



REPUBLIC OF KENYA



Khaoya v Wangamati (Petition 4 of 2022) [2023] KEHC 2124 (KLR) (21 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2124 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA**

PETITION 4 OF 2022

DK KEMEL, J

MARCH 21, 2023

BETWEEN

JOHN WEKESA KHAOYA (THE C.E.O CENTRE FOR HUMAN RIGHTS ORGANIZATION) PETITIONER

AND

HIS EX. THE GOVERNOR BUNGOMA COUNTY HON. W.W WANGAMATI RESPONDENT

JUDGMENT

1. This judgement determines the constitutional petition dated June 13, 2022 and filed in Court on June 14, 2022.
2. The Petitioner, the CEO Centre for Human Rights Organization, on behalf of the Bungoma County general public interest approached this Honourable Court seeking the following orders:
 - i. This Honourable Court be pleased to grant orders compelling the Respondent, the accounting officer, to release public land inventory report dated July 2019 and update the general public of Bungoma County on the same.
 - ii. Costs be in the cause.
3. The Petition was accompanied by an affidavit in support sworn by the Petitioner herein on June 13, 2022. He averred that he is a Kenyan citizen of sound mind and an adult, and that the proceedings before this Court were commenced on behalf of the people of Bungoma County under the orders issued to him on 20th May 2022.
4. He averred that on or about February 18, 2019, the Respondent herein established a taskforce committee of 11 members on land inventory and to run the exercise for a period of 90-100 days and give a report to the Governor



5. He averred that the exercise was conducted up to June 2019 and the report was handed over to the Respondent but the same is yet to be updated for purposes of information for the general public of Bungoma County.
6. He averred that about one month to the general elections, the Respondent and the accounting officer failed to upload the same for recommendations and implementation of it thus violating Chapter 6 of the *Constitution of Kenya, 2010* pursuant to mandatory social accountability.
7. He averred that he wished this Court be pleased to compel the Respondent to produce the report in Court for updating the general public in Bungoma County.
8. On 23rd December 2021, the Petitioner filed a supplementary affidavit dated 23rd December 2021 where he averred that he was commencing this Court proceeding on his own behalf and that of the people of general public interest in Bungoma County under Article 22(1)(3)(c) and (4) of the *Constitution of Kenya, 2010*.
9. He alleged that on and/or about February 18, 2019 the Respondent herein established a taskforce committee of 11 members to inquire into the illegal acquisition of public land in Bungoma County under Hon. Lawrence Sifuna the Chairperson, Linet Chemos Chemtai vice chairperson and Henry Bramwel Wakwabubi secretary. The members of the taskforce were: George Nyeli Khasabuli; Kystansus Dabani Wosianju, Jonathan Lusaka, Alfred Simiyu Wangila, Josphine Lusweti, Ednah Olekete, Ruth Nekesa and Wycliffe Wamalwa.
10. He averred that the taskforce was mandated to establish and update the County on land inventory on classes of land issues of: markets/town/urban centres, cooperative societies, playing grounds/stadiums, recreational parks, cattle dips, cattle salt licks/bilongo, bull camps, water springs/water points, administrative centres/chiefs offices, ECDEs/schools, shrines/sacred places, social amenities, factories/industries, churches/mosques and health facilities.
11. He averred that the taskforce exercise was to be done in three phases as from 18th February 2019 within 60 days. The said exercise proceeded up to July 2019, and that the report was handed to the Respondent with no updates to the general public of Bungoma County, two years down the lane.
12. He averred that it was seven months to the general elections 2022 with no response from the Respondent thus violating Chapter Six of the *Constitution of Kenya*.
13. He averred that he wished this Court be pleased to compel the Respondent to produce the report in Court for updating the general public in Bungoma County.
14. In response to the Petition, the Respondent filed a replying affidavit dated February 10, 2022. It averred that the purported Petition lacks merit and ought to be dismissed with costs as the same is bad in law, frivolous, unmerited and an abuse of Court process.
15. It was averred that the document purported to be a Petition was not a constitutional petition and that the prayers sought were not clear as they were vague, fictitious and an abuse of the Court process.
16. It was averred that the Petitioner had not stated clearly the specific taskforce report that he is seeking the Court to compel the Respondent to avail to him and that he never requested the same from the Respondent and was denied access to the same.
17. It was further averred that the Petitioner failed to disclose any valid reasons and grounds of the Petition and that he failed to disclose material facts that he had sought the said taskforce report from the Respondent but was denied access.



