



**Malombo t/a OM Robinson & Company Advocates v Mbaruk & another
(Petition E061 of 2021) [2024] KEHC 7309 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 7309 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION E061 OF 2021**

OA SEWE, J

MAY 23, 2024

**IN THE MATTER OF ARTICLES 10(2), 22(1), 23(3), 47, 73,
75(1), 201, 232, 258 OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF THE LEADERSHIP AND INTEGRITY ACT, 2012

AND

IN THE MATTER OF THE PUBLIC FINANCE MANAGEMENT ACT, 2012

AND

IN THE MATTER OF THE PUBLIC SERVICE (VALUES AND PRINCIPLES) ACT, 2015

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURES RULES, 2013**

BETWEEN

**ROBINSON ONYANGO MALOMBO T/A OM ROBINSON & COMPANY
ADVOCATES PETITIONER**

AND

MARYAM MBARUK 1ST RESPONDENT

AISHA ABDI 2ND RESPONDENT

JUDGMENT

[1] The petitioner herein, Robinson Onyango Malombo t/a O.M. Malombo & Company Advocates, filed his Petition on 14th October 2021 praying for the following reliefs:



- (a) A declaration that the respondents' actions and/or omissions to pay the petitioner pursuant to the Consent Order dated 28th September, 2020 in HC JR No. 6 of 2019 is unconstitutional and violation of the petitioner's right to acquire and own property and the right to expeditious, efficient, lawful, reasonable and procedurally fair administrative action as guaranteed in Articles 40(1) and 47(1) of the Constitution, respectively.
- (b) A declaration that the respondents' refusal to pay the petitioner his legal fees and subjecting him to humiliation and giving him false promises of payment and forcing him to reveal his financial constraints is unconstitutional and a violation of his inherent dignity and the right to have that dignity respected and protected as enshrined in Article 28 of the Constitution.
- (c) A declaration that the respondents' failure to provide the petitioner and the residents of Mombasa County with the information as to how the Kshs. 705,795,000/= and Kshs. 635,215,000 released to them by the National Treasury to off-set pending bills on 11th December 2019 and 8th January 2020 is unconstitutional and a violation of his and the residents of Mombasa's right to information as enshrined in Article 35(1) of the Constitution and Section 96 of the County Governments Act, 2015.
- (d) A declaration that the respondents' failure to provide the petitioner and the residents of Mombasa County with the information as to how much it received from the Kshs. 133 Billion, Kshs. 43.5 Billion and Kshs. 345 Billion released to the County Governments by the National Treasury in the months of January 2021, June 2021 and July 2021, respectively, and how much of the said money it used to off-set pending bills, is unconstitutional and a violation of his and the residents of Mombasa's rights to information as enshrined in Article 35(1) of the Constitution and section 96 of the County Government Act.
- (e) A declaration that following the ruling and determination in High Court Judicial Review No. 06 of 2019: O.M. Robinson & Company Advocates v County Executive Committee Member of Finance (County Government of Mombasa & 3 Others) holding that the respondents' actions of disobedience to lawful order is a gross abuse of public office devoid of reason contrary to requirements of good governance and public policy and that their actions are contrary to Chapter Six of the Constitution on leadership and integrity, the Leadership and Integrity Act and their consequent verdict of guilt for contempt of court and sentence for 6 months imprisonment and/or failure to comply with the Consent Order dated 28th September 2021, the respondents are unfit to hold public office either permanently or for a specified period as the Court may deem just.
- (f) An order of *Mandamus* do issue to the respondents directing them to forthwith or within a time-frame specified by the Court, to furnish the petitioner and this Court with the following information:
 - (i) A list of all the creditors of the County Government of Mombasa between December 2019 to November 2021.
 - (ii) A list of the creditors who have been paid with the funds released by the National Treasury between December 2019 to November 2021.
 - (iii) A list of the nature of goods and/or services provided by the said creditors.
- (g) An order that the petitioner be compensation as follows:
 - (i) Special damages of Kshs. 135,810/=



