



Otieno & 2 others v Coca-Cola Company Limited & 2 others; Luo Council of Elders & another (Interested Parties) (Petition 11 of 2021) [2022] KEELC 14665 (KLR) (9 November 2022) (Judgment)

Neutral citation: [2022] KEELC 14665 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
PETITION 11 OF 2021
GMA ONGONDO, J
NOVEMBER 9, 2022**

BETWEEN

**MICHAEL KOJO OTIENO 1ST PETITIONER
WALTER OKELO OPIYO 2ND PETITIONER
EVANCE OTIENO OLOO GOR 3RD PETITIONER**

AND

**COCA-COLA COMPANY LIMITED 1ST RESPONDENT
KISII BOTTLERS 2ND RESPONDENT
ALMASI BEVERAGES 3RD RESPONDENT**

AND

**LUO COUNCIL OF ELDERS INTERESTED PARTY
RAILA AMOLO ODINGA INTERESTED PARTY**

JUDGMENT

1. By a petition filed on 17th March 2021, the three petitioners acting in person, are seeking the orders infra;
 - a) A declaration that the 1st and 2nd respondents have threatened and violated the Constitution of Kenya, 2010, the Statutory Instruments Act, 2013, the Fair Administrative Action Act and Forests Act, 2016.



- b) A declaration that the ficus sycamores tree be adopted by the people of Homa Bay and as a beacon of Luo Cultural and ecological heritage as a symbol of the communities to environmental conservation, health being and benefits (sic).
 - c) An order compelling the respondents herein to bear the cost of the tree during the period of three years it was destroyed for maintenance.
 - d) Any other relief the court may deem just to grant.
2. The 2nd petitioner is represented by Migele and Company Advocates pursuant to a Notice of Appointment dated 28th January 2022 and filed herein on even date.
 3. The 1st interested party is not represented.
 4. The 2nd interested party is represented by the firm of Awele Jackson Advocates LLP, further to the Notice of Appointment dated 25th November 2021 and filed on 26th November 2021.
 5. Together with the petition, the petitioners filed an application by way of Notice of Motion dated 16th March 2021 seeking the orders infra:
 - a) Spent
 - b) That pending the inter-partes hearing and determination of the application and/or the petition herein, the honourable court be pleased to issue an order herein for the respondents to adopt the Valuation Report and to facilitate the tree planting exercise as per the Evaluation Report KFS/HB/7/VOL 1/1/208 dated 11th April 2017 and be planted before the fourth year as per the applicants' cultural norms.
 - c) That consequent to the grant of the prayers above, the honourable court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice.
 - d) That the costs of the application be provided for.
 6. The petition is anchored on the Supporting affidavit sworn on even date by Michael Kojo Otieno, the 1st petitioner herein and the accompanying documents, to wit: a copy of the visitors book signed by Raila Amolo Odinga on 2nd August 2014, a copy of letter dated 11th September 2017 on the assessment of the ornamental tree, copy of shipment waybill, copy of assessment report dated 11th April 2017, copy of letter by the Officer In-Charge of Station dated 14th February 2018, motor vehicle search dated 18th August 2020, motor vehicle search dated 16th March 2021 and copy of the standard newspaper in which the story was reported (Bundle of documents marked as Exhibit MKO-1).
 7. In brief, the petitioners' lamentation is that on or about 25th March 2017, the defendant maliciously damaged an ornamental tree of species ficus sycamorus known in Luo language as bongu, planted by the 2nd interested party. That the incident at Bunge la Wenye Nchi Grounds while a driver was reversing the vehicle belonging to the respondents KBX 385 L. That the driver promised to replace the tree only to bring a different one. That despite making several attempts to have the tree replaced, their efforts have not borne fruit.
 8. Initially, the petition and the application were lodged at Migori Environment and Land Court. On 19th October 2021, the matter was transferred to this court, upon its establishment, for hearing and determination in the spirit of Articles 6 (3) and 48 of the Constitution of Kenya, 2010.



