



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT LODWAR**

**CONSTITUTIONAL PETITION NO. 1 OF 2020**

**IN THE MATTER OF ARTICLES 2, 10, 22, 28, 35, 40, 47, 50, 159 & 165 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT**

**(NO. 4 OF 2015)**

**AND**

**IN THE MATTER OF KADHI'S COURT AT KAKUMA KCMC 14 OF 2019**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLES 28, 40, 47 & 50 OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**ABDIRAHMAN ALI ..... PETITIONER**

**VERSUS**

**KHALIF ABDULLAHI MOHAMED.....1<sup>ST</sup> RESPONDENT**

**THE KADHI'S COURT AT KAKUMA.....2<sup>ND</sup> RESPONDENT**

**OFFICER IN-CHARGE LODWAR G.K PRISON...3<sup>RD</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. By a petition filed on 20/5/2020, the petitioner moved this court for an order that the judgment by Hon. J.J. KUNYUK (Senior Resident Kadhi) dated and delivered on 26<sup>th</sup> July, 2019 be deemed unconstitutional, null and void and that the decision by the Hon. Khadhi requiring the parents and/or guardians of Aisha Abdirahim Ali to pay the sum of USD 6000/- to the 1<sup>st</sup> Respondent be quashed.

2. The said petition was accompanied by a Notice of Motion, in which the petition sought for conservatory orders suspending the warrants of committal issued against him on 14<sup>th</sup> May, 2020 pending hearing and determination of the petition filed herein, which conservatory orders the court issued on 17/6/2020, with directions on the filing of responses and written submissions.

3. In response to the petition, the respondent on 29/7/2020 took out a Preliminary Objection on the grounds that the court did not have the jurisdiction to hear the matter and that the same was an abuse of the court process.

**SUBMISSIONS**

4. On behalf of the Respondent’s/Objctor Mr. Odhiambo submitted that the petition offended orders 43 and 45 of the Civil Procedure Rules and Sections 1A, 1B, 1H, 3A and 75A of the Civil Procedure Rules. It was submitted that the petition was an abuse of the Court process, premature, bad in law and incompetent. It was stated that the petition originated from divorce Cause No. 14 of 2019 which was heard, determined and judgment delivered thereon on 26/7/2019.

5. It was contended that if the petitioner was dissatisfied with the said judgment, then he ought to have appealed against the decision of the Kadhi. It was submitted further that there was Notice of Motion dated 3/12/2019 in **MISC. NO. 1/2019 AISHA ABDIRAHMAN ALI v KHALIF ABDULLA MOHAMMED** in which the Appellant therein sought for leave to file an appeal out of time and before the said application was heard and determined, the present petition was filed, as an appeal clothed as a constitutional petition. It was submitted that the petition was filed in bad faith and should therefore be dismissed.

6. On behalf of the petitioner Mr. Anyoka submitted that the petitioner here in is not a party to **Misc. Appl. No.1 of 2019** and that the same was not a party to the divorce cause, leading to the decree complained of. It was submitted that the petitioner’s rights under Articles 23(1), 28, 40, 47, 50 and 258 of the constitution were violated, by being ordered to pay USD 6000 while not being a party to the proceedings.

**DETERMINATION**

7. Article 165 (1) of the Constitution establishes the High Court and rest in its powers to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; Article 23 (1) of the Constitution provides that the High Court has jurisdiction in accordance with Article 165 to hear and determine application for redress of a denial, violation or infringement of or threat to a right in fundamental freedom in the Bill of Rights.

8. In the case of **JOHN GITHONGO & 2 OTHERS v HARUN MWAU & 4 others NAIROBI PETITION NO. 44 OF 2012 [2012]eKLR** the court had this to say:-

**“The right to enforce fundamental rights and freedoms under Article 22 of the Constitution is a fundamental right. The right to proceed with a case for enforcement is independent and it is the obligation of that Court to ensure that the access is unhindered and devoid of obstacles that diminish the right sought to be enforced. (See *Rashid Allogoh & Others v Haco Industries Ltd Nairobi Civil Appeal No. 110 of 2001 (Unreported)* and *Maharaj v Attorney General of Trinidad & Tobago (No 2) [1979] AC 385*).**

**While Article 22 of the Constitution provides an independent and direct access to the High Court for enforcement, it is not the exclusive means for enforcing fundamental rights and freedoms. Ms Lubano has argued that Article 22 is exclusive and rule 12 of the *Gicheru Rules* implies that in order to enforce fundamental rights, a petition shall be filed in accordance with that rule.**

**This reasoning cannot stand for several reasons. Firstly, the High Court under Article 165(3)(b) has jurisdiction to determine the question whether a right or fundamental freedom in the Bill of rights has been denied, violated, infringed or threatened. Article 165(3)(d) also grants the High Court jurisdiction respecting interpretation of the Constitution including a question whether any law is inconsistent with or in contravention of the Constitution and the question whether anything said to be done under the authority of the Constitution is consistent with or in contravention of the Constitution. The question whether anything said to be done or is consistent with the Constitution includes matters concerning the Bill of Rights which is part of the Constitution. This jurisdiction is not an independent jurisdiction, it is exercised in ordinary cases or disputes coming before the court and it need not be exercised through an Article 22 application (see the case of *Peter Kaluma v Attorney General Nairobi Petition No. 79 of 2011 (Unreported)*).**

**Secondly, Article 2(1) of the Constitution is the supremacy clause and applies to the law and conduct and in any proceedings before the High Court, the court may be required to pronounce on fundamental rights and freedoms under the Constitution and where such a question arises then the court must decide and hold that the Constitution is the supreme law”.**

9. It therefore follows that in matter concerning the constitution, rights and fundamental freedoms guaranteed under the constitution, the High Court has jurisdiction. In this matter the petition has raised the right to fair trial under Article 25, and the right to freedom and security under Article 29(a) of the Constitution thereby granting this court the jurisdiction to hear and determine the petition.

10. The applicant/petitioner has alleged that not being a party to the proceeding before the Kadhi’s court, an adverse order and warrant of committal to civil jail were issued against him, thereby raising the issue of violation or threatened violation or infringement of his constitutional right. It is therefore clear that the petition is not an abuse of the court process.

11. The issue as to whether or not the petition shall succeed is left to the hearing and determination of the petition. It therefore follows that the preliminary objection herein has no merit and is dismissed with no order as to cost.

**Dated, signed and delivered at Lodwar this 2<sup>nd</sup> day of March, 2021**

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**J. WAKIAGA**

**JUDGE**