



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.625 OF 2014

BETWEEN

PEACE AND PROSPERITY KENYA.....PETITIONER

AND

THE HONOURABLE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

Introduction

1. The Petitioner, Peace and Prosperity Kenya, is a society registered under the **Societies Act, Cap 108, Laws of Kenya**, serving the people of Kenya in Rabai within Kilifi County. It has filed the Petition dated 18th December, 2014, against the Attorney General of the Republic of Kenya whose office is a creation of the **Constitution** under **Article 156 (4)**. The Petitioner asserted that it has commenced the instant proceedings acting in its own interest and in the public interest pursuant to **Article 258 (2) (b) and (c)** of the **Constitution**.
2. The Petitioner essentially seeks a constitutional interpretation of **Article 32 vis- a-vis Article 74** of the **Constitution** as read together with the **Third Schedule** of the **Constitution** and the **Oaths and Statutory Declarations Act, Cap 15, Laws of Kenya**. It contends in that regard that it is aggrieved by the use of Holy Books for swearing purposes under the said Act.

The Petitioner's Case

3. In a Supporting Affidavit sworn on its behalf by one, Ndune A. Katulusi, on 17th December, 2014, it was its contention that it is a multi-religious group that comprises Christians and Muslims and who make up over 90% of the total population of the Republic of Kenya and are spread throughout the Country.
4. It contended that it is common practice for the State, the private sector and the Judiciary to use Holy books for swearing and taking oaths and it was its case in this regard that both faiths (Christianity and Islam) do expressly prohibit the use of the Holy Books (Holy Bible and the Holy Quran) for purposes of swearing.
5. It was its further contention that **Article 32** of the **Constitution** guarantees the freedom of religion and as such, religion should be respected including the need not to use Holy Books in the above

manner.

6. The Petitioner then concluded that the **Oaths and Statutory Declarations Act**, which is commonly used to administer oaths, does not have any provision stipulating that the Holy Books should be used for swearing purposes and argued that since the law applicable is devoid of such a provision, the organs of the State should not continue to administer oaths with the Holy Books against the freedom of religion guaranteed under **Article 32** of the **Constitution**.
7. For the above reasons the Petitioner prays for the following orders;
 - a. ***A constitutional interpretation of Article 32 vis a vis Article 74 read together with the Third Schedule of the Constitution in relation to the use of Holy Books for purpose of swearing.***
 - b. ***A constitutional interpretation of Article 32 vis a vis the Oaths and Declaration Act, Cap 15, Laws of Kenya, in relation to the use of Holy Books for purposes of swearing.***
 - c. ***In the alternative, a declaration that the use of the Holy Book for swearing purposes in all forums of our society is unconstitutional.***
 - d. ***Costs of this Petition.***

The Respondent's Case

8. While opposing the Petition, the Attorney General filed Written Submissions dated 27th May, 2015. His case was that this Petition does not meet the constitutional threshold which is a fundamental requirement, as the Petitioner, which is an amorphous group, has failed to raise any constitutional issue to warrant the Court's attention.
9. He also contended that the prayers sought and the issues raised herein are similar to those in ***Petition No.111 of 2014, David Gitahi Suing as the Chairman of Othaya Residents Foundation vs Attorney General***, in which the judgment was delivered by Majanja J on 16th April, 2014 when he dismissed the same on the basis that it lacked merit.
10. Accordingly, and without prejudice to the foregoing, he contended that nowhere in the **Constitution** and the **Oaths and Statutory Declarations Act** is it made mandatory for any public officer to swear by the Bible, Quran or any other Holy Book and as such, the use of the said Holy Books for swearing of public officers does not in any way violate the Constitution.
11. He added that the Preamble to the **Constitution** provides that the people of Kenya acknowledge the supremacy of the Almighty God of all creations and so the place of God is secure in the Constitution.
12. While placing reliance on **Anarita Karimi Njeru vs Attorney General [1979] KLR 54; Mumo Matemu vs Trusted Society of Human Rights Alliance and Others, Nairobi CA Civil Appeal No 290 of 2013; and Meme vs Republic and Another [2004] 1 EA 124**, he argued that the Petitioner herein seeks to invoke Biblical and Quranic principles to impugn the legal provisions for taking oaths, and as such, its case is not founded on the Constitution or any law. That the Petitioner has also not referred to any Article of the Constitution that has been violated or any law that has been breached and as such, this Court is not competent to make judgments on the religious suitability of taking an oath on the Bible or Quran and the spiritual consequences of doing so unless such a requirement is a breach of the Constitution or any other law.
13. While urging the Court to dismiss the Petition with costs to it, he asserted that the Petition is actuated with baseless allegations and cannot withstand any legal scrutiny as it seeks vague prayers; and that it is misconceived, premature and otherwise an abuse of the Court process and ought to be dismissed.

