



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
PETITION NO. 45 OF 2015
IN THE MATTER OF ARTICLES 22 (1)
AND
IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS
OR FUNDAMENTAL FREEDOMS UNDER ARTICLE 36 (2)
BETWEEN
MARGARET MORAA.....PETITIONER
VERSUS
SHEM ONYIEGO (CHAIRMAN KISII TOMATOES GROUP.....1ST RESPONDENT
FRANCIS JOMO (TREASURER KISII TOMATOES GROUP.....2ND RESPONDENT
ANTONY MWAURA (SECRETARY KISII TOMATOES GROUP.....3RD RESPONDENT
TIMOTHY KAMBUNI (DIRECTOR
REVENUE, KISII COUNTY GOVERNMENT.....4TH RESPONDENT
KISII COUNTY GOVERNMENT.....5TH RESPONDENT

JUDGMENT

Background

1. Through an amended petition dated 15th August 2016 brought under **Articles 22 (1) and 36 (2) of the Constitution**, the petitioner therein, who describes herself as a tomato trader within Kisii County, claims that the respondents herein, on diverse dates between the months of June 2015 and September 2015, restrained her from carrying out her tomato business ostensibly on account of her failure to join a group known as Kisii Tomatoes Group. She claims that the respondent's actions were unlawful and in breach of her constitutional rights as envisaged under **Articles 22 (1) and 36 (2) of the Constitution**. She therefore seeks redress in respect to the said violation.

The petition

2. In the petition dated 5th October 2015 and amended on 15th August 2016, the petitioner sought the following reliefs:

- a) **A declaration do issue to the effect that the Respondents have infringed the Petitioner's right not to be compelled to join an association of any kind under Article 36 (2) of the constitution of Kenya 2010.**
- b) **The respondents be ordered to compensate the Petitioner accordingly.**
- c) **Permanent injunction to restrain the respondents from compelling the Petitioner to join any Association.**
- d) **Costs of the petition.**

3. The petitioners case is that the respondents issued ultimatums to her, on diverse dates between June 2015 and September 2015, compelling her to join a group known as Kisii Tomato Group, against her wish and that following the said ultimatums, the respondents on 24th and 27th September 2015 locked up the petitioners lorries that were loaded with tomatoes thereby barring her from selling her stock at Daraja Mbili and Suneka markets. The petitioner further claims that as a result of the respondents said actions, her tomatoes stock wasted away thereby leading her to incur a loss of Kshs. 187,000/= which loss she seeks compensation for in her petition.

4. The reiterates that she stands to suffer both emotional and financial turmoil unless the respondents are restrained from continuing with their unlawful activities.

5. The petitioner also filed a statement alongside the petition in which she repeated her claim that the respondents locked her out of business as a way of compelling her to join the Kisii Tomatoes group (hereinafter "group").

6. In her written submissions filed in court on 24th January 2017 the petitioner observed that the respondents had not filed any response to the amended petition and maintained that the respondents had infringed on her rights under **Article 36 (2) of the constitution** which stipulates that a person shall not be compelled to join an association of any kind. The petitioner argued that it was not in dispute that she was a tomato trader and added that the 4th respondent had in his replying affidavit confirmed that the tomato group existed.

7. The petitioner maintained that she was entitled to the orders sought in view of the fact that the respondents had infringed on her constitutional rights she relied on the decision in the case of **Multiple Hauliers East Africa Ltd vs Attorney General & 10 others [2013] eKLR** herein it was held:

"As observed above, the evidence before me indicates a violation of the petitioner's rights to fair administrative action. Under the provisions of article 23, this court has the jurisdiction, in a petition alleging violation of constitutional rights to grant appropriate relief, including declaration of rights, a conservatory order, an order of compensation and an order of judicial review."

The respondents' case

8. The court record shows that on M/s Bw'ondika & Co. Advocates and Kennedy Chweya Onsembe advocate entered appearance for the Respondents herein.

