



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.70 OF 2012

BETWEEN

MIKE RUBIA.....1ST PETITIONER

SAMUEL NJUNU MUGWE (*suing personally and on behalf of Orange Democratic Party-Murang’a County Branch*).....2ND PETITIONER

AND

DR. MOSES MWANGI.....1ST RESPONDENT

PETER MUNGA.....2ND RESPONDENT

JIMNAH MBARU(*sued personally and on behalf of Murang’a County initiative*).....3rd RESPONDENT

JUDGMENT

Introduction

1. The Petitioners, Mike Rubia and Samuel Njunu Mugwe claim to be the declared officials and or initiators and or originators of an entity known as Muranga County Initiative (hereinafter “MCI”). The 2nd Petitioner, Mike Rubia, is the Chairman while the 2nd Petitioner, Samuel Njunu Mugwe, is the Secretary of the Orange Democratic Movement (ODM), a political party, at the Party’s Murang’a Branch.
2. They have filed this Petition claiming that on diverse dates in 2012, the Respondents, as part of an entity known as the MCI caused to be published in the mass media (both electronic and through a paid advertisement in a nationally circulating newspaper), a message purporting to bind the people of Murang'a County to support a political outfit called the PNU Alliance. Part of the alleged message stated as follows;

"That the people of Murang'a County will support the PNU Alliance as the vehicle through which we will pursue and achieve the development aspirations and political future of the country and support all efforts to:

- i. ***Ensure the continuity of the Grand Coalition of President Mwai Kibaki, to which the country***

leadership belongs, in order to ensure the legacy of socio-economic transformation.

ii. ...”

It is that message that triggered the present Petition.

The Petitioners’ case

3. The Petitioners contend that the publication of the message in issue was part of a campaign intended to show that the people of Murang’a County ought to be compelled to join, remain in and support the PNU Alliance and discourage and exclude any other political party from operating and recruiting members within the said County. They claim that the publication of that message contravenes the Constitution which requires that all political parties should be of a national nature by ensuring that they have members from all Counties in the Country. The Petitioners are also of the view that the exclusion of different political parties and opinions as well as the coercion of the people of Murang'a to support the PNU Alliance preconditions tension and undermines the integrity and dignity of every individual.
4. It was the Petitioners’ further contention that the statement was made with the intention of influencing people around the Country to adopt a general strategy of support for the PNU Alliance and specifically compel the people of Murang’a to disassociate themselves from any other political party. They thus claimed that as people hailing from Murang’a County, their right to freedom of conscience, thought, belief and opinion was violated.
5. It was also the Petitioners’ case that by publishing the message of exclusion of different political parties and opinions as well as coercion of the people of Murang'a to support the PNU Alliance through the electronic and print media with national reach and circulation, the Respondents were virtually encouraging other political leaders across the country to emulate them and zone their respective Counties into exclusive political zones thereby creating the preconditions for ethnic tension across Kenya. They thus claim that the Respondents’ actions violated **Article 19(2) of the Constitution** as their declaration vitiates equality and the dignity of every individual thus undermining social justice for all in Kenya. Further, that the balkanization of Kenya into narrow political and ethnic units to the exclusion of others violates the national values and principles of governance espoused in **Article 10 of the Constitution**.
6. The Petitioners in their Petition dated 9th March 2012 therefore seek a declaration that the Respondents’ publication is a threat to the Constitution and human rights and fundamental freedoms of the individual as enshrined in **Articles 32, 33, 36 and 38 of the Constitution**. They also seek an order directing the Respondents to publish an acknowledgement of the breach and an apology to the public as well as costs of the Petition.

