



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CONSTITUTIONAL PETITION NO. 8 OF 2016

IN THE MATTER OF ARTICLES 22(1) (A) & (3), 23 AND 46 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE MATTER OF B P S (A MINOR) SUING THROUGH HIS NEXT FRIEND AND FATHER N S S.....PETITIONER

VERSUS

TATA CHEMICALS MAGADI LIMITED.....RESPONDENT

RULING

This petition was brought before this court on 8/12/2016 by the petitioner N S S suing on behalf of his son the minor herein referred as B.P. S. against Tata Chemicals Magadi Limited, the defendant company. In the petition dated 8/12/2016 and filed on 14/12/2016 the petitioner herein sets out the following facts:-

That he was an employee of defendant company until 2014, where in the course of his employment he was entitled to benefits more specifically free medical cover for self and his immediate family through the scheme referred as Medical Staff at Magadi Hospital. The petitioner avers that on diverse dates between 15th June 2009 and 19/6/2009 the petitioner's son B. P. S. fell sick and sought medical treatment at Magadi Hospital. On examination on what diagnosis the petitioner's son was treated and later referred to Getrude Children Hospital for further management. In the course of treatment the petitioner avers that the son developed sound and hearing complications.

The petitioner further deposes that in the year 2013 the son underwent corrective surgery full paid for by the defendant company; with a condition that he was to be subjected to a second surgery on July 2015. According to the petitioner when he approached the defendant company to meet the cost of the second surgery and treatment the requisition was declined. The petitioner avers that in the event the objection by the defendant company is not to pay for the surgery is allowed his son herein will be in jeopardy affecting his future social economic aspect of life. The petitioner therefore in his petition seeks the following orders;

1. A declaration that the petitioner is entitled to compensation for the severe loss of hearing caused by the misdiagnosis and wrongful treatment by the medical staff at the respondent's facility.
2. General damages for pain, suffering and loss of amenities.
3. Cost of Cochlea implantation Surgery for the right ear.

4. Cost of speech therapy, mapping sessions and school fees.
5. Costs of the external components of the cochlea implant for both ears and their insurances.
6. Costs of the suit.
7. Interest on (ii) to (vi) above at court rates.

When the defendant was served with the petition a notice of preliminary objection dated 24/4/2017 was filed on 25/4/2017. The preliminary objection is predicated on three grounds.

- a. This Honourable Court lacks the jurisdiction to hear the petition.
- b. The issues arising in this matter are not capable of being determined fairly and justly by Petition as sought by the Petitioner.
- c. The Petition is fatally and irretrievably defective and cannot lie as there is not specific constitutional right and/or fundamental freedom that has allegedly been infringed or threatened to be infringed.

The said petition was canvassed and argued by way of written submissions by the counsels filed in support and objection as to its substance on the issues set down for determination.

The defendant company through Counsel Mr. Oyoo first line of attack was the incompetence and defect of the petition so far as the orders sought cannot be issued by this court for want of jurisdiction. The learned counsel argued and submitted that the petitioner has not specifically pleaded the breach of fundamental rights and freedoms as provided for in the constitution. Learned counsel further contended that the alleged breach based on article 22 and 23 of the constitution is not crystal clear for this court to grant the declaratory prayers in the petition. The learned counsel further argues that the petitioner has essentially addressed himself with issues to do with award of compensatory damages which has nothing to do with violation of his constitutional rights and freedoms. Learned counsel further submitted that in so far as the claim is concerned the petitioner is in the wrong forum which has no jurisdiction to determine the dispute on the merits. Learned counsel cited the following decisions to buttress his submissions.

- 1. *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd [1969] EA 696***
- 2. *Anarita Karimi Njeru v The Republic [1976 -1980] KLR 1272***
- 3. *Thorp v Holdsworth [1879] 3 Ch. D. 637***
- 4. *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR.***
- 5. *Peter Michobo Muiru v Barclays Bank of Kenya Ltd & Another [2016] eKLR***

In his closing remarks learned counsel relying on the legal principles in the above cited cases urged this court to struck out the petition for lack of jurisdiction. Mr. Tobiko for the petitioner submitted that the petitioner has invoked articles 22 and 23 of the constitution to grant him the locus *standi* to file and prosecute the petition in a representative capacity. Learned counsel further contended that the petition together with corresponding supporting affidavit does demonstrate a violation of a constitutional right which this court has jurisdiction to determine in reference to article 165(3) of the constitution, the dicta in the cases of *W.J. & Another v Astarikoh Henry Amkaah & 9 Others [2015] eKLR*, and *Zipporah Seroney & 5 Others v Daniel Toroitich Arap Moi & Another [2015] eKLR*.