- (ii) General damages for violation of the above-mentioned rights.
 - (h) The costs of the Petition be borne by the respondents
 - (i) Interest on the amount awarded at court rates.
- [2] With the leave of the Court, the petitioner filed an Amended Petition dated 28th September 2023 to take into consideration additional sums due to the petitioner. The suit was undefended as it was filed against individuals who have since left office. That notwithstanding, the burden of proof is on the petitioner to prove his case to the requisite standard. In *Wamwere & 5 Others v Attorney General* (Petition 26, 34 & 35 of 2019) Consolidated) [2023] KESC 3 (KLR) (Constitutional and Human Rights) (27 January 2023), the Supreme Court held:
- " A petitioner bore the burden to prove his/her claim of alleged threat or violation of rights and freedoms to the requisite standard of proof, which was on a balance of probabilities. Such claims were by nature civil causes. The onus of proof was on the 1st appellant to adduce sufficient evidence to demonstrate that she owned or erected or lived in the alleged properties; and that State agents interfered or deprived her of the subject properties. That was the import of section 107 of the *Evidence Act* on the burden of proof."
- [3] Hence, in connection with the burden of proof, Section 107 of the *Evidence Act*, Chapter 80 of the Laws of Kenya is explicit that:
- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."
- [4] Likewise, Section 108 of the *Evidence Act* provides that:
- The onus of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
- [5] Indeed, in *Wamwere & Others v Attorney General* (*supra*), the Supreme Court held, at paragraph 21 that:
- " ...Even in situations where a respondent did not file or tender evidence to counter the petitioner's case, the petitioner bore the burden of establishing his/her allegations on a balance of probabilities. As to whether such standard was met would depend on whether a court based on the evidence was satisfied that it was more probable that the allegation(s) in issue occurred. The 1st appellant's evidence or lack of it, for that matter, could not be the basis of a finding that it was more probable than not that her right not to be deprived of property was infringed."
- [6] The Petitioner herein has sued the 1st and 2nd Respondents in their former capacity as the CEC Finance and Chief Officer in charge of Finance in Mombasa County Government. He asserted that the two respondents violated Articles 10, 35, 40, 47, 73, 75 and 232 of the *Constitution* by refusing to settle his legal fees to the tune of Kshs. 84, 840,000/=.
- [7] A perusal of the record shows that although the two respondents were employees of the County Government of Mombasa, they have since ceased to work as such. Accordingly, Mr. Tajbhai, Advocate, (instructed by the Office of the County Attorney) who initially represented them applied for leave to



cease acting; which application was allowed on 19th July 2023. It is apparent therefore that the Petition has been brought against the wrong parties because, under Section 21(3) of the [County Governments Act](#), the statutory duty to pay is placed on the Accounting Officer. The provision states:

" (3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the [Accounting Officer](#) for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon..."

[8] The term "Accounting Officer" has been the subject of interpretation in various court decisions. For instance, in [Council of Governors & Others v The Senate Petition No. 413 of 2014](#) [2015] eKLR it was held:

(134) The Petitioners have also sought the interpretation of the term "Accounting Officer". In that regard, Article 226 of the [Constitution](#) provides;

(1) Act of Parliament shall provide for -

(a)

(b) The designation of an accounting officer in every public entity at the national and county level of government.

(2) The accounting officer of a national public entity is accountable to the national assembly for its financial management, and the accounting officer of a county public entity is accountable to the county assembly for its financial management.

Pursuant to this provision, Parliament enacted the [Public Finance Management Act](#). The appointment and designation of a County Government Accounting Officer is provided for under Section 148 of that [Act](#), as follows;

1. A County Executive Committee member for finance shall, except as otherwise provided by law, in writing designate accounting officers to be responsible for managing the finances of the county government entities as is specified in the designation.

2. Except as otherwise stated in other legislation, the person responsible for the administration of a county government entity, shall be the accounting officer responsible for managing the finances of that entity.

(135) It therefore follows that "an accounting officer" for a County Government entity is the person so appointed and designated as such by the County Executive Committee Member for Finance under Section 148 of the [Public Finance Management Act](#). Indeed, Section 148 (3) of the [Public Finance Management Act](#) mandates the County Executive Committee Member for Finance to ensure that each County government entity has an Accounting Officer as provided for under Article 226(2) of the [Constitution](#).

[9] Likewise, in [Republic v Kisii County Government Ex-Parte Peter Kaunda Nyamosi & 2 others](#) [2018] eKLR, the position taken was:

" 25. It is therefore clear that the accounting officer for the County Government is the County Executive Member for Finance. Since the order of *mandamus* was



against the County Government, I do not think that this is fatal as the order of *mandamus* remains alive and the court may issue a notice to show cause against the accounting officer, upon whom the statutory duty is imposed, to ensure that its decision is enforced (see *Consolata Kihara & 21 Others v Director of Kenya Trypanosomiasis Research Institute* [2003] KLR 582 and *Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County (Ex Parte David Mugo Mwangi)* Nbi HC Misc. App. 222 of 2016 [2018] eKLR).”

