



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

PETITION NO. 15 OF 2015

(Formerly Kisii High Court Constitutional Petition No. 23 of 2012)

**IN THE MATTER OF: ARTICLES 22, 23 (3), 28, 29(C), 32 (1) (2) (4), 47 OF THE
CONSTITUTION, 2010**

AND

**IN THE MATTER OF: VIOLATION AND OR INFRINGEMENT OF THE PETITIONER'S
RIGHTS UNDER THE BILL OF RIGHTS**

AND

**IN THE MATTER OF: ENFORCEMENT OF BILL OF RIGHTS UNDER THE
CONSTITUTION 2010**

AND

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS &
FUNDAMENTAL FREEDON) PRACTICE AND PROCEDURE RULES, 2013**

BETWEEN

BABA JOSEPH GINDE OULO.....1st PETITIONER

ST. JOSEPH MISSIONS OF MESSIAH IN AFRICA LTD.....2nd PETITIONER

AND

1. HON ATTORNEY GENERAL

2. THE DISTRICT COMMISSIONER RONGO

3. THE O. C. P. D. RONGO

4. CHAIRMAN OF NATIONAL COUNCIL FOR CHILDREN SERVICES

5. THE COUNCIL FOR CHILDREN SERVICES

6. THE CHILDREN OFFICER RONGO DISTRICT

JUDGMENT

Introduction:

1. On 04/06/2011 the 2nd, 3rd, 6th and 7th Respondents herein carried out what they described as a ‘rescue operation’ at the premises of the 2nd Petitioner at Opapo area in Rongo Sub-county within Migori County. Resulting from the operation several children were removed from the premises and arraigned before the Magistrates Court at Rongo.

2. The 1st Petitioner who describes himself as the head of the second Petitioner witnessed the operation. The Petitioners now contend that the Respondents’ actions are unconstitutional and have adversely affected them.

The Petitioners’ case:

3. The 2nd Petitioner is a limited liability company by guarantee. Among its objectives is to establish, operate and carry out activities, projects schemes and programs for the furtherance of religious and other charitable works. One of its projects is the establishment at Opapo area which comprises of a church and other training facilities (hereinafter referred to as ‘**the premises**’).

4. The Petitioners’ case is set out in the Petition dated 30/01/2012. The Petitioners contend that the 2nd, 3rd, 6th and 7th Respondents unlawfully and without notice invaded the premises and were so inhuman as they terrorized, attacked, beat and tear-gassed worshippers and even fired live bullets as they ridiculed and called them names before whisking away 13 children who were the children of the worshippers most of whom had accompanied their parents or guardians. That caused a lot of damage to the buildings’ doors and windows as they also deconsecrated holy items and places used in worship. The Petitioners further contend that the actions of the said Respondents were contrary to **Articles 28, 29(c), 31, 32 and 47** of the **Constitution**.

5. The Petitioners aver that the said Respondents did not inform them of their decision to visit the premises and it caught them unawares. To the Petitioners, the raid was pre-meditated as the Respondents were accompanied by both the electronic and print media and that the raid was extensively reported in radios, televisions and newspapers.

6. The Petitioners only learnt through the press on 06/06/11 that the raid was occasioned by the belief on the part of the Respondents that the Petitioners were unlawfully detaining children at the premises, that the children were used for unlawful purposes, that the worshippers who were mostly women as well as the children were in tattered robes and dreadlocks, that the children were not enrolled in any learning institution, were unkempt and never took bath, that the 2nd Petitioner was not running a lawful church but a sect and was leading people astray and that the 1st Petitioner was calling himself ‘Baba Nyaseye’.

7. As a result of the foregoing, the Petitioners prayed for the following orders: -

a) A declaration be issued to the effect that the Petitioners are entitled to protection under the constitution.

b) A declaration that the Petitioners rights under Article 28, 29 (c) (d)31 (a) (c), 32 (1) (2) (4) and 47 of the constitution 2011 were violated and infringed by the Respondents jointly and severally.

c) A further declaration that the 1st Respondent is vicariously responsible for the infringements and violations by the 2nd and 3rd Respondents.

d) A declaration that the 4th and 5th Respondents are vicarious responsible for the violations and infringements of the 6th Respondents.

e) General damages

f) Exemplary damages

g) Costs of the petition be ordered to be paid by the Respondents jointly and

h) The Honorable Court be pleased to issue such orders and or writs as the Court may deem fit and/or expedient.

