



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 412 OF 2015

IN THE MATTER OF ARTICLE 22 OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF ALLEGED INFRINGEMENT AND CONTRAVENTION OF ARTICLES
41(1), 41(2), 47 AND 40(3b) OF THE CONSTITUTION**

BETWEEN

HON. AUGUSTINE GAKURE MONYO.....PETITIONER

AND

COUNTY GOVERNMENT OF MURANG'A.....RESPONDENT

JUDGMENT

Introduction

1. The Petitioner holds the elective and constitutional office of Deputy Governor of the devolved County Government of Muranga. He was elected on March 2013 pursuant to the provisions of Article 180(1) 2(2) of the Constitution alongside the Governor of the County. He took office almost immediately on 27th March 2013.

2. The Petition herein concerns not the Petitioner's office but his welfare. The Petitioner assails the Respondent for what the Petitioner terms unlawful and wrongful deductions from the Petitioner's emoluments. The Petition is stated to have been brought and filed in the matter of alleged infringements of Articles 40(1)(b), 41(1) & (2) and 47 of the constitution. The Petitioner swore an affidavit in support.

3. The Petition is opposed. One P. K. Mukuria swore the Replying Affidavit on 2nd October 2015 on behalf of the Respondent.

Background facts, chronology and prayers

4. Following the Petitioner's election as Deputy Governor, the County Government embarked on the process of availing accommodation for the Petitioner and the Governor. Appropriate residential houses

were identified. Terms were negotiated and agreed. A lease was drawn. The Petitioner and the County Secretary signed the lease. The lessor, Planfam Company Ltd, also signed the lease. The Petitioner thereafter took possession. The lease had been made between the Lessor and the Respondent, as the lessees. The Respondent paid the due rentals. The Respondent also expended upwards of Kshs.4,830,187/70 furnishing, renovating and refurbishing the residential house. The residential house stood on the property known as Land Reference No. 28844.

5. Then in July 2014 the Respondent terminated the lease and thereafter sought to recover the rent the Respondent had paid up to July 2014 from the Petitioner. The recovery was made monthly by way of set-off from the Petitioner's salary at the rate of Kshs.233,006/=. The deducted amount included both the cost of furniture bought by the Respondent and also renovations undertaken by the Respondent to the premises.

Petitioner's case

6. The Petitioner contends that the deductions are wrong and illegal as it is the Respondent who contracted to pay the rent. Besides, the Petitioner also contends that the deductions relating to the furniture and renovations bought or undertaken by or at the Respondents costs cannot be fetched on the Petitioner.

7. The Petitioner contends that all the deductions are unwarranted seeks an order to restrain the Respondent from effecting or continuing to effect the deductions. Additionally, the Petitioner seeks orders for the refund of all monies deducted from the Petitioner's salary either as rent or furniture/repair costs.

Respondent's case

8. The Respondent contends that the Petitioner's benefit and emoluments were clearly outlined in a Gazette Notice No. 2888 of March 2013 and published by the salaries and Remuneration Commission. The Respondent asserts that the Petitioner was never entitled to any housing benefit at the Respondent's expense and any money that was erroneously paid was certainly recoverable.

9. The Respondent further states that in any event, the lease upon which the payments were made by the Respondent to a third party for the benefit of the Petitioner was itself an illegality and the Petitioner ought not to be allowed by the court to rely upon the same. According to the Respondent, the Petitioner committed the Respondent to contractual obligation when the Petitioner did not have such capacity or authority. Further, the lease itself had no grounding under either statute law or the Constitution.

10. The Respondent further asserts that the surcharge being levied on the Petitioner is legal and not out of any malice.

Arguments

11. Both parties filed written submissions. The Petitioner's submissions were filed on 14th October 2015 whilst the Respondent's submissions were filed on 26th October 2015.

12. The parties respective cases were argued by Mr. Khasiani for the Petitioner and Mr. Mbugua Ng'ang'a for the Respondent before me on 28th October 2015.

Petitioner submissions

13. Restating the facts of the case, Mr. Khasiani submitted that the lease executed between the Respondent and the third party Planfam Company Ltd was perfectly regular and legal pursuant to section 32 of the Country Governments Act (Act No. 17 of 2012) which authorises the Deputy Governor to deputize for the Governor, in the execution of the governors functions.

