



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PETITION NO 324 OF 2011

JANE WAMBUI MUIGAI AND 14 OTHERS.....PETITIONERS

AND

JOSEPH MUIGAI KARANJA 1ST RESPONDENT

TABITHA MUKAMI MUIGAI.....2ND RESPONDENT

JUDGMENT

Introduction

1. The petitioners have brought this petition seeking among others, orders that they are equal members of the 1st respondent's family, are entitled access to the bank accounts and information on the investments of the 1st respondent, and a declaration that the 1st respondent's family is a polygamous family.
2. The 1st and 2nd petitioners are respectively the 1st and 2nd wives of the 1st respondent, married to him under customary law, while the 2nd respondent is the 3rd wife of the 1st respondent. The 3rd to the 15th petitioners are children of the 1st respondent with the 1st and 2nd petitioners.
3. In their petition dated 16th December 2011, the petitioners seek orders as follows:
 - (a) **A declaration that they be recognized as equals in the family of the 1st respondent and accorded all rights and privileges that go with being member of an elite family including a budgetary allocation for their basic needs.**
 - (b) **A declaration that the 1st respondent family is polygamous and in the same breath annual the marriage contracted by the 1st and 2nd respondent to give legal validity to the 1st and 2nd petitioners association to 1st respondent.**
 - (c) **Compensation for missed opportunities.**
 - (d) **A declaration that the 1st and 2nd petitioners are equal stake holders and directors in Keroche breweries Ltd entitled to accruing costs and benefit.**
 - (e) **That they be granted access to information on the running of family businesses and bank**

accounts inclusive of Keroche Breweries Ltd.

(f) The 1st and 2nd respondent be compelled to disclose their investments and or accounts held by themselves and the same be shared out equally among the respondents and the 1st and 2nd petitioner.

(g) That costs be in the cause.

4. The petition is supported by an affidavit sworn by John Karanga Muigai, the 9th petitioner, on 16th December 2011.

5. The petition is opposed. Both respondents filed replying affidavit sworn on 18th January 2012. The parties also filed written submissions dated 5th March 2012 and 12th March 2012 respectively.

Petitioner's Submissions

6. The petitioners' case as presented by their Learned Counsel, Mr. Nguring'a, is that the respondents have violated their rights under the Constitution by discriminating against them on the grounds of social and economic status. They allege that their rights under Article 43(1) of the Constitution have been violated, and that the obligation to meet these rights is not a preserve of the state but that the actualization of these rights rests also with parents, siblings and guardians, whom the petitioners describe as having a moral obligation towards the beneficiaries of those rights.

7. They assert that their rights under Article 43(1) of the Constitution have been violated by what they term as the illegal union between the 1st and 2nd respondents and by the respondents appropriating the family resources to themselves in exclusion of the petitioners.

8. The petitioners claim that the 1st respondent, as the father of the 3rd - 15th petitioners, has neglected and abdicated his duties, thus denying them opportunities and positive exposure in life, causing them to live a life of desperation without any skills to enable them earn a decent living. They claim that out of the 15 petitioners, only the 5th petitioner managed to acquire tertiary education; that the others were not facilitated to pursue tertiary education, and six of the petitioners have not acquired secondary education despite the 1st respondent being a wealthy man of means.

9. The petitioners claim that the 1st respondent has built his wealth out of their sweat and then discarded them after his main investment, Keroche Breweries Ltd, which he initially started as a sole proprietor, became a market success; that the 2nd respondent, who married the 1st respondent under the provisions of the African Christian Marriage and Divorce Act Chapter 152 of the Laws of Kenya), has utilized her marriage to portray herself as the proper spouse of the 1st respondent, thus appropriating all the family resources to herself and alienating the petitioners from the family empire and cutting off the 1st respondent from the petitioners. They state that as a result, they cannot even secure their immediate needs while the 2nd respondent's children live a life of opulence, and they therefore feel disadvantaged and used, and some have developed psychiatric complications.

The Respondents' Case

10. The 1st respondent, while acknowledging that the 3rd to 15th petitioners are his children, disputes their allegation that he denied them educational opportunities, asserting that he took them to various schools at different economic time in his life but they all dropped out of school due to their academic abilities. He submits, however, that the 3rd to 15th petitioners are capable of providing for themselves.

11. The 1st respondent also claims that he has distributed his entire wealth and assets to the 1st and

2nd petitioners and the 2nd respondent in his lifetime; that he even gave the 1st and 2nd petitioners monies to start businesses, and that he also gave them various properties which he sets out as being Title No. Loc 16/54; plots in Muruaki Scheme, Gitangwany 828, Nyandarua/Muruaki/1399, Kijabe/Kijabe Block 1/2825, Kijabe/Kijabe Block 1/1228 and Kijabe/Kijabe Block 1/2824.

12. He denies that any of his properties was ever registered in his name in trust for any of his children or wives, and states that he sub-divided his assets equally between his wives on or about 1996 and each invested her share in the manner she deemed fit; that the 2nd respondent invested her share in a brewing company which she called 'Keroche Breweries Ltd'; that he is not a shareholder of this company but the Chairman of the Board of Directors; that Keroche Industries Limited is a juristic person and is not a family company as alleged.

13. The 1st respondent asserted that he had not denied the petitioners equal rights with the 2nd respondent and thus violated their rights under Article 45(1) of the Constitution, nor had he caused psychological problems to the 5th petitioner. The 1st respondent submitted that he was under no obligation, constitutional or otherwise, to provide access to health facilities, adequate housing, freedom from hunger, provision of clean water, education or social security to any of his grown up children.

