



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT KERICHO**

**ELC NO. 5 OF 2019**

**IN THE MATTER OF ARTICLE 40(1) OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF VIOLATION OF RIGHTS TO A CLEAN AND HEALTHY ENVIRONMENT UNDER ARTICLE 42, 69  
AND 70(1) AND (2) OF THE CONSTITUTION OF KENYA 2010**

**BETWEEN**

**JOYCE CHEPKORIR ROTICH.....PETITIONER**

**VERSUS**

**JINGXI ZHONGMEI ENGINEERING**

**CONSTRUCTION CO. LTD.....1<sup>st</sup> RESPONDENT**

**ATTORNEY GENERAL.....2<sup>nd</sup> RESPONDENT**

**RULING**

1. The Petitioner filed her Petition dated the 23<sup>rd</sup> September 2019 on the 24<sup>th</sup> September 2019 which Petition was supported by an Affidavit sworn by the Petitioner on 24<sup>th</sup> September 2019, wherein she sought for the following orders;

- i) Cost of demolition and construction of a new house.
- ii) General damages.
- iii) Cost of this suit.
- iv) Any other relief the court deems fit to grant.

2. Pursuant to the filing and service of the Petition, and in response thereto, the 2<sup>nd</sup> Respondent filed their Notice of Preliminary Objection dated 13<sup>th</sup> October 2020 to the effect that the Petition was misconceived, bad in law and a waste of precious judicial time. That the fundamental rights and freedoms as set out in the Bill of Rights in the Constitution of Kenya could only be enforced by a private individual by way of a Constitutional Petition only as against the state and the state organs and not by a private individual as against another private individual as sought by the Petitioner. That further, the Petitioner's claim if any, was a claim founded on the law of Tort and the same could only be remedied in a civil suit and not through a Constitutional Petition. The 2<sup>nd</sup> Respondent's objection was also based on the fact that there had been a misjoinder to the Petition as no claim had been raised against them.

3. The 1<sup>st</sup> Respondents through their Grounds of Opposition dated 16<sup>th</sup> November 2020 also opposed the Petition stating that the same as drawn was ex facie bad in law, vexatious, misconceived, incompetent, oppressive, mischievous and an abuse of the court process.

4. That the Petitioner was guilty of laches as the matter herein was time barred and did not disclose any violation of a Constitutional right. That the Petitioner's claim was not in any way a Constitutional issue and therefore ought to be enforced under the right provision of the law.

5. That further, the 1<sup>st</sup> Respondent would be highly prejudiced with the proceedings herein since the concerned officers and/or employees who had been involved in the alleged road project and who would have been its key witnesses had since retired and gone back to the

Republic of China and/or had been deployed to other countries. They sought for the Petition to be dismissed.

6. On the 16<sup>th</sup> February 2021, directions were taken for both the Preliminary Objection and Grounds of Opposition to be disposed of by way of written submissions wherein only the Petitioner and the 1<sup>st</sup> Respondent complied.

#### **Petitioner's written submissions.**

7. The Petitioners through their written submissions gave a brief analysis of the facts of the matter in issue to the effect that on 4<sup>th</sup> December 2012, the Respondents had been tasked to undertake the rehabilitation and construction of the Londiani-Fortenan road C35 by the Government of Kenya.

8. That during the construction of the road they had used explosives in blasting the rocks on the site which process caused serious damage to her three bed roomed residential house situate on her property known as Block 9/1723 (Jagoror) 244, which was located approximately 200m from the blasting site.

9. That the blasts caused severe cracks on the structural foundation of the house, its walls and floors as well as on an underground tank and a pit latrine thus making the house and inhabitable.

10. That despite several communications to the resident Engineer as well as the County Commissioner Londiani sub County, there had been no action taken to remedy the damages caused on to her property.

11. That the actions of the Respondent had exposed them to various human rights violations including a threat of her life, right to safe and clean environment and a threat to her security because of the dilapidated and dangerous state of her house. The present Petition, which was brought under the provisions of Article 22(sic) thus sought remedy for the various violation of the Bill of Rights.

12. That the Respondents' Preliminary Objection and Grounds of Opposition were an attempt to mislead the court and waste judicial time instead of having the matter decided on merit based on substantial issues.