The Respondents’ case

7. The Petitioners withdrew the case against the 2nd Respondent on 16th November 2012. These Submissions are therefore in respect of the case against the 1st Respondent, Dr. Moses Mwangi and the 3rd Respondent, Jimnah Mbaru, only. In response to the Petition, they filed a Replying Affidavit sworn by the 3rd Respondent on 19th December 2012. They also filed written Submissions dated 30th May 2013.
8. Jimnah Mbaru in his Affidavit aforesaid admitted that the MCI, of which he was a member, caused to be published the above mentioned declaration and that MCI was within its fundamental freedoms of speech and association in making that publication as it informed the people of Murang'a and the Nation at large of what was happening in Murang'a in terms of social, educational and economic developments. That the publication was a result of a comprehensive meeting held on 18th February 2012 between stakeholders of the MCI including professionals, business people, farmers, clergy and members of the general community to deliberate on an action

plan on education, agriculture, health, water and sanitation, investment and industrialization. That a common political stand was proposed in order to *inter-alia* improve education and enhance assistance to poor and needy children as well as their families. That therefore the Murang'a Declaration on development and political future of Murang'a county as published in the "Daily Nation" newspaper of 23rd February 2013 was intended to set forth the framework of development programmes and civil rights actions in 2012 and beyond for the said County.

9. He denied that the declaration by MCI imposed upon any person a political party nor any political position or views but rather it had proposed the political party of choice by MCI and it could not mean that other persons coming from Murang'a did not have their constitutional rights as to freedom of choice. And in any event, **Section 14(8)** of the **Political Parties Act** bars the Petitioners from suppressing or attempting to suppress the lawful political activity of another person.
10. He claimed that the Petition is bad in law as it is based on assumptions which are a culmination of the Petitioners' misconstrued understanding of the publication referred to in their Petition. And if at all the Petitioners were aggrieved by the said publication, the proper channel of complaint should have been to the National and Integration Commission which has the mandate and the ability to interrogate the *bonafides* of the Petitioner's complaint. That in that regard, where there is a procedure provided by the law, the same should be strictly adhered to.
11. It was the Respondents' further submission that a Petition cannot be lodged between two private persons, but rather between a private individual and a State, or a State institution. They relied on the case of *Uhuru Muigai Kenyatta v Nairobi Star Publication Petition No. 187 of 2012* in support of that proposition and they thus submitted that the Petitioners ought to have instituted their claim under private law and not through a Constitutional Petition.
12. As to the import of the impugned declaration, it was the Respondents' submission that the Petitioners had failed to show how MCI by that declaration, forced the people of Murang'a to support the PNU Alliance. That they have also failed to tender any evidence as to how the declaration has intimidated and ridiculed them and that it is trite law that he who alleges must prove.
13. On the allegation of curtailing political rights under **Article 38** of the **Constitution**, it was the Respondents' submission that they were merely expressing their political rights as allowed by law which should not be curtailed because of the Petitioners' selfish political interests. On the freedom of association, they submitted that it was within the Respondents' rights to declare support for the political outfit which they felt would enable Murang'a County to achieve its development goals.
14. The Respondents also submitted that during the electioneering period statements such as '*the winning formula*', '*political strongholds*', '*voting six piece*' and '*tyranny of numbers*' were used. That these statements were not calculated to bar any political party from campaigning in any region but were mere political expressions aimed at attracting citizens to one side of the political divide. They thus described the Petitioners' mission as a mere witch hunt and urged the Court to dismiss the Petition with costs.

Determination

15. From the Parties' Submissions as above, the only issue coming up for determination is whether the Respondents' publication in the "Daily Nation" newspaper of 23rd February 2013 violated the Petitioners' fundamental rights and freedoms as enshrined in **Articles 32, 33, 36 and 38** of the **Constitution** as alleged. However, before I turn to consider that issue, I recall that the Respondents claimed that the Petitioners cannot enforce their fundamental rights and freedoms as against them because they are private citizens. That therefore a private citizen is not capable of violating another private citizen's rights. I must therefore pose here to determine that issue.

Whether a private citizen can enforce fundamental rights and freedoms as against another private citizen?

16. Granted, there are a number of High Court decisions that have dealt with the issue whether a private citizen can maintain an action for violation of fundamental rights as against another private citizen. Even in those decisions, the Judges have appeared to differ. Some have held that the rights and duties of individuals are regulated by private law and duties imposed by the Constitution under fundamental rights provisions are owed by the State and not private individuals – See for example **Kenya Bus Services Ltd & Another, HCC Misc. Suit No.413 of 2005** **Richard Nduati Kariuki v Hon. Leonard Nduati, Misc Civil Applic No. 7 of 2006** and **Alphonse Mwangemi Munga & 10 Others (2008) e KLR.**
17. The Respondents have in that regard relied on the case of **Uhuru Muigai Kenyatta v Nairobi Star Publication (supra)** to contend that the State is the one which has an obligation to observe, protect and respect the human rights of individuals and that obligation is not imposed on private citizens. However, whereas this Court generally prescribes and holds the same views as in the **Uhuru Muigai Kenyatta v Nairobi Star** case because of the unique circumstances of that case the Court subsequently clarified that issue in **Jemimah Wambui Ikere v Standard Group Ltd and Anor Petition No. 466 of 2012** where it stated as follows;