9. On 6th December 2013, the 4th respondent filed a notice of preliminary objection to the petition in which he stated that the 4th respondent could not be sued in his individual capacity which objection was

upheld by this court in the ruling delivered on 19th July 2017 wherein the case against the 4th respondent was struck out.

10. On 10th February 2017, M/s Sagwe & Co. Advocates filed a notice of change of advocates in respect to 1st, 2nd and 3rd respondents.

11. A careful perusal of the court file shows that none of the respondents filed any response to the petition even though they filed their respective written submissions before judgment.

The 1st, 2nd and 3rd Respondents' submissions

12. M/s Sagwe & Co. Advocates submitted that the 1st, 2nd and 3rd respondents do not own any markets within Kisii County from which they could have stopped the petitioner from selling her tomatoes and added that since the petitioner was not one of their members. Their group's rules and regulations were not applicable to her.

13. The 1st, 2nd and 3rd respondents maintained that they could not grant any fair administrative action to the petitioner in view of the fact that they are not the administrators of Kisii County Government that is charged with the responsibility of overseeing and controlling the administration of business in the various markets within Kisii County.

14. The respondents argued that the petitioner's claim and prayers sought were not clear and thus their decision not to file any response to it since no specific claim had been made against them.

15. It was the respondents' argument that the petitioner's claim that she incurred losses amounting to Kshs. 187,000/= in respect to tomatoes that were not sold, was not specifically proved.

The 5th respondent's submissions

16. Mr. Onsembe, learned advocate for the 5th respondent, submitted that the petitioner did not comply with the statutory requirement under Section 13A of the Government Proceedings Act which provides for issuance of Notice of Intention to institute proceedings against the government. According to Mr. Onsembe advocate, the provision of Section 13A of the Government Proceedings Act applies not only to the national government but also to the county government in line with the provisions of **Articles 1 (3) (4), 6 (2); 176, 186 and 189** which provides for two levels of government. The 5th respondent cited several cases in which the relationship between the county government and national government was discussed and argued that it was a government as envisioned under Section 13A of the Government Proceedings Act (hereinafter "the Act") and therefore ought to have been served within 30 days a notice prior to the institution of the petition against it.

17. The 5th respondent cited the case of the **Council of Governors & 6 others vs The Senate, Nairobi Petition NO. 413 of 2014** wherein the implications of **Section 13A (1) on proceedings** against the government was discussed as follows:

"We are aware of the decision in the case of Orengo –vs- Attorney General (supra) where it was held that section 13A (1) of the Government Proceedings Act creates a mandatory obligation on every person prior to filing any litigation against the government to issue the required 30 days' notice to the Attorney General."

18. In the **Council of Governors case (supra)** the learned judges quoted with approval, Ringera J in **Hudson Laise Walumbwa Vs Attorney General HCCC No. 2714 of 1987** wherein it was held:

"Section 13A (1) of the Government Proceedings Act is in clear and mandatory terms that do not permit any excuses or exception. Its plain meaning, to my mind, is that no proceedings against

the Government under the Government Proceedings Act can be instituted before the statutory notice has been given and expired. The dictionary meaning of the word “lie” in this context is according to the Concise Oxford Dictionary, 8th edition, “be admissible or sustainable”. A suit which does not lie cannot be tried by a court of law. This Section 13A (1) is not in the nature of statutory period limitation which must be pleaded and which could be waived by the defendant expressly or by conduct. It is in the nature of a substantive peremptory bar to institution and trial of suits files in disregard of its requirements. The Attorney General cannot waive it. Neither can the Court. And it matters not why it was not complied with as a part of substantive law, the defendant may or may not plead it”.

19. The 5th respondent argued that the petitioner’s failure to issue it with a notice as is required by the provisions of **Section 13A (1) of the Government Proceedings** was a clear breach of mandatory statutory provisions whose effect was to render the instant proceedings incompetent, and worthy of being struck out.

