



**Kitur v Center & 2 others (Petition E011 of 2023)
[2024] KEHC 14806 (KLR) (4 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 14806 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PETITION E011 OF 2023
JRA WANANDA, J
OCTOBER 4, 2024**

BETWEEN

GIDEON KIBITOK KITUR PETITIONER

AND

NURU WELLNESS CENTER 1ST RESPONDENT

STEPHEN KIBITOK 2ND RESPONDENT

TERESA MAGUT 3RD RESPONDENT

JUDGMENT

1. The Petitioner is an 82 years old Senior citizen. In this Constitutional Petition, he has sued his own 2 children for allegedly abducting and/or arranging for the same, and having him detained at the 1st Respondent rehabilitation institution on the allegation that he is mentally challenged and/or a chronic alcoholic and therefore, a threat to his wife.
2. He has filed the Petition dated 26/07/2023 through Messrs Songok & Co. Advocates and seeks orders as follows;
 - a. A declaration that the wrongful detention at the 1st Respondent’s premises was unlawful.
 - b. A declaration that the Petitioners’ rights to liberty were violated.
 - c. A declaration that the Petitioner is entitled to compensation for the Respondents.
 - d. Special damages as per paragraph 8 of the Petition.
 - e. General damages for forcefully detaining, kidnapping, assaulting and causing the Plaintiff grievous harm.
 - f. Costs and interests of this Petition and or suit.



- g. Any other relief that the court deems fit to grant.
3. The Petition is supported by the Affidavit sworn by the Petitioner in which he deponed that on 19/07/2023, at around 1900 hours, the 2nd and 3rd Respondents, in the company of unknown thugs, forcefully entered into his homestead at Cheptil in Nandi County and kidnapped him, assaulted him, bundled him into a motor vehicle and took him to the 1st Respondent's institution where they admitted him without his consent while alleging that he was mentally ill. He deponed that upon inquiry from the management of the 1st Respondent and intervention by his relatives, it was alleged by the 1st Respondent's management that they were informed that the Petitioner had mental issues and that he had troubled his wife and that the 1st Respondent had clear instructions from the 2nd and 3rd Respondents, and one Joseph Bittok, that the Petitioner should not be released without their authority. He deponed that the 2nd and 3rd Respondents and the said Joseph Bittok are his biological children and that their action is an overreaction since if there were any differences between the Petitioner and his wife, the same should be sorted through the justice system and not by detention of the Petitioner at a rehabilitation institution.
 4. He deponed further that upon further inquiry for the outrageous allegation of ill-health, the 1st Respondent's manager (one Sylvester) brought a psychiatrist who examined the Petitioner and determined that he was mentally stable but that the said manager declined to share the medical Report with the Petitioner stating that he could only release the same through a Court order. He deponed further that his relatives then arranged for him to be examined by an independent government medic who prepared and supplied a medical Report, that the relatives had also reported the matter to the Yamumbi police post and that despite demands for the Petitioner to be released, the Respondents have declined to do so. He deponed that he continues to suffer mental anguish for being forcefully detained and being held incommunicado and that the Respondents have committed illegalities whose particulars he listed as forcefully detaining, kidnapping and assaulting him and causing him grievous harm, denying him access to medication, violently robbing him of his belongings including Kshs 3,500/-, forcefully detaining and denying him his rights to movement and liberty, failing to provide legal or medical grounds for forcefully detaining him and falsifying medical reports that the Petitioner was mentally ill, and using criminal allegations that the Petitioner had differences with his wife to detain him. He also accused the 2nd Respondent of declining to refund to him a friendly loan of Kshs 300,000/- advanced to him by the Petitioner and hiring thugs to kidnap the Petitioner.
 5. On 27/11/2023, Messrs Tunoi & Co. Advocates filed a Notice of Appointment indicating that they had come on record for the Respondents. On 28/11/2023, Mr. Tunoi, Counsel from the said law firm, attended Court and stated that the Petitioner had since been released from the 1st Respondent institution. Upon Mr. Tunoi's request, I granted him 14 days to file a Response. When he appeared in Court on 7/11/2023, he stated that he had indeed filed a Replying Affidavit. The same not being in the Court file, I directed him to supply a copy before the next Court attendance.
 6. Further, the Counsels for the respective parties, Mr. Songok and Mr. Tanui, then agreed, by consent, that the hearing of this case be conducted by way of a viva voce trial. In the circumstances, since on his part, the Petitioner's Counsel had already earlier filed his Witness Statements and List of documents, I gave the Respondent's Counsel leave and timelines to also file and serve his pleadings and I then fixed the case for hearing on 22/02/2024. However, by the that date, no Witness Summons or List of documents had been filed on behalf of the Respondents and the Replying Affidavit alleged to have been filed had also not been supplied. Further, neither the Respondents nor their Counsel attended Court. The hearing therefore proceeded ex parte, with only the Petitioner.



