



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ENVIRONMENT AND LANDS COURT

CONSTITUTIONAL PETITION NO. 18 OF 2020

COMMISSION FOR HUMAN RIGHTS AND JUSTICE...PETITIONER

VERSUS

LAND SETTLEMENT BOARD OF TRUSTEES.....1ST RESPONDENT

NATIONAL LAND COMMISSION.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

BANDARI INVESTMENT COMPANY LTD.....4TH RESPONDENT

CABINET SECRETARY.....5TH RESPONDENT

PERMANENT SECRETARY OF LANDS.....6TH RESPONDENT

RULING

1. This ruling is in respect of Notice of Motion filed by the 4th Respondent on 18/09/2020 seeking for the following orders:-

a. That this Honorable Court be pleased to strike out this petition for being otherwise an abuse of the process of the court; or

b. That this Honorable Court be pleased to stay all proceedings herein pending the hearing and determination of ELC Constitutional Petition No. 15 of 2017.

2. The Application was based on the grounds that were rehearsed in the Supporting Affidavit of Ken Tobias Odero Sungu. That the Petition is on behalf of the squatters of Nguu Tatu area who were evicted from the subject property known as Plot No. 817 (Original No. 324) Section II MN. That there exists a similar matter ELC No. 15 of 2017 between the 4th Respondent who is the plaintiff in that suit and Nguu Tatu Squatters and others. That the issue arising in ELC 15 of 2017 is on question of ownership and occupation of the suit property between Nguu Tatu squatters and the 4th Respondent. That the same issues raised herein are being litigated between the same parties with the similar facts and over the same suit property. That the Petition does not raise any Constitutional issues but civil issues and that the Petitioner does not have *locus standi* to institute this suit. The Applicant consequently filed written submissions reiterating the contents of the Supporting Affidavit.

3. The Application was opposed by the Petitioner/Respondent vide a Replying Affidavit and oral submissions in open court. The Petitioner/Respondent stated that the cause of action and prayers in ELC No. 15 of 2017 are distinct and totally different from the Petition herein and that the Petitioner is not a party to ELC No. 15 of 2017. That the Petition herein is on violation of basic human rights and fundamental freedoms as encapsulated in the Constitution. That at the time the Respondents/Applicants were given Title to the suit land, the land had already been acquired by the Petitioner therefore there was no land to be given.

4. The issues to be determined by this court are as follows:-

a. Whether this Petition offends the principles of drafting Constitutional Petitions

b. Whether this Petition is an abuse of the court's process.

c. Whether this Petition offends the provision of Section 6 of the Civil Procedure Act

d. Whether the petitioner has *locus standi* to institute this Petition

5. I will consider each of these issues in turn.

A. Whether this Petition offends the principles of drafting Constitutional Petitions

6. The petitioner in the Petition lists the following violations;

i. Article 1 on the sovereignty of the people

ii. Article 2 on the supremacy of the constitution

iii. Article 3 on the Obligation to respect, uphold and defend the constitution

iv. Article 10(1)(d) on the National values and principles of governance bind all states organs public officers state officer and all persons to promote human dignity, social justice, inclusivity, equality, human rights, no discrimination and protection of the marginalized.

v. Article 40 on the rights of every person to acquire and own property.

7. The principles of drafting Constitutional Petitions were clearly captured in the case of **Anarita Karimi Njeru v Republic [1979] eKLR**. Trevalyan J (as he then was) and Hancox J (as he then was) stated as follows:-

“We would however again stress that if a person is seeking redress from 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/her case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

8. Restated, the principles established in Anarita Karimi Njeru case require the petitioner to:-

i. Specifically set out the provisions in the Bill of Right that have been allegedly violated;

ii. Provide the particulars of the alleged violations;

iii. Provide particulars in which the Respondent has purportedly infringed the rights.

