Yaa v Noor & 4 others (Environment & Land Case 8 of 2011)
[2023] KEELC 22311 (KLR) (13 December 2023) (Judgment)

Neutral citation: [2023] KEELC 22311 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 8 OF 2011

NA MATHEKA, J

DECEMBER 13, 2023

BETWEEN

ENGINEER CHARO WA YAA ..... PETITIONER

AND

JAMA ABDI NOOR ..... 1ST RESPONDENT

TRADE PLUS INTERNATIONAL LIMITED ..... 2ND RESPONDENT

MUNICIPAL COUNCIL OF MOMBASA ..... 3RD RESPONDENT

COUNTY GOVERNMENT OF MOMBASA ..... 4TH RESPONDENT

THE HON ATTORNEY GENERAL ..... 5TH RESPONDENT

JUDGMENT

1. Vide a Notice of originating Motion dated 19th January 2011, the petitioner sought orders of declaration that the actions of security officers from Kisauni Police Station of demolishing the houses erected on Plot No. 232/2/Block II/MN/Mombasa CR No. 18446 on 21st October 2010 contravened was irregular, illegal and contrary to Articles 26, 27 (1) and 4, 28, 29, 40, 43, 53 and 56 of the *Constitution*. It was averred that there was no notice whatsoever of the intended evictions and without provisions of a relocation option which was illegal, oppressive and a violation of the rights of the petitioners. In this case the issues for determination are;

    a. Whether the Notice of Originating Motion dated 19th January 2011 qualifies and meets the threshold of a constitutional petition.

    b. Whether the petitioner was illegally evicted from Plot No. 232/2/Block II/MN/Mombasa CR No. 18446 on 21st October 2010 and whether any constitutional right was violated.

2. The description of Notice of Originating Motion, which is an interlocutory motion as a petition is indefensible. Though the same was filed shortly after the promulgation of the *Constitution* in 2010, there were still rules on how a petition ought to be drafted under the old Constitution. In *Randu Nzai Ruwa & 2 others v The Secretary, Independent Electoral and Boundaries Commission & 9 others* (2012) eKLR, where the court faced a similar issue and held that;

> " Although the Applicants also describe the Interlocutory Motion as a Petition, it cannot, strictly speaking, be said to be a Petition under the relevant rules for the following reasons:
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> > First, it is not drafted in the wording of a petition or in terms of Form D Rule 12 of the *Constitution* of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006 made by former Chief Justice E. Gicheru (hereinafter "the Gicheru Rules"). Those Rules are made applicable, mutatis mutandis, under the *Constitution*, 2010, pursuant to Section 19 of the Sixth Schedule thereof. Secondly, it is not a petition at all in that it does not contain allegations or instances of breaches of the Bill of Rights in the required format. Instead, it is an urgent application for interlocutory orders pending the determination of the application. It is, in fact, clearly an application under Rule 20 of the Gicheru Rules, for conservatory or interim orders. Form D, which is the appropriate form for Petitions under the Gicheru Rules, requires that: "...the allegations upon which the Petitioner(s) rely must be concisely set out in consecutively numbered paragraphs"
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> Such allegations or statements of assertion or accusations of breaches by the Respondents in respect of the fundamental rights of the Applicants are not clearly and concisely set out in the Applicant's Motions.
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> Notwithstanding these formal technical irregularities, we have admitted the Applicant's Motions so as to deal with the substantive issues in the applications for striking out. We have taken this course in light of Articles 159(2) (d), and 22(3) (b) and (d) of the *Constitution*, which oblige this court to take cognisance of the following:"

3. The court will in the spirit of substantive justice admit the motion of the applicant and take a wide and purposive approach to ensure that, it deals with the substance of the application. To start with the court would like to distinguish between a matter of public importance with the meaning of Article 163 (4) of the *Constitution* and public interest litigation. Perhaps what the petitioner seeks to convey to this court is that he has brought the suit before the court as a person acting in the public interest or more so acting in a representative capacity within the confines of Article 22 (2) of the *Constitution*. In other words, the petitioner herein has brought this suit to enforce the rights and fundamental freedoms enshrined in the Bill of Rights on behalf of the 276 households evicted from the suit property. The application before the court will be qualified alongside the threshold set out for a Constitutional petition, as first set out in *Anarita Karimi Njeru v The Republic* (1979) eKLR, where it was held that;

> " We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the *Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

4. The Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR, emphasised the principles set out in Anarita Karimi and held that,

> "The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today: "The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing."

