



REPUBLIC OF KENYA



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**Ogogoh & another v Cabinet Secretary, Ministry of Interior And Coordination
of National Government & 3 others; Kahia & 2 others (Interested Parties)
(Petition E001 of 2024) [2024] KEHC 5804 (KLR) (16 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5804 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

PETITION E001 OF 2024

OA SEWE, J

MAY 16, 2024

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 12, 14, 15, 17, 22,
23, 48, 60, 61, 62 67, 69, 159, 162, 165, 258 AND 260 OF
THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE KENYA CITIZENSHIP AND
IMMIGRATION ACT, 2011**

AND

**IN THE MATTER OF THE REGISTRATION OF PERSONS ACT,
CHAPTER 107, LAWS OF KENYA**

AND

**IN THE MATTER OF THE ILLEGAL AND FRAUDULENT
ACQUISITION OF KENYA CITIZENSHIP BY OSMAN AHMED
KAHIA AND SUBSEQUENT ACQUISITION OF PUBLIC LAND
BY KAHIA TRANSPORTERS LIMITED AND TRADE LEAD
LIMITED**

AND

**IN THE MATTER OF VIOLATION OF ARTICLES 12, 14, 15
AND 17 OF THE CONSTITUTION OF KENYA**

BETWEEN

JULIUS OGOGOH 1ST PETITIONER



COMMISSION FOR HUMAN RIGHTS AND JUSTICE 2ND PETITIONER

AND

CABINET SECRETARY, MINISTRY OF INTERIOR AND COORDINATION OF
NATIONAL GOVERNMENT 1ST RESPONDENT

PRINCIPAL REGISTRAR OF PERSONS 2ND RESPONDENT

THE ETHICS AND ANTI-CORRUPTION COMMISSION ... 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

AND

OSMAN AHMED KAHIA INTERESTED PARTY

KAHIA TRANSPORTERS LIMITED INTERESTED PARTY

TRADE LEAD LIMITED INTERESTED PARTY

RULING

- (1) Upon the filing of the Petition dated 17th January 2024, the interested parties, namely, Osman Ahmed Kahia (the 1st interested party), Kahia Transporters Limited (the 2nd interested party) and Trade Lead Limited (the 3rd interested party) filed a Notice of Preliminary Objection dated 30th January 2024 on the grounds that:
 - (a) The Petition is res judicata within the meaning of Section 7 of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya.
 - (b) The petitioner has no locus standi to institute a suit against the 1st, 2nd and 3rd interested parties in respect of the subject matter raised in the Petition.
 - (c) The Petition offends the principles set in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR.
 - (d) The Petition raises no known cause of action against the 1st, 2nd and 3rd interested parties.
- (2) Accordingly, the interested parties prayed that the Petition be declared as a wanton abuse of court process and be dismissed in limine with costs.
- (3) Directions were consequently given on 5th February 2024 that the Preliminary Objection be canvassed by way of written submissions. To that end, the interested parties filed written submissions dated 12th March 2024. They proposed only one issue for determination, namely, whether their objection is merited. They then addressed the Court on the twin issues of res judicata and locus standi. They urged for judicial restraint with regard to the petitioner's allegations against them. I will revert to those submissions shortly for their full tenor and effect.
- (4) The petitioner opposed the Preliminary Objection, basically arguing that a preliminary objection cannot be properly taken if there is any issue involving a clash of facts, requires the production of evidence or where an assessment of the testimony is needed. The petitioner relied on *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 and *Peter Mungai v Joseph Ngaba*



Kuria & Another; Leah Njeri Ndichu (Interested Party) [2022] eKLR, among other authorities. He urged the Court to dismiss the Preliminary Objection on that score.