9. Lenaola J (as he then was) reiterated the principles in Anarita Karimi's case in the case of **Stephen Nyarangi Onsuma and Another vs. George Magoha & 7others (2014) eKLR** when he stated as follows:

“...this court has in the past expressed its concern about the manner in which parties coming before the court and alleging violation to constitutional rights have presented these cases. As a basic minimum, a Petition is required to cite the provisions of the constitution which have allegedly been violated, and the manner in which they have been violated and the remedy which he seeks, for the violation. In demonstrating the manner in which they have been a violation, a Petitioner should present before the court evidence of the factual basis upon which the court can make a determination whether or not there has been a violation,”

10. In this suit, the petitioner has presented an omnibus Petition. They cite Article 1, Article 2, Article 3 and Article 10 of the Constitution but does not say how a dispute of ownership of land has threatened the said provisions. The petitioner also mentions that Article 40 has been violated but has failed to evidentially and on a factual basis show how this right has been violated or threatened.

B. Whether this Petition is an abuse of the court's process.

11. ‘*Abuse of the process of court*’ is a term found in Section 3A of the Civil Procedure Act, Laws of Kenya, and declares that:

“Nothing under the Act shall limit or otherwise affect the inherent power of the Court to make such orders as may necessary for the end of justice or to prevent abuse of the process of court.”

12. This provision finds its expression in Article 159(2)(d) and (e) of the Constitution which requires the court to administer justice without undue regard to technicalities, and to promote the purpose and principle of the constitution, the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. The essential test in Article 159 (2) (d) and (e) of doing substantial justice is the avoidance of procedural technicalities. There is however no technicalities where the Constitution and the law is clear.

13. In **Bethwell Allan Omondi Okai vs. Telkom and 9 others (2013) eKLR**, the court said:

“In our view, there is considerable merit in the submission that where there is clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament that procedure should be strictly followed.”

14. The Land Act 2012, Laws of Kenya has prescribed clear procedures for seeking redress whenever a person alleged to be prejudiced by the exercise of statutory power. The Constitution is not to be used as a general substitute for litigating ordinary civil disputes.

15. In **Uhuru Muigai Kenyatta vs. Nairobi Star Publication Ltd (2013) eKLR** Lenaola J (as he then was) said;

“...where there is a remedy in civil law, a party should pursue that remedy. My mind is clear however that not every ill in society should attract a constitutional sanction. Such sanctions should be reserved for appropriate and really serious occasions. It is important to recognize that even if a case does raise a Constitutional matter, the assessment of whether the case should be heard by this court rests instead on the additional requirements that this court must be in the interest of justice and not every matter will raise a Constitutional issue worthy of attention.”

16. The test whether a Petition raises a constitutional issue was also discussed by Tuiyott J in **Four Farms Limited v. Agricultural Finance Corporation (2014) eKLR** as follows:

“...where there is a parallel remedy, Constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a general rule, there must be some feature, which at least arguably indicates that the means of least redress otherwise available would be adequate. To seek constitutional relief in the absence of such feature would be a misuse and an abuse of the court process.”

17. In my view, the petitioner herein is seeking declaratory reliefs that could have easily been sought out in the civil court. This is the epitome of abuse of the court process. That being said, is the petitioner attempting to elevate pure civil disputes and presenting them as constitutional issues against the statutory procedures provided in Civil Procedure Act? My answer is yes! The Constitution is not to be used as a general substitute for litigating ordinary civil disputes. The Petition herein is disguised as a Constitutional Petition for the redress of violation of fundamental rights when it is in fact an ordinary civil dispute for ownership of property. The Constitution should not be invoked unless the constitutionality is itself in question.

C. Whether this Petition offends the provision of Section 6 of the Civil Procedure Act

18. The Petition herein is on behalf of the squatters of Nguu Tatu area who are being evicted from the subject property known as Plot No. 817 (Original No. 324) Section II MN. There exist a similar matter ELC No. 15 of 2017 between Bandari Investment Co. Limited versus Nguu Tatu residence and 23 others. Having perused the ELC 15 of 2017 file, I have come to the conclusion that the suit property being claimed in both claims are similar. Both cases share the same fundamental issue of ownership. The 4th Respondent herein is the Petitioner in ELC 15 of 2017 and the matter was advertised severally in the daily newspaper for any person with interest in the suit property to join. The Respondents in ELC 15 of 2017 are residents of Nguu Tatu. At any time the residents of Nguu Tatu could have joined in the proceedings and make their claim in the case. I have therefore no hesitation in finding, as I hereby do, that this suit offends the provisions of Section 6 of the Civil Procedure Act. Res Sub-judice is a principle that goes to the core of rule of law as far as litigation is concerned. Any suit that runs afoul this principle has zero chances of survival.

