



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 117 OF 2011

JOASH ERIC OYWA AYIEYE.....PETITIONER
T/A PROTOCOL DOCUMENTATION SERVICES
AND
THE HON. ATTORNEY GENERAL1ST RESPONDENT
THE DIRECTOR,
CIVIL REGISTRATION DEPARTMENT2ND RESPONDENT

JUDGMENT

The Petition

1. The Petitioner JOASH ERIC OYWA trading in the name and style of Protocol Documentation Services brings this Petition alleging that his fundamental rights have been violated by the Respondents.
2. The Petition dated 14th July 201 and filed on 15th July 2011 seeks the following substantive reliefs:
 - (a) *THAT pending the hearing and determination of this Petition a conservatory order be issued directing the second Respondent and/or his or her officers to receive for processing proper applications for birth or death certificates submitted to Civil Registration Centres countrywide by the Petitioner on behalf of his clients.*
 - (b) *THAT pending the hearing and determination of this Petition a conservatory order be issued directing the second Respondent and/or his or her officers to issue the Petitioner with processed birth or death certificates for proper applications for births or deaths certificates submitted by the Petitioner on behalf of his clients.*
 - (c) *THAT a declaration be issued to declare that by submitting applications for birth or death certificates at Civil Registration Centres on behalf of his clients the Petitioner provides lawful messengerial services to persons who may not be in a position to personally submit the said applications.*
 - (d) *THAT a declaration be issued to declare that by collecting birth or death certificates from Civil Registration Centres on behalf of his clients the Petitioner provides lawful messengerial services to persons who may not be in a position to personally collect the said certificates.*
 - (e) *THAT a declaration be issued to declare that the refusal, or neglect, or failure by officers of the second Respondent herein to receive for processing applications for birth or death certificates from the Petitioner, or to issue him with processed birth or death certificates on behalf of his clients, constitute a violation of the Petitioner's right to fair administrative action under Article 47 of the Constitution of Kenya.*
 - (f) *THAT the second Respondent retracts, with similar prominence, the adverse Public Notice about Petitioner and his firm that the second Respondent placed in the Daily Nation newspaper of 10/2/2010.*
 - (g) *THAT the Government of Kenya, through the second Respondent, compensates the Petitioner for*

violation his right to Fair Administrative Action under Article 47 of the Constitution of Kenya by the Second Respondent and/or his or her officers.

(h) THAT the costs of this Petition be borne by the Respondents in any event.

3. The Petitioner states that he has been running messengerial services on behalf of different clients by charging a modest fee. His work involves collecting documents and submitting them to various registries such as the law courts, Kenya Revenue Authority and land registries. He also pays on behalf of his clients' utility and other bills.

4. The Petitioner further states that until January 2011 one of his main sources of income was to visit Civil registries headed by the 2nd Respondent with a view to applying for birth and death certificates and/or collecting processed birth and death certificates on behalf of his clients. As part of his work, the Petitioner endeavoured to support the government's efforts to improve registration of birth and deaths by publishing booklets on the subject and carrying out sensitization and awareness activities.

5. The Petitioner avers that the 2nd Respondent's officers were aware of his messengerial services but in 2006, he was arrested over allegations of impersonation but was never charged. Thereafter, after a meeting with officials of the 2nd Respondent he was allowed to continue with his work.

6. His grievances followed the publication of an article in the Daily Nation of 10th December, 2009 titled, "In birth Certificates duo's financial records get life" which publicized the Petitioner's services with regard to application for birth and death certificates.

7. In response to the article the 2nd Respondent published a notice in the Daily Nation of 10th February 2010, titled "**Public Notice on issuance of Birth Certificates and Death Certificates**" The notice advised members of the public that it did not engage the Petitioner, his company or any persons nor has it intention to engage him to process late registration of birth and or issuance of deaths certificates.

8. The notice went further to inform the public that registration of births and deaths does not operate through any agency by the Petitioner which it referred to as a brokerage firm. The Notice expressed the 2nd Respondent's intention to take legal action against any company or organisation that purports to act on its behalf in the issuance of births and deaths certificates.

9. The Petitioner complains that the 2nd Respondent's notice implied that he was a broker yet his services were merely messengerial.

10. To remedy his situation, the Petitioner complained to the Public Complaint Standing Committee (PCSC) on 12th March 2010. The PCSC wrote to the Permanent Secretary in the Ministry of State for Immigration and Registration of Persons over the Petitioner's complaint but nothing was forthcoming. Nothing has been forthcoming on this front to date.