- (5) On the merits of the application, the petitioner took the view that he has the requisite locus standi to present the Petition. He relied on Articles 22, 23 and 48 of *the Constitution* as well as the case of Mumo Matemu (supra) to support his argument that the scope of locus standi has been enlarged considerably under the 2010 Constitution, particularly by Article 3(1) which places an obligation on every person to respect, uphold and defend *the Constitution*.
- (6) I have given due consideration to the interested parties' Preliminary Objection as well as the submissions made herein in respect thereof. As was well-explicated in Mukisa Biscuits Manufacturers Ltd vs. West End Distributors Ltd (supra), a preliminary objection consists of:

“...a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.”

- (7) Accordingly, a Preliminary Objection ought not to be raised where reliance is placed on disputed facts which are yet to be proved; or where, to arrive at its determination on the preliminary points raised, the Court must embark on an inquiry to ascertain the underlying facts. Hence, the expressions of Sir Newbold, P. in the Mukisa Biscuits Case are apt. Here is what he had to say:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually raised on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

- (8) Accordingly, the Court must now determine whether the four grounds set out in the interested parties' Notice of Preliminary Objection dated 30th January 2024 have been proved, namely:
- (a) Whether the Petition is res judicata within the meaning of Section 7 of the *Civil Procedure Act*;
 - (b) Whether the petitioner has the locus standi to institute the Petition against the interested parties;
 - (c) Whether the Petition offends the principles set in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR.
 - (d) Whether the Petition raises a valid cause of action against the interested parties.

A. On Res Judicata:

- (9) There is no gainsaying that res judicata is a plea that goes to the jurisdiction of the Court, and which, if successfully raised, has the potential of disposing of the entire suit; for Section 7 of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, does provide that:

“No Court shall try any suit or issue in which the matter in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title...and has been heard and finally decided by such Court.”



- [10] In the instant matter, the interested parties provided the background facts of the matter at paragraphs 1 to 15 of their written submissions. The 1st interested party explained that he is a Kenyan citizen by birth; and that he was summoned by officers of the Directorate of Criminal Investigations to report to their offices on 22nd July 2021. He was subsequently arrested and arraigned before court on 28th July 2021. Owing to what he considered a breach of his constitutional rights, he filed Nairobi High Court Constitutional Petition No. E413 of 2021: Osman Ahmed Kahia v the Inspector General of Police & 5 Others seeking various reliefs. The Petition was heard and determined in his favour on 23rd February 2023.
- (11) The interested parties accordingly complained that a private citizen has now taken it upon himself to petition this Court contending that his rights have been violated by reason of the citizenship of the 1st interested party and the proprietary rights of the 2nd and 3rd interested parties. It was therefore the submission of the interested parties that this Petition is res judicata as the issues raised herein are the very issues that were determined in the earlier Petition. They relied on *Republic v Independent Electoral & Boundaries Commission & Another, Ex Parte Coalition for Reforms and Democracy (CORD)* [2017] eKLR, *Kennedy Mokuia Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende* [2022] eKLR and *Margaret Wanjiku Henry v Road Touch Services* [2022] eKLR, among other authorities.
- (12) It is noteworthy however that whereas the existence of the previous suit is conceded to in the Petition, it is not altogether clear whether it raised similar issues as those raised herein. Indeed, there is no indication that the petitioner herein was a party to that previous Petition. It therefore follows that, for the Court to make a determination either way, it would have to embark on an examination of the factual evidence in connection with the previous Petition to ascertain whether:
- (a) The subject matter identical in both suits.
 - (b) The parties in the suit are substantially the same.
 - (c) The subject matter is the same; and,
 - (d) Whether there is a final determination as far as the previous decision is concerned.
- (see *Bernard Mugo Ndegwa v James Nderitu Githae and 2 Others* [2010] eKLR)
- (13) It is therefore my finding that the issue of res judicata was wrongly taken by way of a preliminary objection. In this regard, I adopt the words of Hon. Ojwang, J. (as he then was) in *Oraro v Mbaja* [2005] 1 KLR 141 that:

“...The principle is abundantly clear. A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed...Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”



B. On Locus Standi:

(14) The contention by the interested parties that the petitioner has not disclosed how delay in investigations by the respondents gives him the right to petition the Court over issues that are actively under investigations. They submitted that the petitioner has not revealed to the Court the nexus between the delay of investigations and how such delay affects his social, constitutional or personal rights.

