5. I have very carefully considered the Petition, the Notice of Motion, the Replying affidavit, the Preliminary Objection, the Petitioner's written submissions dated 27th September, 2019 and Respondents written submissions dated 12th July 2019, and from above, the issues arising for consideration from the Notice of Preliminary Objection are as follows:-

a) Whether the County Assembly or any of its committees has powers to summon any person for purposes of giving any information or evidence?

b) Whether the petitioner's constitutional issues are in conformity with mandatory requirements of drawing up constitutional petitions?

c) Whether there is legality of the petitioner's petition against the office of clerk Nairobi City County Assembly and Committee on Planning and Housing?

d) Whether court has jurisdiction to grant orders sought by the petitioner?

A) Whether the County Assembly or any of its committees has powers to summon any person for purposes of giving any information or evidence?

6. The Respondent contention is that the powers of the County Assembly or any of its committee to summon any person for purpose of giving any information or evidence is given by both the Constitution of Kenya 2010 and the County Assembly Powers and Privileges Act No. 6 of 2017. **Article 195 of the Constitution of Kenya 2010** clearly states:-

"1) A county assembly or any of its committees has power to summon any person to appear before it for the purpose of giving evidence or providing information.

(2) For the purposes of clause (1), an assembly has the same powers as the High Court to—

- (a) Enforce the attendance of witnesses and examining them on oath, affirmation or otherwise;
- (b) Compel the production of documents; and
- (c) Issue a commission or request to examine witnesses abroad."

7. On the other end the **County Assembly Powers and Privileges Act No. 6 of 2017**, under **Section 18(1)** gives powers to the County Assembly to summon any person for purposes of giving information or evidence. The said section provides thus:-

"A county assembly or its committees may invite or summons any person to appear before it for the purpose of giving evidence or providing any information, paper, book, record or document in the possession or under the control of that person and, in this respect, a county assembly and its committees shall have the same powers as the High Court as specified under Article 195 of the Constitution." This power is also to be found at section 14(b) of the same Act."

8. In the case of **Owen Yaa Baya vs The County Assembly of Kilifi (2015) eKLR** Hon. Justice Chitembwe stated as follows:-

"Under Article 195 of the Constitution of County Assembly Committee has powers similar to the High Court to summon any person to appear before it for the purpose of giving evidence or providing information." This does not exclude a county secretary. Similarly, the summoning cannot be limited to only those two issues. Giving information can include giving detailed explanation to issues raised in relation to that information.

In my view, having failed to establish a prima facie case, the application would fail. The County Assembly has a role to play in checks and balances of the executive. Article 174 of the Constitution provides that: The objects of the devolution of government are-

i) To enhance checks and balances and the separation of powers. The Court would in halting the process engaged by the Respondent, pending the hearing of the Petition, under the circumstances be interfering with the doctrine of separation of powers."

9. I have considered the provisions in Article 95 of the Constitution of Kenya 2010 and Section 18 of the County Assembly Powers and Privileges Act No. 6 of 2017 and it is clear, that a County Assembly or any of its committees has unqualified powers to summon any person to appear before it for the purpose of giving evidence or providing information, paper, book, record or documents in the possession or under control of that person and in that respect the County Assembly and its committee shall have the powers as the High Court as specified under Article 195 of the Constitution. The same power is also to be found under section 14(b) of the same Act. The petitioner has failed to establish lack of such powers. I find that the County Assembly has a mandate to play in checks and balances of the Executive as per **Article 174 of the Constitution of Kenya 2010** where it is provided:-

"The objects of the devolution of government are—

- (a) to promote democratic and accountable exercise of power;
- (b) To foster national unity by recognising diversity;
- (c) To give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;
- (d) To recognise the right of communities to manage their own affairs and to further their development;
- (e) To protect and promote the interests and rights of minorities and marginalised communities;
- (f) To promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;
- (g) To ensure equitable sharing of national and local resources throughout Kenya;
- (h) To facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya; and
- (i) to enhance checks and balances and the separation of powers."