The Respondents' cases:

8. The 1st Respondent entered appearance for the 1st to 6th Respondents but did not file any response to the Petition.

9. The 7th Respondent entered appearance and filed a Replying Affidavit sworn by one **Peter Kiiru Kamau** (hereinafter referred to as '**Peter**'). The 7th Respondent is a Non-Governmental Organization established to variously champion, promote and protect the rights of the children under the Constitution and the law by *inter alia* undertaking various programs one of which is the Legal Aid Program which focusses on legal advice, legal representations, fact-finding missions, rescues and general social investigations.

10. The 7th Respondent states that sometimes in June 2011 it received information from a local journalist that a **Legio Maria sect** based in Opapo in Rongo within Migori County was denying children their fundamental rights. As the matter fell within the objectives of the 7th Respondent, Peter visited the 6th Respondent and made enquiries where he learnt that indeed the 6th Respondent was already aware of the issue and was planning to visit the premises in the company of the 2nd and 3rd Respondents.

11. The visit was on 04/06/2011. The 7th Respondent accompanied them alongside the electronic and print media. On reaching at the premises, Peter states that the police requested to gain access into the premises to *inter alia* ascertain the conditions under which the children were in but they were denied. As the police were forcing their way into the premises, the worshippers which had gathered in the compound confronted them and a fracas ensued. The police however managed to disperse them using tear-gas and found 12 children living in deplorable conditions whom they rescued.

12. The children were taken to the Children's Court at Rongo and all those who were not in school were placed in various schools under the supervision of the 6th Respondent. The court further bonded the parents and guardians of the children to exercise proper care.

13. The 7th Respondent distanced itself from any wrong doing in the matter and was delighted that it had realized the children's right to education. It also stated that it learnt that the police had obtained a search warrant of the premises from the court at Rongo prior to the visit.

14. The 7th Respondent also took issue with the way the 1st Petitioner appeared in the Petition given that the 2nd Petitioner was a limited liability company and as such a separate legal identity. It also contended that there was no evidence that the 1st Petitioner was the leader of the 2nd Petitioner company and urged that its Petition be struck out. It was further contended that even the Petition by the 2nd Petitioner should be struck out as the 2nd Petitioner did not avail the resolution by the company to institute the Petition.

The Parties' submissions: -

15. Whereas the Petitioners and the 1st to 6th Respondents filed their respective written submissions, the 7th Respondent did not. The Petitioners expounded on the contents of the Petition and prayed that the orders sought be allowed. They likewise prayed for an award of Kshs. 10,000,000/= as a fair compensation arising out of the contravention of their rights. The case of **Mwangi Stephen Mureithi vs. Daniel Toroitich arap Moi (2014) eKLR** was cited in support of the award.

16. The 1st to 6th Respondents' submissions mainly reiterated the contents of the Affidavit of Peter in demonstrating that none of the alleged rights of the Petitioners were contravened either as alleged or at all as the search was lawful having been sanctioned by a Court of Law and that it was the Petitioners and their followers who resisted the police from discharging their duties hence the confrontation. This Court was hence urged to decline any monetary compensatory award in line with the persuasive decision of **Kenya Human Rights Commission vs. Non-Governmental Organizations Board (2016) eKLR**.

Analysis and Determinations: -

17. I have carefully read and considered all the pleadings, the submissions and the decisions relied upon by the parties in the instant Petition. Since the 7th Respondent raised twin issues on the competency of the Petition preliminarily, I will first deal with those issues. First, it is argued that the 1st Petitioner should be struck out of these proceedings because the Petition is majorly by the 2nd Petitioner which is limited liability company with its separate legal identity and as such the 1st Petitioner cannot purport to act on its behalf.

