

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI,

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO 535 OF 2017

AND IN THE MATTER OF: ARTICLE 10, 22, 23, 27, 38, 50, 258 & 259 (1)

OF THE CONSTITUTION OF KENYA, 2010 AND IN

THE MATTER OF: ARTICLE 38 AND 258 OF THE CONSTITUTION OF KENYA 2010

(THE RIGHT TO VOTE)

BETWEEN

STEPHEN OKOTH MWANGA.....PETITIONER

VERSUS

CORNELL RASANGA AMOTH.....RESPONDENT

JUDGMENT

Petitioners case

1. The Petitioner avers that he is a registered voter at Siaya County, Ugenya Constituency, North Ugenya Ward, Sega Township Polling Station, hence eligible to vote in the Presidential elections scheduled to take place on 26th October 2017.

2. The Petitioner avers that for the last 10 days or so, and on diverse dates in repeated public rallies, the Respondent, who is the Governor of Siaya County has "publicly threatened that anybody who will visit any polling station in Siaya County will be met with violence and will be burned with his family members and his homes."

3. The petitioner cites the following instances, namely:-

i. that on 17th October 2017, at 7:20 am and 8.00am or thereabouts in a discussion in a local radio station a one Odour Odongo a Member of the Siaya County Assembly called and said he would mobilize thugs to hurt the petitioner and burn his houses and lorry.

ii. that on 15th October 2017, the Respondent was reported by the Nation Television telling the people of Siaya that if anybody visited the polling station, "they would die and go to see the mothers" which was construed to they will be harmed and killed.

iii. that the same utterances were repeated at Mombasa.

4. He also avers he has information that there will be a meeting scheduled by the Respondent on 23rd October 2017 (now past) whose agenda was to arrange, organize and finance some 50 youths for every polling centre to stop by any means necessary, anybody who is a voter from accessing the polling station

and that it was common knowledge that any person accessing polling station in Siaya, Kisumu, Homabay and part of Migori will be harmed or stopped.

5. The petitioner fears that unless stopped by this court the aforesaid threats will be carried out thus wrongfully stopping people, many of whom hail from other communities from casting their votes, which is a contravention of the constitution and their right to vote, hence a violation of articles 10, 27, and 38, hence the reliefs sought in the petition.

6. An attempt by counsel for the Petitioner to introduce electronic evidence was objected to by the Respondents' counsel. I upheld the objection and reserved the reasons to be made in this judgment.

7. The petitioner also gave oral evidence and essentially highlighted the contents of the Petition and his affidavits filed in court.

Respondent Grounds of opposition

8. The Respondents objection can be summarized as follows:- **(i)** that Rule 8 (1) of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013^[1] provides that petitions be filed in the nearest court having jurisdiction; **(ii)** that this petition lacks merit; **(iii)** that there is no link between the petitioner and the allegations; **(iv)** that the acts complained of are attributed to third parties; **(v)** that there are available remedies under other laws; **(vi)** that it's a matter of notoriety that the call for boycott was made by NASA and not by the Respondent; and **(vii)** that the orders sought are vague/ambiguous and incapable of being enforced.

Petitioners counsels submissions

9. Regarding the objection grounded on Rule 8 (1) above, Mr. Kihara for the Petitioner submitted that failure to file the case in the nearest court having jurisdiction is not fatal and urged the court to determine the case on merits. He urged the court to uphold the petitioners Rights to exercise his voting rights, the right not to be discriminated on account of his political affiliation and the right to make political choices.

Respondents' Counsels submissions

10. Mr. Wakla for the Respondent urged the court to dismiss the Petition on account of infringing Rule 8 (1) cited above, that the petition lacks merits, no material evidence has been adduced, that the utterances complained of are attributed to third parties, that the petitioner has other remedies under the law and that the poll boycott complained of was called by NASA and not the Petitioner.

Reasons for upholding the objection on electronic evidence

11. Section **106 B** of the Evidence Act^[2] states that electronic evidence of a computer recording or output is admissible in evidence as an original document “if the conditions mentioned in the section are satisfied in relation to the information and computer.”

12. In my view, this is a mandatory requirement which was enacted for good reason to safeguard a situation whereby the court may admit into evidence or rely on manipulated electronic evidence or record hence the stringent conditions in sub-section **106 B (2)** of the Evidence Act. ^[3]

13. The conditions are aimed at vouching the authenticity and integrity of the electronic record sought to be produced. Section **106B** of the Evidence Act^[4] provides that:-

“106B (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electromagnetic media produced by a computer (herein referred to as computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without

further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.