18. It was averred that what was presented before this Court was a mere statement of wish by the Petitioner without sufficient reasons and therefore cannot be used to seek intervention of this Honourable Court.
19. In response to the Respondent's replying affidavit, the Petitioner filed a replying affidavit dated February 24, 2022, averring that the Respondent's replying affidavit as sworn by Mr. Allan Wafula Chenane lacked merit as he had no locus standi to swear with the purported authorization of the County Attorney as no form of authority letter was filed in Court and/or attached to the purported replying affidavit.
20. It was averred that the purported chief of staff swearing the replying affidavit was not attached to the office of the County Attorney, the chief officer lands and/or the CEC of Lands of Bungoma County.
21. He averred that it was prudent and in the interest of justice that Article 35 of the *Constitution of Kenya* be observed and that the Respondent files the taskforce report updated to the general public of Bungoma County pursuant to Article 1, 2, 3(1) of the *Constitution*.
22. The Petition was canvassed by way of written submissions. Both parties filed and exchanged their submissions.
23. Vide submissions dated 13th June 2022 and filed in Court on 14 June 2022, the Petitioner submitted that this being a public interest Petition, this Court is bound to independently analyze, evaluate and assess the Petition presented and arrive at an independent conclusion and finding.
24. It was submitted that the Respondent be compelled to avail the report on Bungoma County public land inventory report as a mandatory social accountability demand. The Respondent being the accounting officer of the report violated Chapter 6 of the *Constitution of Kenya, 2010*, Article 75 and Article 73.
25. It was submitted that the taskforce public land inventory report by the chairman taskforce committee and the interested party was sufficient to sustain a report update by the Respondent for accountability to the public for decision, actions and commitment in service to the people. He urged this Court to compel the Respondent to release the same to the general public of Bungoma.
26. The Respondent vide submissions dated July 27, 2022 and subsequently filed on even date, submitted that the Petition before this Honourable Court is fanciful and a waste of Court's time as no evidence had been submitted to corroborate the allegations made. The petition before this Court failed to communicate the explicit rights the Respondent infringed and the remedy the Petitioner seeks from this Court. Counsel relied on the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice & Procedure Rules, 2013* at Section 10 and the cases of *Trust Bank Limited vs H.S. Amin & Company Ltd & Another* (2000) eKLR; *Brite Prints (K) Ltd vs Attorney General* HCC No. 1096 of 2000 and *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR.
27. It was submitted that on a balance of probabilities, the Petitioner's case is fanciful as he failed to provide evidence to support any allegations he made.
28. It was submitted that the allegations as captured by the Petitioner, in his supporting affidavit that a task force which existence they denied as no documentation had been brought to demonstrate the promulgation of any such task force and the requisite appointment of the members to the alleged committee, the terms of reference of the alleged committee or any witnesses who can corroborate the existence of any such committee. Counsel further submitted that the principle in law is that he who alleges must prove and relied on the cases of *Miller vs Minister of Pension* (1947) ALL ER 373 and *H. Col Peter Ngari Kagume & Others vs Attorney General* (2016) eKLR.



29. It was submitted that the Petitioner has not adduced any evidence to support any of the allegations made and that no such taskforce was ever constituted by the Respondent. Counsel urged this Court to dismiss the Petition as the same is incompetent, lacks merit and an abuse of the due process.
30. Having set out the respective pleadings, replies and submissions of the parties, this Court takes the view that the following are the issue for determination in this matter:
- i. Does the court have jurisdiction to hear the petition?
 - ii. Whether the petitioner’s petition has met the threshold of proof.
31. As regards the first issue, jurisdiction is the first issue this Court should deal with, for without it, the entire process and the resulting orders will be a nullity. As was stated by Nyarangi JA in the *Owners of Motor Vessel “Lillian S” v Caltex Oil Kenya Limited* (1989) KLR 1 that: -
- “Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
32. Ojwang J (as he then was) also stated in Misc Application No 639 of 2005 Boniface Waweru Mbiyu v Mary Njeri & another that: -
- “The entry point into any court proceeding is jurisdiction. If a court lacking jurisdiction to hear and determine a matter overlooks that fact and determines the matter, its decision will have no legal quality and will be a nullity. Jurisdiction is the first test in the legal authority of a court or tribunal, and its absence disqualifies the court or tribunal from determining the question.”
33. It is not in doubt that the High Court is the right forum for cases challenging the constitutionality of actions done under the authority of the *Constitution*. Article 165 of the *Constitution* provides that:
- 165(3) subject to clause (5), the High Court shall have—
- (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - (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.
34. Based on the above provision of the *Constitution*, i take the view that this case has been rightly filed before the High Court.
35. As regards the second issue, it is noted that the sRespondent however, makes the further argument that the Petition was crafted in such a manner that it failed to communicate what rights had been infringed on or the exact remedy the Petitioner seeks from this Honourable Court.