5. The question is whether the applicant has established, with a degree of precision his complaint, the manner in which the stated constitutional provisions were infringed and the injury sustained. The applicant in the Notice of Originating Motion dated 19th January 2011 refers to Article 2(5), 28, 31 (a) and 43(1)(b) of the *Constitution* of Kenya, and further to that the petitioner has referred to Article 26, 27 (1), (2) and (4), 28, 29,40,43 53 and 56 of the *Constitution*. It has been claimed that on 21st October 2010, the 1st respondent sent police from Kisauni Police Station to demolish houses erected on the suit property and that the demolishment continued on the 23rd, 24th and 30th of October rendering the residents homeless. That the actions of the police of demolishing the house contravened Article 2 (5) of the *Constitution*, particularly UN General Comments 4 and 7 on the right to adequate housing. The evictions were said to have contravened Article 28 of the *Constitution* on the right to inherent dignity, while the demolitions were said to contravene Article 31 by denying the residents their right to privacy and that the evictions subjected the residents to poor living conditions contrary to Article 43 which guarantees economic and social rights including the right to accessible and adequate housing and reasonable standards of sanitation.

6. There have been little particulars enumerated by the applicant, even in the testimonies of his witnesses in court little was said that would support the allegations of violations of constitutional rights and freedoms. PW1 testified that he was not around during the evictions but claimed his child's arm was broken during the said evictions which cost him around Kshs 1.5 million. However, none of those claims were sustained through admission of evidence. While PW2 stated in cross-examination that the police did not injure her or her family during the evictions. Save for claiming to have been evicted, there is little particulars that were provided by the witnesses that spoke to the infringement of the constitutional rights and freedoms. Evictions are not per se illegal, therefore it was not prudent for the applicant to merely claim that the residents were evicted from the suit property, and not sustain his claim. For example, the applicant did not show how the evictions were illegal and the extent to which that illegality violated their socio-economic rights and other rights enshrined in the *Constitution*. The burden remains with the applicant who alleged violations to prove it, this can be done through documentary evidence supported by testimonies in court. Without first making a case for himself, the burden of proof does not shift to the respondents to prove otherwise. The applicant has alleged in his submission that the suit property was government land at the time the residents settled in before it was allocated to KPA who transferred it to its pension scheme. However, these allegations have not been sustained and even no evidence was led during the trial to support the claims, it is not enough to merely allege but proof has to be provided. In deed the applicant in their submissions did not dispute that there were previous cases of adverse possession filed by the Petitioners which were dismissed.

7. The applicant failed to show that the evictions were illegal, which provisions of the bill of rights they violated, the manner in which the rights were violated and that it was indeed the respondents who violated these rights. I associate the findings herein with what the court held in *Bernard Ouma Omondi & another v Attorney General & another* (2021) eKLR that;

> " The Amended Petition as drawn and filed has in every sense not met the threshold of what constitutes a Constitutional Petition. The Petition is not set out with a reasonable degree of precision of that which the Petitioners complain of, the Constitutional provisions said to be infringed, and the manner in which they are alleged to be infringed are not sufficiently pleaded. The provisions cited have not been shown how they have been infringed.
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> It is now settled law that for Constitutional Petition to be successful it must raise with reasonable precision the constitutional provisions which have been infringed or threated to be infringed or violated, and the manner in which those provisions were infringed by the Respondents. I find that this is not only necessary for the court to be able to ascertain whether there was a violation of a constitutional right but it is also important for enabling the Respondents to respond to the case and every allegation, putting forwarding a concise case on their defence.
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> Upon considering the authorities cited hereinabove, the Petition as drawn and filed, I find that the Petition before me does not raise any Constitutional provisions which has been violated by the Respondents and further that it does not expound on the actions or omissions which the Respondents have carried out or failed to carry out which infringed on or violated the Petitioners rights. I find that if the Petitioners had sought to pursue the matter through another legal avenue they would have had a better chance of success."

8. This court is not satisfied that the applicant has proved his case against the respondents on a balance of probabilities for the court to grant the prayers sought in his Notice of Originating Motion dated 19th January 2011. In my view the motion did not meet the threshold for a constitutional petition and the same is dismissed with no orders as to costs.

9. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 13TH DAY OF DECEMBER 2023.

N.A. MATHEKA

JUDGE