Tsumo v Mwakwaya (Constitutional Petition E055 of 2022)
[2023] KEHC 23192 (KLR) (22 September 2023) (Ruling)

Neutral citation: [2023] KEHC 23192 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CONSTITUTIONAL PETITION E055 OF 2022

OA SEWE, J

SEPTEMBER 22, 2023

BETWEEN

MWANAULU KHALFAN TSUMO ..... PETITIONER

AND

JUMAA MBARUKU MWAKWAYA ..... RESPONDENT

RULING

1. The Petition dated September 7, 2022 was filed by M/s Aboubakar, Mwanakitina & Co Advocates on behalf of the petitioner, Mwanaulu Khalfan Tsumo. She complained that she has been unable to prosecute her divorce case before the Kadhi's Court due to factors beyond her control. She explained that the respondent is her husband; and that on December 21, 2017 she instituted divorce proceedings against him before the Kadhi's Court at Kwale, being Kwale KCCC No 36 of 2017: Mwanaulu Khalfan Tsumo v Jumaa Mbaruku Mwakwaya.

2. The petitioner further deposed that the respondent was duly served with court process and that he accordingly entered appearance and filed his defence as required by law; but that the matter could not proceed because the court file got lost at the registry. After some time, she was advised to file a fresh suit; which she did; but the second suit, namely Kwale KCCC No 10 of 2020: Mwanaulu Khalfan Tsuma v Jumaa Mbaruku Mwakwaya, was ultimately dismissed for being sub judice.

3. The petitioner further averred that the decision to dismiss the divorce cause was later reviewed and, on the September 14, 2020, an order was made for the divorce cause to proceed. However, on October 2, 2020, the respondent made an application for stay of proceedings pending appeal, which stay was granted. Thus, it was on the basis of the foregoing chain of events that the petitioner contended that the proceedings were tainted with illegalities and consequently prayed that:

(a) An order calling for the Kadhi's file in respect of KCCC No 10 of 2020 Mwanaulu Khalfan Tsumo v Juma Mbaruku Mwakwaya be made for purposes of reviewing and or setting aside the illegal stay order made on October 2, 2020;

(b) Upon granting prayer [a] above, the Court do order that the matter do proceed before another Kadhi other than Hon Wendo S Wendo;

(c) Cost of the Petition be provided for;

4. In response to the Petition, the respondent filed the Notice of Preliminary Objection dated November 21, 2022 on the grounds that:

(a) The Petition is incurably defective and does not meet the threshold and requirements of a constitutional petition as required by law.

(b) The Petition does not raise any constitutional issues to warrant the exercise of the Court's constitutional jurisdiction.

(c) The remedies sought by the Petitioner herein are untenable and the same cannot be granted in a constitutional jurisdiction forum.

5. The Preliminary Objection was urged by way of written submissions pursuant to the directions given herein on May 3, 2023. Accordingly, Mr Mwadzogo filed his skeleton submissions dated June 2, 2023. He underscored the basis of the Preliminary Objection, namely, that constitutional petitions are special proceedings and ought not to be resorted to where there are other avenues for redress in existence. He posited that there exist several remedies under the law to cure the petitioner's grievance about a misplaced divorce file. Counsel relied on *Gabriel Mutava & Others v Managing Director, Kenya Ports Authority* [2016] eKLR in support of his arguments.

6. It appears that no submissions filed on behalf of the petitioner. I have nevertheless considered the Preliminary Objection in the light of the averments set out in the Petition and its Supporting Affidavit as well as the documents annexed thereto. The issue that arises for determination is whether the respondent's Preliminary Objection has merit.

7. The law in respect of preliminary objections is now settled, that a preliminary objection ought to be in the nature of a demurrer, and should not invite the court to exercise its discretion or to make a determination on the facts. Thus, in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors* [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. Further, the Court of Appeal, in the case of *Nitin Properties Ltd v Singh Kalsi & another* [1995] eKLR, held:

> "...A Preliminary Objection 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..."