11. He also filed a suit against the 2nd Respondent and the Permanent Secretary in the Ministry of Immigration and Registration of Persons namely, High Court (Milimani Commercial Court) Civil Case Number 5228 of 2010 in that connection but he later withdrew the suit.

12. The Petitioner further complains that he continues to receive a cold shoulder from the 2nd Respondent's officers and as a result has suffered substantial loss and damage to his business. The 2nd Respondents officers have declined to receive his applications submitted on behalf of his clients and or refused to release to him document's on behalf of his clients.

13. The Petitioner contends that his activities are lawful and in accordance with the provisions of the Births and Deaths Registration Act (Chapter 149 of the Laws of Kenya) hereinafter "the Act") and in particular Rules 5(2) and 11 of the Births and Deaths Registration Rules (hereinafter "the "the Rules") made pursuant to the Act.

14. The Petitioner contends that the refusal, neglect or failure by the officers of the 2nd Respondent to receive for processing applications for birth and death certificates from the Petitioner, or to issue him with processed birth or death certificates on behalf of his clients, offend his right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair as guaranteed by Article 47(1) of the Constitution of Kenya.

15. The Petitioner also invokes the provisions of Article 25(c) of the International Covenant on Civil and Political Rights (ICCPR) which entitles every citizen to have access, on general terms of equality, to public service in his country. Article 13(2) of the African Charter of Human and People's Rights (ACHPR) which guarantees the right of equal to the public service of a country is also invoked.

Replying Affidavit

16. A Replying Affidavit sworn by STEPHEN KOKONYA on 23rd August 2011 was filed on behalf of the Respondents in opposition to the Petition. Mr. Kokonya is a Senior Assistant Director civil Registration within the Ministry of State for Immigration and Registration of Persons.

17. Mr. Kokonya deposes that the petitioner is not authorised to offer any subsidiary or supportive services in the application or discharge of its duties mandated by the Act. In his view neither Rule 5 nor Rule 11 of the Rules provide for an intermediary to process birth and death certificates nor does the Act contemplate such services as offered by the petitioner.

18. As regards, the Notice in the Daily Nation issued by the 2nd Respondents, Mr. Kokonya states that the notice was a routine notice issued to members of the public and if any applications forwarded by the Petitioner were rejected, it is because they did not meet the requirements of the Act specifically section 11 and Rule 5 of the Rules.

19. Mr. Kokonya also asserts that there is no evidence from any person or party contemplated by the Act who has been aggrieved or whose application was rejected or denied after giving satisfactory reasons for failure to attend personally for registration.

20. Mr. Kokonya also avers that the petitioner cannot purport to violate the procedure under the Act on one hand and thereafter seek refuge under Article 47(1) of the Constitution.

Submissions

21. The Counsel for the respective parties made brief submissions which reiterated their respective pleadings. The Petitioner also relied on written submission. I have evaluated the evidence before me and now make my findings.

The Constitution

22. The issue for consideration in this matter is whether there has been a violation of Article 47(1) of the Constitution. Article 47 encompasses the right to fair administrative action and provides as follows:-

47 (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the right in clause (1) and that legislation shall –

(a) provide for the review of administrative action by a court or if appropriate an independent and impartial tribunal and

(b) promote efficient administration.

23. Under the 5th schedule, Parliament has four years to enact legislation to give effect to the provisions of Article 47(1) but notwithstanding the lack of legislation on the subject, this Court is obliged by the provisions of Article 20 and 21 to give full effect to the tenor and effect provisions of the Bill of Rights. Parliament, however, enacted the Commission on the Administrative of Justice Act. [Act No. 23 of 2011] which deals with Article 47(3) (b). The provisions of Article 47 are also underpinned by Article 232(1) on the values and principles of the public service.

24. The Petitioner's claim against the Respondents is premised on the provisions of the Act which provides a legal and administrative framework for the registration of births and deaths. Any dealing the petitioner has with the 2nd Respondent would have to be carried out within the framework provided by the statute. It is therefore necessary to determine the extent of the Petitioner's rights under the statute.

25. An issue that needs to be settled is whether in fact the matters occurring prior to the 27th August, 2010 can be subject of challenge under this Constitution. Some of the acts complained of, particularly publication of the notice in the Daily Nation occurred on 10th February 2010 before the Constitution came into force. I take the view that these acts cannot form the basis of a challenge as the Constitution is not retrospective in this respect. A litigant can only seek constitutional relief for a violation that took place after the commencement. They may, however, form the subject of challenge not in themselves, but as part of a continuing or threatened violation.

26. In this case, the inquiry shall be limited to the acts which can be considered as continuing in the sense that the Petitioner's wishes to continue business but for the continued violation of his right under Article 47 of the Constitution.

Findings

27. According to the Petitioner there is nothing in the Act that prevents the 2nd Respondent from receiving application forms for birth and death certificate from him on behalf of his clients. This issue determination turns on the interpretation of the provisions of Sections 11 and 16 of the Act and Rules.

28. Section 11 provides of the Birth and Death Registration Act.

Upon the birth of any child, the registration of whose births is compulsory, it shall be the duty of the mother and the child, and in default of the father and mother, of the occupier of the house in which to his knowledge the child is born, and of every person present at the birth, and of the person having charge of the child, to give notice of the birth, within such time as it may be from time to time prescribed, to the registrar of the registration in which the birth occurs.

Provided that, in the case of births in persons, hospitals, orphanages, barracks or quarantine status, the duty to give such notice shall be on the officer in charge of the establishment in which the birth took place.

29. The mode of registration of deaths is provided under section 16 of the Act which provides:-

16. Every person notifying a death shall, to the best of his knowledge and ability give the particulars, which shall be entered forthwith by the registrar in the register, and the person notifying the death shall certify to the correctness of the entry by signing or, if he is illiterate, by fixing her mail to the register.

30. The process of the registration is operationalised by the Rules. Rule 5(1) of the Rules which provides as follows:-

5(1) Any person whose duty it is not register a birth or death, may, on sending to the Registrar satisfactory reasons for him non attendance, apply to registrar the birth or death without personal attendance at the office of the registrar, and the registrar may register the birth or death without personal attendance of the informant, or may deter registration until the informant has attended personally.

(2) A persons registering a birth or death without personal attendance shall fill in and sign the appropriate registration form giving the particulars prescribed, which form shall be obtained from the registrar.

31. The petitioner has also relied on the provisions of Section 26 of the Act which provides for the inspection of registers and provision of copies and certificates.

Section 26(3) provides, ***“The Principal Registrar shall, on payment of a prescribed fee, furnish a certificate in prescribed form of the birth of any person completed in the prescribed manner from the records and registers in his custody”***

32. It is patently clear from the provisions of the Act, I have cited that registration of birth and deaths is to be carried out by the personal attendance, in the case of the birth, the mother and the father or the person in whose custody the birth occurred. In the case of death, the death is reported by a person with personal knowledge of the death.

33. The Act imposes obligations of specific persons to apply for registration of births and deaths and where the person is unable to be personally present the registrar is empowered to dispense with personal attendance when an application is made.

34. The petitioner in this case is not the person contemplated under Section 11 and 16 of the Act. He is not a person- whom a statutory duty is imposed by the Act. He is not authorised to present documents for registration unless the persons contemplated under Section 11 and 16 of the Act are excused from by personal attendance after giving satisfactory reasons in terms of Rule 5(1) of the Rules.

35. I have considered the depositions and I do not find any person who has sought registration and whose application has been rejected or denied after giving the registrar satisfactory reasons for failure to attend personally for registration. I also do not find any person who has been excused by the registrar from personal attendance and who has engaged the petitioner and who has had his or her application rejected.

36. I do not find a violation of Article 47(1) the Petitioner’s right in so far as the provisions of the Act have been applied by the registrar as the Petitioner is not the one seeking registration nor has he acted on behalf of a person who has sought and been granted exemption not to attend to registration personally.

37. The provisions of Section 26 of the Act allow any person to inspect the register and obtain copies of the birth or death certificate upon application and on payment of a prescribed fee. I agree with the sentiments expressed in the **Republic –vs Pattni** Nairobi Criminal Case No. 229 of 2003 (Unreported [2005] eKLR that;

“under Cap 149, the Registrar had no power to ask for reasons why a certificate of death had been applied foronce a person applied for such certificate, the Registrar was obligated to issue the certificate upon payment of prescribed fees”

In my view this is consistent with the purpose of public registers that the public is entitled to information contained in a public register.

38. What the petitioner was doing was to process registrar births, that is, act as an intermediary for purposes of effecting registration. This is not permitted by the Act at least in the manner contemplated by the Petitioner.

39. I also do not find any evidence that the petitioner as a member of the public has been denied his right to inspect the public register and obtain copies of records in accordance with the Act.

Conclusion

40. In the circumstances, I find that the Petitioner’s right under Article 47(1) of the Constitution have not

been violated. I therefore dismiss this Petition but I make no order as to costs.

DATED and **DELIVERED** at **NAIROBI** this 4th day of November, 2011.

D.S. MAJANJA
JUDGE

Mr. Okello instructed by Gad, Keter and Okello Associates Advocates for the Petitioner.

Mr. Terell instructed by the State Law Office for the Respondent.