13. The Petitioner framed her issues for determination as follows;

- i. Whether this is a suit or Petition.
- ii. Whether the Respondent must be a state or state official.

14. In response to the issues for determination, the Petitioner submitted that the substratum of the Petition was the violation of her economic and property rights as well as a violation of her right to clean and safe environment to which the Petition had been brought under Article 22 of the Constitution.

15. That the Petition was not guided by the provisions of the Civil Procedure Rules or the Limitation of Actions Act and as such the 1<sup>st</sup> Respondent could not purport to use the same laws in an attempt to have the Petition dismissed.

16. That the 2<sup>nd</sup> Respondent was enjoined to the Petition as a representative of the state with whose authority and permission the 1<sup>st</sup> Respondent undertook the habilitation and construction of the Londiani-Fortenan road C35. That the violation by the 1<sup>st</sup> Respondent was commissioned by the Government of Kenya which led to the subsequent violation of the various fundamental rights and freedoms of the Petitioner. It was their submission that the Respondents jointly violated, denied, infringed and continued to threaten the Petitioner's fundamental rights and freedoms and as such were rightly enjoined in the matter and therefore the Petitioner had a right to seek redress for relief before the court. The Petitioner relied on Rule 4 of the Mutunga Rules.(sic)

17. The Petitioner further relied on Rule 5(b) of the Mutunga rules (sic) to submit that no Petition should be defeated by reason of the misjoinder or non-joinder of parties and that the court should in every proceeding deal with the matter in controversy in so far as it regarded the rights and interests of the parties actually before it, so as to make orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

18. The Petitioner sought for the court not to delve into the issues of technicalities while determining the Petition but to be guided by the substance of the case and thereafter arrive at a decision based on the merits of the case. Reliance was placed on the provisions of Article 159 of the Constitution.

19. The Petitioner further relied on the cases of **Nicholas Kiptoo Arap Koriri Salat vs Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR** to submit that whereas the court was being invited by the Respondents to look and consider the technicalities thus foregoing the merits of the case, it went against the said precedents and provisions of the law that required courts to look at the merits of the case and not to be quick to strike out cases based on procedural technicalities. That the Preliminary Objection dated 13<sup>th</sup> October 2020 by the 2<sup>nd</sup> Respondent as well as the 1<sup>st</sup> Respondent's Ground of Opposition dated 16<sup>th</sup> November 2020 lacked merit and were only aimed at wasting judicial time and delaying the administration of justice. That the same ought to be dismissed with costs and the Petition dated 23<sup>rd</sup> September 2019 be set down for hearing at the soonest possible.

#### **1<sup>st</sup> Respondent's submissions**

20. The 1<sup>st</sup> Respondent, vide their written submission and in opposition to the Petitioner's Petition and after giving a brief history of the matter in question, submitted that after the Petitioner had complained through a complaint letter dated the 4<sup>th</sup> December 2012, over the 1<sup>st</sup> Respondent's alleged damage to the verandah of her house, she had been asked to prepare an assessment report of the alleged damage which she did in January 2014, two years after the alleged damage.

21. The 1<sup>st</sup> Respondent's argument therefore was that two years was such a long time that a lot may have happened to the house that which was not directly associated to the 1<sup>st</sup> Respondent. That in addition, neither the Petitioner nor her assessor had clearly indicated how they had come to the conclusion that the damage as alleged in the Petition had been caused by the 1<sup>st</sup> Respondent's activities.

22. That a second assessment had been done on the 18<sup>th</sup> of June 2018, which was six years down the line which, logically speaking, a lot of activities may have taken place causing the alleged damages to the Petitioner's house. It was their submission that in the event that such a house ever existed or if it was ever damaged, then the alleged damage could have been as a result of the normal effluxion of time.

23. The 1<sup>st</sup> Respondent's submission was that indeed the Petitioner never had any house during the alleged year of 2012 for reason that there has been no attachments, documents or title to prove ownership of the house or the land parcel No. Block 9/1723 (Jagoror) 244. That secondly the Petitioner's claim was baseless and unfounded because her supporting documents were contradictory, inconsistent, fictitious and suspicions.