14. Counsel then submitted that the Respondent was estopped from recovering any monies paid to the

said party as rent as the Respondent had notwithstanding clarifications, from the Salaries and Remuneration Commission as well as the Kenya National Audit Office, continued to pay rent to the said party. Additionally, continued Mr. Khasiani, the Respondent even continued to pay rent after it had purportedly terminated the lease with third party.

15. Counsel then stated that the Petition was not challenging termination of the lease but was aggrieved that the Petitioner's right to property under Article 40 as well as the right to fair labour practices under Article 41 and to fair administrative action under Article 47 had been infringed or violated as the Petitioner had been arbitrarily deprived of his property (salary) without any hearing and they had led to an unfair remuneration for the services to the Respondent.

Respondent's submissions

16. Mr. Mbugua Ng'anga's submissions were firstly to the effect that the Petition lacked merit as it did not constitute any constitutional complaint. Secondly, counsel submitted that the Petitioner was guilty of an unexplained delay in contesting the deductions.

17. Thirdly it was counsel's submissions that the Petitioner had through an illegality obtained a pecuniary benefit when the Petitioner signed a lease he should not have signed and also when the Petitioner was aware of the Gazette Notice of 1st March 2013 which limited the Petitioner benefits and emoluments.

18. The Respondent further submitted that under the provisions of Article 226(5) of the Constitution, the Petitioner having directed, through the execution of the lease the use of public funds contrary to law, was personally liable to make good such loss. Mr. Mbugua Ng'anga further relied on the provisions of section 203 of the Public Finance Management Act (Cap 412c) for the proposition that the Respondent had the discretion to file civil proceedings for recovery against the petitioner or to simply surcharge and off-set the same from the petitioner earnings.

19. The Counsel relied upon the case of **Kenya Airways Ltd –V- Satwant Singh Flora (2013) eKLR** where the court of Appeal was firm on the proposition that a court of law should never enforce an illegal contract or allow itself to be used to enforce obligations alleged to arise out of a contract or transaction which is illegal. The Court of Appeal was also clear that if the illegality is brought to court's attention and if the person invoking the courts' aid is himself implicated on the illegality, the court could not to assist such a claimant any further.

20. Counsel also relied on the case of **R. –V- Chairman Betting Control & Licensing Board and 2 others, Ex parte Interactive Gaming and Lotteries Ltd (2015) eKLR** for the proposition that there can be no estoppel against a statute or the constitution.

Analysis & Determination

21. From the Petition as well as the supporting affidavit and also from the submissions of counsel various issues can be discerned. Core amongst them however is whether there is shown any breach or violation of the Petitioner's constitutional rights or fundamental freedom given that the petition was stated to have been brought under Article 22 of the Constitution. Secondly too is the issue whether the petitioner was guilty of an inexplicable delay in filing the action.

22. It is now settled law that a party who alleges that his rights have been violated or threatened with violation must with reasonable precision state the relevant Articles of the Constitution stated to have been violated or to be under threat of violation. He must also outline with reasonable clarity the manner in which the respondent has purportedly infringed on the rights: **Anarita Karimi Njeri –V- R (1979) KLR 154, Koinange –V- A.G (2007) 2 EA 256, The Attorney General –V- Butambala (1992) LRC 496, Matiba –V- Attorney General (1990) KLR 666** and lately, **Mumo Matemu –V- Trusted Society of Human Rights Alliance & 5 others Civil Appeal No. 290 of 2012 (2012) eKLR**, where the court of Appeal drove home the import of the principle as to precision in litigation in the following words:

However, our analysis cannot end at that level of generality. It was the High Court’s observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting.” Yet the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under section 1A and 1B of the Civil Procedure Act (Cap 21) and section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. 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.”

23. It is to be noted that the above principle is besides the fact that the burden of proof is still resident in the Petitioner who must satisfy the court accordingly. As was stated in the case of **Stephen Nyarangi Onsuma & Another –V- George Magoha & 7 others (2014) eKLR**

“... This court has in the past expressed its concern about the manner in which parties coming before the court and alleging a violation to constitutional rights have presented these cases. As a basic minimum a Petition is required to cite the provisions of the Constitution which have allegedly been violated, and the manner in which they have been violated and the remedy which he seeks, for that violation. In demonstrating the manner in which they have been a violated, a Petitioner should present before the court evidence of the factual basis upon which the court can make a determination whether or not there has been a violation.” (emphasis added)

24. Where the threshold is not met, then the Petition must fail: see, for example, **Peter Muneria Ole Muya –v- Principal Magistrate Narok & 6 others [2014]eKLR** and **Samson Otieno Bala t/a Nissan Enterprises –v- Kenya Bureau of Standards & 4 Others [2015]eKLR**.