(15) I have similarly considered the various authorities relied on by the petitioner. I entirely agree with him that Article 3(1) of *the Constitution* has indeed widened the concept of locus standi considerably. Indeed, in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR the Court of Appeal held:

“(27) Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under article 10 of *the Constitution* by necessity and logic broadens access to the courts. In this broader context, this court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process...We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1st respondent had the locus stand to file the petition. Apart from this, we agree with the superior court below that the standard guide for locus standi must remain the command in article 258.”

(16) A similar position was taken in the case of *Sollo Nzuki v Salaries and Remuneration Commission & 2 others* [2019] eKLR thus:

“It is therefore clear that over time the issue of standing, particularly in public law litigation has been greatly relaxed and in our case *the Constitution* has opened the doors of the courts very wide to welcome any person who has bona fide grounds that *the Constitution* has been or is threatened with contravention to approach the court for an appropriate relief. In fact, since article 3(1) of *the Constitution* places an obligation on every person to respect, uphold and defend *the Constitution*, the invitation to approach the court for redress as long as the person holds bona fide grounds for believing that *the Constitution* is under threat ought to be welcome...”

(17) It would require proof to demonstrate bad faith and therefore there is no basis for holding that the Petition was filed for extraneous reasons. In the premises, it is my considered finding that the petitioner had the requisite locus standi to file this Petition.

C. On Specificity:

(18) It is now settled that a litigant alleging violation of constitutional rights or freedoms, must plead his case with reasonable precision. This principle was enunciated in *Anarita Karimi Njeru Case*, thus:

“...if a person is seeking redress from the 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 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.”

- (19) It is manifest from the Petition that the petitioner complied with this requirement in that he set out the names and description of the parties in Part A of the Petition; while in Parts B and C thereof, he set out the locus, jurisdiction, legal foundation and the facts in support of his Petition. At part D of the Petition, the petitioner specified the provisions of *the Constitution* alleged to have been violated and the manner of the alleged violations. I am therefore satisfied that the petitioner pleaded his case with the requisite specificity expected. Indeed, in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR the Court of Appeal expressed the view that:

“We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude *ex ante* is to miss the point.”

- [20] I am further persuaded by the view taken by Hon. Odunga, J. in *Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & Another* [2016] eKLR in connection with the requirement of specificity of pleadings. Here is what the learned Judge had to say:

“On the issue whether this Court can determine the constitutional issues raised without compliance with the requirements stipulated in *Anarita Karimi Njeru vs. Attorney General* (*supra*), it is my view that the said decision must now be read in light of the provisions of Article 22(3)(b) and (d) of *the Constitution* under which the Chief Justice is enjoined to make rules providing for the court proceedings which satisfy the criteria that formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation and that the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities. Whereas it is prudent that the applicant ought to set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed, to dismiss a petition merely because these requirements are not adhered to would in my view defeat the spirit of Article 22(3)(b) under which these proceedings may even be commenced on the basis of informal documentation...”

D. On whether the petitioner has a cause of action against the interested parties:

- (21) Needless to mention that this suit is not against the interested parties. It is against the 5 named respondents. Indeed, it is instructive that in Rule 1 of the Mutunga Rules, an interested party is defined thus:

“interested party” means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation.”



(22) It was therefore unwarranted, in my considered view, for the interested parties to seek the striking out of the Petition, granted the circumscribed nature of the role of an interested party in a suit such as this. Indeed, the Supreme Court pointed out in *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* [2014] eKLR that:

“A suit in Court is a ‘solemn’ process, “owned” solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings.”

(23) In the result, I find no merit in the interested parties’ Preliminary Objection. The same is hereby dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 16TH DAY OF MAY, 2024

OLGA SEWE

JUDGE