7. The Petitioner testified as PW1. He adopted his Witness Statement and reiterated the matters already recited from his Supporting Affidavit above. He reiterated that he was forcefully abducted and detained without cause and recounted the violent manner in which he was abducted during which he suffered physical injuries. He stated that he was detained at the 1st Respondent institution for 5 days and that it is the police who had him released. He reiterated that one of the Respondents had refused to refund him a debt of Kshs 300,000/- and that the other one lives in the United States of America and has been pressurizing the Petitioner to allocate him land and also that the son had built a house on the Petitioner's land. He also produced exhibits which included a medical Report, demand letter, photographs of the Petitioner and also of the 1st Respondent institution, and a copy of his National Identity Card.
8. PW2 was one Isaac Misoi who described himself as a clinical officer at the Moi Teaching and Referral Hospital. He produced his medical Report dated 25/07/0223 and testified that he was examined the Petitioner and determined that he had a painful leg and swollen left finger, that he also conducted a mental assessment and determined that all the Petitioner's faculties were normal. He stated that he examined the Petitioner at the 1st Respondent institution whose director informed him that he had detained the Petitioner for chronic alcoholism.
9. The Petitioner then closed his case and the Respondents being absent, the trial was concluded. Although I granted leave to the parties to file closing written Submissions, I have not come across any such Submissions filed by either.

Determination

10. This is an unfortunate case considering that, as aforesaid, it a claim by an 82 years old Senior citizen accusing his own sons of allegedly abducting him and detaining him in a rehabilitation centre on grounds that he is mentally challenged and/or an alcoholic, grounds which the Petitioner vehemently denies. This case is an embarrassment to the family. Ideally, it is one of those family disputes that ought to have been quietly deliberated upon within the family setting and amicably settled therein. The family should not have allowed such kind of case to have progressed up to the Courts. Whatever the outcome, a case of this nature irreparably "poisons" and harms the family bond leaving little hope for any reconciliation. The family should have considered to have it settled under Mediation or Alternative Justice System (AJS). Be that as it may, since the case is already here, I am called upon to determine it, which I proceed to do.
11. In my view, the issue that arises for determination herein is "whether the Petitioner is entitled to the declaratory orders and damages sought in his Constitutional Petition".
12. It has been well settled over time that it is a requirement that a Constitutional Petition must set out with a degree of precision the Petitioner's complaint, the provisions infringed and the manner in which they are alleged to be or to have been infringed.
13. The said principle was enunciated in the leading case in these matters, namely, Anarita Karimi Njeru -vs- The Republic (1979) eKLR. The same has been restated in numerous cases, most notably, in the Court of Appeal case of Mumo Matemo -vs- Trusted Society of Human Rights Alliance & 5 others (2013) eKLR in which the following was stated:
 - (39) The issue was raised that the 1st respondent had omitted to frame their case or complaint with precision as required under the High Court's pronouncement in Anarita Karimi Njeru v The Republic (1976-1980) KLR 1272. Counsel for the appellant submitted that the petition failed the requirement as it did not state the alleged constitutional provisions violated and the acts



or omissions complained of with reasonable precision. Apart from citing omnibus provisions of *the Constitution*, the petition provided neither particulars of the alleged complaints, the manner of alleged infringements or the jurisdictional basis of the action before the court. He maintained that such failure to draft the petition with precision had prejudiced the appellant and the other respondents.

