



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

PETITION NO. 4 OF 2017

JOHN MBAU MBURU t/a

J.M MBURU & COMPANY ADVOCATES.....PETITIONER

AND

COUNTY GOVERNMENT OF MOMBASA.....RESPONDENT

AND

ROBINSON ONYANGO MALOMBO t/a

O.M.ROBINSON & COMPANY ADVOCATES.....INTERESTED PARTY

JUDGMENT

THE PETITION

1. By Petition dated 13th January, 2017 and filed herein on 19th January, 2017, the Petitioner claims alleged violations of identified Constitutional provisions by the Respondent. The Petitioner, an advocate of the High Court of Kenya, claims that he is the sole proprietor of the firm of J. M. Mburu & Company, Advocates, and a citizen and resident of Kenya and as such was entitled to the rights and freedoms of the individual guaranteed under Chapter Four of the Constitution of Kenya 2010 (hereinafter called “the Constitution”).

2. The Respondent is the County Government of Mombasa and is sued as the legal successor of the Municipal Council of Mombasa (hereinafter called “the council”) by virtue of schedule 6 section 33 of the Constitution and sections 55, 56, 57 (1) 58 (1) and 59 of the Urban Areas and Cities Act No. 13 of 2011. The Respondent is further sued as a state organ which is bound by the Bill of Rights set out in Chapter Four of the constitution and is also bound to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of rights by virtue of Articles 20 (1) and 21(1) of the Constitution. Further, the Petitioner brings this action under Article 22(1) of the Constitution seeking the reliefs set out in the petition by virtue of Article 23 (3) of the constitution.

3. The Petitioner claims that in on or about the month of March, 2011 the Council instructed the petitioner to act as Lead Counsel to one Robinson Onyango Malombo, Advocate (hereinafter called “the Interested Party”) in respect of **Civil Appeal (Msa) No. 283 of 2007 (Kenya Ports Authority -vs- 1. The Municipal Council of Mombasa 2. The Attorney General)**. Pursuant to the said instructions the Petitioner avers that it was orally agreed between the petitioner, the Interested Party and the council that in consideration for leading the Interested Party the Council would pay the petitioner his professional fees comprising half of the professional fees payable to the Interested Party directly. Following the oral agreement, the petitioner and the Interested Party duly executed a written agreement on *inter alia* the terms aforesaid for the purpose of formalizing the oral agreement. Under the said agreement, the Interested Party assigned fifty per cent of the fees payable to him to the petitioner which sum was payable directly to the petitioner. In pursuance of the said agreement, the Interested Party with the petitioner’s assistance rendered an interim fee note for Kshs. 232,101,975.00 which upon discussion with the Council was reduced to Kshs. 174,101,975.00. The Petitioner alleges that the Council then proceeded to split the said sum into two equal parts in favour of the petitioner and the Interested Party payable separately to their respective firms. The sum due to the petitioner was then lumped together with the balance of fees which the Council was then paying to the petitioner in varying instalments arising from professional services rendered earlier in different matters. The sum due to the respective advocates, exclusive of Value Added Tax (VAT) amounted to Kshs. 87,050,987.50. Upon addition of VAT the sum came to Kshs. 101,500,000.00. Pursuant to the said agreement, the petitioner proceeded to perform his obligations as instructed by the Council, culminating in the hearing and Judgment of the said Appeal and advising the Council on how to proceed following the Judgment, which was in favour of the appellant. However, the Council initially accepted the Petitioner’s advise on the way forward but later declined to proceed with the matter as instructed by the petitioner, and the matter is still pending in the Court of Appeal.

4. The petitioner states that after the Council had merged the said sum of Kshs. 101,500,000.00 with the said ongoing account, it continued paying the aggregate sum due on the account in instalments, and as at the time of dissolution of, and replacement by, the respondent of the

council the balance due on the said account was Kshs. 102,000,000.00 comprising the said sum of Kshs. 101,500,000 and Kshs. 500,000.00 being balance due from work done previously. The petitioner states that under the provisions of schedule 6 Section 3 of the Constitution and sections 58 (1) and 59 of the Urban Areas and Cities Act aforesaid the respondent, upon its establishment, assumed the said debt and is bound to settle it. The petitioner further states that from the outset the respondent admitted the said debt and promised to settle it but has failed to do so for a period which now amounts to almost four years. The petitioner further states that while he pursued payment of the said sum of money, the respondent mistreated him in various ways as shown in the affidavit filed herewith. The petitioner states that the respondent's failure to pay the said long admitted sum for almost four years punctuated by false promises of payment leading him to travel to and from Mombasa many times thereby incurring heavy travelling expenses and subsistence while at Mombasa in pursuit of payment have caused him severe losses, inconvenience, anxiety and suffering.

5. The petitioner states that the respondent's failure to pay the said sum and giving endless false promises of payment for almost four years thus putting the petitioner to great expense, anxiety, inconvenience and suffering constitutes a violation of his right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair guaranteed by Article 47 (1) of the constitution. The petitioner states that the respondent's mistreatment of him while he pursued payment of his lawful dues as particularized in the supporting affidavit filed herewith violated his inalienable right and fundamental freedom from torture, inhuman or degrading treatment guaranteed by Article 25 (a) of the constitution, and violated his inherent dignity and the right to have that dignity respected and protected as guaranteed by Article 28 of the constitution. The petitioner states that the respondent's failure to pay or withholding his money for almost four years violates his fundamental right to acquire property guaranteed by Article 40 (1) of the constitution. The petitioner further states that the respondent failure to pay his lawful dues for such a grossly inordinate period coupled with false promises of payment and mistreatment of him while he pursued payment of the same as aforesaid constitutes a violation of his right to enjoyment of his rights and fundamental freedoms to the greatest extent consistent with the nature of the rights freedoms guaranteed by the foregoing provisions in contravention of Article 20 (2) of the constitution. The petitioner states that in addition, the respondent has not given the petitioner a written reason for its failure to pay the said sum despite its obvious adverse effects on the petitioner's aforesaid rights in contravention of Article 47 (2) of the constitution. The petitioner further states that in the absence of intervention by this court the respondent is very likely to continue delaying payment of the said sum and thereby violate the petitioner's rights guaranteed under Articles 47 (1) and 40 (1) of the constitution. The petitioner further states that the said violations have subjected him to severe distress, inconvenience and expense and should be redressed expeditiously.

6. Consequently, the Petitioner prays as follows:

(a) A declaration that the respondent's failure to pay the said long aforesaid admitted sum of Kshs.102 million for almost four years violates the petitioner's right to expeditious, efficient, lawful, reasonable and procedurally fair administrative action guaranteed by Article 47 (1) of the Constitution.

(b) A declaration that the respondent's continuous mistreatment of the petitioner by way of false promises, delays and indifference and/or recklessness as to his plight and/or deliberate infliction of financial and psychological harm on him during the said period as he sought payment of his dues as particularized in the supporting affidavit filed herewith constituted a violation of the petitioner's right to expeditious, efficient, lawful, reasonable and procedurally fair administrative action guaranteed by Article 47 (1) of the Constitution.

(c) A declaration that the respondent's mistreatment of the petitioner while he pursued payment of his lawful dues as indicated in paragraphs 13 of the Petition and particularized in the supporting affidavit filed herewith violated his inalienable right and fundamental freedom from torture, inhuman or degrading treatment guaranteed by Article 25 (a) of the Constitution.

(d) A declaration that the respondent's mistreatment of the petitioner while he pursued payment of his lawful dues as stated above violated his inherent dignity inhuman and his right to have that dignity respected and protected guaranteed by Article 28 of the Constitution

(e) A declaration that the respondent's refusal to pay or withholding the petitioner's money for almost four years violates his fundamental right to acquire and own property guaranteed by Article 40 (1) of the Constitution

(f) A declaration that the respondent's failure to pay the petitioner's lawful dues for such a grossly inordinate time coupled with false promises of payment and mistreatment of him while he pursued payment of the same as aforesaid constitutes a violation of his right to enjoyment of his rights and fundamental freedoms to the greatest extent consistent with the nature of the rights freedoms guaranteed by the said Articles 47 (1) and (2), 25 (a), 28 and 40 (1) of the Constitution in contravention of Article 20 (2) of the Constitution.