19. In view of my findings that this Petition offends section 6 of Civil Procedure Act, I am convinced that this is an appropriate case in which to exercise the drastic power of striking out for being an abuse of the court process.

D. Whether the petitioner has locus standi to institute this Petition

20. The petitioner in this case is Commission for Human Rights and Justice. The preamble and first paragraph of the Petition are drawn as follows:-

“The humble petition of Commission of Human Rights and Justice (Whose address of service for purposes of this suit shall be care of Obara and Obara Co. Advocates, Corporate Insurance Building Treasury Square P.O Box 86875-80100, Mombasa)

1. This petition concerns the protection of fundamental economic and social rights including access and ownership of land (property) in Kenya and redress to historical land injustices and settlement citizens whose land was wrongly and unlawfully alienated, this rendering them landless and/or destitute or squatters on their own ancestral land.

2. The Petitioner is a registered non-profit organization registered under CAP 164 Laws of Kenya; its full mandate is to operate as human rights watchdog in the whole republic of Kenya. Its lobbies for the deepening and entrenchment and good governance, democratic practices, accountability, due process of law and social injustices in our society. Based in Mombasa, committed to the promotion of basic human rights and justice, and bring this petition on its own behalf and on behalf of the greater public and/or citizens of Kenya.”

21. The Applicant/4th Respondent’s bone of contention is that the Petitioner has not attached a copy of the Certificate of Incorporation and any letter from the Nguu Tatu residents authorizing the Petitioner to act on their behalf in this Petition. The starting point in discussing locus standi, in my view is Article 22 of the Constitution which is drawn as follows:-

“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.”

22. It will be seen from the above provision, that proceedings alleging a violation of the bill of rights, may be instituted by a "person". Article 260 of the Constitution, which is the interpretative section, defines "person" as follows:-

“Person” includes a company, association or other body of persons whether incorporated or unincorporated;”

23. It would seem therefore, from a reading of Article 22 and the definition provided in Article 260, that a company, association or other body of persons whether incorporated or unincorporated, may institute proceedings asserting a violation of a right in the Bill of Rights. In addition to this, Rule 4 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provides that;

“4. (1) Where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.

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

(ii) a person acting as a member of, or in the interest of, a group or class of persons;

(iii) a person acting in the public interest; or...”

24. Similarly, Section 3(3) of Trustees (Perpetual Succession) Act, CAP 164, and Laws of Kenya provides that all entities registered under this act are body corporates with the ability to sue and be sued. Section 7 goes on to state that a Certificate of Incorporation is evidence of complying with the Act.

25. Taking all the Laws into consideration, the petitioner in my view has *locus standi* to institute this suit. However the main contention is evidence of its incorporation and authority to act on behalf of the Nguu Tatu Residents. Is this a technical issue that can be rectified or a substantial issue with no remedy but to strike out the suit in its entirety? Rule 18 of The Constitution of Kenya, (Protection of Rights and Fundamental Rights) Practice and Procedure Rules, 2013 do provide for an avenue to amend.

“A party that wishes to amend its pleadings at any stage of the proceedings may do so with the leave of the Court.”

26. Rule 18 therefore creates a satisfactory solution to the above question.

27. Nonetheless, and for the reasons already given, I move to strike out the Petition. I am particularly satisfied that-

a. This Petition herein is sub-judice;

b. That this Petition offends the principles of drafting Constitutional Petitions;

c. That the Petition is otherwise an abuse of the court process.

28. For all these reasons, the Application dated 18/09/2020 is allowed and the petitioner’s Petition dated on15/07/2020 is hereby dismissed. Considering the conditions of the petitioner, I direct that each party bears its own costs.

29. It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 8TH DAY OF MARCH, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE