



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

PETITION NO. 1 OF 2010

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTIONS 70, 72 91), 81 (1), AND 82 (2), & (3) OF THE CONSTITUTION OF KENYA

AND

MORAA GESICHO APPLICANT

VERSUS

ATTORNEY GENERAL RESPONDENT

RULING

The petitioner, who describes herself as a victim of the infamous post 2007 election violence and a Researcher, filed a petition under **sections 70, 72 (1) 81 (1) and 82 (2) and (3) of the Constitution of Kenya**. She sought the following prayers:

- “1. A declaration that the findings and recommendations of the Commission of Inquiry into post 2007 election violence be declared null and void.**
- 2. A declaration that the Truth, Justice and Reconciliation Commission has no basis upon which to pursue justice for the victims of post 2007 election violence.**
- 3. A declaration that a fresh inquiry be instituted.**
- 4. Any further orders as this Honourable court may consider appropriate.”**

Before the petition was heard, the respondent filed a notice of preliminary objection based on the following grounds:

- “1. That the petitioner lacks the requisite *locus standi* to initiate, maintain and urge the instant petition.**
- 2. The court lacks the necessary jurisdiction to grant the prayer sought in the petition.**
- 3. The petition does not raise any constitutional issue as envisaged by chapter V of the constitution.**
- 4. The provisions of the Commission of Inquiry Act in relation to the Commission of inquiry into post election violence were fully complied with and is now spent; the report is itself not open to challenge.**

5. There is no nexus between the implication of CIPEV report and the ongoing Truth Justice and Reconciliation Commission.

6. The petition is verbose, otiose incompetent inept and fails to satisfy the basis ingredients for bringing such petition.”

Mr. Kipkogei, learned Litigation Counsel, made submissions in support of the preliminary grounds aforesaid.

As regards the petitioner’s *locus standi* to initiate this petition, counsel argued that the petitioner had assumed the role of a representative of all the victims of the post election violence. Under **section 84** of the **Constitution**, there is no room for representative suit in such matters. He cited **NJOYA & OTHERS –VS- ATTORNEY-GENERAL & OTHERS**, [2004] 1 EA 194. He added that the petitioner had merely made general allegations without specifying whether the Commission of Inquiry into the Post Election Violence (**CIPEV**) occasioned any infringement of her constitutional rights.

Counsel further argued that the CIPEV was appointed by the President of the Republic of Kenya under the **Commissions of Inquiry Act Cap 102**. It had power to regulate its own proceedings. The Commission conducted its proceedings in accordance with the regulations that it had formulated. The petitioner did not challenge those regulations if at all she was aggrieved by the same. That could only be done while the commission was still constituted. The CIPEV has already concluded its work, handed its report and the same has already been acted upon, counsel added.

Mr. Kipkogei further submitted that there is no nexus between the CIPEV report and the Truth Justice and Reconciliation Commission (TJRC). The latter is a body corporate and it had not been made a party in these proceedings. Its creation cannot therefore be challenged in the manner as presented by the petitioner.

In reply, the petitioner, who was unrepresented, argued that the respondent ought to have filed a replying affidavit and/or grounds of opposition before raising the preliminary objections. Not having done so the preliminary objections could not lie. She cited **KOBO SAFARIS LIMITED –VS- ABOUT AFRICA LIMITED & 2 OTHERS**, HCCC NO. 681 of 1995. In that decision, Waki, J., (as he then was), cited **MUKISA BISCUIT COMPANY-VS- WEST END DISTRIBUTORS LIMITED** [1969] E.A. 696 at page 700 where it was held that:

“A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”

Regarding her *locus standi* to institute the petition, the petitioner stated that she is a law abiding Kenyan. Any citizen can invoke the provisions of **section 84 of the Constitution** when he/she feels that their constitutional rights have been or are about to be breached. She also cited **NJOYA & OTHERS – VRS- ATTORNEY-GENERAL & OTHERS** (supra) in support of her submissions. She further argued that the petition is of great public interest and novelty in our jurisprudence. In her words, it is the first time in this country that a local commission has ousted the jurisdiction of the High Court and Subordinate Courts of the country and recommended that offences committed within the jurisdiction of these courts be heard by the International Criminal Court of Justice. The petition should therefore be heard and determined on its merits rather than on technicalities.

As regards the TJRC, the petitioner argued that one of the terms of reference of the CIPEV was to make recommendations to the TJRC. However, the TJRC was not in existence when the CIPEV report was compiled and handed over to the appointing authority. The CIPEV did not therefore make any recommendations to the TJRC.

Finally, the petitioner contended that her petition was undefended because the respondent had not filed any replying affidavit or grounds of opposition.