(g) A declaration that failure by the respondent to give written reasons for its failure to pay the said sum despite its obvious adverse effects on the petitioner's rights set out in the foregoing paragraphs contravenes the Petitioner's right to such reasons guaranteed by Article 54 (2) of the Constitution.

The Response

7. The petition is opposed by the Respondent vide a Replying Affidavit sworn by Jimmy Waliaula on 28th February, 2017. The deponent states that he is Director – Legal Services of the County Government of Mombasa and the Respondent herein and he is well versed with matters of this petition.

8. The Respondent's case is that the County Government of Mombasa is not privy to the contract seeking to be relied on by the Petitioner and had at no point instructed the Petitioner to act as alleged lead counsel to the Interested Party herein in respect of any matter whatsoever. The deponent denies any knowledge of an agreement between the Interested Party and the Petitioner and the Respondent. The Respondent completely denies knowledge of the alleged agreement mentioned at paragraph 7 of the petition. Paragraph 7 reads as follows:

“Following the oral agreement, the petitioner and the said Malombo duly executed a written agreement on inter alia the terms aforesaid for the purposes of formalizing the agreement. Under the said agreement, the said Malombo assigned fifty percent of the fees payable to him to the petitioner which sum was payable directly to the petitioner.”

9. The Respondent denies being privy to the said alleged agreement, and states that it was not involved in it in any way whatsoever

10. The Respondent further denies instructing the Petitioner in any way whatsoever. The Respondent’s case is that the Petitioner has wrongly invoked the Court’s Constitutional Jurisdiction whereas his remedy has underpinnings in contract law, against the Interested Party, if at all. The Respondent’s case is that the Petitioner cannot invoke the extraordinary jurisdiction of this court in an attempt to oust normal statutory mechanisms through a constitutional petition while he has a remedy available to him elsewhere.

11. The Respondent states further that the attachment of by laws as annexures to prove that the Petitioner has previously engaged with the then council under then municipal officials is an entire misdirection of the matter he alleges to be in issue before this court. The Respondent states that where a person is alleging a contravention or threat of a constitutional right, he must set out the right infringed and the particulars of such infringed threat. The Respondent’s case is that the Constitutional provisions invoked under this Petition are entirely unrelated to the claim. For instance the Petitioner seeks to rely on Article 22 (1) of the Constitution which is on Fundamental Freedoms and breach thereof, while, relying on Article 40(1) of the Constitution the Petitioner has failed to show how his right to property has been infringed as alleged, and is a further diversion from the claim under his Petition.

12. The Respondent states that the Petitioner is also relying on Article 25 (a) which is far reaching. The Respondent states that torture as envisioned under Article 25 (a) of the Constitution is generally an aggravated form of human treatment used to obtain, for example, a confession from a person. The Respondent’s case is that the Petitioner has failed to properly invoke the rights envisioned under the Articles he seeks to rely on in his Petition and his remedy lies elsewhere. Further the Respondent states that the Mombasa Municipal Council was a creature of the Local Government Act and under the stewardship of the Town Clerk of the City and thus the Petitioner cannot maintain his claim as against the County Government as it did not transact with him, and that the Mombasa County Government is not in any way related nor comparable to the Mombasa Municipal Council as the County is a creature of the Constitution.

The Interested Party

13. In the course of the proceedings the Interested Party successfully applied to join the proceedings, and later filed Grounds of Opposition to the petition on 16th March, 2017. The Interested Party’s case is that the Petition herein is a gross abuse of the Court process for the following reasons:-

(a) That the Agreement dated 29th March, 2011, entered between Mr. John Mburu Advocate and the Interested Party marked “JMM-5” was a private arrangement between two parties to which the Respondent was not privy.