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(44) 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.”

14. Further at paragraph 87(3) in the same Judgment, the Court stated as follows:

“It is our finding that the Petition before the High Court was not pleaded with precision as required in Constitutional Petitions. Having reviewed the Petition and supporting affidavit we have concluded, that they did not provide adequate particulars of the claims relating to the alleged violations of *the Constitution* of Kenya and the *Ethics and Anti-corruption Commission Act*, 2011, accordingly the Petition did not meet the standard enunciated in the Anarita Karimi Njeru case.”

15. In the instant case, it is evident that the Petitioner has not disclosed the Constitutional provisions that he alleges were infringed or violated. Save for the Articles of *the Constitution* cited in the title, there is no demonstration or elaboration on how the cited provisions of *the Constitution* were infringed upon, or the particulars pertaining to the actions that amounted to violation of each. In fact, the manner in which the Petition has been drafted makes it look more like a Complaint filed in the ordinary suit. Throughout the Petition and even in the Affidavit sworn, there are no provisions of *the Constitution* cross-referenced whatsoever and it appears that the Petitioner has left it to the Court to speculate and decide which provisions were violated by which specific acts of the Respondents. This, the Court cannot do for the Petitioner.

16. In the premises, my finding is that the Petition herein has failed to pass the threshold test insofar as it fails to link the infringement alleged, to the specific provision of *the Constitution* involved, to any degree of precision. Consequently, the Court cannot consider the declaratory orders and damages sought in the Petition.

17. Further, my view is also that this case is an ordinary suit disguised as a Constitutional matter. The case appears to be simply a claim for damages for the tort of wrongful detention or false imprisonment or illegal confinement and perhaps, assault, allegedly committed by the Respondents. This position attracts consideration of the doctrine of “constitutional avoidance” in regard to which the Supreme Court, in the case of Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others Pet. 14A, 14B & 14C of 2014 of [2014] eKLR stated as follows:

[105]. We shall now turn to the Constitutional-Avoidance Doctrine. The doctrine is at times referred to as the Constitutional-Avoidance Rule. Black’s Law Dictionary, 10th Edition at page 377 defines it as:

“The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion”



18. On the same issue, in the case of KKB v SCM & 5 others (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR) (22 April 2022) (Ruling), Mativo J (as he then was), remarked as follows:

32. 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. In the South African case of *S v Mhlungu* (supra) Kentridge AJ, stated in the dissenting opinion respecting the principle of avoidance (at paragraph 59), that he would lay 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. And in *Ashwander v Tennessee Valley Authority*²⁰ the U.S. Supreme Court 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. Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of rights.²¹ Currie and de Waal²² opine that the principle of constitutional avoidance is of crucial importance in the application of the Bill of Rights.

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33..... It is the fact that every legal dispute is capable of either direct or indirect application of the Bill of Rights. Every dispute is essentially a constitutional issue when one looks at it. This arises necessarily because of the principle of constitutional supremacy.²³ One needs to be aware however of the singleness of the legal system. This is embodied in the fact that the supremacy of/ *the Constitution* does not detract from the usefulness of the rest of the body of law. In essence all other laws give full expression to the ideals of *the Constitution* until found to be inconsistent to it.

.....

34. 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.

.....

36. 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. The exceptions to the application of the doctrine of constitutional avoidance are: -

- i. where the constitutional violation is so clear and of direct relevance to the matter,
- ii. in the absence of an apparent alternative form of ordinary relief and
- iii. where it is found that it would be a waste of effort to seek a non-constitutional resolution of the dispute.²⁵

