



REPUBLIC OF KENYA

High Court at Nakuru

Petition 54 of 2012

KAPI LTD.....1<sup>ST</sup> PETITIONER  
IAN SHAW.....2<sup>ND</sup> PETITIONER

VERSUS

PYRETHRUM BOARD OF KENYA.....RESPONDENT

RULING

KAPI Ltd and Ian Shaw have filed this petition against the Pyrethrum Board of Kenya seeking the following declarations and orders:-

1. A declaration that the demanding or taking possession of the petitioners' pyrethrum flowers grown on the petitioners' properties known as Ol-Kalau Nursery Plot No. 307 (Mawingu Scheme) being a total of 50 acres and LR No.11322 (Oljororok Farm) being a total of 100 acres , by the respondent without compensation, is unconstitutional;
2. A declaration that the termination of the petitioners' leases to the properties known as Ol-Kalau Nursery Plot No. 307 ((Mawingu Scheme) being a total of 50 acres and LR No.11322 (Oljororok Farm) being a total of 100 acres on which the petitioners have grown pyrethrum flowers, on the basis that the petitioners have failed to deliver pyrethrum flowers without payment or on the basis of expressing their views on reforms in the pyrethrum industry as captured in the Pyrethrum Bill 2011, is unconstitutional;
3. A declaration that the withdrawal by the respondent of the letters of access for the pyrethrum formulations manufactured by the petitioners, on the basis that the petitioners have failed to deliver pyrethrum flowers without payment or on the basis of expressing their views on reforms in the pyrethrum industry as captured in the Pyrethrum Bill 2011, is unconstitutional;
4. General damages for trespass by the respondents or their agents on the premises of the petitioners being on Friday 30<sup>th</sup> March 2012 on Land Reference Number 11322 (Oljororok Farm).

Filed simultaneous with the petition is the chamber summons dated 19/12/2012 in which the petitioners/applicants seek the following prayers:-

- (2) That pending the hearing and determination of this petition, a conservatory order do issue restraining the respondent by itself, its servants or agents from demanding or taking possession of the petitioners pyrethrum flowers grown on the petitioners properties known as Ol-Kalau Nursery Plot No. 307 (Mawingu Scheme) being a total of 50 acres and LR No. 11322 (Oljororok Farm) being a total of 100 acres;

**(3) That pending the hearing and final determination of the petition hereto, a conservatory order do issue restraining the respondent from terminating the petitioners leases to the properties known as Ol-Kalau Nursery Plot No. 307 (Mawingu Scheme) being a total of 50 acres and LR No. 11322 (Oljororok Farm) being a total of 100 acres;**

**(4) That pending the hearing and final determination of the petition hereto, a conservatory order do issue restraining the respondent from withdrawing the letters of access for the pyrethrum formulations manufactured by the petitioners.**

In reply to the chamber summons, the respondent through their counsel, Mukite Musangi Advocate, filed a notice of preliminary objection on 11/1/2012 which contained four points. The points are as follows:-

**(1) The proceedings before the court do not seek interpretation of any Constitutional rights and should not be brought by way of a petition;**

**(2) The proceedings before the court seek the determination of competing private rights to property between private corporate persons and therefore can only be determined by a substantive suit for recovery of or protection of the suit property;**

**(3) The petitioners herein also seek determination of private contractual rights and this cannot be achieved or litigated through a constitutional petition but can only be properly determined through a substantive formal law suit;**

**(4) There is no constitutional matter between the state and its citizens to be determined in this petition and therefore the petitioner has come before the court using an entirely erroneous process for determination of its grievances and the court is cannot make any of the orders sought.**

Mr. Musangi urged that the courts have set the threshold upon which a constitutional question will arise. He submitted that in the instant case, two private individuals entered into a contract and if there is a breach or disagreement, it should be litigated in a substantive suit. He also pointed out that Kenya is not involved in this dispute. Counsel went ahead to submit that the new **Constitution** establishes a social contract between the State and its citizens and that the only parties who can litigate within the **Constitution** to enforce their rights are the Kenyan citizens which the 2<sup>nd</sup> petitioner is not, because he described himself as a citizen of the United Kingdom and is not a party of the social contract between Kenya and its citizens. He further submitted that in this case the petitioner needs to file statements, cross examine the defendants on them. When making reference to **Article 40(3)** of the **Constitution**, Counsel urged that the State is barred from depriving another of property but that provision does not include the citizen and a fellow citizen. He urged the court to strike out the chamber summons and petition because the application should not use this process for convenience.

Mr. Kurgat, counsel for the petitioner/applicant opposed the preliminary objection. Counsel, urged that **Article 65** of the **Constitution** allows anybody to approach the court for determination of his rights and that includes foreigners who have rights too. He urged that the respondent is a statutory body created under the **Pyrethrum Act** and that part of the challenge is that the Act empowers the respondent to demand delivery of pyrethrum even if there is no payment. Mr. Kurgat urged that the applicant has listed the specific constitutional provisions that have been violated by the respondent, i.e. **Article 19, 20, 23, 30, 40, 47, 64** and **227**. He also invoked **Article 159** that the court is enjoined to determine issues before it without undue regard to technicalities and that the preliminary objection raised is a procedural issue and should be disregarded.

After hearing the two counsel, I think that the issues that have arisen as to who can come to this court to enforce his right; whether the applicant individual can guarantee another individual's rights; whether the petition and chamber summons raise any constitutional issues and whether the petitioner has come to the proper forum for redress; whether the petitioner/applicant can bring a petition for violation of his rights.