I have considered the above submissions. I will first deal with the issue of *locus standi* because unless a party demonstrates that he or she has the necessary legal capacity to institute proceedings before a court of law, the court cannot grant any orders.

In the petition the petitioner has stated as follows:

“(B) LOCUS OF THE PETITIONER”

1 The Applicant is a citizen of Kenya and a person entitled to the enjoyment of the Fundamental Rights and Freedoms of the Individual enshrined in the Constitution of Kenya and particularly section 70, 72 (1), 81(1), and 82 (2) and (3) of the Constitution of Kenya at all material times.

2 The Applicant states that her Fundamental Rights and Freedoms were contravened and violated by the findings and recommendations of the Commissioner (sic) of Inquiry into Post Election Violence.”

Although there is an affidavit sworn by the petitioner in support of the petition, I cannot consider the same at this stage because an affidavit is not a pleading, it is evidence. In considering a preliminary objection, the court can only look at the pleadings filed. A preliminary objection cannot be determined upon consideration of the evidence on record, only the pleadings are to be considered. It is also trite law that a preliminary objection cannot be raised if any fact has to be ascertained from the available evidence. A preliminary objection is argued on the assumption that all the facts pleaded by the other side are correct. See MUKISA BISCUITS MANUFACTURING COMPANY LIMITED –VS- WEST END DISTRIBUTORS LIMITED (Supra).

At this stage the court has to assume that what the petitioner stated in her petition regarding her legal capacity to institute the petition is true.

In ALBERT RUTURI & ANOTHER –VS- THE ATTORNEY-GENERAL & ANOTHER, Civil Application No. 905 of 2001, which was cited in ONYANGO & 12 OTHERS –VS- ATTORNEY-GENERAL & 2 OTHERS [2008] 3 KLR (EP), it was held that:

“As a general rule relating to this type of public interest litigation, we wish to state, that what gives *locus standi* is a minimal personal interest and such an interest gives a person a standing even though it is quite clear that he would not be more affected than any other member of the population.”

A similar holding as above was made in NJOYA & 6 OTHERS –VS- ATTORNEY-GENERAL & ANOTHER (supra). A preliminary objection was raised challenging the court’s jurisdiction to entertain an application that sought, *inter alia*, a declaration that certain sections of the **Constitution of Kenya Review Act** were unconstitutional and ought to be struck out. It was also argued that the applicants had not shown that matters they complained of had or were likely to contravene any rights vested upon them personally. The court held, *inter alia*, that:

“The first role of the court should be to uphold constitutionalism and the sanctity of the Constitution. Such a role cannot be well performed by shutting the door of the court on the face of persons who seek to uphold the Constitution on the ground that such persons have no peculiarly personal stake in a matter which belongs to all. The applicants therefore had *Locus Standi* to challenge the compliance of the Constitution of Kenya Review Act or any provision thereof with the Constitution.”

The court went on to state that since the Applicants had stated that their Fundamental Rights had been curtailed they had sufficiently brought themselves within the court’s jurisdiction under **section 84** of the **Constitution**.

I wish to adopt the holdings in the aforesaid matters and having done so, overrule grounds 1, 2 & 3 of

the preliminary objection.

As regards grounds 4 and 5, these cannot be determined without perusing the CIPEV report to determine what its mandate was, its recommendations and whether there was any nexus between CIPEV and TJRC. This is not an exercise that can be undertaken when a court is considering a preliminary objection. At this stage, the court cannot conclude that the petition is verbose, otiose and incompetent as stated in ground No. 6.

In dealing with a matter that raises somewhat novel legal arguments as this one, even where the petitioner is unrepresented, a court of law should be slow in shutting out an applicant at the preliminary stages of the matter. It is, in my view, desirable that the court grants the applicant wide latitude to ventilate her claims so that the court can render an appropriate decision, one way or the other. This is the only way in which the court can develop constitutional jurisprudence. The court should not be restrictive in its approach to cases dealing with alleged breach of citizens' fundamental rights. If, upon hearing and evaluating all the evidence that will be laid before it, the court is of the view that the threshold of breach of a Constitutional right has not been attained, it will so find and hold. If it finds otherwise, it will equally make the appropriate declaration. I overrule all the preliminary arguments and direct that parties do proceed to fix a date for hearing of the petition. I make no orders as to costs.

DATED, SIGNED AND DELIVERED AT KISII THIS 28TH DAY OF JUNE, 2010.

D. MUSINGA

JUDGE.

28/6/2010

Before D. Musinga, J.

Mobisa – cc

Applicant present

N/A for the Respondent

Court: Ruling delivered in open court on 28th June, 2010.

D. MUSINGA

JUDGE.