14. Like the 1st respondent, the 2nd respondent is categorical that she has no constitutional, legal or moral obligation towards the petitioners, her co-wives and her husband's children from his union with the 1st and 2nd petitioners. She is a shareholder, director and Chief Executive Officer of Keroche Industries Ltd which she states she build singlehandedly by investing her money into the business to which the petitioners did not contribute at all. The assets that the company owns, she avers, belong to the company and not to its shareholders, directors or relatives. She asked the court to dismiss this petition with costs as it raised no constitutional issues.

Determination

15. It is now settled that a party who alleges violation of a constitutional right must demonstrate which of his or her constitutional rights have been violated, and the manner in which they have been violated. See **Anarita Karimi Njeru v Republic (1976-80) 1 KLR 1272** and **Trusted Society of Human Rights Alliance v Attorney General and Others Petition No. 229 of 2012**. In this case, the petitioners allege violation of their rights under Article 43(1) and 45(1) of the Constitution by the respondents. The issue that I am called upon to determine is whether, from the facts set out before me, a violation of the rights of the petitioners under these two provisions of the Constitution has been made out.

Violation of Article 43(1)

16. The petitioners have alleged that their rights under Article 43(1) of the Constitution have been violated by the 1st respondent denying them educational opportunities and discriminating against them at the behest of the 2nd respondent. This Article provides as follows:

43. (1) Every person has the right—

(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;

(b) to accessible and adequate housing, and to reasonable standards of sanitation;

(c) to be free from hunger, and to have adequate food of acceptable quality;

(d) to clean and safe water in adequate quantities;

(e) to social security; and

(f) to education.

17. While recognising that, in line with the provisions of Articles 2(1) and 20(1) of the Constitution, which provide that the Constitution and the Bill of Rights respectively apply to all persons and bind all persons and state organs, there is under our Constitution both horizontal and vertical application of the Bill of Rights, the question that one may ask is whether a private citizen owes another private citizen the socio-economic rights guaranteed under this Article.

18. A distinction must be made, in my view, between those rights which both private persons and the state are under an obligation to respect, and those which the state has a positive obligation to provide. Article 21 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.'

19. It is apparent that the rights under Article 43 are guaranteed to citizens by the state, which has an obligation to ensure the progressive realisation of these rights, and progressive realisation has been clarified by the Committee on Economic Social and Cultural Rights in General Comment No. 3, as imposing an obligation on the state to move as expeditiously and effectively as possible towards realisation of these rights, and that it should not take retrogressive measures with regard to these rights.

20. In my view, there are no circumstances under which a private citizen in the position of the respondents can have an obligation to provide another, adult citizen who is not under a disability with the rights guaranteed under Article 43. That is an obligation specifically imposed on the state. From the averments in the affidavits before me, all the petitioners are adult, some with children of their own, and none has a disability, so they cannot claim a right to be maintained on the basis of minority or disability. In any event, even in those cases where there is an obligation to provide for minors or persons with disabilities, such obligation would arise under Articles 53 and 54 respectively, and under the Children and Persons with Disabilities Acts, and not under Article 43(1) whose provisions impose an obligation only on the state.

Violation of Article 45(1)

21. The petitioners have alleged violation of their rights under Article 45(1) of the Constitution. This Article provides as follows:

'The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.'

22. This provision is a statement of the constitutional principle with regard to the family, and does not contain any specific right capable of violation. It may be, however, that the petitioners had in mind Article 45(3), which provides that

'Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.'

23. While this provision may have some application with regard to the 1st and 2nd petitioners, it is difficult to see how it is of assistance to the 3rd to 15th petitioners. As adult children of the 1st respondent, they are not 'parties to (the) marriage' between their parents, so they have no claim whatsoever under this Article. As for the 1st and 2nd petitioners, this provision would be relevant where they have lodged a claim for division of assets acquired during marriage. It cannot properly be invoked in a constitutional petition alleging violation of constitutional rights.

24. This is the fundamental weakness of this petition. The parties have come before this court raising what are matters that fall within the ambit of a family court at the dissolution of marriage and distribution of property acquired during marriage, and others that fall for determination under the law governing companies. The assets of Keroche Breweries Ltd, a private limited liability company and thus a juristic person, belong to the company and this court cannot now be used to determine who owns what and how the company should be run.

25. This court has made it clear on numerous occasions that it cannot be used as a general substitute for the normal procedures in cases where there are other procedures available for determining disputes. See, for instance, **Booth Irrigation -v- Mombasa Water Products Ltd, HCC Misc 1052 of 2004.**

26. What is before me is a family dispute disguised as a constitutional matter. The petitioners assert rights against individual citizens which are only guaranteed by the state, and which only the state has an obligation to provide. It is not for this court to determine whether or not the 1st respondent did fail to provide for the petitioners, or that the petitioners were provided for and are now seeking more than they are entitled to.

27. In the case of the 1st and 2nd petitioners, they are, as wives of the 1st respondent, entitled to relief under family law. In the case of the 3rd to the 15th petitioners, as adult children of the 1st respondent, their entitlement is limited to what the law recognises as their right to inherit from the 1st respondent in the event of his demise. Should they wish to make a claim with respect to Keroche Breweries Limited, they should do so under the provisions of law governing limited liability companies, not under the provisions of the Constitution. As correctly submitted by the respondents, this petition raises no constitutional issue and is therefore dismissed.

28. As this petition arises in what appears to be a very troubled polygamous family, the petitioners should not be further burdened with the costs. Each party shall therefore bear its own costs.

Dated, Delivered and Signed at Nairobi this 14th day of March 2013.

Mumbi Ngugi

Judge

Mr. Nguring'a instructed by the firm of P. M. Kahiga & Co. Advocates for the Petitioners

Mr. Esmail instructed by the firm of Kilukumi & Co. Advocates for the Respondents