25. However, as was held by this court in **Fazleabbas Mohammed Chandoo –V- A. I. Hussein – Kadhi, Kadhis’ Court & 4 Others [2015] eKLR**:

“[30].....caution must however be exercised when invoking the ratio decidendi in Anarita Karimi Njeri (supra). The court must not be in a hurry to declare petitions fatally defective. Attempts to ensure the ends of justice are met must be made”

26. Attempts to ensure the ends of justice are met are realized when the court is painlessly satisfied, upon perusal of the pleadings and explanation by the Petitioner, that there is a sufficiency of information as to a constitutional right being violated or under threat of violation.

27. In the instant petition, the Petitioner has simply stated at the title thereof an alleged infringement of Articles 40(3)(b), 41(1) & (2) and 47 of the Constitution.

28. Article 40 deals with the right to property whilst Article 41 deals with labour relations. Article 47 on the other hand guarantees the right to fair administrative action. In the cause of the oral arguments, the Petitioner’s counsel also mentioned the above Articles.

29. I have read through the Petition, there is no information or particulars on the specific facets of the Articles breached, abused or violated by the Respondent. Neither is there any information on how the Respondent violated or abused the Petitioners rights vis-à-vis these Articles of the Constitution and the rights reserved thereunder. I listened, too, to the Petitioner’s counsel as he made oral submissions. Apart from pointing out the Articles, counsel did not make any attempts to relate the facts to any specific provisions of the rights allegedly violated or infringed.

30. In my view, it was not enough for the Petitioner to simply state the Articles of the constitution. The Petitioner needed more. It did not have it though.

31. There is no doubt that the Petitioner may have a genuine dispute or concern in so far as the deductions are being effected on his salary and emoluments, however not every dispute takes or must take constitutional trajectory simply because an Article of the Constitution has been referred to. I am satisfied that the existence of Petitioner's remedy if at all does not depend on the blanket allegations and references to the three Articles of the Constitution outlined above. Indeed, it is *an abuse of the process of the Court for a party to apply for a constitutional remedy when there was no proven breach of a fundamental right*.

32. I find and hold that the petitioner has not met the threshold of competency set out in the *Anarita Karimi Njeru's case*.

33. Based on the foregoing, I see no reasons why the court should go through the pain of trying to discern the exact violations and determining if the same have been proven.

34. Suffice to state nevertheless that State officers have an obligation both under the Constitution and relevant statute law in particular the Public Finance Management Act (Cap 412C) to practice and exhibit a high level of fiscal staintlessness when dealing with public funds. The Constitution places a high premium on transparency and accountability generally when it comes to dealing with public finances. Complete openness and accountability is expected of all State officers who deal with or access public finances. Where loss is incurred out of fraud corrupt conduct or negligence then the State officer involved is personally liable. Recovery is to be made from that State officer. The recovery process must however adhere to the requisite due process mechanisms and ought not to be arbitrary or lead to pecuniary embarrassment. The Petitioner herein is a State officer and the principles would be applicable to him.

35. I hasten to add that this court's brief was involved with a determination as to breaches of fundamental rights and freedoms guaranteed under the Constitution. I have found that none has been shown even on the face of the pleadings. The effect however does not rob the Petitioner of the right to pursue any other avenue for redress as I hold the view that the Petitioner may have a genuine grievance and concern but not as a constitutional question.

36. It would be important to note that the notion that when a government body allegedly acts contrary to the law and a party feels aggrieved, then there is a breach of the constitution or of a fundamental right is misleading and simply mythical. That appears to have been the Petitioner's notion herein.

Conclusion

37. I come to now rather obvious conclusion that the Petition is on the face thereof wanting in merit. The jurisdiction of this Court both under Article 22 and 165 of the Constitution ought not to have been invoked. The Petitioner has to pursue other avenues for redress and in particular as a dispute between an employee and employer.

38. The Petitioner may have a right of audience but his petition is wanting and ought not to be here.

Disposal

39. The petition can and must only be dismissed.

40. It is so dismissed with costs to the Respondent.

Dated, signed and delivered at Nairobi this 26th day of January, 2016.

J.L. ONGUTO

JUDGE