24. That although the Petitioner claimed that her house which stood on land parcel No. Block 9/1723 (Jagoror) 244 was destroyed in the year 2012, yet the Bill of Quantities for erection and completion of her proposed residential house was dated the 23<sup>rd</sup> April 2014, clearly confirming the fact that by the time the alleged to damages were taking place, the house was not in existence but was a mere proposal.

25. It was the 1<sup>st</sup> Respondent's submission that the Petitioner, in an attempt to manipulate and fraudulently obtain money from them, had tried to manufacture supporting documents which then explained why she took seven years to file the present Petition without an explanation for the delay.

26. The 1<sup>st</sup> Respondent framed their issues for determination as follows;

- i. Whether the Petitioner has capacity and/or locus standi to sustain her claim herein.
- ii. Whether the Petitioner has proved her case against the 1<sup>st</sup> Respondent to the required standard.
- iii. Whether the Petitioner should be granted the prayers sought in her Petition herein.

27. On the first issue for determination the 1<sup>st</sup> Respondent submitted that it was well established in law that locus standi is a right or capacity upon which one could bring action or approach the court as was held in the case of **Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & Another [2016] eKLR** while referring to the case in **Ms. Priscilla Nyokabi Kanyua vs. Attorney General & Interim Independent Electoral Commission Nairobi HCCP No. 1 of 2010**.

28. That in the current Petition, there was no indication that the Petitioner had a right of action against the 1<sup>st</sup> Respondent Company by virtue of the fact that she had not proved any association with the property described as No. Block 9/1723 (Jagoror) 244 through proof of ownership.

29. On the second issue for determination as to whether the Petitioner had proved her case to the required standard, it was the 1<sup>st</sup> Respondent's submission that the matter was Res ipsa loquitur based on the facts herein presented. That the cause of action had allegedly occurred in December 2012 wherein the Petitioner had claimed that the 1<sup>st</sup> Respondent's construction activities had cause a crack on her verandah. After two years, she had claimed that the whole house had now developed cracks. The Petitioner had not demonstrated how her and her assessors had arrived at the conclusion that indeed the 1<sup>st</sup> Respondent's construction activities were responsible for the cracks as alleged. That further, the bill of quantities for erection and completion of the Petitioner's proposed residential development on plot No. Block 9/1723 (Jagoror) 244 was prepared and dated 23<sup>rd</sup> April 2014 which was 2 (two) years after the alleged activity had occurred. That it was therefore clear that the Petitioner was on a fishing expedition whose aim was to extort money from the 1<sup>st</sup> Respondent.

30. Finally the 1<sup>st</sup> Respondent submitted that the Petitioner was not entitled to the orders sought in her Petition and relied on the provisions of Sections 107 and 109 of the Evidence Act to submit that it was trite law that a party alleging a fact had the onus of proving the existence of such facts of which from the contents of the Petitioner's Petition, it was evident that she had not proved her case as was required.

31. The 1<sup>st</sup> Respondent also relied on the decided case in **Silla Muhia Kinyanjui & 2 Others vs Attorney General [2020] eKLR** to submit that the Petitioner's delay in filing her claim seven (7) years after the cause of action was inordinate and without any plausible explanation and therefore the same ought to be dismissed with costs.

#### **Determination.**

32. Upon consideration of the Petitioner's Petition and the Preliminary Objection raised I am obliged to revisit the all-important case decided by the Court of Appeal in the case of **Mukisa Biscuits Manufacturing Co. Ltd -v- West End Distributors Limited (1969) EA. 696** A Preliminary Objection per Law J.A. was stated to be thus:-

*“So far as I am aware, 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.”*

In the same case Sir Charles Newbold, P. stated:

*‘ . . . .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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.’*

33. From the submissions and pleadings filed in this Petition, it is clear that the Respondents herein are challenging the Petitioner’s Petition dated the 23<sup>rd</sup> September 2019 and filed on the 24<sup>th</sup> September 2019 to the extent that it was misconceived, bad in law and a waste of precious judicial time. That the Petitioner had no locus standi to file the Petition and ought to have filed an ordinary suit as provided for by procedure because the present Petition did not raise any breach of the Constitution. That the fundamental rights and freedoms as set out in the Bill of Rights in the Constitution of Kenya could be enforced by a private individual by way of a Constitutional Petition, only as against the state and the state organs and not by a private individual as against another private individual as sought by the Petitioner. That further, there was no cause of action against the 1<sup>st</sup> Respondent as the Petitioner had not proved any association with the property described as No. Block 9/1723 (Jagoror) 244 through proof of ownership and third that that since the Petition was brought 7 years after the cause of action, it was time barred.