(2) The conditions mentioned in subsection (1), in respect of a computer output, are the following

(a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in paragraph (a) of sub section (2) was regularly performed by computers, whether—

(a) by combination of computers operating in succession over that period; or

(b) by different computers operating in succession over that period; or

(c) in any manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, then all computers used for that purpose during that period shall be treated for the purposes of this section to constitute a single computer and references in this sections to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any matters to which conditions mentioned in sub-section (2) relate; and

(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.

(5) For the purpose of this section, information is supplied to a computer if it is supplied thereto

in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of an appropriate equipment whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purpose of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities.”

14. The above conditions which are couched in mandatory terms were not complied with in this case, hence the reason why I upheld the objection by the Respondents' counsel.

Place of suing

15. Rule **8 (1)** of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, provides that "Every case shall be instituted in the High Court within whose jurisdiction the alleged violation took place."

16. The cause of action in this case arose in Siaya County. There is High Court in Siaya. Apart from Siaya, there is a High Court in Kisumu. No sufficient explanation was offered as to why this suit was filed in Nairobi.

17. Article **259** of the Constitution provides that the Constitution shall be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights and permits the development of the law; and contributes to good governance. Consistent with this, when the Rules or Regulations are in issue, the court is under a duty to examine the objects and purport of an Act and to read the provisions of the legislation and the Rules, so far as is possible, in conformity with the Constitution.^[5]

18. Thus, a court ought first to determine whether, through “the application of all legitimate interpretive aids,”^[6] the impugned Rule is capable of being read in a manner that is constitutionally compliant.

19. Our Constitution requires a purposive approach to statutory interpretation. Rule 3 of the Rules provides for the scope of the Rules and their overriding objective which is to facilitate access to courts under article **48** of the constitution. Rule 3 commands this court to interpret the Rules in accordance with Article **259 (1)** of the constitution with a view to advancing and realizing the rights and freedoms enshrined in the Bill of Rights and values and principles of the constitution.

20. The court in exercise its jurisdiction under the rules is required to facilitate the just, expeditious, proportionate and affordable resolution of all cases while rule 5 provides for timely disposal of cases.

21. As pointed out above, that constitution introduces a mandatory requirement to construe every piece of legislation (including Rules made under the legislation) in a manner that promotes the ‘spirit, purport and objects of the Bill of Rights.’

22. It is important to establish the scope and intended effect of a law^[7]or Rules. The often quoted dissenting judgment of **Schreiner JA** eloquently articulates the importance of context in statutory interpretation:-

“Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that ‘the context’, as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and within limits, its background.”^[8]

23. A contextual or purposive reading of a statute must of course remain faithful to the actual wording of the statute. It must be said that context is everything in law, and obviously one needs to examine the

particular statute and all the facts that gave rise to it. A contextual interpretation of a statute, therefore, must be sufficiently clear to accord with the rule of law.

24. Mindful of the imperative to read legislation, Rules or Regulations in conformity with the Constitution, but only to do so when that reading would not unduly strain the legislation, Rules or Regulations, I turn to an analysis of the effect of Rule 8 (1).

25. Rule **8 (1)** is clear that a Petition ought to be filed in the nearest court having jurisdiction. Nairobi is not the nearest court. Is the petition before me fatal? Sub-Rule (2) provides that despite rule (1), the high court may order that a petition be transferred to another court of competent jurisdiction either on its own motion or on the application of a party.

26. The Rule does not state that the court ought to dismiss the petition. It creates what I would describe as "*territorial jurisdiction.*" Guided by the purposive interpretation of the constitution, the scope and objectives of the rules and the command under article 259 of the constitution, I find that it was not the intention of the draftsman of the Rules to punish a party by dismissing a petition filed in the wrong court.

27. It is my view courts ought to be slow to dismiss a constitutional Petitions where a party is seeking to enforce fundamental rights without hearing the matter on merits. The time frame here does not allow the court to transfer this case as required under Rule 8 (2) because the matters raised relate to the Presidential elections to be held tomorrow. That option cannot be exercised at this late hour. Though recognizing the need for parties to comply with the Rules and in particular file petitions in the nearest court having jurisdiction, I am constrained to find and hold that a transfer is not a viable option in the circumstances of this case, while a dismissal would be too drastic and will amount to denying the petitioner the right to access the court.