“...each case must be looked at in its specific and unique circumstances and that the Court must determine whether there is a constitutional issue raised in the petition that ought to be addressed by the Court under Article 23(1) of the Constitution.”

Similarly in **Rapinder Kaur Atwal v Manjit Singh Amrit Petition No. 236 of 2011** I expressed myself as follows;

“All the authorities above, would point to the fact that the Constitution is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within administrative processes. In this case, the former must be true.....i must add the following; our Bill of Rights is robust. It has been hailed as one of the best in any constitution in the world. Our courts must interpret it with all the liberalism they can marshal. However, not every pain can be addressed through the Bill of Rights and alleged violations thereof”.

18. In that regard, I maintain that the Constitution is not a substitute for all redress of all injuries especially where the Petitioner has another remedy in law. If that be the case, he must pursue that remedy instead of making constitutional issues of what really is a pure matter of private law and where private law has an adequate remedy. As to the issue whether a private citizen can allege a violation of fundamental freedoms as against another private citizen, I reiterate the findings in the **Jemima Wambui Ikere Case (supra)** where the Court stated as follows;

“I am clear in my mind that the Constitution in Articles 2 and 20 and the definition of the term “person” under Article 260 envisaged both vertical and horizontal application of the Bill of Rights; vertical application between the citizen and the State and horizontal application between one citizen and another citizen. Article 2 of the Constitution provides that ‘this Constitution is the supreme law of the land and binds all persons and all state organs at both levels of government’. Similarly, Article 20 provides that; ‘The Bill of Rights applies to all and binds all state organs and all persons’. Article 260 has defined a person as ‘including a company, association or other body of persons whether incorporated or unincorporated’. My reading of the above provisions of the Constitution reveals that no person is above the Constitution and every person is bound by the provisions of the Constitution including the Bill of Rights. It therefore means that the Petitioners are entitled under Article 22 of the Constitution to institute a claim alleging a violation of the Constitution whether those violations are by a private citizen or the State.”

19. I do not see any reason and the Respondents have given me none as to why I should depart from the above reasoning. It is also clear to my mind that there is nothing in the Constitution that draws the distinction between vertical and horizontal application of the Bill of Rights. The Bill of Rights applies to all persons and binds everybody. My sister and brother, Mumbi J. and Majanja J. have respectively and equally held that the Bill of Rights applies both horizontally and vertically. (See *Law Society of Kenya v Betty Sungura Nyabuto & 2 Others (2012) e KLR, B.A & Another v The Standard Group Ltd (2012) e KLR*) and I agree with their reasoning.

20. Having found that the Petitioners can claim a violation of fundamental rights as against the Respondents, I now turn to determine whether the Respondents' actions as above violated the Constitution in any way, as alleged.

Whether there is a violation of the Constitution

21. The Petitioners' case against the Respondents is straight forward; that the publication of the message by MCI in a local daily newspaper was part of a campaign intended to compel the people of Murang'a County to join, remain in and support the PNU Alliance and discourage and exclude any other political party from operating and recruiting members within Murang'a County. That as such, the publication was a violation of the Petitioners' fundamental rights and freedoms as enshrined in **Articles 32, 33, 36 and 38** of the **Constitution**.