10. I find by the interference of the court as sought by the petitioner in halting the process engaged by the Respondents, would amount to interfering with the doctrine of separation of powers especially where there is no evidence, that the Respondent's acts are unconstitutional or are beyond their constitutional mandate. The petitioner has not demonstrated nor submitted on the Respondents unconstitutional acts. It has further not been demonstrated, that the summons were issued contrary to provisions of the constitution and statute referred above. I find the Respondents conduct of summoning the petitioner's meritorious and to be within the confines of the law and is lawful and not tainted with any illegalities for court to decide otherwise.

B) Whether the petitioner's constitutional issues are in conformity with mandatory requirements of drawing up constitutional

petitions?

11. Perusal of the petition herein reveals, that it is founded under Articles 179, 181, 186, 195 and 196 of the Constitution of Kenya 2010. This is found on the face of the petition. The petitioner in the body of the petition does not in any way disclose or state or indicate how the Respondents have violated or threatened to violate the said provisions of the constitution and in what manner. It is incumbent upon the petitioner alleging threat or violation of various constitutional provisions to state in what manner and by whom; the alleged provisions are threatened or violated. It is not enough to just state the Articles threatened or violated and fail to demonstrate how the Respondents have violated or threatened to violate the provisions of the constitution.

12. The manner of instituting constitutional petitions are well guided by Article 22(1) of the Constitution and Rule 4 of the Constitution of Kenya (*Protection of Rights and Fundamental Freedoms*) Practice and Procedure Rules 2013. The aforesaid provisions of the law makes it mandatory, that a constitutional petition should raise issues regarding breach of a right contained in the bill of rights, breach of fundamental freedoms as well as breach of any provisions of the constitution.

13. The petition as drawn and filed does not raise any issue regarding violation of any provision of the constitution. The petitioner further has not demonstrated how the provisions it has invoked have been violated by the Respondents. The law related to drawing of the petition was settled in the case of **Anarita Karimi Njeru vs Republic (No.1) (1979) KLR 154** in which the court stated as follows regarding drafting of constitutional petitions:-

"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 a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

14. I have perused the petition as drawn and filed and with all due respect; I find that the petition is contrary to the holding in **Anarita Karimi Njeru vs Republic (supra)**. The petition does not provide any particulars of the alleged complaints, the manner of alleged infringements and as such has no jurisdictional basis before this court.

15. In the case of **Godfrey Paul Okutonyi (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:-

"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."

16. Having considered the petitioner's petition and considering the way the same has been drawn and filed, I find the petition do not fall within the requirements set out in drafting and drawing of the petition. The petitioner has not shown how summons to its members constitutes a violation of human rights or a breach of any provisions of the law. The petitioner has further not complied with the mandatory requirements for drawing up constitutional petitions in that it does not fully describe the parties. It does not describe the 2nd and 3rd respondents, and that there is no authority from the petitioner authorizing Peter Gachau to swear the affidavit in support of both the Notice of Motion and the petition. Accordingly I find that the petition does not raise any constitutional issues and has not conformed to the mandatory requirements of drawing up constitutional petitions.

C) Whether there is legality of the petitioner's petition against the office of clerk Nairobi City County Assembly and Committee on Planning and Housing?

17. The Respondents contend, that the office of the Clerk Nairobi City County Assembly is not liable to be sued in the instant petition and the proceedings against it cannot stand by dint of **section 11(3) of the County Assembly Powers and Privileges Act No. 6 of 2017** which provides:-

"(3) The Clerk or other members of staff shall not be liable to be sued in a civil court or joined in any civil proceedings for an act done or ordered to be done in the discharge of their functions relating to proceedings of a county assembly or its committees."

18. From the provision of **section 11(3) of the County Assembly Powers and Privileges Act No. 6 of 2017**, it is clear, that the office of Clerk Nairobi City County Assembly, the 2nd Respondent, is not liable to be sued in a civil court or be joined in any civil proceedings for an act done or ordered to be done in discharge of their functions relating to proceedings of a County Assembly or its committee. I therefore find there is illegality of the petitioner's petition against the office of the Clerk Nairobi City County Assembly and Committee on Planning and Housing.