28. The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.[\[9\]](#)

29. In my view, the court is not powerless to grant relief when the ends of justice and equity so demand, because the powers vested in the court are of a wide scope and ambit.[\[10\]](#) The inherent power, as observed by the Supreme Court of India in *Raj Bahadur Ras Raja vs Seth Hiralal* [\[11\]](#) "has not been conferred on the court; it is a power inherent in the court by virtue of its duty to do justice between the parties before it." **Lord Cairns** in *Roger Vs Comptoir D' Escompts De Paris* stated as follows:-

"One of the first and highest duties of all, Courts is to take care that the act of the court does no injury to any of the suitors and when the expression 'Act of the court' is used it does not mean merely the act of the primary court, or of any intermediate court of appeal, but the act of the court as a whole from the lowest court which entertains jurisdiction over the matters up to the highest court which finally disposes of the case."

30. The fundamental duty of the court is to do justice between the parties. It is, in turn, fundamental to that duty that parties should each be allowed a proper opportunity to put their cases upon the merits of the matter. It is fundamental principle of natural justice, applicable to all courts whether superior or inferior, that parties must be given a reasonable opportunity of appearing and presenting their case. If this principle be not observed, the person affected is entitled, *ex debito justitiae*, to have any determination which affects him set aside.

31. My interpretation of the Rules, the Right to be heard and the relevant constitutional provisions is that the territorial jurisdiction does not in the special circumstances of this case prevent me from hearing this case. I find there is nothing to bar me to exercise my jurisdiction and discretion and hear this matter on merits notwithstanding Rule 8 (1).

Whether the petitioner has proved his case to the required standard

32. The crux of the petitioners case is that the Petitioner has publicly threatened him in several public rallies that he will be met with violence if himself and his family visit polling stations within Siaya County. The first incident cited was on 17th October 2017. It is attributed to a one Oduor Odongo and not the Respondent. No evidence was provided to establish the connection between the said person and the Respondent.

33. The other allegation was premised on the electronic evidence which was disallowed as explained above. The oral evidence presented by the petitioner in my view did not shed light on the issue.

34. A news paper cutting, though not admissible in evidence was attached to the affidavit. But the story relied upon in the said newspaper is attributed to the petitioner who was being interviewed by the press. It is not attributed to the Respondent.

35. It is important to point out that despite the seriousness of the allegations, the Petitioner has not reported the threats to the police. The threats, if true, border on criminal activities. We have laws and agencies competent to deal with such cases. In addition to the criminal nature of the allegations, they are also offences under the Elections Act. Again, there is nothing to show that the petitioner made a report to the relevant organs. Such an omission leaves a serious dent in the petitioners case. One of the prayers sought is police protection yet no report was made to the police.

36. It is an well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed.^[12] The standard of proof is the legal standard to which a party is required to prove his/her case. The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In the case of *Miller vs Minister of Pensions*,^[13] Lord Denning said the following about the standard of proof in civil cases:-

‘The ...{standard of proof}...is well settled. It must carry a reasonable degree of probability....if the evidence is such that the tribunal can say: ‘We think it more probable than not’ the burden is discharged, but, if the probabilities are equal, it is not.’

37. The reason for this standard is that in some cases, the question of the probability or improbability of an action occurring is an important consideration to be taken into account in deciding whether that particular event had actually taken place or not.

38. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. The standard of proof, in essence can loosely be defined as the quantum of evidence that must be presented before a court before a fact can be said to exist or not exist.

39. On damages, no evidence has been presented before this court to justify an award of damages. There are no averments in the plaint to support the claim for damages nor is there evidence to support it. It only appears in the prayers and in the counsels submissions.

40. In conclusion, I am constrained to find that the Petitioner has not proved this case to the required standard. Consequently, I dismiss this petition with no orders as to costs.

Orders accordingly.

Signed, Dated, Delivered at Nairobi this 25th day of **October** 2017

John M. Mativo

Judge

[1] Legal Notice No. 117 of 28th June 2013

[2] Cap 80, Laws of Kenya

[3] Ibid

[4] Ibid

[5] Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others [2000] ZACC 12; 2001(1) SA 545; 2000 (10) BCLR 1079 (CC) at para 22.

[6] National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 24

[7] Thornton Legislative Drafting 4ed (1996) at 155 cited in JR de Ville above n 18 at 244.

[8] University of Cape Town vs Cape Bar Council and Another 1986 (4) SA 903 (AD). See also Jaga v Dönges NO and Another; Bhana v Dönges NO and Another 1950 (4) SA 653 (A) at 662-3.

[9] Richard Nchapai Leiyangu vs IEBC & 2 others

[10] See Mamraj vs Sabri Devi, AIR 1999 P & H 96

[11] AIR {1962} AC 527

[12] Koinange and 13 others vs Koinange {1968} KLR 23

[13] {1947} 2ALL ER 372