22. The impugned publication as reproduced elsewhere above and for clarity read as follows;

"That the people of Murang'a County will support the PNU Alliance as the vehicle through which we will pursue and achieve the development aspirations and political future of the country and support all efforts to

- i. ***Ensure the continuity of the Grand Coalition of President Mwai Kibaki, to which the country leadership belongs, in order to ensure the legacy of socio-economic transformation***
- ii. ***..."***

23. Can this publication be said to have violated the Petitioner's fundamental rights and freedoms? Looking at the Petition, Affidavits, the Submissions and evidence before me and in particular the exhibit produced in the Affidavit of the 1st Petitioner and marked as "MR2", it is not clear how the Petitioners' rights and freedoms have been violated. First, in what context is the impugned publication made? As will be seen from the exhibit, the Petitioners merely produced parts of a much longer publication and availed those parts to the Court. For instance, it will be noticed that the alleged offensive publication appears somewhere before Item number 8 of that declaration. The exhibit does not show anything as between Items Nos.3 and 8. I am constrained to ask myself, what was published before the offending lines? The 1st Petitioner in his Affidavit failed to provide any explanation or create such nexus as to enable the Court decipher the import of the alleged offensive publication. But basically what I gather is that the few lines availed to the Court and as reproduced elsewhere above, violated the Petitioners' fundamental rights and freedoms. My findings on that issue is as follows;

24. As regards the violation of the freedom of conscience, religion, belief and opinion, **Article 32** states as follows;

"(1) Every person has the right to freedom of conscience, freedom of conscience, religion, thought, belief and opinion.

(2) Every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship.

(3) A person may not be denied access to any institution, employment or facility, or the

enjoyment of any right, because of the person's belief or religion.

(4) A person shall not be compelled to act, or engage in any act, that is contrary to the person's belief or religion."

25. Looking at the provisions of **Article 32**, it is clear that they are related to freedom of conscience and to religious beliefs. Indeed, while interpreting **Article 9** (*similar to our Article 32 of the Constitution*) of the European Convention on Human Rights, the European Court on Human Rights has stated that **Article 9** protects the right of individuals to hold religious and other beliefs, and to practise them alone or with other people and also the right to manifest one's religion or beliefs and it has stated in many instances that the State is not entitled to assess the legitimacy of the religious views or the way in which they are manifested - See *Hasan and Chaush v Bulgaria, (2002) 34 EHRR 55, Metropolitan Church of Bessarabai v Moldova (2002) 35 EHRR 305* and *Sahin V turkey (2007) 44 EHRR 5.*

26. Similarly, **Article 18** of the **International Covenant on Civil and Political Rights**, which is similar to our **Article 32**, has been interpreted by the UN Human Rights Committee as protecting;

"theistic, non-theistic and atheistic beliefs as well as the right not to profess any religion or belief. The terms belief and religion are broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions - See General Comment 22, para 9."

I am duly guided and that being the case and applying the above interpretation in the context of the Petition before me, I do not see how the Petitioners' rights under **Article 32** of the **Constitution** have been violated by the Respondents in publishing the impugned declaration.

Turning to the freedom of expression, **Article 33** provides as follows;

"(1) Every person has the right to freedom of expression, which includes—

(a) freedom to seek, receive or impart information or ideas;

(b) freedom of artistic creativity; and

(c) academic freedom and freedom of scientific research.

(2) The right to freedom of expression does not extend to—

(a) propaganda for war;

(b) incitement to violence;

(c) hate speech; or

(d) advocacy of hatred that—

(i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or

(ii) is based on any ground of discrimination specified or contemplated in Article 27 (4).

(3) In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others."

27. The Petitioners claim that their freedom of expression has been violated because the decision to belong to PNU Alliance was made for them by the Respondents and that they should feel safe to express their political opinions even if they are contrary to the views of MCI.
28. I must state that the Petitioners failed to understand the normative context of the freedom of expression. As reproduced above, freedom of expression protects the right to seek, receive or impart information or ideas. I did not hear the Petitioners to be claiming that they were denied a platform to express their ideas or opinion so that they would now claim a violation of the freedom to express themselves. For instance, Jimna Mbaru in his Affidavit explains that there was a meeting held on 18th February 2012, between stakeholders of the MCI including professionals, business people, farmers, clergy and members of the community to deliberate on an action plan on education, agriculture, health, water, sanitation, investment and industrialization as a result of which the MCI declaration was made and adopted. On that issue it is not the complaint of the Petitioners that they attended the said Stakeholders meeting and they were not given an opportunity to express their ideas on the issues forming the subject of discussion. Had that been so, then a different issue would have arisen. It is not sufficient for the Petitioners to claim that they do not feel safe to express their political opinions. For instance, I am constrained to ask myself the following questions again; what makes them feel unsafe? Have they for instance been attacked, ridiculed or beaten for expressing their political opinions? When and where did that happen? As can be seen from the record, I do not have answers to these questions and I am consequently unable to find a violation of the freedom of expression based on the material before me – See **Anarita Karimi Njeru vs Republic (1976-1988 EA 14** on the need to be precise in alleging constitutional violations.