9. It is notable that parties initially agreed to attempt to resolve this dispute by Alternative Dispute Resolution mechanisms in accordance with Articles 60 (1) (g) and 159 (2) (c) of the Constitution of Kenya, 2010 and in line with the court's directions of 16th December, 2021. However, they failed to reach an amicable settlement.
10. The 1st, 2nd and 3rd respondents through the firm of M/s Nyamurongi and Company Advocates, opposed the petition and the application by way of their 15-paragraphed Reply to Petition dated 30th November, 2021 and duly filed herein on 16th December, 2021. They also filed a Replying Affidavit sworn on 14th December, 2021 by Timothy M. Muthini, the Chief Human Resource Officer of the 3rd respondent. The respondents contend that no constitutional issues are disclosed by the instant petition. That the claim before court is for recovery of what is purportedly the assessed value of destroyed ornamental tree known as ficus sycamorus.
11. The respondents further contend that the honourable court lacks jurisdiction to issue a declaration which amounts to determination of and imposition of culture on an indeterminate category referred to in the petition as "the people of Homa Bay". That further, the 3rd respondent had offered to offset the assessed cost of procuring, planting and maintaining the damaged tree as outlined in the Assessed Value of Destroyed Ornamental Tree, being Kshs. 68,024/= in the aggregate.
12. The petition was heard by written submissions pursuant to orders of this court made on 21st February 2022.
13. The petitioners did not file submissions regarding the petition herein.
14. The respondents' counsel filed submissions dated 30th May 2022 on 31st May 2022. Counsel identified five issues for determination thus: whether the petitioners have lawful authority to agitate the petition before the court, whether any constitutional issues are disclosed by the petition, whether the court has jurisdiction to issue the declarations sought by the petitioners, whether reliefs sought can issue and whether the petition should be dismissed.
15. In discussing the issues, counsel submitted, inter alia, that the petitioners lack locus to lodge the instant petition and that the same does not disclose any constitutional issues. That the petitioners do not have any interest in the purportedly damaged tree thus, if at all, compensation were to issue, to whom would it be made? That further, no cause of action has been disclosed against the 1st and 3rd respondents. Counsel urged the court to dismiss the petition with costs to the respondents. Counsel relied on various authorities including the case of Sheikh Mohamed Nunow v Ali Ibrahim Hassan [2019] eKLR, to fortify the submissions.
16. I have anxiously studied the entire petition and application, the respondents reply to the petition and the 3rd respondent's replying affidavit as well as the parties' respective submissions. In that regard, the following issues fall for determination:
 - a) Whether the petition meets the threshold of a Constitutional Petition;
 - b) If the answer for (a) above is in the affirmative, whether the Petitioners are entitled to the remedies sought in the petition.
 - c) Who between the parties should meet the costs of the petition?
17. This court is empowered by Article 162 (2) (b) of the Constitution of Kenya, 2010 as well as Section 13 of the Environment and Land Court Act, 2015 (2011), to hear and determine Constitutional Petitions; see also United States International University v The Attorney General and 2 others [2012] eKLR.



Whether the petition meets the threshold of a Constitutional Petition

18. It is a well-developed principle that in constitutional litigation, a party that alleges violation of his or her rights must plead with reasonable precision in regard to the manner in which there has been such alleged violation. This proposition was enunciated in the case of *Anarita Karimi Njeru v The Republic* (1976-1980) KLR 1272 where the court stated thus:-

“Constitutional violations must be pleaded with a reasonable degree of precision.”

19. In essence, the court stated that the Articles of the *Constitution* which entitles rights to the Petitioner must be precisely enumerated and the claim pleaded to demonstrate such violation with the violations being particularized in a precise manner. Furthermore, the manner in which the alleged violations were committed and to what extent must be shown by way of evidence based on the pleadings.
20. The said principle was later restated by the Court of Appeal in the case of *Mumo Matemo v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR. The court went ahead to establish the standard of proof in Constitutional Petitions thus:

The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of the *Constitution* in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the *Constitution*, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the *Constitution* and the rule of law, without any particulars.

