



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
PETITION NO. 11 OF 2015

**BENARD NKANDO M' ARAJA STANELY KIOME (Suing as legal representative
of 187 members of mwangathia & kijia location respectively.....PETITIONER**

.-VS-

MINISTRY OF GENDER CHILDREN SOCIAL SERVICES.....1ST RESPONDENT

CABINET SECRETARY MINISTRY OF LABOUR &

SOCIAL SERVICES.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

Registration of elderly people

[1] The Petitioners in the Petition dated 12th May 2015 are elderly members of the society. They are 187 in number and have come to court seeking for the following orders:

- 1. A declaration that that the Petitioners are eligible to be registered for consideration under the government social protection program meant to assist the elderly members of the society in the Republic of Kenya.**
- 2. An order of specific performance, ordering the 1st and 2nd Respondents to register the Petitioners for consideration under the government social protection program meant to assist the elderly members of society.**
- 3. Costs of the Petition and interest.**

[2] Briefly, the Petitioner's case is that they are aged over 65 years and so senior citizens of the Republic of Kenya; they are, therefore, eligible to be registered under the evolution of Kenya's old person cash transfer program- a government social protection program meant to assist the elderly and poor members of the society. However, the Petitioners contended that on diverse dates they had tried to register under the evolution of Kenya's old persons cash transfer programs but the officials of the Ministry of Gender, Children and Social Services at Gatimbi discriminated against, neglected and refused to register the Petitioners in the program on the ground that they were not poor and vulnerable members of society. And by that discrimination, the Petitioners claim that their Constitutional Rights were violated particularly Article 21, 43 and 57 of the Constitution of Kenya 2010, since the criteria used to select the elderly and

vulnerable members of the society was not adhered to.

Petition opposed

[3] The Petition was opposed via Grounds of Opposition and a Replying Affidavit filed in court on 9th December 2015 and 11th February 2016 respectively by the Respondents contending inter alia that Article 57 (d) of the Constitution did not create a right that was directly enforceable against the Respondents and that the Petitioners had not demonstrated with sufficient clarity the manner and extent of the alleged violation by the Respondents.

[4] It was further deposed for the Respondents that the Older Person Cash Transfer program is; (1) aimed at reducing poverty and vulnerability in targeted populations through regular predictable cash transfers; and (2) focused on providing cash transfer to poor household who have at least one member above the age of 65 years but owing to budgetary constraints, the coverage was not universal.

Directions

[5] When the matter came up for directions on 31st March 2016, the court directed that this Petition be disposed of by way of written submissions. Parties filed submissions as directed and I shall consider them below.

Petitioners' submissions

[6] The Petitioners argued in their submissions that they had availed their names for registration for consideration in the Government of Kenya's old person cash transfer program; but their registration was denied. The answers they got for the decline were unsatisfactory. Again, they urged that there was no logistic survey that was carried out on the community to establish people who were eligible for the program; the Respondent neither indicated which barazas were held to determine the Petitioners were above the score card to determine the poverty level nor followed the process used to identify the most vulnerable people in Mwangathia and Kijia Location for purposes of the program. There was need to consult the members of public and hold chief Barazas to determine the most suitable persons for the scheme. But none of these was done and that the Respondent cannot show the criteria used to come up with the list of vulnerable members of the location.

Respondents' submissions

[7] On the other hand, it was submitted for the Respondent that that through their Replying Affidavit, they had demonstrated at length how owing to budgeting constrains, coverage was not universal and that age was a minimum requirement since other secondary factors came into play. Accordingly, age was not the sole determinant as claimed by the Petitioners. They submitted further that the program was ongoing in phases to ensure there was an upscale process every financial year according to availability of funds and that it was therefore evident that that there was an elaborate process midwifed by the Respondents which was contingent on several factors.

[8] It was further contended that Article 57 (d) of the Constitution did not create a right that was directly enforceable against the Respondent and that, it was not stated which aspect of, how and the extent to which Article 43 was violated by the Respondents, or how it contemplates to confer them with any benefit.

DETERMINATION

[9] I carefully considered this Petition, the Rival submissions by the parties and the authority relied upon by the Respondents. I am of the following persuasion. Although the specific provision under which the Petition is premised has not been stated, the Petitioners have however alleged in the body of the Petition that their constitutional rights and in particular Article 21, 43 and 57 of the Constitution have been violated. It is, therefore, the obligation of the Petitioners to demonstrate upon evidence or legal

arguments, that their right has been violated, the manner it has been violated and the relief they seek for that violation. See the principle in the case of Anarita Karimi Njeru v Republic (No. 1) [1979] 1 KLR 154 and augmented by the Court of Appeal recently in the case of Mumo Matemu v Trusted Society of Human Rights Alliance Civil Appeal No. 290 of 2012 [2013]eKLR where the Court of Appeal rendered itself thus:

“The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the Constitution, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the Constitution and the rule of law, without any particulars.

We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting,” without requiring remedy by the 1st respondent.”

[10] The Petitioners in this case alleged that the Respondents have violated their constitutional rights namely Article 21, 43 and 57 of the Constitution. These articles are inextricable one way or other as shall be clear later. Article 21 is on the **states’ obligation in implementation of rights and fundamental freedoms in the bill of rights**. In article 21(2) & (3) the state shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under article 43 of the Constitution. Article 43 is on social economic rights which older people are also entitled. Article 21(3) obligates all state organs and public officers to address the need of vulnerable groups within society. But, older members of society are specifically provided for in article 57 of the Constitution which places a duty upon the state to take measures to ensure that the older people fully participates in the affairs of society; pursue their personal development; live in dignity and respect and free from abuse; and receive reasonable care and assistance from family and state. The affidavit by Respondent has in detail stated that this program is towards realization of rights for older members of society in article 57 of the Constitution. They have also stated in length that owing to budgetary constraints coverage was not universal and that further age was not the sole determining factor but a minimum requirement since other factors come into play. In my view, age alone is not enough; other factors including the financial status of the particular member, availability and receipt of care and assistance from the family of the older members of society should be considered. I also observe that this program is toward realization of the rights in article 43 and 57 of the Constitution; that is well and good. Although age is not the only factor, there is, however, another fundamental issue being raised in this petition; that the criteria set for identifying the older members of society who should benefit from the program was not adhered to. The constitutional thread arising from Article 21, 43 and 57 of the Constitution is that the state, all state organs and public officers shall take measures including setting of standards and criteria to achieve the rights guaranteed under the Constitution. There are those rights which will be realized progressively but there are those which are realized immediately. But, whatever the case, the constitutional principles placing obligation on the state, portend that the state and the relevant state organs concerned should show that measures, standards and criteria are in place and will achieve the rights guaranteed. A claim has been made that the set criteria of identifying the older members of society who will benefit from the program herein was not adhered to. In paragraph 10 of the affidavit by Lucy W. Kirimo she deposed on some of the requirements in the set selection criteria such as household earning less than Kshs. 2000 and Kshs. 1500 per month for urban and rural areas respectively; house hold is not enrolled in another cash transfer program; homestead not receiving regular pension; beneficiary has been resident in Kenya for more than one year and is Kenyan citizen. She deposed further in paragraph 12 of

her said affidavit that Department of Social Development then uses a score card to further vet and narrow down the list of probable beneficiaries classifying them into three broad categories of Not poor, Poor and Extremely poor. She made further disclosures that the Department uses public places and chiefs' barazas where the members of the public vet the eligibility of the older members identified to benefit from the program. According to her, the community carries out all these activities for purposes of ownership and sustainability of the program. She stated that the department has ensured that the process is participatory and transparent. She described the process of nomination as a scientific process of data analysis based on information gathered. The said description is a perfect depiction of an objective process of selection of the persons to benefit from the program. However, absolutely no document or tools that were used to select the beneficiaries of the program herein was annexed for the benefit of this court. Therefore, in the absence of documents to show the process used was as described in the affidavit, the claim by the Petitioners that the set criteria to identify the beneficiaries was not adhered to could as well be tenable. Again, this is an era of justification and legitimacy of exercise of public power by state organs. Public participation is also a constitutional principle underpinning all public assignments by the state. Once again, I say nothing was given to show that public participation was engaged in the process. Accordingly, a major lapse is apparent here and part of the Petitioners petition must succeed. And as commanded under article 23 of the Constitution, the court shall fashion appropriate remedy in the circumstances of this case. Thus, I will neither declare that the petitioners are eligible for registration, nor order specific performance that the Respondents register the Petitioners in the program; as that is the duty of the Respondents: I will, instead, direct the Respondents to apply the set criteria upon the Petitioners and determine whether they qualify or not; and depending on the result of the scientific process described in the affidavits filed; report their decision to this court within 45 days of today. I will also give further directions on the matter as well as on costs. This is a partial decision of this petition. It is so ordered.

Dated, signed and delivered in open court at Meru this 30th day of January 2017

F. GIKONYO

JUDGE

In the presence of:

Mutungu advocate for petitioner

Munene advocate for Kieti advocate for respondents

F. GIKONYO

JUDGE