On the freedom of association, **Article 36** provides as follows;

- “(1) Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.***
- (2) A person shall not be compelled to join an association of any kind.***
- (3) Any legislation that requires registration of an association of any kind shall provide that—***
- a. registration may not be withheld or withdrawn unreasonably; and***
 - b. there shall be a right to have a fair hearing before a registration is cancelled.”***

29. The Petitioners claim that their freedom of association has been violated by the publication made as it had an inference that a decision had been made that the people of Murang’a County all belonged to the PNU Alliance. That anyone in Murang’a who has a dissenting opinion or preference of another political party would be treated with ridicule, contempt and odium and would be seen as a traitor of the PNU Alliance.

30. To my understanding, the freedom of association provides for the right of every person to form and belong to any association of their choice. I did not hear the Petitioners to be claiming that the MCI declaration was mandatory, compulsory and binding on all the people of Murang’a County and as such everyone including the Petitioners had to belong to PNU Alliance. Had that been the case, then my finding would have been different. That is all there is to say on this aspect of the Petition.

31. I now turn to consider the violation of **Article 38** of the **Constitution** which provides for political rights as follows;

- “(1) Every citizen is free to make political choices, which includes the right—***

(a) to form, or participate in forming, a political party;

(b) to participate in the activities of, or recruit members for, a political party; or

(c) to campaign for a political party or cause.

(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for—

a. any elective public body or office established under this Constitution; or

b. any office of any political party of which the citizen is a member.

(3) Every adult citizen has the right, without unreasonable restrictions—

(a) to be registered as a voter;

(b) to vote by secret ballot in any election or referendum;

(c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.”

32.The Petitioners are aggrieved with the declaration to the extent that it allegedly makes them members of the PNU Alliance. Under **Article 38(1)** above, every citizen has a right to make political choices which include the right to form and participate in a political party, recruit members for a political party and campaign for a political party. Applying that provision in the context of this Petition, I do not see how the Petitioners’ rights have been violated. Firstly, it is clear that the MCI Declaration is not binding on all people of Murang’a County and secondly, no one has been forcefully compelled to be a member of any political party and particularly the PNU Alliance. I say so because the Petitioners are members and indeed officials of ODM party. I did not hear them to be saying that their political party has been sabotaged in Murang’a County as a result of the impugned publication. Further, no one has been forcefully made to vote for the PNU Alliance in any election. In any case, a vote is by secret ballot and no one can be compelled to vote for a certain party if they are not interested in it or do not share the manifesto of that party.

33.As to the allegation that the publication caused negative ethnicity and promoted tribalism, there is no evidence before me to that effect. A Court of law is always guided by evidence and not mere allegations which are not supported by law or any fact.

34.Having addressed my mind as above, it is clear by now that I do not see any merit in the Petition.

35.In conclusion, throughout the hearing of this matter, it was obvious to me that the Court was being used to settle political scores and it is obvious that petty political rivalries were elevated to the venerated heights of constitutional issues. This Court will not countenance situations like those. The High Court in its status as the interpreter of the Constitution will take a dim view of such actions and as can be seen above, there was nothing constitutional about the whole Petition.

36.In the end, the Petition is hereby dismissed. As for costs, if ever any purported Constitutional Petition requires an order of payment of costs by the Petitioners, this one ranks high in the list and the reasons are obvious. Let the Petitioners as a lesson in abuse of Court process pay costs to 1st and 3rd Respondents only.

37.Orders accordingly.

DATED, DELIVERD AND SIGNED AT NAIROBI THIS 26TH DAY OF AUGUST, 2014

ISAAC LENAOLA

JUDGE

In the presence of:

Kariuki – Court clerk

Miss Jemtai holding brief for Mr. Njenga for Petitioners

No appearance for Respondents

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE