Omwoyo v Attorney General & 4 others (Constitutional Petition E045 of 2023) [2024] KEHC 7511 (KLR) (13 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7511 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CONSTITUTIONAL PETITION E045 OF 2023

OA SEWE, J

JUNE 13, 2024

BETWEEN

OBED OMARI OMWOYO ..... PETITIONER

AND

HON. ATTORNEY GENERAL ..... 1ST RESPONDENT

THE CABINET SECRETARY, MINISTRY OF HEALTH ..... 2ND RESPONDENT

THE NATIONAL HOSPITAL INSURANCE FUND ..... 3RD RESPONDENT

ST PETERS ORTHOPEDIC AND SPECIALTY CENTRE ..... 4TH RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 5TH RESPONDENT

RULING

[1] This ruling is in respect of the Notice of Preliminary Objection dated 14th September 2024. The Notice was filed by the 4th respondent, St. Peters Orthopedic and Specialty Centre, seeking the striking out of the Petition dated 20th August 2023 on the following grounds:

(a) That the Petition makes no allegation of any infringement or violation of the petitioner's rights by the 4th respondent or any other party.

(b) The Petition does not set out with adequate precision the petitioner's complaint, the provisions of *the constitution* infringed and the manner in which they are alleged to be infringed as held in the case of Anarita Karimi Njeru v Republic [1979] eKLR.

(c) That the petitioner has also failed to plead any particulars of such infringement as required to meet the constitutional threshold as set out in the case of Mumo Matemu v Trusted Society of Human Rights Alliance v 5 Others [2013] eKLR.

(d) The Petition does not state in clear, concise and precise manner the correlation between the alleged infringement and the actions of the respondents (if any) as set out in the case of Manase Guyo & 260 others v Kenya Forest Services [2016] eKLR.

(e) That the Court lacks the jurisdiction to hear this matter pursuant to the doctrine of avoidance and the principle of exhaustion.

[2] In the premises, the 4th respondent prayed that the Petition be struck out not only on the ground of lack of jurisdiction, but also on the ground that it does not meet the threshold for a constitutional petition.

[3] Directions were thereafter made on 11th October 2023 that the Preliminary Objection be canvassed by way of written submissions. The parties were accordingly given timelines for purposes of compliance. As of 16th April 2024 the petitioner had neither complied nor shown interest in the prosecution of the Petition; and so it was at the instance of the 4th respondent that the matter for fixed for ruling.

[4] In its written submission dated 23rd January 2024, the 4th respondent submitted that, although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated, infringed or threatened with violation, the Article is not without limitation. It submitted that one has to show the rights said to be infringed as well as the basis of his or her grievance. To augment this assertion, the 4th respondent relied on Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others [2014] eKLR and Anarita Karimi Njeru v Republic (supra).

[5] The 4th respondent further submitted that there is no nexus between the actions complained of and the provisions cited by the petitioner. The cases of Mumo Matemu v Trusted Society of Human Rights Alliance (supra) and Manase Guyo & 260 Others v Kenya Forest Services (supra) were cited for the proposition that it is not sufficient for a petitioner to merely cite provisions of *the Constitution* or statute believed to have been infringed without more. The 4th respondent posited that it is imperative for a petitioner to also state in what manner the alleged provisions were infringed.

[6] Lastly, the 4th respondent submitted that, since there is another mechanism available to the petitioner through which the dispute can be resolved, the Petition is untenable in view of the doctrine of avoidance. Accordingly, the 4th respondent prayed for the striking out of the Petition with costs. In this regard, the 4th respondent relied on Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & 10 Others [2015] eKLR in which it was held that:

> The doctrine of constitutional avoidance requires courts to resolve disputes on a constitutional basis only when a remedy depends on *the Constitution*."

[7] Needless to emphasize that a preliminary objection must only raise issues of law. In Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696, it was held:

> ...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. 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...a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued 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] And, in the case of Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others [2015] eKLR the Supreme Court held:

> 21. The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits..."

[9] Hence, for a preliminary objection to succeed the court must be satisfied that it raises a pure point of law. It is argued on the assumption that all the facts pleaded by the other side are correct. Therefore, a preliminary objection would not lie if what is sought is the exercise of judicial discretion. Undoubtedly, the issues of specificity and the doctrine of avoidance are both capable of disposing of the Petition in limine and therefore are proper subjects to raise as preliminary points. My considered view on the two issues is as follows:

A. On specificity:

[10] In the case of Anarita Karimi Njeru v Republic [1979] eKLR, it was held:

> ...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."

[11] The principle was affirmed by the Court of Appeal in the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR as hereunder:

> (42) ...the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle under section 1A and 1B of the *Civil Procedure Act* (Cap 21) and section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:
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> > "The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing."

[12] A perusal of the Petition dated 20th August 2023 confirms that the petitioner set out the legal foundation of the Petition at paragraphs 1 to 15. He then set out the facts in support of the Petition as well as the alleged violations in the ensuing paragraphs. That the 4th respondent is a key participant in the Petition is explicit in those paragraphs. In particular, at paragraph 16 the petitioner explicitly alleged contravention of Article 35 by the parties; and therefore, on the face of it, it cannot be validly argued that the Petition does not meet the requisite threshold.