[10] The same position was taken in *Soloh Worldwide Inter-Enterprises v County Secretary Nairobi County & another* [2016] eKLR

" 17. It therefore follows that the person who has the overall financial obligation for the purposes of the affairs of a County Government must be the County Executive in Charge of Finance and unless he shows otherwise, he is the one under obligation to pay funds, in the capacity as the accounting officer. It must always be remembered that a judicial review application is neither a criminal case nor a civil suit hence the application ought to be brought against the person who is bound to comply with the orders sought therein. In an application for *mandamus* where orders are sought to compel the satisfaction of a decree against a County Government, the proper person to be a respondent ought to be the said County Executive in Charge of Finance unless he discloses that he had in fact appointed an accounting officer for that purpose...”

[11] There is no proof that either of the respondents is the County Executive Committee Member for Finance to make payments on behalf of the County Government Department. Indeed, there is no dispute that the respondents are no longer serving in the Mombasa County Government and the Petitioner has not shown any reason why he has not enjoined the current Accounting Officer or the County Government of Mombasa.

[12] It is noteworthy that the Petition before the court was amended on the 28th September 2023, yet the Petitioner did not remedy the question of joinder by either including the current Accounting Officer or including the County Government of Mombasa. This is significant because Section 133 of the *County Government Act* provides:

- (1) No act, matter or thing done or omitted to be done by—
 - (a) any member of the county government or its administration board or committee;
 - (b) any member of the county assembly;
 - (c) any member of staff or other person in the service of the county government; or
 - (d) any person acting under the direction of the county government, shall, if that act, matter or thing was done or omitted in good faith in the execution of a duty or under direction, render that member or person personally liable to any civil liability.
- (2) A person who is not exempted from liability under subsection (1) and who directs or concurs in the use of funds contrary to existing legal rules or instructions shall be accountable for any loss arising from that use and shall be required to make good the loss even if that person has ceased to hold office.



[13] From the reading of Section 133 of the *County Government Act*, it is also clear that members of the Committee or any person in the service of the county government are shielded from personal liability. See *John Rimui Waweru & 3 others v Gitunguri Constituency Ranching Co. Ltd & 5 others* [2015] eKLR where the court struck out suit against a Governor because he was shielded from personal liability by Section 133 of the *Act*.

[14] Moreover, it is imperative that the allegations in a constitutional petition be serious enough to measure up to the high standards set out in the *Constitution*. Where, for instance, there exists an alternative remedy through statutory law, such as this case, then such a remedy ought to be pursued instead. In *Patrick Mbau Karanja v Kenyatta University* [2012] eKLR Hon. Lenaola, J. (as he then was) held:

"...in *Francis Waitihaka -vs- Kenyatta University* Petition No. 633 of 2011, this Court was categorical that it is imperative that the Bill of Rights and the Constitutional interpretative mandate of this Court should not be invoked where other remedies lie. Further the Court also cited with approval, the decision in *Teitinnang -vs- Ariong* (1987) LRC (const.) 517 where it was held as follows: -

"Dealing now with the questions, can a private individual maintain an action for declaration against another private individual or individuals for breach of fundamental rights provisions of the Laws? The rights and duties of individuals, and between individual, are regulated by private laws. the *Constitution*, on the other hand, is an instrument of government. It contains rules about the government of the Country. It is my view, therefore that duties imposed by the *Constitution* under the fundamental rights provisions are owned by the government of the day, to the governed. I am of the opinion that an individual or group of individuals, as in this case, cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or group of individuals. Since no duty can be owed by an individual or group of individuals to another individual under the fundamental rights provisions of the *Constitution* no action for a declaration that there has been a breach of duty under that provision can lie or be maintained in the case before me, and I so hold".

[15] Hon. Chacha, J. was of a similar view in *Godfrey Paul Okutoyi & others v Habil Olaka & Another* [2018] eKLR. He held:

" 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."

[16] In view of the above, I find no merit in the Amended Petition dated 28th September 2023. The same is hereby dismissed with no orders as to costs granted the circumstances of the matter.

It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 23RD DAY OF MAY 2024

OLGA SEWE

JUDGE