We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru (Supra)*. In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting,” without requiring remedy by the 1st respondent...”

21. In the petition before the court, the petitioners referred to Articles 3(1), 10, 11, 22, 23, 42, 43, 44, 46, 47, 50(1), 69, 70 and 258 of the *Constitution* of Kenya, 2010.
22. Notably, the petitioners’ complaints arise from the alleged damage of an ornamental tree of species ficus sycamorus known in Luo language as bongu, planted by the 2nd interested party. This incident, according to the petitioners, occurred at Bunge la Wenye Nchi Grounds in Homa Bay while a driver was reversing a motor vehicle registration number KBX 385 L, belonging to the respondents. So, how does this become a constitutional matter?
23. It is therefore, my considered view that there are no constitutional issues that warrant adjudication by this court. So, the instant petition may very well constitute an abuse of the due process of the court.



24. Where there is the alternative remedy of filing a suit in the ordinary Civil Courts, a party ought not to invoke the jurisdiction of the Constitutional Court; see *Abraham Kaisha Kanziku v Governor of Central Bank & others* [2006] eKLR.
25. Similarly, in the case of *Godfrey Paul Okutoyi & others v Habil Olaka & Another* (2018) eKLR Chacha, J on the issue of there being an alternative remedy in lieu of constitutional remedies at paragraph 65 stated:-
65. It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a court of law in the manner allowed by that particular statute or in an ordinary suit as provided by procedure. It is not every failure to act in accordance with a statutory provision or where action is taken in breach of a statutory provision that should give rise to a Constitutional petition. A party should only file a constitutional petition for redress of a breach of the *Constitution* or denial, violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure.”
26. Also, in the case of *Bernard Murage v Fine Serve Africa Ltd & others* [2015] eKLR, the Court stated:-
- “Not each and every violation of the Law must be raised before the High Court as a constitutional issue. Where there exist an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first”.
27. In view in the foregoing and looking at the Petitioners’ pleadings, the evidence as well as the submissions of the parties, it is my conserved view that the petitioners have not met the requirements of a constitutional petition. Although the petitioners have pleaded provisions of the *Constitution*, they have not demonstrated to the required standard, how their individual rights and fundamental freedoms were violated, infringed or threatened by the respondents. They have not adduced sufficient evidence to demonstrate the alleged violations.
28. Even assuming that this petition was competent, it would not pass the test of the burden of proof. Sections 107 to 110 of the *Evidence Act* Chapter 80 Laws of Kenya provide that a party who alleges must prove that allegation. The claim must be propounded on an evidentiary foundation. In saying so, I rely on the case *Leonard Otieno v Airtel Kenya Limited* [2018] where Mativo J. held that:-
- “It is fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the proposition he asserts to prove his claim. Decisions on violation of Constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivializethe *Constitution* an inevitable result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.”



Whether the Petitioner is entitled to the reliefs sought in the petition;

29. In the foregone, I am of the considered view that the petitioners have not met the threshold of a constitutional petition. Therefore, they are not entitled to the remedies sought in the petition.

Costs of the Petition

30. The proviso to Section 27(1) of the *Civil Procedure Act*, Chapter 21 Laws of Kenya provides that costs follow the event within the discretion of the court. By the character of the petition, this court would be loathe to award costs to the parties herein.

31. It is my finding that this petition lacks merit and it is hereby dismissed with no order as to costs.

32. Orders accordingly.

DATED, DELIVERED AND SIGNED AT HOMA BAY THIS 9TH DAY OF NOVEMBER, 2022.

G M A ONGONDO

JUDGE

Present

1. 1st and 3rd petitioners- present in person

2. Mr. Migele, learned counsel for the 2nd petitioner

3. Mr. M. N. Ndungu holding brief for Mr. Nyamurongi, learned counsel for the 1st, 2nd and 3rd respondents

4. Okello, Court Assistant