18. It is true that the 2nd Petitioner is a limited liability company. It has a Memorandum and Articles of Association and is run by a Board of Directors. It is a juristic person with separate legal entity from the 1st Petitioner. The 2nd Petitioner can sue and be sued on its own. Although the 1st Petitioner is among the Founders and Directors of the 2nd Petitioner, the legal identity of the 2nd Petitioner remains quite different from the 1st Petitioner (**Salmon vs. Salmon (1895-9) All ER 33**). Except and subject only to specific well-established instances, the general rule is that in any action in which a wrong is alleged to have been done to a company, it is the company itself which is the proper claimant and not any of its Directors. I am therefore in agreement with the Court of Appeal when it re-affirmed that position in **Gitobu Imanyara & 2 others vs. Attorney General (2016) eKLR**. The Court revisited the issue and rendered itself at length in an appeal arising from a Constitutional Petition jointly filed in the High Court by a company and its Directors.

19. Paragraph 2 of the Petition describes the 1st Petitioner as the leader and/or head of the 2nd Petitioner. I believe the basis of that averment is in the 2nd Petitioner's Memorandum and Articles of Association wherein the 1st Petitioner is named as a Founder and a Director. That being so, the 1st Petitioner is hence enjoined in the Petition not on his own as a person, but for and on behalf of the 2nd Petitioner as its founder and leader. To me, the position would be different had the 1st Petitioner participated in the Petition on his own right as **Baba Joseph Ginde Oulo** citing the alleged violations against himself and not as a representative of the 2nd Petitioner. A look at the entire Petition will also vindicate the fact that the allegations of violations of rights and fundamental freedoms are on the part of the 2nd Petitioner and not on the 1st Petitioner.

20. The need for clarity and precision in the drafting and presentation of constitutional Petitions has been emphasized time and again. The Court of Appeal in the case of **Mumo Matemu vs. Trusted Society of Human Rights Alliance and 5 others, Civil Appeal No. 290 of 2012 (2013) eKLR** dealt with the issue at length as well as the High Court in the case of **Anarita Karimi Njeru vs. AG. (No. 1) 1979 KLR 154** among other decisions.

21. By placing the above legal guidance and the Petition side by side, I reiterate that the Petition is mainly by the 2nd Petitioner. To that extent, the 1st Petitioner is improperly enjoined in the Petition and is hereby struck out accordingly. Needless to say, the 1st Petitioner reserves his right to institute appropriate

proceedings; if need be.

22. The second preliminary issue is on the lack of a resolution by the 2nd Petitioner to institute the Petition, I respectfully consider that argument to be hinged on a procedural technicality. The dispute is not a commercial one but a constitutional one out to determine whether some alleged rights and fundamental freedoms were contravened. **Article 159** of the **Constitution** which calls for substantive justice therefore comes to play.

23. As I find the preliminary issues partly successful, I will henceforth only deal with the Petition by the 2nd Petitioner.

24. Having so found, I will now deal with the effect of the 1st to 6th Respondents in not filing any responses to the Petition. **Rule 15** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** (hereinafter referred to as '**the Rules**') provides that the Attorney General or any other State organ shall within 14 days of service of a Petition respond by way of a replying affidavit or by filing any other document as a response to the Petition. **Rule 16** of the Rules provides that a Court remains at liberty to hear and determine a Petition in case the Respondent fails to respond to that Petition. The Attorney General in this Petition is the 1st Respondent.

25. The 1st to 6th Respondents entered appearance but failed to file any response to the Petition despite having been given ample time to do so. I however agree with the submission by the 1st to 6th Respondents that such notwithstanding, a party is at liberty to file written submissions.