D) Whether court has jurisdiction to grant orders sought by the petitioner?

19. In the petitioner's petition under paragraphs 13 and 21 there is admission, that there is ongoing land case before Environment and Land Court being Case No. 368 of 2015 between the parties herein over the subject property of this petition. Considering the orders sought herein, it appears that the appropriate forum to seek the orders sought in the instant petition will therefore be in the trial court, which is the Environment and Land Court. I am in view of the above, of the view, that the orders sought by the petitioner can be sought before the Environment and Land Court as by seeking such orders before this Court the petitioner is calling upon this court to exercise jurisdiction over a matter before a court of parallel jurisdiction. I find that the reliefs sought by the petitioner in this petition are capable of being sought and granted by the Environment and Land Court. I further find that in view of the proceedings pending before the Environment and Land Court this petition is *sub-judice*; has no basis and is an abuse of court process.

20. Section 6 of the Civil Procedure Act provides:-

"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.

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."

21. In the case of Kenya Planters Co-operative Union Limited vs Kenya Co-operative Coffee Millers Limited & another [2016] eKLR the court held as follows:-

"A matter which is still pending in Court, un-decided or still under consideration is therefore sub-judice and that is precisely the position with regard to Kegugoya Environment and Land Court Civil Appeal No. 60 of 2014. I hold the view that a Constitutional Petition is amenable to the sub-judice rule just like any other civil proceeding and that explains the insertion of the words "or proceeding" in Section 6 of the Civil Procedure Act. I am therefore satisfied that this Constitutional Petition is sub-judice in view of the pendency of the appeal at this Court in which substantially the same issues have been raised.

While this Court affirms the petitioner's right to approach it to enforce a Constitutional right, it must also be made clear that this Court has a duty to ensure that its process is not abused. This petition is clearly an abuse of the process of this Court and the law enjoins me to make appropriate orders to bring such process to an end."

22. On the issue of citing the Respondents for alleged contempt as alluded to by the petitioner, it should be noted the alleged orders were not issued by this court but by a court of similar stature to this honourable court. This court lacks jurisdiction to cite the respondents as court cannot cite a purported contemnor for contempt where the alleged contempt arises from orders issued by court of parallel jurisdiction or a superior court for that matter. In the case of **Olive Mwihaki Mugenda & another vs Okiya Omtata Okoiti & 4 others [2016] eKLR** where the Court of Appeal held as follows:-

"It is our considered view that as a general principle, contempt committed before another superior court is punishable by that court and a declaration for contempt and sanctions or remedies for the contempt are determined and enforceable in the first instance by that court. Guided by the foregoing reasoning and taking into account the grounds in support of the present application, we make a finding that this Court has no original jurisdiction to declare the 2nd appellant to be in contempt or to deny right of audience to the 2nd appellant for contempt allegedly committed before another court."

23. Further to the above even if this court had jurisdiction to cite the Respondents for contempt, it is worth to note the orders of 14th December 2015 by Honourable Lady Justice Gitumbi do not bar the Respondents from summoning of the petitioner but directs that *status quo* be maintained in that there should be no sub-division, transfer, sell or development of the properties pending the hearing and determination of Elc No 368 of 2015.

24. From the above, I find no legal basis for the petitioner to urge this court to make determination in regard of a matter that is pending before another court with jurisdiction. In view of the above I am satisfied, that this court has no jurisdiction to grant the orders sought as the matter is pending before the Environment and Land Court between the parties herein.

25. Having considered all the grounds raised in the preliminary objection by the Respondents, I am satisfied the petition herein is without merit and the same is for dismissal. The petition dated 24/5/2019 is accordingly dismissed with costs.

Dated, signed and delivered at Nairobi this 19th day of December, 2019.

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J .A. MAKAU

JUDGE