Determination

14. The key issue to be addressed in the instant Petition is whether the administration of oaths using the Bible and Quran is unconstitutional. But before this Court embarks on that determination, it must first address preliminary questions raised by the Respondent in regard to;
- i. Whether the Petitioner has pleaded constitutional with precision in line with the principle espoused in the **Anarita Karimi case (supra)**; and
 - ii. Whether the issues arising herein have been heard and determined by a Court of competent jurisdiction in earlier proceedings and ought therefore to be barred by the doctrine of *res judicata*.

Whether the Petitioner has pleaded constitutional issues with precision in line with the principle espoused in the Anarita Karimi case (supra)

15. The principle espoused in the **Anarita Karimi case (supra)** is that;

“... We would 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 this case), that he should set out with 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...”

16. The rationale for the principle in the **Anarita Karimi Case (supra)** was explained by the Court in **Ramadhan Juma Abdalla and Others vs R Pet No. 468 of 2012** where it was pointed out that:

“... Having considered the rival Submissions, I find that the issue for determination before this Court is whether the Petitioners' rights to a fair hearing were infringed and in the circumstances, whether they are entitled to a new trial in accordance with Article 50 (1), (2) and (6) of the Constitution. Before I determine that issue, I insist that it is imperative and most urgent at this preliminary stage to set the threshold that must be met for any party alleging breach of their fundamental rights and freedoms and it is this; that the allegations must be stated in all clarity and the illustrations on infringement, threat and/or violation demonstrated with some measure of particularity.”

The Court went on to state:

“In the case of Nurani vs. Nurani (1981) KLR 88 at page 99 I believe this threshold was further qualified on Court procedures when the court held that: "Whether the proceedings are of a civil or criminal nature, the court will not protect an imaginary deprivation of a fundamental right or allow it to be capriciously pushed to absurd lengths...." I agree and it is also my view that whereas scientific exactitude is not what a Court expects of a claimant, surely the Court must not be treated to the mere expression of a complaint of alleged breach of fundamental rights without extrapolation...”

17. Further in the Ugandan case of **Ismael Serugo vs Kampala City Council and Attorney General, Constitutional Appeal No.2 of 1998** the Court noted thus;

“... The Petition must show on the face of it, that interpretation of a provision of the Constitution is required. It is not enough merely to allege that a constitutional provision has been violated”

I agree with the above propositions of the law and I do not see any reasons to depart from the same. I wish to only add that the precision required herein is not mathematical or scientific but rather a concise demonstration of an alleged infringement whether actual or threatened. The case on the face of it must therefore aptly be illustrative of the nexus between a Petitioner's complaint and the provisions of the Constitution.

18. Turning back to the instant Petition, in the above context, the genesis of the Petitioner's case is that the use of Holy Books in taking oaths is unconstitutional and as such contravenes **Article 32** of the **Constitution**. At paragraph 20 of the Petition, the Petitioner thus stated that:

“Use of Bibles and Qurans in political events for swearing in of candidates or State officers is contrary to the Religious beliefs of the Petitioner, consequently thereto, infringing on the freedom of religion as provided under Article 32 of the Constitution.”

