



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

PETITION NO. 15 OF 2020

IN THE MATTER OF ARTICLES 10, 19, 20, 22, 23, 27, 28,

35, 40, 45, 47, & 165 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF THE LAND ACT NO. 6 OF 2012

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND

FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES 2013

BETWEEN

GACHERI DAVID MUKINDIA.....PETITIONER

VERSUS

CHARLES MURUGU MUKINDIA.....1ST RESPONDENT

JOSEPHINE KATHURE KITHINJI.....2ND RESPONDENT

FRIDAH KIENDE MUKINDIA.....3RD RESPONDENT

HARRIET KARURU MWITI.....4TH RESPONDENT

KENYA COMMERCIAL BANK LTD.....5TH RESPONDENT

CO-OPERATIVE BANK LTD.....6TH RESPONDENT

CONSOLIDATED BANK LTD.....7TH RESPONDENT

YETU SAVINGS & CREDIT CO-OP SOCIETY.....8TH RESPONDENT

URUKU RURAL SACCO LTD.....9TH RESPONDENT

DCIO IMENTI NORTH.....10TH RESPONDENT

RULING

1. The Petitioner and the 1st Respondent are estranged wife and husband, having been married for over 35 years. Their marriage was solemnized on 3rd June 2010. As disclosed by the Petitioner, there is a pending divorce cause, namely Divorce Cause No. 1 of 2019. As further disclosed by the 1st Respondent in his replying affidavit sworn on 2nd December 2020, there is also a pending matrimonial cause, namely, Matrimonial Properties Cause No. 14 of 2019.

2. At the time of their marriage, they acquired various properties together. The Petitioner is aggrieved that the 1st Respondent allegedly charged the properties they so jointly acquired to various financial institutions including the 5th, 6th, 7th, 8th and 9th Respondents behind her back. She claims that the 1st Respondent forged her signatures while applying for loan facilities from the various institutions.

3. The Petitioner filed the instant Petition and contemporaneously filed an application under certificate of urgency dated 31st August 2020 seeking various reliefs from this Court. In her Petition dated 31st August 2018, she seeks to have the charges registered in favour of the various financial institutions against the suit properties declared null and void as well as to have the same discharged. In her application dated 31st August 2018, she seeks an order directing the 5th, 6th, 7th, 8th and 9th Respondents to provide the Petitioner with all the documentation involved in creating charges over all parcels of land registered in the name of the 1st Respondent in which such Respondent has an interest as collateral for a loan advanced or any other interests.

4. In opposition, the 1st, 2nd, 3rd and 4th Respondents filed a Notice of Preliminary Objection dated 15th September 2020. They raise the following objections therein: -

i. The Petition raises no constitutional issues.

ii. Only the 11th Respondent is the legal custodian of the alleged charge documents and no formal demand for the same has been exhibited.

iii. All suit parcels of land are duly secured by restrictions registered on 5th July 2019.

5. The Court ordered that the Preliminary Objection be heard in priority to the application since it touches on the Jurisdiction of the Court consistently with the *locus classicus* of **Owner of the Motor Vessel "Lilian S" Vs Caltex Oil (Kenya) Limited**, Nyarangi JA held that jurisdiction is everything and without it, a court must down its tools.

6. What properly constitutes a preliminary objection has been defined in **Mukisa Biscuit Company v Westend Distributor Limited (1969) EA 696** as follows: -

‘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.’

7. A preliminary objection should therefore only be raised where there are no disputations on matters of facts by parties. Should this Court find that there any disputations of fact which will require it to look at evidence adduced and interrogate factual issues, the Court will not entertain the preliminary objection.

Determination

i) Whether the Petition raises Constitutional Issues

8. The 1st, 2nd, 3rd and 4th Respondents claim that the Petition does not raise Constitutional issues. The 6th Respondent also urges at paragraphs 12, 13, 14, 15 and 16 of her replying affidavit sworn on 11th December 2020 that the issue of execution of charge documents is not a constitutional issue. She urges that the matter ought to have been filed as an ordinary civil claim, and specifically that the Land and Environment Court is the Court with jurisdiction to entertain such a dispute. She further urges that parties, would only be able to test the veracity of the Petitioner’s assertions if the matter is properly instituted as a civil claim as this would allow for cross examination and calling of various witnesses including Advocates who witnessed the signatures.

9. Indeed, in order to determine this issue, the Court only needs to look at the contents of the Petition. No disputations of fact arise. This point squarely befits the description of a preliminary objection.

10. Although parties did not file submissions to support their respective arguments on the preliminary objection, this Court has taken note of the nature and contents of the Petition and analyzed the same in view of determining whether or not the Court has jurisdiction. The Court has had a chance to look at the supposed Constitutional issues raised in the Petition. At first glance, the drafting of the Petition is wanting as the nature of rights complained of ought to have been precisely outlined as against the facts applicable. See **Anarita Karimi Njeru V Republic and Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR**. However from the face of it, the rights being

complained of include the following: -

- i. The rights to own and acquire property as per Article 40 of the Constitution.
- ii. The rights to access to information as per Article 35 of the Constitution.
- iii. The rights to parties to a marriage as per Articles 45 of the Constitution.
- iv. The rights to fair administrative action as per Article 47 of the Constitution.