[13] Indeed, Rule 10(3) and (4) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, recognizes that:

> (3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.
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> (4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court."

[14] Accordingly, I fully endorse the expressions of Hon. Odunga, J. (as he then was) in Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & Another [2016] eKLR that:

> 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..."

[15] Indeed, in Mumo Matemu v Trusted Society of Human Rights Alliance [2013] eKLR, the Court of Appeal pointed out 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."

[16] In this respect, the Court of Appeal reiterated the viewpoint taken by a 3-judge bench of the High Court in Trusted Society of Human Rights Alliance v Attorney General & 2 Others [2012] eKLR in which it was held that:

> We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication: a person claiming constitutional infringement must give sufficient notice of the violation to allow her adversary to adequately prepare her

case and to save the Court from embarrassment of adjudicating on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are so insubstantial and so attenuated that a Court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the respondents in a constitutional petition are fashioned in a way that gives proper notice to the respondents about the nature of the claims being made so that they can adequately prepare their case..."

[17] Thus, it is my considered finding that the Petition is indeed compliant as to specificity.

B. On the doctrine of avoidance:

[18] The doctrine of avoidance was well-discussed by the Supreme Court in Petition 14, 14A, 14B & 14C of 2014 (Consolidated) Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR (29th September 2014) (Judgment) thus:

(256) The appellants in this case are seeking to invoke the "principle of avoidance", also known as "constitutional avoidance". The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v. Mhlungu, 1995 (3) SA 867 (CC) the Constitutional CourtKentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

"I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."

(257) Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936)).

(258) From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd respondents' claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright- infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court..."

[19] In the case of K K B v S C M & 5 others (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR) (22 April 2022) (Ruling), Hon. Mativo, J. (as he then was) also expressed himself on the doctrine as hereunder:

In summation, the doctrines of ripeness and constitutional avoidance shun to deal with a constitutional issue where there exists another legal course which can give the litigant the relief he seeks. In other words, a constitutional issue is not ripe for determination until the determination of the constitutional issue is the only course that can give the litigant the remedy he seeks. Both constitutional avoidance and ripeness avert the determination of the constitutional issues until it becomes very necessary to the extent that it is the only course available to assist the litigant's cause..."

[20] Further in the case of *Faraj & 3 others v Police & 2 others (Constitutional Petition 165 of 2020)* [2022] KEHC 287 (KLR) (27 April 2022) (Judgment) Hon. Mativo, J. (as he then was) indicated:

> 27. The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved. In that regard, the Supreme Court stated in Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others (at para 256) that the principle of avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis.
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> ...
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> 29. The doctrine of ripeness and constitutional avoidance gives credence to the concept that *the Constitution* does not operate in a vacuum or isolation. It has to be interpreted and applied in conjunction with applicable legislation together with other available legal remedies. Where there are alternative remedies the preferred route is to apply such remedies before resorting to *the Constitution*. The possibility of the elevation of any dispute to a constitutional issue is what is sought to be averted by the doctrines of ripeness and constitutional avoidance. It is borne out of a realisation that all legislative or common-law remedies are part of the legal system..."

[21] Since it did not fall within the ambit of the Preliminary Objection for the Court to inquire into the factual details as to whether the prerequisites to Article 35 were complied with, the 4th Respondent's argument that the petitioner has not shown that he sought any information from them or that access was denied are premature. It is also irrelevant at this point for the 4th respondent to argue that the petitioner has not proved that the Centre is required by law to disclose information to the public about its operations.

[22] Needless to mention that the doctrine of constitutional avoidance does not divest this Court of the jurisdiction to hear and determine Constitutional Petitions. The doctrine only restrains the court from hearing and determining a matter where there exists another appropriate forum that can hear and determine the matter effectively. In this regard, Article 165(3)(b) of the Constitution is explicit that:

> Subject to clause (5), the High Court shall have—
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> (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;"

[23] Moreover, Sub-article (3)(d) adds that the High Court has jurisdiction:

> (d) ...to hear any question respecting the interpretation of this Constitution including the determination of—
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> (i) the question whether any law is inconsistent with or in contravention of this Constitution;
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> (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
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> (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and *Constitution of Kenya, 2010*"

[24] The Petition seeks declaratory orders for purposes of enforcing the constitutional rights of access to information under Article 35 as well as enforcement of socio-economic rights under Article 43. Prima facie, these are grievances that can only be enforced by way of a constitutional petition. Since no suggestion was proffered by the 4th respondent as to any other alternative way of realizing the rights it is plain to me that the doctrine of constitutional avoidance is not applicable to the circumstances of this Petition.

[25] In the premises, it is my finding that the 4th Respondent's Notice of Preliminary Objection dated 14th September 2023 lacks merit and it is hereby dismissed with an order that the costs thereof be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 13TH DAY OF JUNE 2024

OLGA SEWE

JUDGE