26. Under **Rule 20** of the Rules, a Petition may be heard by way of affidavits, written submissions or oral evidence. In this matter directions were taken with the concurrence of the parties that the Petition be heard by way of affidavits and written submissions. Since the 1st to 6th Respondents did not respond to the contents of the Petition, moreso the factual averments, those factual averments remain mainly uncontroverted. Borrowing from the ordinary civil litigation, a party which fails to file a defence or files a defence but fails to call evidence in support of that defence renders the contents of such a defence evidentially worthless. (See the cases of **Chrispine Otieno Caleb =vs= Attorney General (2014) eKLR, Drapery Empire vs. The Attorney General Nairobi HCCC No. 2666 of 1996 (ur), Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007(ur)** among others).

27. The matter does not end there. The party which benefits aforesaid must go further to prove its case and demonstrate that it is entitled to the prayers sought in the matter. Such a party is not entitled to judgment as a matter of course. The fact that the Respondents did not file any response does not in any way shift the burden of proof from the 2nd Petitioner. The 2nd Petitioner must lay on the legal table evidence of facts contended against the Respondents whereof this Court will evaluate it to satisfy itself that indeed the evidence attains the required standard of proof short of which the claim must be dismissed. That legal position does not change even in the absence of a rebuttal by the other side. (See the Court of Appeal **in Daniel Toroitich arap Moi v. Mwangi Muriithi, Civil Appeal No. 240 of 2011** (unreported) and **Mumbi M'Nabea v. David Wachira, Civil Appeal No. 299 of 2012** (unreported).

28. In determining whether the prayers sought are available to the 2nd Petitioner herein, this Court shall further weigh the evidence of the 2nd Petitioner against that of the 7th Respondent. I have evaluated the evidence of the 7th Respondent who accompanied the 2nd, 3rd and 6th Respondents to the premises. That evidence however does not sufficiently answer the Petition. For instance, when Peter visited the 6th Respondent and raised the matter concerning the children at the premises, he learnt that the 6th Respondent was already aware of it and that the matter was being dealt with. It remains unclear under what circumstances the 6th Respondent came to know of the matter. Likewise, there is no evidence of how the decision to remove the children from the premises was reached. There is also the issue of the alleged search warrant. Whereas the 7th Respondent allege to have learnt much later after the impugned visit that the 3rd Respondent had obtained a search warrant from the court at Rongo, the Petitioners are

opposed on grounds that the warrant was never served upon the 2nd Petitioner or displayed at the premises during the visit and that it referred to the Legio Maria sect and not the 2nd Petitioner. Further, the warrant contravened **Sections 118, 119 and 120** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya. All these issues remain unanswered.

29. The response by the 7th Respondent further fails to answer the question as to why no one was charged if indeed the 2nd Petitioner and its worshippers obstructed the police in the lawful execution of their duties.

30. On the other hand, there is no dispute on some issues. That the 2nd, 3rd, 6th and 7th Respondents visited the premises in the company of the journalists; that the visit was pre-planned; that the 2nd Petitioner was unaware of the decision and the visit; that there was disorder and violence at the premises; that the incident was widely covered and reported by the electronic and print media, that properties of the 2nd Petitioner within the premises were destroyed; that the children who were taken away were later on released to their parents and guardians by the court among others.

31. The 2nd Petitioner attacks the impugned visit on two fronts. That it was neither made aware of nor participated in the decision-making process that led to the decision to visit of the premises and take away the children therefrom and that the unilateral decision was unlawfully executed. On the first front, the 2nd Petitioner contend that its *right to a fair administrative action* pursuant to **Article 47** of the **Constitution** was contravened. On how the unilateral decision was executed, the 2nd Petitioner contend that its *right to privacy* under **Article 31** of the Constitution, its *right to security* under **Article 29** of the **Constitution**; its *freedom of belief, religion, thought and conscience* under **Article 32** of the **Constitution** and its *right to inherent dignity* under **Article 28** of the **Constitution** were variously contravened.

32. On the **right to a fair administrative action**, let me start by saying that it may have been true that the conditions in which the children were living in the premises were unfavorable to their welfare and that the decision was justified. It is therefore for the 2nd Petitioner to demonstrate to a degree of precision and specificity how the administrative action in question was not expeditious, efficient, lawful, reasonable and/or procedurally fair.