36. I have perused the pleadings before me and tried my best to visualize the appropriate Articles of the Constitution that were infringed upon, the evidence availed in respect to the same infringement and the relevant prayers sought to remedy the situation. I am of the humble view that, when a litigant moves to Court, it must be clear from his pleadings what exactly his grievance is and what remedy he is seeking from the Court. It is not for the Court to second guess or imagine what the cause of action is and what relief a litigant expects from the Court.
37. Pleadings are not just a formality; they are essential in order to frame issues for the determination by the Court and to enable the parties know exactly what case they are expected to meet. This issue was aptly addressed in the time honoured English case of Thorp v Holdsworth [1876] 3 Ch. D. 637 at 639 where the Court held that:
- “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.”
38. This level of precision is demanded more so in Constitutional Petitions where violations of fundamental rights and freedoms have been alleged. This Court in Anarita Karimi Njeru v Republic [1976-1980] 1 KLR 1272 pronounced itself as follows:
- “We would, however, again stress that 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.”
39. The Respondents argued that the petition failed to disclose the constitutional provisions under which it is brought nor did it give any particulars of breach. It was further noted that though the supporting affidavit of 23rd December 2021 claimed the petition was brought under Article 22 and 35 of the Constitution, the particulars of breach by the Respondent were unclear.
40. I must reiterate that Anarita Karimi Njeru was decided under the old Constitution. The decision in that case must now be reconciled and be brought into consonance with the new Constitution. In my view, the present position with regard to the admissibility of petitions seeking to enforce the Constitution must begin with the provisions of article 159 on the exercise of judicial authority. Among other things, this article stipulates that:
- a. justice shall be administered without undue regard to procedural technicalities; and
 - b. the purpose and principles of this Constitution shall be protected and promoted.

Unfortunately, the position has not changed much, particularly when it comes to constitutional matters.



41. This Court reiterated the position in *Anarita Karimi* (*supra*) succinctly in *Mumo Matemu vs. Trusted Society of Human Rights Alliance and 5 others* Civil Appeal No. 290 of 2012 (2013) eKLR where it stated:

“(41) 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.

However, our analysis cannot end at that level of generality. It was the High Court’s observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting.” Yet 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.” (emphasis added).

42. The petition before this Court is not the epitome of precise, comprehensive, or elegant drafting, my view is that the complaint raised by the petitioner is sending me on a guessing game cycle. I try to decipher whether such a taskforce committee was ever established, were the alleged named ever appointed as members of this taskforce committee? and if yes, was a report prepared and shared with the county executive for purposes of review and implementation?
43. The Petitioner scantily just collected some material or information, put it in form of a constitutional petition and just dumped it on the arms of justice, for this Court to literally sift through and determine what it was about. He failed to not only cite the articles of the *Constitution* he felt the Respondent offended, but also failed to succinctly show the manner in which the Respondents violated them. It is not enough to mention perceived violations of the *Constitution* in passing in the supporting affidavit in his petition. Even the provisions of section 1A and 1B of the *Civil Procedure Act* and section 3A and 3B of the *Appellate Jurisdiction Act* cannot be invoked in his aid.
44. On that score alone, the Petitioner’s petition is found to be wanting and must be dismissed. In my opinion, this is a matter which was brought to Court in good faith and in the interest of the general public of Bungoma County. I therefore make no order as to costs.



45. Finally, it is my humble view that Kenya's devolved system of governance presents County Governments with the opportunity to enhance service delivery at the local level, and the citizen in the devolved units with numerous opportunities to engage in governance processes. Leadership is a contract between those in leadership positions and the governed. Whereas both levels of government: the national and county have specific mandates in regard to the delivery of public goods and services, those entrusted with public offices and resources have a duty to be accountable to citizens for their decision and the utilization of public resources including public finance. I do urge the Respondent to have the same report, if it exists, uploaded on their official website or made available at the requisite offices for access to the interested members of the general public of Bungoma County.

DATED AND DELIVERED AT BUNGOMA THIS 21ST DAY OF MARCH 2023.

D. KEMEI

JUDGE