This to me is a clear and precise pleading as the Petitioner alleges an infringement of religious beliefs of its members as provided under the Constitution. I hold so bearing in mind that the said **Article** under **Sub-clause (1)** is to the effect that: ***“Every person has the right to freedom of conscience, religion, thought, belief and opinion.”*** My understanding of the Petitioner's case is therefore that the freedom of religious belief as enshrined under the said Article is at stake as a result of the taking of oaths using the Bible and the Quran. Based on the foregoing therefore, I am unable to fault the Petitioner's case on the ground that it has not been pleaded with precision, and as such, that contention by the Respondent must fail.

Whether the issues arising herein have been heard and determined by a Court of competent jurisdiction.

19. It is now well settled by Courts in this and other jurisdictions that once a matter has been the subject of litigation between the same parties and heard and determined by a Court of competent jurisdiction, no party should ever again be permitted to litigate on the same matter. This doctrine has come to be known as the principle of *res judicata* and the key rationale behind it is to ensure that there is finality in litigation but in litigation touching on alleged violation of fundamental rights, the doctrine should be sparingly invoked.

20. In that context, in **Petition No.111 of 2014, David Gitahi Suing as the Chairman of Othaya Residents Foundation vs Attorney General**, I note that the Petitioner therein, by his Petition dated 17th March 2014 sought the following orders *inter alia*: an order that there should be a stop to the use of the Bible for swearing in Public Institutions.

21. In a Judgment delivered on 16th April 2014 by Majanja J the learned Judge in the above case partly outlined the Petitioner's and Respondent's case therein as follows:

“[2] As the prayers show, the Petitioner is aggrieved by the fact that the Bible is used in public institutions to take the oath of office. He marshals biblical arguments and exhortations to shore up his case. The grounds of his case are set out in the Petition and i set them out verbatim as follows;

- i. ***To stop the use of the Holy Bible in swearing in the Public Institutions. It is against the Bible. According to James 5:12 and Mathew 5:34-37, “But I say to you, swear not at all, neither by heaven; for it is God's throne nor by earth for it is footstool; neither shall you swear by your head, because you cannot make one hair white or black. But let your communication be yea, yea: Nay for whatsoever is more than this come of evil Yeas, yes- No, no”***
- ii. ***Our leaders who swear with the Bible do not fulfil the oath, hence making the Country sinful before God, Mathew 5:33 and Psalms 15:1-4. “In whose eyes a vile person is condemned; but he honours them that fear the Lord He that swears to his own heart and changes not.”***
- iii. ***Leviticus 5: 4-13 “Or if a soul swear, pronouncing with his lips to do evil or to do good whatsoever it be that a man shall pronounce with an oath and it be hid from him, when he knows of it, then he shall be guilty of one of these.”***
- iv. ***Spiritual problems cannot be identified by academic qualifications or the levels of authority but by the servants of God to whom may be revealed Genesis 41: 16 “And Joseph answered***

Pharaoh, saying it is not in me: God shall give pharaoh an answer of peace"

- v. *Proverbs 31:8-9 says that "Open your mouth for the dumb in the cause of all such as are appointed to destruction. Open your mouth, judge righteously and plead the cause of the poor and needy."*
- vi. *Our leaders after living life against the will of God they later take sacrifices in the house of God covering the altar of God with tears, weeping and groaning because he does not accept favorably from their hands. Malachi 2: 13.*
- vii. *Using the Bible is an evil foundation and traps Christians who don't understand the Bible for the constitution allows those who know to affirm by lifting their hand.*
- viii. *In our Country this is a new time of leadership and governance and for the fulfilment of the will of God. He has sent me to deal with the spiritual matters affecting our Country.*

[3] The Respondent filed grounds and written submissions in opposition to the Petition. The gist of the response is that the Petition lacks merit and does not disclose any constitutional violations. The Respondent avers that under Article 74 of the Constitution, a State Officer must take and subscribe to an oath or affirmation of office before assuming office or performing the functions of office. The form of the oath or affirmation is set out in the *Third Schedule* to the Constitution or prescribed under an Act of Parliament."