(b) The said Agreement which is the basis for which the Petitioner is seeking to be paid Ksh. 102 million is of a purely commercial nature and the alleged violations occasioned by the Respondent to the Petitioner do not meet the threshold and the test of Constitutional Petitions as stated in the case of **Anarita Karimi Njeri –vs- Republic (1976-1980) 1KLR 1972** and more recently reiterated by the Court of Appeal in the case of **Mumo Matemu- vs- Trusted Society of Human Rights Alliance & 5 Others (2013) e KLR** in that: the Petitioner has failed to state any alleged constitutional provision that was violated and the acts or omissions complained of with reasonable precision, but has instead sought to disguise the disappointment of a disgruntled Creditor to fit certain violations of specific rights as guaranteed in the Bill of rights. That is to say:-

i) The Petitioner has only pleaded in paragraph 15 of his Petition that his rights to fair Administrative action under Article 47(1) have been infringed yet he was never subjected to any administrative action in the first place. Failure to pay a creditor or promises to pay does not amount to unfair Administrative action by whatever standard.

ii) In view of the above, no written reasons pursuant to Article 47(2) were necessary as demanded by the Petitioner in paragraph 20 of his Petition.

iii) The Petitioner has not given any evidence to show that he was subjected to torture, inhuman or degrading treatment or punishment contrary to Article 25(a) of the Constitution.

iv) The Respondent instructed the Interested Party to handle the relevant cases and the Petitioner was only involved as a result of a private arrangement with the Interested Party. Any monies owed by the Respondent are to the Interested Party and the Petitioner’s claim that his rights to protection of property under Article 40 of the Constitution have been violated are therefore misplaced.

a. The procedure for which an Advocate can claim his fees from a client is duly provided for in the Advocates Act Cap 16 Laws by way of Taxing his Bill of Costs. The Petitioner has therefore wrongly sought Constitutional reliefs through this Petition yet there is a parallel remedy available to him.

(c) If the Petitioner’s claim against the Respondent is based on the Agreement between Mr. Mburu Advocate and the Interested Party, then the said claim is purely commercial and the same can be perfectly litigated in a Commercial Court. There is therefore a parallel remedy which has not been utilized by the Petitioner.

14. The Interested Party avers that as correctly acknowledged by the Petitioner in paragraph 8 of his Affidavit, the Petitioner was not in the Respondent’s predecessor’s panel of external lawyers and could not therefore be engaged to provide legal services as required by the Public

Procurement and Disposals Act.

15. It is the Interested Party's case that the Orders sought in this Petition cannot therefore be granted as to do so would be sanctioning an illegality. The Interested Party states that any debt if acknowledged by the Respondent to the Petitioner on the basis of the said Agreement is illegal and any payment (if any) that has so far been made to the Petitioner is illegal and the Petitioner should refund the same.

The Preliminary Objection

16. The Respondent also filed a Preliminary Objection to the Petition on 3rd March, 2017, stating that this court has no jurisdiction to hear and determine this matter, arguing that the Petitioner seeks to enforce contractual rights through a constitutional petition; and that the Respondent was not party to the contractual agreement that the Petitioner seeks to enforce. The court directed that the Preliminary Objection be canvassed together with the petition.

Submissions

17. The petition was canvassed by way of written submissions together with parties affidavits on record. In addition to Supporting Affidavit the Petitioner filed a Supplementary Affidavit on 2nd June, 2017. I have carefully considered the petition and opposition to it together with counsel submissions. In my view the issue for determination is whether or not this court has the jurisdiction to entertain this matter in the light of the said Preliminary Objection, and if so, whether the Petitioner's constitutional rights have been violated as alleged or at all.

The Determination

18. I have considered this petition, supplementary affidavit, the preliminary objection the response thereto and submissions by counsel for the parties and authorities relied on. In my view the following issues call for determination.

(a) Whether this Court has jurisdiction to entertain this Petition.

(b) Whether this petition meets the threshold of constitutional petitions as provided in the case of **Anarita Karimi njeru vs. Republic (1976-1980)1 KLR 1972.**

(c) Whether the Petition offends the principle of Constitutional Avoidance.

19. Since the issue of Jurisdiction has been raised by the Respondent and the Interested Party herein, this Court will in the first instance determine whether it has Jurisdiction to delve into the merits of the dispute between the parties. It is trite law now that Jurisdiction is everything and without it, the court must down its tools. There are plenty authority on this issue.

The Supreme Court in **Samuel Kamau Macharia v. KCB and Others [2012] eKLR** stated as follows:

“A Court’s jurisdiction flows from either the Constitution or Legislation or both. Thus a Court can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...the Court must operate within the constitutional limits. It cannot expand jurisdiction through judicial craft or innovation.”