33. The starting point is **Article 47** of the **Constitution** and the **Fair Administrative Act, 2015** (hereinafter referred to as '**the Act**'). **Article 47** of the **Constitution** states as follows: -

“47. (1) every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

34. The Act defines an ‘**administrative action**’ to include: -

“i. the powers, functions and duties exercised by authorities or quasi-judicial tribunals: or

ii) any act, omission or decision of any person, body or authority that affects the legal rights or interest of any person to whom such action relates;”

35. **Section 4** of the Act provides that: -

‘1. Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.’

36. In the context of this matter, I wish to appreciate the importance of fair administrative action and to associate myself with **Majanja, J.** when he expressed himself in **Moses Kiarie Kuria & 4 Others v.**

Attorney General & 3 others (2014) eKLR thus:

‘The Constitutional guarantee of the right to fair administrative action is aimed at instilling discipline to administrative action so that the values and principles of the Constitution are infused in matters of public administration.’

37. From the definition of a ‘*fair administrative action*’ in the Act and the reading of **Article 47** of the **Constitution** together with **Section 4** of the **Act**, the process to be undertaken in reaching an administrative decision has varied elements of procedure. They include: -

- i) Whether the action was expeditious and efficient;**
- ii) Whether the action was lawful,**
- iii) Whether the action was reasonable;**
- iv) Whether the action was procedurally fair;**
- v) Whether written reasons were given; and**
- vi) Whether the principles of good governance, integrity and transparency were adhered to.**

38. Even without dealing with each of the above elements in singular and in detail, by subjecting how the decision to remove the children from the premises was arrived at *vis-à-vis* the foregone elements, that decision does not pass the test of a fair administrative action. I say so because the Respondents have failed to demonstrate that there was any prior notice given on the process towards the decision, that they offered an opportunity to the Petitioners to make representations, how the decision was reasonable and lawful, why written reasons for the decision were not given and how the Respondents adhered to the principles of good governance, integrity and transparency.

39. In all aspects, the decision-making process did not pass both the constitutional and statutory tests. As earlier on said, it is not only the nature of the decision which matters but the process as well. (See the case of **Justice Amraphael Mbogholi Msagha v. Chief Justice & 7 others Nairobi HCCC No. 1062 of 2004 (2006) 2 KLR 553**). I therefore find that the 2nd Petitioner’s right to a fair administrative action was contravened.

40. I will now examine how the decision to remove the children from the premises was executed alongside the alleged contraventions. On the **right to privacy**, **Article 31** of the **Constitution** provides that: -

‘Every person has the right to privacy, which includes the right not to have –

- (a) their person, home or property searched;***
- (b) their possessions seized;***
- (c) information relating to their family or private affairs unnecessarily required or revealed; or***
- (d) the privacy of their communications infringed”***

41. The 7th Respondent alluded that the impugned visit was not in contravention of the right to privacy as there was a valid court search warrant. As said above, there is no evidence that the warrant was served on the 2nd Petitioner or was at least shown to its representatives during the impugned visit. Likewise, the contention that the warrant referred to another entity cannot be overlooked given that the 2nd Petitioner is a separate legal entity. There is however evidence that the Respondents forced themselves into the

premises, property was destroyed and holy places deconsecrated. As I find no justification in what the Respondents did, I hold that the 2nd Petitioner's right to privacy was, as well contravened.

42. On the **right to freedom and security**, **Article 29** of the **Constitution** states as follows: -

'Every person has the right to freedom and security of the person, which includes the right not to be –

(a) deprived of freedom arbitrarily or without just cause;

(b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;

(c) subjected to any form of violence from either public or private sources;

(d) subjected to torture in any manner, whether physical or psychological;

(e) subjected to corporal punishment; or

(f) treated or punished in a cruel, inhuman or degrading manner."

