Biwott v Jerotich & 4 others (Petition E010 of 2024)
[2024] KEHC 13817 (KLR) (7 November 2024) (Ruling)

Neutral citation: [2024] KEHC 13817 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

PETITION E010 OF 2024

OA SEWE, J

NOVEMBER 7, 2024

BETWEEN

KIPCHIRCHIR BIWOTT ..... PETITIONER

AND

RISPER JEROTICH ..... 1ST RESPONDENT

KCB BANK KENYA LIMITED ..... 2ND RESPONDENT

NCBA BANK LIMITED ..... 3RD RESPONDENT

EQUITY BANK KENYA LIMITED ..... 4TH RESPONDENT

HARAMBEE SACCO SOCIETY ..... 5TH RESPONDENT

RULING

1. Before the Court for determination is the 1st respondent's Preliminary Objection dated 11th July 2024. The 1st respondent contended that:

   (a) The Suit is an abuse of court process, fatally defective, is frivolous and vexatious.

   (b) The Suit as drawn and taken is an appeal against the various decisions of the Children's Court in MCC No. 326 of 2015 including the Ruling/Order of the Court made on 26th August, 2022 and 7th February, 2018 guised as a constitutional Petition.

   (c) The Honourable Court is not clothed with the requisite jurisdiction to entertain the Petition and to issue the Orders sought;

   (d) The Petition is an affront to the explicit provisions of Part VIII of the *Civil Procedure Act* and the applicable Rules/Regulations.

(e) The Petition falls short of the conditions set in the celebrated case of Anarita Karimi Njeru v Republic 1979 eKLR.

(f) The suit offends the doctrine of exhaustion.

2. Directions were given on 15th July 2024 that the Preliminary Objection be canvassed by way of written submissions and although the petitioner complied and filed written submissions dated 29th August 2024 the 1st respondent did not.

3. In the case of Mukisa Biscuits Manufacturers Ltd v West End Distributors Ltd 1969 E.A 696, it was well-stated that a preliminary objection consists of:

> ...a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection 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."

4 Accordingly, in *Independent Electoral & Boundaries Commission v Cheperenger & 2 others (Civil Application 36 of 2014)* 2015 KESC 2 (KLR) (15 December 2015) (Ruling), the Supreme Court restated that:

> ...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..."

5. In the premises, it is manifest that grounds a, b and d above do not lend themselves to consideration as preliminary points of objection. I will therefore confine myself to the following three issues only:

(a) Whether the Court has the requisite jurisdiction to handle this Petition;

(b) Whether the Petition is compliant in terms of the principle of specificity laid down in the case of Anarita Karimi Njeru;

(c) Whether the doctrine of exhaustion is applicable to the subject matter of this Petition.

A. On Jurisdiction:

6 It is now trite law that jurisdiction is everything and without it, a court must down its tools. In The Owners of Motor vessel Lillian 'S' vs Caltex Kenya Limited 1989 KLR 1 the Court held:

> 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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

7 Moreover, in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others 2012 eKLR, the Supreme Court pointed out that:

(68) A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It

cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law..."

8 The jurisdiction of the High Court is provided for in Article 165(3) of the Constitution thus:

(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(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;

(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

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

9 With the foregoing in mind, I have perused the Petition filed herein. It is explicit for, instance at paragraph 26 and elsewhere, that the petitioner alleged infringement of his constitutional rights. The said paragraph reads:

> ...the 1st respondent's conduct and/or action of subjecting him further to the garnishee proceedings and subsequent DNA test after the 1st DNA test proved the petitioner is not the father is not only a miscarriage of justice but also an intrusion of his constitutional rights on his privacy contrary to article 10(b), 27(1), 28, 29(f), 47 and 50 of *the Constitution* of Kenya 2010."

10. Hinged on that assertion are several prayers, including declaration of unconstitutionality. In the premises, the petitioner had a bona fide complaint falling within the jurisdiction of this Court for purposes of Article 165(3) of *the Constitution*. Whether or not the reliefs sought are merited is another issue altogether and cannot therefore be the subject matter of the Preliminary Objection. Indeed, in the Mukisa Biscuits Case Sir Newbold, P. pointed out that:

> A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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."

11. It is therefore my finding that the Court has the requisite jurisdiction to hear and determine this Petition.

B. On the test of Specificity:

12. It is now settled that there is a basic threshold that constitutional petitions must adhere to. Hence, 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."

13. 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."

14. As has been pointed out herein above, the petitioner alleged violation of his constitutional rights and supplied the facts in support of the allegations. That suffices; granted that 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.

(4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court."

15. 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..."

16. 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."

17. 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..."

18. Thus, it is my considered finding that the Amended Petition is indeed compliant as to specificity.

C. On the doctrine of exhaustion:

19. In Speaker of National Assembly v James Njenga Karume 1992 eKLR the Court of Appeal held that:

> ...where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed..."

20. Subsequently, the Court of Appeal made its affirming pronouncement in Geoffrey Muthinja Kabiru & Others v Samuel Muguna Henry & 1756 others 2015 eKLR, as follows:

> It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution."

21. The principle was reiterated in William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) 2020 eKLR, as follows:

> 52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of *the Constitution*..."

22. In this instance, the 1st respondent seems to be questioning the fact that the instant Petition appears to be premised on the same facts that form the subject matter of the proceedings before Tononoka Children's Court. If so, the doctrine of exhaustion would not apply, granted that the nuance of the Petition is vindication of constitutional rights. Indeed, in the case of Mohamed Ali Baadi and others v Attorney General & 11 others 2018 eKLR, the court held:

> While our jurisprudential policy is to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for by statute (See The Speaker of National Assembly vs James Njenga Karume {1992} KLR 21), the exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective. Thus, in the case of Dawda K. Jawara vs Gambia it was held that:
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> A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint in its totality ...the Governments assertion of non-exhaustion of local remedies will therefore be looked at in this light ...a remedy is considered available only if the applicant can make use of it in the circumstances of his case."

23. More importantly, the alternative solution must be appropriate for the grievance and adequate as a means of redress. In Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others 2017 eKLR, the court held:

> 46. What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it.

47. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake..."

24. Moreover, the Supreme Court pointed out, in the case of Nicholus v Attorney General & 7 others; National Environmental Complaints Committee *& 5 others (Interested Parties) (Petition E007 of 2023*) 2023 KESC 113 (KLR) (28 December 2023) (Judgment), that:

> 105 ...the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy is deemed inadequate in addressing the issue at hand, then the court is not restrained from providing constitutional relief. But there is also a need to emphasize the need for the court to scrutinize the purpose for which a party is seeking relief, in determining whether the granting of such constitutional reliefs is appropriate in the given circumstances. This means that a nuanced approach to the relationship between constitutional reliefs for violation of rights and alternative means of redress, while also considering the specific circumstances of each case to determine the appropriateness of seeking such constitutional reliefs, is a necessary prerequisite on the part of any superior court..."

25. In the premises, it is my finding that the Petition herein is properly before this court and the respondent's reliance on the doctrine of exhaustion is misplaced. In any case, to ascertain whether or not the doctrine is applicable, the Court is required to embark on an in-depth investigation of the surrounding facts, an activity that is inappropriate for a Preliminary Objection.

26. In Oraro v Mbaja 2005 1 KLR 141, Hon. Ojwang, J. (as he then was) made the point that:

> ...The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed...Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..."

27. In the result, I find no merit in the 1st respondent's Preliminary Objection. The same is hereby dismissed with no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 7TH DAY OF NOVEMBER 2024

OLGA SEWE

JUDGE