37. A reading of the issues presented in this Petition leave no doubt that the Petitioner's grievance if any can effectively be addressed in a matrimonial suit. The court handling the matrimonial case will be better suited to determine whether or not there was a valid marriage. The court will weigh the veracity or otherwise of the diametrically opposed positions presented by the parties. To me, this is a proper and fit case for this court to invoke the doctrine of constitutional avoidance and decline to entertain the matter as I hereby do.
38. Closely tied to the doctrine of constitutional avoidance and ripeness is the question whether this Petition raises a constitutional question. I have severally in my decisions including some cited in this case stated that a constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.²⁶ When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider Constitutional rights or values.²⁷:-
.....
39. Courts abhor the practice of constitutionalizing every dispute. Flowing from the issues discussed above, the 1st and 2nd Respondent's objection succeeds and on this ground the Petitioners Petition is dismissed with no orders as to costs. Having so found, I find no reason to address the application for conservatory orders."
19. Similarly, in the case of Uhuru Muigai Kenyatta vs Nairobi Star Publication Limited (2013) eKLR, Lenaola J (as he then was) stated as follows:
- "Where there is a remedy in civil law, a party should pursue that remedy and I say so well aware of the decision of Haco Industries where the converse may have been expressed as the position. My mind is clear however that not every ill in the society should attract a constitutional sanction as stated in AG v Dutambala Criminal Appeal No 37 of 1991 (Tanzania Court of Appeal) such sanctions should be reserved for appropriate and really serious occasions ..."
20. Further in John Harun Mwau v Peter Gastrow & 3 others (2014) eKLR, it was stated that:
- "Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if the remedy is available to an applicant under some other legislative provision or some other basis, whether legal or factual, a court will usually decline to determine whether in addition to breach of the other declaration of rights ... It is established practice where a matter can be disposed without recourse to the Constitution, constitution should not be invoked at all ..."



21. There is also the decision of L. Mugambi J in the case of *Anyango v Attorney General & 2 others (Petition 034 of 2021)* [2024] KEHC 254 (KLR) (Constitutional and Human Rights) (25 January 2024) (Judgment), in which he held as follows:

44. In the instant petition, this court considers the allegations raised heavily lie in the tort of false imprisonment and malicious prosecution. The petitioner's cause of action could have adequately been remedied by conventional torts law not as a constitutional grievance. I find the words of the Court of Appeal in *James Kanyiita Nderitu v Attorney General and the Director of Public Prosecution* (2019) eKLR relevant in this matter. The court in dismissing a similar matter stated: "...

"As we have stated above, the remedy for the appellant was to institute a suit for malicious prosecution. He has failed to do so and a constitutional petition cannot be used to circumvent primary legislation for enforcement of a given right or violation. It is not open to the appellant to urge that there can be no wrong without a remedy. Indeed, this legal principle is correct; the appellant had a remedy in the tort of malicious prosecution or an action for defamation, he has chosen not to pursue the causes of action within the legal time frame..."

22. Applying the above principles to the facts of this case, my view of the Petitioner's case is that the issues raised in the Petition do not raise constitutional issues that can only be determined in a Constitutional Petition. It is trite that in determining whether an argument raises a constitutional issue, the Court is not strictly concerned with whether the argument will be successful, but the question is whether the argument forces the Court to consider constitutional rights or values. Constitutional Courts must be cautious to ensure that their mandate is not abused or trivialized and that the mere allegation that a human right or fundamental freedom has been or is likely to be contravened is not by itself sufficient to entitle an applicant to invoke the jurisdiction of a Constitutional Court especially if it is made for the purpose of avoiding applying the normal judicial remedy.

23. It is also an accepted principle of constitutional law that the Courts will not consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to a claimant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights. Courts have consistently rejected cases that are disguisedly instituted as constitutional disputes when in reality they are not. I find this to be one such case disguisedly instituted as a constitutional dispute. Upon considering the matters raised herein, I am convinced that the Petitioner's claim should have been pursued as an ordinary civil suit before the Civil Division of the High Court. The claim is a pure case of a tort upon which compensation by way of damages is what has been sought. For this reason, I decline to entertain this Petition.

Final Orders

24. In light of the above, the Petition is struck out with no order on costs as the Respondents never filed any Response thereto nor participate at the trial.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 4TH DAY OF OCTOBER 2024

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WANANDA J. ANURO

JUDGE



Delivered in the presence of:

Ms Luserya h/b for Songok for Petitioner

N/A for Respondents

Court Assistant: Brian Kimathi