22. As can be deduced from the above verbatim excerpts, the genesis of the Petitioner's case therein revolved around the taking of oaths using the Bible. In this regard, the Court in its said Judgment reached the following conclusion;

"[5] In essence the Petitioner seeks to invoke Biblical principles to impugn the legal provisions for taking oaths. The Petitioner's case is not founded on the Constitution or any law. The Petitioner has not referred to any Article of the Constitution that has been violated or any law that has been breached. The Court is not competent to make judgments on the religious suitability of taking an oath on the Bible and the spiritual consequences of doing so unless such a requirement is a breach of the Constitution or the law. The Petition must therefore fail on this ground."

On the **Oaths and Statutory Declarations Act**, the Judge had this to say:

"[6] I would add that the Oaths and Statutory Declarations Act (Chapter 15 of the Laws of Kenya) which governs the taking of oaths and affirmation, does not require that every oath be taken on the Christian Bible. Every person has a choice whether in fact he or she should be sworn. Section 15 thereof provides that, "Every person upon objecting to being sworn, and stating the ground of such objection, either that he has no religious beliefs or that the taking of the oath is contrary to his religious belief shall be permitted to make his solemn affirmation instead of taking an oath in all places and for all purposes where an oath is required by law, which affirmation shall be of the same effect as if he had taken an oath." Likewise, the *Third Schedule* to the Constitution, which provides the form of oath or affirmation to be taken by State Officers, does not require taking the oath based on the Bible."

On the options available to the Petitioner, he stated thus:

"[7] The petitioner and others who believe that taking an oath on the Bible is a violation of their sacred principles have the freedom, consistent with Article 32 of the Constitution which protects freedom of religion, to decline to take an oath that offends their religious beliefs."

He then concluded as follows:

“[8] In light of what I have stated, the petition lacks merit as it is not grounded on any alleged or threatened violation of the Constitution or the Bill of Rights. It is dismissed with no order as to costs.”

23. In my view, the Learned Judge addressed his mind to the question revolving around the constitutionality of taking an oath using the Bible *vis-à-vis* **Article 32** and the **Third Schedule** of the **Constitution**; and the **Oaths and Statutory Declarations Act**. The same finding can properly be made with regard to the use of the Quran or any other Holy Book. Does this Court then have the jurisdiction to reopen the question as the Petitioner herein suggests? It can do so if the decision of Majanja J can be distinguished or if I see any reason to depart from it.

However, the decisions solid on all the issues I am required to address in the present Petition and whereas I may be reluctant to strictly invoke the doctrine of *res judicata* as the Petitioner was not party to the proceedings before Majanja J. Nevertheless, I see no reason to depart from his findings and I adopt these findings as if they were mine.

24. To my mind, therefore it is clear that the single issue before me has already been litigated upon and a decision has been rendered by a Court of equal jurisdiction and I see no reason to depart from that decision. Juxtaposing the Petitioner’s case herein and that of the Petitioner in **David Gitahi (supra)** it is clear to me that the Petitioner has merely sought to seal the loopholes in the prior case by adding constitutional provisions which were not asserted in the earlier case but no difference has been made to the foundation of his case which remains weak. I must however restate the position of this Court that *res judicata* in matters under the Bill of Rights should only be invoked in the clearest of cases and my findings above would have been the same even if no prior decision on the subject had been made.

Disposition

25. Based on my reasoning above, I am inclined to dismiss the instant Petition but shall make no orders as to costs since clearly the matters raised were in the interest of the wider public.

26. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF FEBRUARY, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Mr. Mbithi holding brief for Mr. Lumumba for Petitioner

Mr. Sekwe for Respondent

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE

19/2/2016