Learned counsel submitted the court is clowned with the requisite jurisdiction to deal with the petition as filed. M/s Tobiko further submitted in response to the fatal and defect of the petition by invoking the provisions of article 46 of the constitution on violation of consumer rights. The learned counsel argued

and submitted that the High Court has jurisdiction to enforce the bill of rights. In doing so learned counsel maintained that the court is mandated to avoid technicalities in order to deny citizens a right under the constitution. This was to persuade this court not to strike out the petition on a technicality on grounds that the matters raised are not capable of being determined fairly and conclusively. In this regard learned counsel invited this court to be guided by the constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 commonly referred to as (Mutunga Rules) to accommodate the petition.

According to learned counsel the petitioner has approached this court through constitutional petition, that the defendant has violated and infringed the rights under the bill of rights. Learned counsel contended that the specific rights have been pleaded and the relevant articles of the constitution shown. Learned Counsel further submitted that there is no other court that bears competent jurisdiction to determine the question whether a right of fundamental freedom has been denied, violated, infringed or threatened. According to Learned Counsel the fact that the rights of the petitioner that have been infringed touch on consumer rights does not deprive the High Court of the jurisdiction under the constitution.

In support of the submissions on the court's jurisdiction and defective petition learned counsel cited the following cases to distinguish the ones referred to by the respondent's counsel.

- 1. *Peter M. Kariuki v Attorney General [2014] eKLR.***
- 2. *Nation Media Group Ltd v Attorney General [2007] eKLR.***
- 3. *Zipporah Seroney & 5 Others v Daniel Toroitich Arap Moi & Another [2015] eKLR***
- 4. *Samuel Gunja & Another v County Assembly of Marsabit & 2 Others [2016] eKLR.***
- 5. *Maasai Mara (SOPA) Limited v Narok County Government [2016] eKLR.***

In a nutshell relying on the above cases Learned Counsel submitted that the defendant's preliminary objection dated 24/4/2017 is misguided, misconceived and incapable of being granted.

ANALYSIS AND DETERMINATION:

It is trite law that the issue of jurisdiction of the court can be raised by a party to the proceedings or be raised by the court *suo moto*. In this petition the substantial issue which is at the heart of the dispute is whether this court is the appropriate tribunal to grant the reliefs by the petition. There is no dispute that the jurisdiction of the high court is provided for under Article 165 (3) (a) (b) (c) (d) (4) 6 and 7 of the Constitution. The same constitution ousted the jurisdiction of the high court under Article 165 (5) in respect of matters:

- “(a) Reserved for the exclusive jurisdiction of the Supreme Court under this constitution; or***
(b) Falling within the jurisdiction of the courts contemplated in Article 162 (2).”

Article 162 (2) prescribes the system of courts. Under this Article 162 (2) it gives parliament the general power to establish courts with the status of the high court to hear and determine disputes relating to:

- “(a) Employment and Labour relations; and***
(b) The Environment and the use and occupation of, and title to land.

((3) Parliament shall determine the jurisdiction and functions of the courts contemplated in Clause (2) above.”

The courts have taken a common approach based on judicial precedents on this question of preliminary

objection as to the jurisdiction. In the locus classic case of *The Owners of Motor Vessel Litheans v Caltex Oil Kenya Ltd*:

“Jurisdiction is everything without it; a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction”.

In the same issue as discussed in *Samwel Kamau Macharia v Kenya Commercial Bank Limited & 2 Others [2012] eKLR* it was held:

“A court’s jurisdiction flows from either the constitution or legislation or both. Thus a court of law 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. We agree with counsel for the first and second respondents in his submissions that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality. It goes to the very heart of the matter, for without jurisdiction the court cannot entertain any proceedings. This court dealt with the question of jurisdiction extensively in the matter of the Interim Independent Electoral Commission (in Constitutional Application No. 2 of 2011.) Thus where the constitution extensively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation nor can parliament confer jurisdiction upon a court of law beyond the scope defined by the constitution. Where the constitution confers powers upon parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law”.

In our administration of justice courts have jealously guarded the issue of jurisdiction guiding discourse of litigation by parties. It is the very essence that an application in respect of a preliminary objection to struck out pleadings or suit, petition for want of jurisdiction is not a demurrer. The application can be taken anytime as it’s with the respondent, even when the opposing party to the dispute has filed no response to the claim. That is the position I consider the respondents finds himself in asking this court at the earliest opportunity to determine the preliminary objection.