11. This Court has also learnt through the affidavits filed by parties themselves that the matter herein stems from a history of an estranged relationship between the Petitioner and the 1st Respondent. There are pending divorce and matrimonial property proceedings. The Petitioner claims that the matrimonial cause has been stayed pending hearing and determination of the instant Petition. This fact has however not been proven by way of annexing any Court order affirming so. Nonetheless, if this is true, then it is an indication that the said matrimonial cause involves properties some of which are the subject of the charges mentioned in the instant Petition.

Nature of Dispute vis a vis Principle of Constitutional Avoidance

12. With this background in mind, this Court has also observed that the main grievances building up to the filing of the instant Petition involve questions of fraud. The Petitioner claims that her signatures in the subject charge documents were forged. Forgery of signatures in order to successfully register a charge is a matter imputing fraud. Fraud as a cause of action can arise in both civil and criminal proceedings. In essence, the Court's findings on whether or not to declare the charge documents null and void and whether to order for discharge of the same are dependent on first, the determination of the matter of fraud. It appears that the real bone of contention is on whether or not the Petitioner gave her spousal consent to have the charges registered and/or whether she signed the charge documents prior to registration of the same.

13. As a point of concern, although the Petitioner has raised the allegations of violation of right to property under Article 40 and the rights to parties to a marriage under Article 45, in her main prayers in her Petition, she does not seek any such declarations that her constitutional rights have been infringed. She merely seeks a declaration that the charges be declared null and void and that the Court orders for a discharge of the charges. The nature of the prayers sought in the Petition speaks volumes as to the real issue the Petitioner is disgruntled with and they in fact betray the Petitioner's Petition.

14. In the case of *Royal Media Services v Attorney General, Civil Appeal No. 45 of 2012 (2018) eKLR*, the Court of Appeal comprising P. N. Waki J, R. N. Nambuye J and A. Makhandia J, while determining an appeal where the Appellant had filed a Petition in the High Court seeking to recover debt ensuing from a contract held as follows: -

“In our view the judge cannot be faulted for holding that a constitutional petition procedure adopted by the appellant in ventilating its claim was ill suited for the kind of claim it had laid before the trial court namely debt collection. We had occasion in the past to bemoan the current trend of filing constitutional petitions and references on matters or claims that have no iota or scintilla of any constitutional bearing. This trend of constitutionalizing virtually everything, which is actually, in our view an abuse of the court process, needs to nibbed in the bud and frowned upon. We stated thus in the case of Gabriel Mutava & 2 Others v Managing Director Kenya Prots Authority & Another (2016) eKLR:

“Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such a party ought to seek redress under such other legal regime rather than trivialize constitutional litigation.....”

15. The above finding surmises the principle of *constitutional avoidance* which holds that where it is possible to decide a case without reaching a constitutional issue, that should be done. In the above case of *Royal Media Services v Attorney General, Civil Appeal No. 45 of 2012 (2018) eKLR*, the quote cited with the approval the decision of the Supreme Court in the case of *Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others, Petition No. 14, 14A, B & C of 2014* where it was held as follows: -

“(256) The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S V Mhulungu 1995 (3) SA 867 (CC) the Constitutional Court, Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows (at paragraph 59):

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

(257) Similarly, the U.S Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (Aswander v Tennessee Valley Authority, 297 U.S 288, 347 (1936))

16. In Nairobi PETITION NO. 187 OF 2016, *THE COUNTY GOVERNMENT OF MIGORI & 4 ORS. THE PRIVATIZATION COMMISSION OF KENYA & ANOR.*, this court considered the principle of constitutional avoidance and held as follows:

“Principle of Constitutional Avoidance

Even where a dispute is properly before the Court, the principle of constitutional avoidance bears upon the consolidated petitions and judicial review proceedings. In MOMBASA HC CONSTITUTIONAL PETITION NO. 61 OF 2012, Jackson Maina Ngamau v. Ethics and Anti—Corruption Commission & 3 Ors., this Court discussed constitutional avoidance as follows:

1. The principle of ‘constitutional avoidance’ as discussed by the Supreme Court of Kenya in Communications Commission of Kenya & 5 Ors. v. Royal Media Services Ltd & 5 Ors. (2014) eKLR that the Court will not determine a constitutional issue or question even where it is properly before it, if there is another basis upon which the case can be disposed of, does not oust the jurisdiction of the Court but rather calls for judicial restraint in cases where there exists an statutory or other remedy. In addition, in accordance with the rule in *The Speaker of the National Assembly v. Karume (2008) EG&F*, it is now accepted as a principle of constitutional adjudication that where the constitution or statute makes provision for the process for determination of a particular matter that procedure should be strictly followed.

The jurisdiction of the High Court as the Constitutional Court is not ousted by such stance, nor is the Court abdicating its role as the interpreter of the constitution under Article 165(3) (d) of the Constitution. The Court only considers that there is adequate and appropriate remedy elsewhere.”