I agree with Mr. Musangi's submissions that in the preamble of the Constitution, there is a social contract

created between the Government and the citizen of Kenya. **Article 20** of the **Constitution** on application of the **Bill of Rights**, it is clear, that every person enjoys the rights and fundamental freedoms in the Bill of Rights. It does not limit it to Kenyan citizens alone. It states as follows:-

**“Art.20(1) The Bill of Rights applies to all law and binds all State organs and all persons;**

**(2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.”**

Similarly, **Article 22** of the **Constitution** on enforcement of the Bill of Rights gives all persons the right to institute court proceedings to enforce their rights. It reads:-

**“Art.22(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.**

**(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—**

- (a) a person acting on behalf of another person who cannot act in their own name;**
- (b) a person acting as a member of, or in the interest of, a group or class of persons;**
- (c) a person acting in the public interest; or**
- (d) an association acting in the interest of one or more of its members.**

The Articles do not specifically omit none citizens of Kenya from enjoying their rights in Kenya. However, apart from the rights listed under **Article 25**, all other rights have their limitations. For example a non-Kenyan may not have the same rights under **Article 35** on access to information as a Kenyan would have, or the economic rights - **Article 43**. As respects this case, the applicants’ right to hold land is provided for under **Article 65** of the **Constitution**. If his rights as respects the holding of land within the context of **Article 65** are violated, then he has the right, under **Article 22** to move the court for enforcement of his rights. I therefore do not agree with Mr. Musangi’s submission that the 2<sup>nd</sup> applicant does not have the right to move a Kenyan court for violation or likely violation of his rights. If the **Constitution** were to make such provision, it would be absurd because it would mean a Kenyan living outside Kenya would be subject to like treatment, so that his basic human rights would not be guaranteed.

**Article 2(5)** of our **Constitution** provides that the general rules of International Law shall form part of the Laws of Kenya. **Article 2(6)** of the Kenyan **Constitution** also adopts any treaty or convention ratified by Kenya as forming part of Kenyan Law. The **Universal Declaration of Human Rights** applies to Kenya by virtue of the above **Articles**. Under **Article 2** of the **Universal Declaration of Human Rights**, everyone is entitled to all the rights and freedoms set out in the declaration without distinction. The **Section** reads as follows:-

**“Art. 2 Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.”**

**Article 8** also goes to confirm that anyone living in Kenya and subject to the law of Kenya is equally protected by the Kenyan law. It reads:-

**“Art.8 Everyone has the right to an effective remedy by the competent national tribunals for acts**

**violating the fundamental rights granted him by the constitution or by law.”**

**Article 17** of the **Universal Declaration of Human Rights**, like **Article 65** of the Kenyan **Constitution** guarantees the right to property – of course each of these freedoms are subject to limitations set forth in the law of each Country.

The Kenyan courts have over the years set the threshold to be satisfied by an applicant who seeks to move the court to determine whether or not his rights have been violated or are likely to be infringed. In **Anarita Karimi Njeru v A.G. 1979) KLR 154, Kneller and Hancox JA** held as follows:-

**“We would however, 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 his case) that he shall set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”**

This position was again adopted by **J. Khamoni in Cyprian Kubai v Stanley Kanyonga Mwenda (2001) KLR 264** when he said:-

**“An applicant moving the court by virtue of Sections 60, 65 and 84 of the Constitution must be precise and to the point only in relation to the section, but also to the subsection and where applicable the paragraph of the Section one of 70 to 83 allegedly contravened plus the relevant account of that contravention so that the respondent knows the nature and extent of the case to respond to enable the respondent prepare accordingly and also know the exact extent and nature of the case it is handling.”**

In sum, the applicant must show the precise complaint, the exact provision of the **Constitution** allegedly or likely to be infringed and the manner in which it has or is likely to be infringed.

The applicant’s complaint is fourfold, that they have supplied pyrethrum to the respondent and the respondent has failed to pay them; that the respondent has forcefully trespassed on the applicant’s property and taken its property forcefully and that **Section 16** and **17** of the **Pyrethrum Act** are unconstitutional in that they require all pyrethrum to be delivered to the respondent. The applicant also complains that the respondent has unlawfully terminated the lease between them. The applicant being a grower and supplier of pyrethrum, there is a contract for supply of pyrethrum created between the two parties so that if the respondent has failed to pay for the pyrethrum supplied, the applicant has recourse to the civil courts for redress. Those are private law rights that need to be litigated in private law. This also applies to the alleged termination of the lease to the land. Lease agreement gives rise to private contractual rights enforceable in ordinary civil courts.

As regards **Section 16** and **17** of the **Pyrethrum Act** being unconstitutional, for restricting the applicant from selling its pyrethrum to any other person or body, the applicant has not cited any provisions of the **Constitution** and I am not aware of any, that restricts the right of the State to regulate production, process and marketing of any commodity in Kenya. **Section 16** and **17** of the **Pyrethrum Act** provide for the orderly cultivation, marketing and processing of pyrethrum in Kenya. It should be observed that pyrethrum is a potentially dangerous chemical hence the need to control and regulate its cultivation and processing. The applicant has not demonstrated the unconstitutionality of the above cited provisions (see **Anarita** case, supra).

As observed above the relationship between the parties is founded on a contract which should be enforced under the private law realm by the applicant’s filing a civil suit for breach of contract. For all the above reasons, I uphold the preliminary objection raised by the respondent, dismiss the application and the petition with costs to the respondent.

**DATED and DELIVERED this 26<sup>th</sup> day of April, 2013.**

**R.P.V. WENDOH**  
**JUDGE**

**PRESENT:**

N/A for the petitioner

N/A for the respondent

Stephen Mwangi – Court Clerk