As emphasized in the case of *the Owners of Motor Vessel Litheans (Supra)*, jurisdiction being the forerunner of judicial process cannot be acquiescence collusion, compromise or as in this case a party cannot confer jurisdiction on a court that lacks it. The petitioner has no legal right to donate jurisdiction by involving the constitutional provisions on the bill of rights to persuade this court to hear the petition on the merits.

I take cognizance the provisions of Article 22(1) of the Constitution which states:

“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been denied, violated or infringed or is threatened.”

It is also important to note that under Article 258 (1), ***“every person has the right to institute court proceedings, claiming that this constitution has been contravened or is threatened with contravention.”***

With petitioner submits that he has the locus *standi* to file and prosecute the petition on behalf of the claimant pursuant to Article 22 and 23 of the Constitution. The petitioner has specifically invited this court to interpret the provisions of Article 43 (1) of the Constitution on economic and social rights.

From the stand point of the petitioner the claimant has a right to the highest attainable standard of health, which includes the right to health care services. On his part the rights have been infringed, and or violated by the respondent conduct failure to meet the cost of the second surgery and treatment. What the court is asked to do in plain language is to order and make a declaration for the respondent to pay for the

treatment of the claimant. It is that simple. In answering this question to meet the needs of the petitioner one must approach the issue by looking at the petition in its entirety. This is to establish whether the high court's general and specific jurisdiction can determine the petition without violating the very constitution.

I have no quarrel with the right of the petitioner to approach this court pursuant to Article 22 and 23 of the Constitution to enforce a breach, infringement or violation of his rights. My problem will be whether this court being a creature of the constitution and statute can assume jurisdiction outside the confines of prescribed legal instruments. That to me will be a violation of the same constitution under Article 3(1) which provides that, ***“every person has an obligation to respect, uphold and defend this constitution.”***

As pointed out by the respondent, the provisions of Article 22 and 23 of the Constitution do not oust the jurisdiction of the court. Learned counsel for the respondent argued that in terms of the prayers in the petition there are no issues which touch on infringement or violation of rights and freedoms of the petitioner.

Having regard to the above in the instant case the petitioner has filed this petition in a legal representative capacity on behalf of the minor – claimant. He has signed the petition and attachments on his behalf. Relying on the petition and corresponding affidavits with annexures the petition allude to the existence of a contract with the respondents came to an end on or about 2014.

According to the petition during the subsistence of the contract he enjoyed certain benefits including medicare for self and his family. It is not disputed that the petitioner's son (minor) fell ill in the year 2009 from which he was examined and treated at the respondent's cost. It is also the petitioner's position that as much as the claimant has received treatment there is need for further surgery to restore his health. This surgery was scheduled to be carried out in the year 2015. The respondent on being confronted with the demand to meet the cost of surgery and treatment declined the request.

The bone of contention therefore between the petitioner and the respondent is that the failure to come to the aid of the claimant is a violation of the constitution. In my view the reading of the petition and annexures shows that it is premised on the contract of employment. The terms and conditions of the contract were dictated by virtue of the petitioner's active employment. It is clear the petitioner rendered services with the respondent which came to an end on in July 2014.

My decision in this case is buttressed by the decision in the ***United States International University – USIU v AG High Court Petition No. 170 of 2012*** where the court in adopting the decision of the constitutional Court of South Africa in *Gcaba v Minister of Safety and Security* where **Majanja J** held inter alia:

“The Industrial Court is a specialist court to deal with employment and labour relations matters.”

By virtue of Article 162 (3) section 12 of the Industrial Court Act 2011 has set out matters within the exclusive domain of that court. The fundamental rights complained of by the petitioner under Article 46 flow from the interpretation of the contract of employment with the respondent. I also hold that the right to compensation for loss or injury arising from defects in goods or services under Article 46 (d) is underpinned in this case under the tort of negligence and vicariously liability.

I am satisfied that the claim as crafted and pleaded does not fall exclusively on the interpretation of the constitution and enforcement to the breach of fundamental rights and freedoms. The petitioner cannot feign ignorance as to the proper forum matter arising from the disputes between him and the respondent cannot be properly adjudicated in this forum.

A distinct must be drawn between matters purely under Article 165 (2) (b) and substantive claims under civil jurisdiction or employment and labour disputes. The respondent preliminary objection to the petition is hereby upheld. That the petition is hereby dismissed as it has not met the admissibility criteria pursuant to Article 22, 23 as read together with Article 165 (3) of the Constitution.

Each party to bear their own costs arising out of this litigation.

DATED, READ, SIGNED IN OPEN COURT AT KAJIADO THIS 25/8/2017.

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R. NYAKUNDI

JUDGE

Representation:

Ms Onyango for Kaplan & Stratton for the respondent present

Ms Nziri Elijah holding brief for M/s Monrei for the applicant present