20. On the issue of whether or not the 5th respondent had infringed on the petitioner’s constitutional rights, the 5th respondent submitted that the petitioner had not proved, to the required standards, that any of her rights had been infringed in view of the fact that all the 4th respondent did was to make a recommendation to the County Secretary for appropriate administrative action and no further concrete action was taken by the said secretary that can be said to have amounted to an infringement of the petitioner’s rights. The 5th respondent stated that the petitioner did not furnish any proof that the county secretary had issued her with any notice not to conduct her business in any of the markets within the county. It was thus the 5th respondent’s case that the instant petition is premature, vexatious and an abuse of the process of court.

21. On whether or not the petitioner is entitled to the orders sought, the 5th respondent submitted that a claim only qualifies to fall under the fundamental rights and freedoms if the principal relief sought is for the enforcement of the fundamental right and not to redress a grievance that is ancillary or secondary to the principal relief which is itself not *ipso facto* a claim for the enforcement of fundamental rights.

22. According to the 5th respondent, the main ground in the petition was the alleged seizure/locking out of the petitioners tomatoes by the respondents. The 5th respondent argues that seizure of goods, if true, is a claim that lies in tort on detinue which does not fall under the ambit of chapter 4 of the constitution and therefore, the claim on breach of fundamental rights is an ancillary claim to the main issue at hand thereby rendering the instant petition and the reliefs sought far-fetched, unfounded and unmerited.

23. The 5th respondent also argued that even if the court was to consider the merits of the petition, the orders of injunction sought could not be granted because the petitioners claim fell short of the threshold set for granting of orders of injunction as were succinctly expressed in the celebrated case of **Giella vs Cassman Brown & Company Ltd [1973] EA 358**.

24. It was the 5th respondent’s position that the petitioner had not furnished any cogent evidence implicating it in the wrongs complained of.

Determination

25. After considering the petition filed herein and the parties respective submissions, I note that the issues for determination are:

- a) **Whether the petition is properly before the court.**
- b) **Whether the respondents infringed on the petitioners constitutional rights and if so;**
- c) **Whether the petitioner is entitled to the orders sought.**

26. Starting with the first issue for determination, the 5th respondent raised the issue of none compliance with the provisions of **Section 13A (1) of the Government Proceedings Act** to be an issue that renders the petition incurably defective.

27. **Section 13A (1) of the Government Proceedings Act** requires that no proceedings should be commenced against a government until after the expiry of a period of days after a notice in writing in the prescribed form have been served on the Government in relation to those proceedings.

28. It was not in dispute that the petitioner did not issue any notice to the 5th respondent prior to the filing of the instant case and therefore What this court needs to determine is if the 5th respondent is a government within the meaning of **Section 13A (1) of the Act**.

29. I am in agreement with the observation of Justice G.V. Odunga in the case of **Republic vs The Attorney General and the Incharge of City County of Nairobi ex parte Wanyee Roki, HC at Nairobi Misc. Civil Application No. 93 of 2015** when he stated:-

“Although the provisions of the Government Proceedings Act do not expressly refer to County Governments, Section 7 of the Sixth Schedule to the Constitution (Transitional and Consequential Provisions) provides that:

All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this constitution”.

“It therefore follows that the provisions of the Government Proceedings Act, a legal instrument enacted before the effective date must be construed with the alterations, adaptations qualifications and exceptions to bring it into conformity with the Constitution, 2010. One such construction would be the reality that there are two levels of Government.”

30. It is my similar observation and finding that the 5th Respondent herein, being Kisii County Government, is a government for all intents and purposes within the meaning of the **Constitutional provisions (Articles 1 (3), (4), 6 (2); 176; 186 and 189** and is therefore not precluded from the mandatory provisions of **Section 13 A(1) of the Act**.

31. As was held in the case of **Hudson Laise Walumbwa (supra)**, the effect of non-compliance with the provisions of **Section 13A (1)** of the Act renders the proceedings incompetent and is a sure ground for striking out. Be that as it may, I would have proceeded to strike out the instant petition on account of non-compliance with the said **Section 13 A(1) of the Act** had it not been for the provisions of **Article 159 (2) (d) of the Constitution** which advocates for the dispensing of substantive justice without undue regard to procedural technicalities.