20. In **Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others** [2014] eKLR, the Supreme Court rendered itself thus:-

“[349] Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Annarita Karimi Njeru v. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement...”

21. I have carefully read through the Petition which is premised under the provisions of Articles **25(a), 28, 40(1), 47(1) and (2)** of the Constitution. As much as the Petitioner has alleged a violation of those rights, it must not escape the mind that the crux of the Petitioner's case is based on a contract for provision of legal services in **Civil Appeal 283 of 2007** which was allegedly breached. The Petitioner is very passionate about the alleged Constitutional breeches, yet he provides no link between the breeches and the private agreement between him and the Interested Party.

22. From the reading of the Petition, one would be forgiven if one assumed that the contest herein should be between the petitioner and the Interested Party. It is difficult to see how the Respondent enters the arena. If the Respondent had assumed responsibility under the said contract, and made some payments and then stopped midway, one could infer a possible breach.

23. Further the Petitioner does not demonstrate the nexus between the Respondent's failures to pay him for the services allegedly rendered and how the failure to pay him is a violation of his rights guaranteed under Article **47(1)** and **47(2)** of the Constitution.

24. Thirdly the Petitioner has failed to demonstrate the basis and nexus between his allegation that the Respondent has violated his right to acquire property guaranteed under Article 40(1) of the constitution and the failure of the Respondent to pay him for the services allegedly provided.

25. In ***Benard Murage v 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;”**

26. The petitioner herein is an advocate of the High Court of Kenya and is deemed to know the avenues at his disposal in matters of professional services duly rendered. In my view the only two ways through which the Petitioner can make a claim against the Respondent for professional services rendered are by filing and taxing a Bill of costs, and secondly, where there is an agreement on fees, suing in contract. I neither see a certificate of taxed costs nor an agreement on fees herein. Both these procedures are founded in contract and are commercial in nature. A Constitutional court cannot purport to enter judgement on a matter which has not been concluded. The Petitioner must first establish that the Respondent owes him the claim herein, and that the failure to pay the same has occasioned constitutional violations to be remedied through a Constitutional Petition.

27. The Court of Appeal in ***Bethwell Allan Omondi Okal vs. Telkom (K) Ltd (Founder) & 9 others*** [2017] eKLR stated thus:

“The Appellant might want to argue that he has a constitutional right of access to justice, and we agree that he does, but the High Court and this Court have pronounced themselves many times to the effect that a party must first exhaust the other processes available by other statutory dispute resolution organs, which are by law established, before moving to the High court by way of constitutional petitions. See *International Centre for Policy and Conflict & 4 others vs. The Hon. Uhuru Kenyatta and others*, Petition No. 552 of 2012, and *Speaker of National Assembly vs. Njenga Karume* [2008] 1KLR 425.”

28. The High Court in ***International Centre for Policy and Conflict and 5 others vs. The Hon. Attorney-General & 4 others*** [2013] eKLR observed as follows;

“[109] An important tenet of the concept of the rule of law is that this Court before exercising its jurisdiction under Article 165 of the Constitution in general, must exercise restraint. It must first give an opportunity to the relevant constitutional bodies or State organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act.”

29. 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 of 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*). The judge went on to add 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 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.”

30. From the foregoing, the question then would be whether the Parties had performed their respective obligations under the contract for provision of legal services and who were parties to the Agreement for provision of Legal services in ***Civil Appeal 283 of 2007***. This court by dint of Article 165(3) of the constitution has the Jurisdiction to answer the above stated questions but not through a constitutional petition. As I have stated earlier, there are adequate statutory provisions under which the Petitioner can claim a remedy. The invocation of the Constitution does not assist the Petitioner at this stage. In the premises it is the finding hereof that this is not a proper matter for a Constitutional Petition and is hereby struck out pursuant to the Preliminary Objection filed on 3rd March 2017.

31. Parties shall carry their own costs of the petition.

Dated, Signed and Delivered in Mombasa this 20th day of December, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Mwangi holding brief Mburu for Petitioner

Mr. Said for Respondent

Mr. Said holding brief Malombo for Interested Party