34. I have carefully considered the content of the Petitioner’s Petition as well as the supporting affidavit. I have also considered the Respondents’ replying affidavits and the submissions of Counsel as well as the relevant provisions of the law and Authorities herein cited. I find the issues arising for determination are as follows:-

**i. Whether a Constitutional Petition can be lodged between two private persons.**

ii. Whether the said Preliminary Objection has merit and should be upheld.

35. The 1<sup>st</sup> Respondent has submitted that this matter is essentially between private parties *where there are express civil remedies available to the Petitioner under the civil law*. The courts have upheld the aforementioned provision and expressed that in matters involving a Constitutional reference, a Petitioner must set out with a reasonable degree of precision the nature of the alleged violation; the person, persons, authority or institution responsible for the violation; the manner of the violation or likely infringement and the provision of the Constitution which creates and gives the Constitutional right that is under violation or threatened violation. (emphasis mine)

36. Indeed our Constitution has broadened the view that a Constitutional Petition can be lodged between two private persons and envisaged a situation where violation can take place between private citizens or persons. That is discernible in Article 3 (1) of the Constitution which enjoins that every person has an obligation to respect, uphold and defend the Constitution and Article 19(1) which states that the Bill of Rights applies to all law, binds all state organs and all persons. These Articles are justiciable and not merely declaratory. It flies in the face of common sense to hold that a private individual cannot violate fundamental freedoms. See **Chrispinus Munyane Papa & another v National Environmental Authority & another [2020] eKLR**.

37. Indeed the court of Appeal in **Moi Education Centre Co. Ltd v William Musembi & 16 Others [2017] eKLR** held as follows:

*“We turn to the question whether the appellant has any obligation to provide the evictees with alternative accommodation. To begin with, we are unable to find fault with the Judge’s interpretation of Article 43 of the Constitution as entailing “a negative obligation not to deprive citizens of . . . shelter” and that “the Bill of Rights applies both vertically-as against the state, and horizontally-against private persons, and that in appropriate cases, a claim for violation of a Constitutional right can be brought against a private individual.”*

38. The Petitioner has alleged that their Constitutional right envisaged under Article 40(1), 42, 69 and 70(1) and (2) of the Constitution had been violated by the Respondents herein and therefore it will be up to her at the opportune time to inform the court the manner in which her rights had been violated. I find no merit on this ground of objection and the same is dismissed.

39. On the second issue or determination, the case of **Mukisa Biscuits Manufacturing Co. Ltd** (supra) is clear that a **Preliminary Objection** consists of pure points of law and it is also capable of bringing the matter to an end preliminarily. See the case of **Quick Enterprises Ltd. vs. Kenya Railways Corporation, Kisumu HCCC No.22 of 1999**, where the Court held that:-

*“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”*

40. In the case of **Avtar Singh Bhamra & Another vs Oriental Commercial Bank, Kisumu HCCC No.53 of 2004**, the Court held that:-

*“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”*

41. The Respondents have alleged that the Petitioner has not proved any association with the property described as No. Block 9/1723 (Jagoror) 244 through proof of ownership and further that the Petition was time barred having been brought 7 years after the cause of action. I find that that these are matters that have to be discerned through facts. Whether not the Petitioner is the registered proprietor of the suit property whether the House existed or not prior to the drawing of the Bill of Quantities and whether the Petition was based on the law of tort, or breach of contract as the substance of the claim so as to bring it within the ambit of the law of limitation, must be examined through facts. I therefore find that both the Preliminary Objection and Grounds of Opposition **respectively lack merit and** proceed to dismiss them with costs to the Petitioner.

**Dated and delivered via Microsoft Teams this 7<sup>th</sup> day of October 2021.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**