32. In this regard, I will, in cognisance of the supremacy of the Constitution as opposed to the Act, focus my attention to the other aspects of the petition including its merits rather the procedural hitch of the petitioner’s failure to give 30 days notice to the 5th respondent prior to the filing of the suit.

33. Turning to the other aspect of whether the petition is properly before the court, is the fact that the petition was not accompanied by an affidavit.

34. I have carefully perused the entire petition and the documents attached to it and I note that it was accompanied by what the petitioner called, “petitioner’s statement”, list of witnesses and list of documents. The above scenario raises the issue of whether the petition can stand in the absence of the supporting affidavit.

35. One may however argue that in dealing with a case such as this one where the main issue pertains to alleged violation of fundamental rights, the courts should once again, in line with the provisions of

Article 159 2 (d) of the constitution, not pay undue regard” to procedural technicalities.

36. It is therefore my finding that the instant petition, as presented, is incompetent as the allegations contained in it are not supported by any evidence (read affidavit). In the absence of an affidavit, the documents attached to the petition and on which the petitioner purported to rely on as exhibits have no evidentiary value in view of the fact that they have not been commissioned by a commissioner for oaths so as to give them the force of exhibits accompanying the affidavit evidence.

37. It is therefore my finding that the instant petition is defective for lack of an affidavit in its support.

38. My above findings on the issue of non compliance with **Section 13 A (1) of the Act** and lack of an affidavit in support of the petition would have been sufficient to determine this petition but I am still minded to consider the merits of this case and tackle the question of whether there was a violation of the petitioners rights as alleged.

39. Closely tied to the issue of violation will be the last issue for determination which is whether the petitioner is entitled to the orders sought.

40. The petitioner’s claim was that the respondents issued ultimatums to her compelling her to join the group known as Kisii tomatoes Group and that later on, the respondents locked up the petitioner’s lorries loaded with tomatoes an act which resulted in her incurring loss of stock amounting to Kshs. 187,000/=. The onus of proof was on the petitioner to demonstrate by way of affidavit and other documentary evidence that the alleged ultimatums were issued to her and further to furnish specific proof of the alleged loss of Kshs. 187,000/=.

41. As I have already observed in this judgment, the petitioner did not swear any affidavit in support of her petition and therefore this onus of proof was not discharged.

42. Needless to say, Sections 107 and 109 of the Evidence Act are clear on the subject of the party charged with the responsibility of proving a case.

43. The said sections stipulate as follows:

“107. Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

“109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

44. Further, it is trite law that special damages have to be specifically proved and in this regard, the petitioner’s claim for an award of Kshs. 187,000/= for the loss of tomatoes does not arise. In the celebrated cases of **Anarita Karimi Njeru [1976-80] KLR 1274**, and **Trusted Society of Human Rights Alliance vs Attorney General & Others HC Petition No. 229 of 2012**, it was held that where an allegation has been made that a constitutional right has been violated, the petitioner must demonstrate, with a reasonable degree of precision, the manner of such a violation.

45. In the instant case, I find that the petitioner did not demonstrate with precision, who exactly had violated her rights and the manner of such violation. The Petitioner did not provide any material before

this court on which it can rely upon in holding that she was compelled to join the Kisii Tomato Group and neither did she disclose who exactly locked up her lorries loaded with tomatoes or what concrete action she took to secure the release of the said lorries.

46. My humble view is that the petitioner's claim on violation of her constitutional rights fell short of the threshold set in the **Anarita Karimi Njeru case (supra)**.

47. Having regard to my above findings on the issues for determination in this case, I find that the petition dated 5th October 2015 and amended on 15th August 2016 lacks merit and the order that commends itself to me is the order to dismiss it with no orders as to costs in view of the fact that the respondents did not file any response to the petition.

Dated, signed and delivered in open court this 24th day of October, 2017

HON. W. A. OKWANY

JUDGE

In the presence of:

- Miss Sagwa for the Petitioner
- Miss Odieny for the 5th Respondent
- Omwoyo court clerk