17. On the facts herein, this Court finds that the dispute in the matter is primarily that of forgery of signatures which will subsequently determine whether or not to order for a discharge of the charges. This is an ordinary civil dispute, much as it can also be a criminal matter. This Court finds that it is possible to determine this issue, either as a civil or criminal matter without having to determine a constitutional issue. Were it that all such disputes would find way into a Constitutional Court, there would be indeed a floodgate of cases, yet there are various other Courts adequately equipped to handle the very matters. This Court finds that this is a matter which ought to have been filed in an ordinary civil suit. Although it is possible for parties to adduce viva voce evidence as well as to have witnesses cross examined in a Petition (unlike what the 6th Respondent deposes to in her affidavit), the norm is usually to proceed by way of affidavit evidence.

Joinder of third parties to Matrimonial Cause

18. The Petitioner has argued that it is not possible to enjoin the other Respondents being financial institutions in the matrimonial cause that is pending because that is a personal matter between herself and the 1st Respondent. This Court does not agree with this submission. Although matrimonial property comprises what was acquired during the subsistence of the marriage, this Court finds that the law makers and judicial officers are well aware that interested third parties including financial institutions are capable of laying claim to any type of property including matrimonial property. To argue that no such third parties can be enjoined to such proceedings is a self-defeating argument more so in the face of clear provisions of law for joinder of parties to proceedings as per Order 1 of the Civil Procedure Rules, 2010. In fact, a Court may on its own motion enjoin a party to any suit if in its view, it is necessary to do so for purposes of effective adjudication and determination of the real matter in dispute. In the case of *EJN v PNN; KMN (Proposed third party) [2019] eKLR Civil Suit No. 18 of 2015*, Muchelule J. allowed an application to enjoin a third party to a matrimonial cause where it was alleged that matrimonial property had been transferred to the said third party.

19. Significantly, see principles for the joinder of parties in the Court of Appeal decision in *Civicon Limited v Kivuwatt Limited & 2 others* [2015] eKLR that –

“Under **Order 1 of the Civil Procedure Rules**, the trial court has wide discretionary powers to make necessary amendments as to the parties to a suit by adding, substituting or striking them out and to make all such changes in respect of parties as may be necessary to enable an effectual adjudication to be made concerning all matters in dispute between them. The court has a separate, independent duty from the parties themselves to ensure that all necessary and proper parties, and no others, are before it so that it may effectually and completely determine and adjudicate upon all matters in dispute. For this reason, at any stage of the proceedings, the court may on such terms as it thinks just and either on its own motion or on application, order for the joinder of a party where

From the forgoing the power of the court to add a party to a suit is wide and discretionary, the overriding consideration being whether he has interest in the suit. The question is whether the right of a person may be affected if he is not added as a party. Generally, in exercising this jurisdiction the court will consider whether a party ought to have been joined as plaintiff or defendant, and is not so joined, or without his presence, the question in the suit cannot be completely and effectively decided.

Accordingly, a necessary party is one without whom no order can be made effectively, while a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceedings....

Again the power given under the Rules is discretionary which discretion must of necessity be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined. In the same vein, a party seeking joinder who fails to establish any right over or interest in the subject matter cannot be enjoined. This Court in *Meme vs Republic (2004) KLR 637* considering an application for joinder held that joinder will be permissible:....

From the foregoing, it may be concluded that being a discretionary order, **the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the**

plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”

20. Should the Petitioner herein consider it unnecessary to enjoin the various financial institutions in the matrimonial cause, the most efficacious thing for her to do is to file an ordinary civil suit raising the issues of fraud and/or forgery of her signature.

Conclusion

21. In the circumstances of this case, the Court finds that the Petition does not raise proper constitutional issues and the said dispute ought to be resolved in an ordinary civil claim. This Court, therefore, finds that it lacks jurisdiction to determine the Petition on the principle of constitutional avoidance. Having already found in the affirmative the first point in the preliminary objection raised, this Court does not find it necessary to determine the rest of the points raised in the preliminary objection, especially in the absence of parties' submissions thereon.

Orders

22. Accordingly, for the reasons set out above, the Court makes the following orders: -

1. Ground Number 1 in the Notice of Preliminary Objection dated 15th September 2020 is hereby upheld.

2. The Petitioner's Petition dated 31st August 2020 is hereby dismissed.

3. In view of the primarily matrimonial nature of the matter, there shall be no order as to costs.

Order accordingly.

DATED AND DELIVERED ON THIS 3RD DAY OF JUNE, 2021

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Mutuma & Koskei Advocates for the Petitioner

M/S Mwenda, Mwarania, Akwalu & Co. Advocates for the 1st, 2nd, 3rd and 4th Respondents

M/S Humphrey & Co. Advocates LLP for the 5th Respondent

M/S Mithega & Kariuki Advocates for the 6th Respondent

M/S Wambugu & Muriuki Advocates for the 7th Respondent

M/S Kiautha Arithi & Co. Advocates for the 8th Respondent

M/S DM Nyamu & Co. Advocates for the 9th Respondent.