



REPUBLIC OF KENYA

High Court at Nakuru

Petition 44 of 2012

VITALIS LUMITI & 55 OTHERS.....PETITIONERS

VERSUS

THE REVEREND OLAF KONNERUP & 2 OTHERS.....RESPONDENTS

RULING

The chamber summons dated 30/10/2012 was filed by the fifty five (55) petitioners/applicants. They seek prayer (2) which is to the effect that the petition is urgent and the court should certify that it raises issues that require interpretation of the Constitution and declaration of Human Rights and should be referred to the Hon. The Chief Justice for purposes of constituting a bench to hear and determine the petition. The other prayers are said to be spent. The application is supported by the affidavit of Rose Wairimu, one of the petitioners. The petitioners describe themselves as the congregants and members of the Bible Baptist Church, Nakuru, which is registered under the **Societies Act** as a church organization. The petitioners' complaint is that they have been barred from conducting and carrying out worship services at their church as a result of which their fundamental rights and freedoms under **Article 10(2)(e)** that guarantees the rule of law, democracy and participation of the people; **Article 27(4) & (5)** which guarantees the right to equality and freedoms from discrimination; **Article 40(1)(a) & (b)** that guarantees protection of the right to property and **Article 65(3)(a), (b)** that gives rights to land holding by non citizens and corporate bodies, have been violated; that the parcel of land on which the church stands serves public interest and therefore public purposes as a religious institution. The deponents explained that the 1st respondent used to be their pastor but fell out with the congregation. He resigned and vowed to use his skin being white and ability to ensure the petitioners were evicted and there is therefore a dispute over the ownership of the land in question on which stands the sanctuary and nursery school on Nakuru Municipality Block 20/52. The appellants claim to have been worshipers there since 1986, but the respondent have now allowed into the premises other denominations by name "**Watchers by Grace Ministries**" to the detriment and exclusion of the petitioners. Rose further deponed that there have been various matters in court in respect of the same property against the 1st respondent but the courts have given different determinations.

Though served with this application, Mr. Ogola, counsel for the respondents did not attend nor did the respondents file any reply. It proceeded to hearing ex-parte.

For this court to refer this matter to the Hon. The Chief Justice, it has to be satisfied that there is a substantial question of law that needs to be determined by an uneven number of judges assigned by the Hon. The Chief Justice.

Even before this court considers whether or not there are substantial questions of law that need interpretation, the onus is upon the applicants to demonstrate that they have a cause of action. The respondents in this petition are private individuals and the question that begs is whether they have the

capacity to guarantee fundamental rights. **Article 21** of the **Constitution** provides as follows:-

“(1) It Is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.

(2) The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.

(3) All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities.

(4) The State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.”

In my view, it is the State and the State organs who must observe, protect and promote the rights and fundamental freedoms under the Bill of Rights. An individual does not have that responsibility or capacity. The applicants do not allege that the State in any way violated their rights. The applicants' claim against the respondents are private rights that should be determined in an ordinary suit. Infact the applicants have urged therebefore other courts before, meaning they want to have a second bite or the cherry. There is now a wealth of authority to the effect that in Constitutional matters the State must be the guarantor of all fundamental rights. In **Kenya Bus Services Ltd & 2 Others v the A.G. (2006)KLR**, J. Nyamu said as follows:-

“Moreover fundamental rights and freedoms are contained in the Constitution are principally available against the state because the Constitution jurisdiction is to define what Constitutes Government and it regulates the relationships between the Government and the governed. On the other hand the rights of the individual interests are taken care of in the proviso of private law and are invariably redressed as such. The judge had relied on the decision of **Teitiwinnang v Ariong & Others (1987) LRConst. 517 at page 599** where the court held:-

“Dealing now with the question can a private individual maintain an action for declaration against another private individual on individual or individuals for breach of the fundamental rights provisions of the Constitution. The rights and duties of individuals and between individuals are regulated by private law. The Constitution on the other hand is an instrument of Government. It contains rules about the Government of the country. It is my view therefore that the duties imposed by the Constitution under the fundamental rights provisions are owed by the government of the day to the governed. I am of the opinion that an individual or a group of individuals as in this case, cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or a group of individuals since no duty can be owed by an individual or group of individuals to another or individual under the fundamental rights provisions of the Constitution, no action for a declaration that there has been a breach of duty under the provision can be or be maintained in the case before me, and I so hold.”

In the same decision the court relied on the decision of **Re Application by Bhadur (1986) LRC (Const) 297 AT PG 298**, where the court said as follows:-

“The Constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can found a claim under substantive law, the proper course is to bring the claim under that law and not under the Constitution.” (see **Harrikisson v Attorney General of Trinidad and Tobago 1979 3 WLR 62 applied.**)

I do agree with the principles set out in the above cases. The applicants want to enforce their private rights and they must bring the claim under the law applicable but not the Constitution.

The application does not disclose any cause of action under the Constitution provisions. There is nothing for me to transfer to the Hon. The Chief Justice for appointing a bench. The application is hereby dismissed.

DATED and DELIVERED this 28th day of March, 2013.

R.P.V. WENDOH
JUDGE

PRESENT:

Ms Kahunga for petitioner

Mr. Mbugua for the respondents

Kennedy – Court Clerk