43. The 7th Respondent averred that the 2nd Petitioner denied the Respondents entry into the premises thereby leading to the confrontation. The 2nd Petitioner avers to the contrary that the police went to the premises in the company of about 100 young men ready for the operation. I have looked at the newspaper cutting on the incident. The visit was an 'operation to rescue children'. Having allegedly obtained a court order and being in the company of the 2nd and 3rd Respondents who are the chief security officers in Rongo Sub-county, it goes without say that the Respondents were in a heavy security detail as opposed to those who were at the premises and who did not even expect such an operation. It is also on record that most of the people at the premises were women and fled.

44. Be that as it may, the 2nd Petitioner was justified in denying the Respondents any access into its private premises until the Respondents demonstrated that they were lawfully allowed to do so. At least the Respondents ought to have produced the court warrant to justify their 'operation'. Whatever therefore resulted was due to the lackluster and unlawful way the Respondents handled the entire issue. That leaves this Court with the only finding that the freedom and security of the 2nd Petitioner as guaranteed under **Article 29(c)** and **(f)** of the **Constitution** was infringed.

45. On the aspect of the **inherent dignity** of the 2nd Petitioner, the totality of all what happened highly and adversely affected the integrity and dignity of the 2nd Petitioner. It was portrayed to the entire world that the 2nd Petitioner is a cult or a sect whereas to the contrary the 2nd Petitioner contends that it offers trainings on sound Christian-doctrines based on the Holy Bible. Likewise, **Article 32** of the **Constitution** was infringed.

46. The above analysis therefore avails that the Respondents' decision to remove the children from the premises and the way that decision was executed were acts not justified under the Constitution and the law. The Respondents variously acted in contravention of the Constitution.

47. Having so found, I will now deal with the aspect of remedies. There is no doubt that several rights and fundamental freedoms were infringed. That calls for appropriate declarations. As for the award of damages in constitutional petitions, there has been a great legal discourse on this aspect. There is however concurrence that the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. Whereas a Court has the discretion to award damages, that ought to be limited to what is '**appropriate and just**' in accordance to the facts and circumstances of a particular case. A Court should therefore exercise rationality and proportionality. Indeed, as severally held in various decisions, in some instances a declaration is

appropriate to meet the ends of justice since a declaration is itself a powerful statement which goes a long way in effecting reparation of the breach, if not doing so altogether. In some cases, reasonable awards of damages may be called for in addition to the declaration.

48. In public law remedies like in this instant case, public policy considerations are important because since it is not only the Petitioner's interest to be considered but the interests of the society as a whole (See the cases of **Gitobu Imanyara & 2 others v Attorney General (2016) eKLR**, **Benedict Munene Kariuki & 14 Others vs. The Attorney General (2011) eKLR** among others.)

49. By taking the foregone into account, I find that the contravention of the rights and fundamental freedoms of the 2nd Petitioner can be adequately addressed by way of appropriate declarations and costs. Those declarations shall be capable of restoring the 2nd Petitioner to where it was before the actions complained of. Further, the 2nd Petitioner has not quantified and proved the actual damage to its various properties as that is a claim for special damages.

50. I further decline to declare that the 4th and 5th Respondents are vicariously liable for the violations and infringements of the 6th Respondent since the 5th Respondent is a separate body corporate under **Section 30** of the **Children's Act** and was not a party in this Petition.

Disposition: -

51. In conclusion, this Court hereby makes the following final orders: -

(a) A declaration hereby issues that the 2nd Petitioner herein, St. Joseph Missions of Messiah in Africa Ltd, is entitled to protection under the Constitution.

(b) A declaration hereby issues that the 2nd Petitioner's rights under Articles 28, 29(c) and (f), 31 (a) and (c), 32(1), (2) and (4) and 47 of the Constitution were jointly and severally contravened by the 2nd, 3rd and 6th Respondents.

(c) A declaration hereby issues that the 1st Respondent is vicariously responsible for the infringements and violations by the 2nd, 3rd and 6th Respondents.

(d) Costs of the Petition to be jointly and severally borne by the 1st, 2nd, 3rd and 6th Respondents.

DELIVERED, DATED and SIGNED at MIGORI this 29th day of June 2017.

A. C. MRIMA

JUDGE