



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 4 OF 2017

BETWEEN

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

Introduction

1. The petitioner filed this petition against the Respondent on the **19th January 2017**, the interested party filed an application seeking to be enjoined in the petition on the **10th March 2017** which Application was allowed on the **13th March 2017**. in the said Petition, the petitioner seeks the following orders:-

Background facts and the Petitioners' case

2. The Petitioners' case may be gathered from the Petition as well as the Affidavits sworn in support of the Petition and the Supplementary Affidavit sworn by the Petitioner on **31st May 2017**.

The case reveals various facts and may be stated as follows.

3. The petitioner contends that he was instructed by the Respondent to act as lead counsel for the interested party herein and that the Respondent would pay him directly half of what was payable to the interested party.

4. The petitioner states that he diligently performed his duties as instructed and that the Respondent under the provisions of schedule 6 section 3 of the Constitution and section 58(1) and 59 of the Urban Areas and Cities Act bounds the Respondent to settle the amount owed to the Petitioner.

5. The petitioner contends that from the outset the Respondent admitted the said debt and promised to settle it but has failed to do so for a period of almost four years.

6. The petitioner further contends that the Respondent has violated his constitutional rights as follows:-

- a. Violation of his inalienable right and fundamental freedom from torture, inhuman or degrading treatment guaranteed by Article 25(a) of the constitution.

- b. Violation of his inherent right to have his dignity respected and protected as guaranteed under Article 28 of the constitution.
- c. Violation of his fundamental right to acquire property guaranteed under Article 40(1) of the constitution.
- d. Failure by the respondent to give the Petitioner written reasons for its failure to pay the debt owed contrary to Article 47 (2) of the constitution.

Respondent's case

7. The Respondent's case may be retrieved largely (but not entirely) from the Replying Affidavit of Jimmy Waliaula sworn on 28th February 2017. The Respondent also filed a Notice of preliminary objection to the Petition.
8. The Respondent contends that it is not privy to the contract relied on by the petitioner and at no point did the Respondent instruct the Petitioner to act as alleged lead counsel to the interested party.
9. The Respondent next contends that the Petitioner seeks to waste this Honourable Courts time by wrongly invoking the Courts jurisdiction yet his contractual remedy lie elsewhere and thus the petition is an abuse of the court process.
10. The Respondent also states that the Petitioner's Petition is full of tales unrelated to his claim and the petition as is is incapable of sustaining the orders prayed against the respondent since the constitutional provision invoked are unrelated to the claim.
11. The Respondent also states that it is a creature of the constitution and that it is not in any way related nor comparable to the Mombasa Municipal Council which the petitioner transacted with.

Interested party case.

12. The interested party's case may be retrieved largely (but not entirely) from the Replying Affidavit of Robison Onyango Malombo sworn on **16th March 2017**. The interested party also filed a grounds of opposition to the Petition.
13. The interested party contends that the petitioner is a non-starter since his engagement with the petitioner was on a personal level and not his law firm of JM Mburu & Company Advocates.
14. It is the interested party's case that the Petitioner having not been procured as required by the procurement and disposal act, it would be an illegality for any monies to be paid to him as payments were to be only made to the interested party whose services were procedurally retained and that the respondent was not privy to the agreement between the petitioner and the interested party.
15. The interested party further contends that he terminated the services of the Petitioner as a result of the petitioner's erratic and unconventional behavior that led to the loss of the Appeal by the Respondent.
16. The interested party also stated that the petitioner claim that he has been subjected to inconvenience and expenses is unsubstantiated since no receipts were annexed to prove the same and that the Petitioners issues were personal and do not raise any constitutional violations that merit audience of a Constitutional Court.

Analysis and Determination

17. I have considered this petition, supplementary affidavit, the preliminary objection the response thereto; submissions by counsel for the parties and authorities relied on. The issues the court is called upon to decide are:-

1. Whether this honourable court has jurisdiction to entertain this Petition.
2. Whether this petition has met the threshold of constitutional petitions as provided in the case of **Anarita Karimi njeru vs. Republic (1976-1980)1 KLR 1972**.
3. Whether the Petition offends the principle of Constitutional Avoidance.

18. Since the issue of Jurisdiction has been raised by the Respondent and the Interested Party herein, this Court will before anything else endeavor to establish whether it has Jurisdiction to delve into the merits of the dispute between the parties. Jurisdiction is everything and without it, the court must down its tools. If this court finds it lacks jurisdiction then it will not analyze the other issues other than Jurisdiction flowing from the submissions of both parties.

19. The Supreme Court in **Samuel Kamau Macharia v. KCB and Others [2012] Eklr.**

“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. The **Supreme Court** in the case of **Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others** [2014] eKLR 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. Carefully reading through the Petitioners’ 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 Petitioners have alleged a violation of those rights we should bear in 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 has allegedly been breached. From the foregoing the Petitioner in my view has failed to demonstrate the basis of his grievance and the link between him and the Articles of the Constitution alleged to have been contravened and as a result his petition failed to meet the irreducible minimum expected for a Court to determine what a litigant’s claim is in a constitutional matter.

22. The petitioner has failed to demonstrate how his alleged mistreatment amounted to violation of his inalienable right and freedom from torture, cruel, inhuman or degrading treatment guaranteed under Article **25(a)** and **28** of the Constitution.

23. Secondly the Petitioner does not demonstrate the nexus between the Respondent’s failures to pay him for the services 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 service 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 who has been in practice for a period of nearly 35 years. This court takes judicial notice that the Petitioner being a senior advocate he is very well aware of all the avenues at his disposal if he intends to ventilate his grievances they include taxing of his bill under the advocate act and suing in the commercial division for breach of contract.

27. This Honourable Court ought to be the Petitioners Court of last resort after since the dispute between the Petitioner and the Respondent is contractual in nature and the commercial division of the High Court would be best suited to resolve the dispute between the parties.

28. The Court of Appeal in **Bethwell Allan Omondi Okal v Telkom (K) Ltd (Founder) & 9 others** [2017] eKLR...

*“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.”*

29. 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.”

30. In **Minister of Home Affairs -vs- Bickle & Others (1985) L.R.C. Cost.755** in which 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.”*

31. 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. There is already a clear process under the Advocate Act for the petitioner to recover his fees, also the Petitioner would have opted to sue for breach of contract in the Commercial Courts. This are the processes that he ought to have followed. The invocation of the Constitution does not assist him. In the circumstances, I therefore find that this Court ought not to entertain the current action brought by way of a petition. It is an abuse of the process of the court and the inherent jurisdiction of the court ought to be prompted to prevent such abuse.

32. This petition is therefore struck out with costs reason being that the Petitioner being a senior Advocate of the High Court ought to have filed his claim in the avenues provided under the statute and I agree with the interested party's submission that the petition is an attempt to circumvent the clear provision of statute.

SIGNED, DATED AND DELIVERED THIS 20TH DAY OF DECEMBER, 2018.

E. K. OGOLA

JUDGE