9. The point raised by the Notice of Preliminary of Objection, in this case, goes to the very root of the Petition itself. If upheld, the Petition may be struck out. Thus, there is no gainsaying that the respondent's Notice of Preliminary of Objection raises a pure point of law deserving of consideration as such; and therefore the question to pose is whether the issues raised by the petitioner meet the threshold for a constitutional petition.

10. The touchstone prescribed in the case of *Anarita Karimi Njeru v Republic* [1976-1980] KLR 1272 is 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."

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 thus:

> "(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, MR 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."
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> (43) The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements...

(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..."

12. It is plain therefore that, in every petition, the fundamental freedoms and rights allegedly infringed ought not to be left to conjecture.

13. Accordingly, I have given careful consideration to the Petition dated September 7, 2022. Apart from setting out the facts relied on, the petitioner stated, at Section C thereof, the violations complained of. She asserted that the proceedings in KCCC No 70 of 2020 are tainted with illegality, unreasonableness and procedural impropriety. She accordingly took issue with the fact that the Hon Kadhi dismissed the suit on the basis of a preliminary objection; and contended that the dismissal was not supported by any proof of the existence of another suit.

14. The petitioner also faulted the Hon Kadhi for staying the proceedings without a formal application or proof of the existence of an appeal. In the premises, the petitioner asserted that her rights under Articles 48 and 50 of the *Constitution* had been violated and prayed for orders calling for the Kadhi's Court file in respect of KCCC No 10 of 2020 for purposes of review and setting aside of the illegal stay order made on October 2, 2020; and an order that the matter do proceed before another Kadhi other than Hon Wendo.

15. It is manifest therefore that, although the Petition has been brought against Juma Mbaruku Mwakwaya as the respondent, none of the alleged violations set out in Section C of the Petition make any reference to the respondent. Likewise, none of the petitioner's prayers are directed at the respondent. It is therefore plain that the Petition is befuddled and strides not only the constitutional jurisdiction of the Court but has elements touching on the revisionary and judicial review of the Court; and is therefore improperly presented as a constitutional petitioner.

16. More importantly, the petitioner indicated, at paragraphs 9 and 10 of her Supporting Affidavit, that on the application of her advocate, the impugned dismissal order was set aside and the suit reinstated to hearing for a determination on the merits. In the circumstances there is absolutely no basis for the allegations of violations of the petitioner's rights under Articles 48 and 50 of the *Constitution* when her only complaint is against an order of stay of proceedings pending appeal. Far from being illegal or irrational, an order of stay of proceedings is provided for in Order 42 Rule 1 of the *Civil Procedure Rules* and therefore was procedurally issued. In any case, the same can be reviewed or appealed and cannot be said to be an infringement of the petitioner's right to access justice or of a fair hearing.

17. It is therefore manifest that the Petition falls far short of the required threshold for constitutional matters. Indeed, in the case of *Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another* [2016] eKLR, the Court of Appeal pointed out that:

"Constitutional litigation is a serious matter that should not be sacrificed on the altar of all manner of frivolous litigation christened constitutional when they are not and would otherwise be adequately handled in other legally constituted forums. Constitutional litigation is not a panacea for all manner of litigation; we reiterate that the first port of

call should always be suitable statutory underpinned forums for the resolution of such disputes."

18. Similarly, in *Harrison v Attorney General of Trinidad and Tobago* [1980] AC 265 cited with approval in the Kenyan case of *Alphonse Mwangemi Munga & 10 Others v African Safari Club Limited* [2008] eKLR, it was held: -

> " The notion that whenever there is a failure by an organ of Government or a Public authority or public office to comply with the law this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed to individuals by Chapter 1 of the Constitution (our Chapter V) is fallacious. The right to apply to the High Court...for redress when any human right or fundamental freedoms is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. The mere allegation that a human right has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the section if it is apparent that the allegation is frivolous, vexatious or abuse of the process of court, as being made solely for the purpose of avoiding the necessity of applying the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom."

19. In the result, I find merit in the Notice of Preliminary Objection dated November 21, 2022. The same is hereby upheld with the result that the Petition dated September 7, 2022 is hereby struck out with an order for each party to bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 22ND DAY OF SEPTEMBER 2023

OLGA SEWE

JUDGE