



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI HIGH COURT

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 210 OF 2016

**IN THE MATTER OF ALLEGED DENIAL, VIOLATION, INFRINGEMENT OF AND
THREAT TO FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL
UNDER ARTICLES 27(1), (2), (4), (5) & (6); 28, 40(1) (a) & (b); AND 64 OF
THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ARTICLES 11, AND 35 OF THE
CONSTITUTION OF THE REPUBLIC OF KENYA**

AND

**IN THE MATTER OF ARTICLES 3(1); 10(b); 20(1), (2), (3) & (4); 50(1);
159(d) and 259(1) (a), (b), (c) & (d) OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF TIMOTHY MWANDI MUUMBO (DECEASED)

BETWEEN

JOHNSTONE KASSIM MUUMBO.....1ST PETITIONER

ALEX MUNYASYA MUUMBO.....2ND PETITIONER

CAROLYNE KALUNDE MUUMBO.....3RD PETITIONER

VERSUS

DR. MOSES NJUE GACHOKI.....1ST RESPONDENT

DR. PETER M NDEGWA.....2ND RESPONDENT

LEE FUNERAL SERVICES LIMITED.....3RD RESPONDENT

BILLY MBUVI MUUMBO.....4TH RESPONDENT

MWINZI MUUMBO.....5TH RESPONDENT

THE INSPECTOR- GENERAL OF POLICE.....6TH RESPONDENT

THE HON. ATTORNEY GENERAL.....7TH RESPONDENT

RULING

THE PETITION

1. The petitioners through a petition dated 23rd May 2015 seek the following reliefs:-

- a) *An order directing the 1st, 2nd, 3rd, 4th and 5th respondents to return the missing parts of the deceased's body.*
- b) *An order that the 1st and 2nd Respondents do correct or delete their untrue reports on cause of death of the deceased.*
- c) *An order that the 6th Respondent does divulge findings of investigations of the matter since the body parts went missing.*
- d) *An order that a report pertaining to samples sent to the Government Chemists from the body of the deceased is availed to the petitioners.*
- e) *General damages.*
- f) *The Respondents to bear the costs of this Petition.*
- g) *Any other and /or further relief that this Honourable Court may deem fit.*

THE PETITIONERS' CASE

2. Following the death of the Petitioners' father Timothy Mwandi Muumbo (deceased) on or about 22nd June 2015, they engaged the 1st respondent on 24th June 2015 to conduct postmortem to determine the cause of the death.
3. The 1st respondent sent them a report whose contents were similar to Police Form No. 23A and to an autopsy report prepared by the 2nd Respondent. Consequently, another postmortem was conducted by professor Rugena on 18th September 2015 but stalled as some vital body parts were missing including the entire heart to which the 1st and 2nd Respondents failed to account for.
4. The Petitioners' case is predicated upon **Articles 35(1) and (2) of the Constitution of Kenya**.
5. The Petition is supported by the affidavit of the 3rd Petitioner sworn on 23rd May 2016.

1ST RESPONDENT'S CASE

6. The 1st Respondent filed a replying affidavit sworn by himself on 29th July 2016 and filed on 4th August 2016. He deposes that the Petition does not disclose the constitutional rights alleged to be violated contrary to **Rules 10(2) (c) and (d) of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**.
7. The 1st Respondent avers that the petition does not raise a constitutional issue and should be determined as a contractual matter between the 1st Respondent and the Petitioners. He asserts that the Petitioners claim does not fall within the ambit of **Article 22 of the Constitution** and that the Petitioners have failed to demonstrate how their rights under **Articles 20, 27, 28, 40 and 64 of the Constitution** had been infringed to warrant the intervention of this Court under **Article 35 (2) of the Constitution**.
8. The 1st Respondent also avers that the petitioners have failed to demonstrate, with a reasonable degree of precision, the provisions of the Constitution which have been violated with regard to it and, the manner of such violation. Further, that the deceased does not have any legal right recognized under the Bill of Rights which is capable of protection by the Court.
9. The 1st Respondent additionally contends that the only relevant provision is **Article 35 of the Constitution** which is untenable as the Petitioners have, sought deletion of a postmortem report without substantiating as to what, the untrue report entails and what it ought to be substituted with; failed to demonstrate that they requested for the deletion of untrue information and were denied; failed to show how the misleading information will prejudice them; and failed to show that the information sought is required for the exercise or protection of another right.
10. The 1st Respondent asserts that contrary to the provisions of Article 258 of the constitution, the petition as framed does not raise any contentious issue and as such declaration sought cannot be granted.

11. The 1st Respondent states that the prayer requesting the 6th and 7th Respondents to avail their investigation is baseless as they have not adduced any evidence to show that they requested for the information and have been denied. Furthermore, it is urged that this is not the correct forum for asking for the deceased's missing body parts.

12. The 1st Respondent deposes that the Petitioners have failed to disclose material facts hence do not deserve equitable remedies.

4TH AND 5TH RESPONDENT'S CASE

13. The 4th and 5th Respondents filed a replying affidavit by Billy Mbuvi Muumbo sworn on 29th July, 2016 and filed on 5th August 2016. It is substantively reiterated that the contents in the 1st Respondent's replying affidavit and the Petition do not meet the threshold for a Constitutional Petition.

14. It is averred that the petition is instigated by a burial dispute being **CMCC No. 3773 of 2015 – Johnstone Kassim and 2 others v Billy Mbuvi Muumbo and anor** which is subject of appeal in **Civil Appeal No. 7 of 2016 – Johnstone Kassim Muumbo and anor vs Billy Mbuvi & anor** and a **Succession Case No. 1673 of 2015** wherein the deceased bequeathed his property to his family leaving out the Petitioners.

THE 6TH AND 7TH RESPONDENTS' CASE

15. The 6th and 7th Respondents drew grounds of opposition dated 20th July 2016 and filed on 5th August 2016 opposing the Petition and urging for its dismissal on the grounds that:-

i) It does not raise any constitutional issues that require determination by this Honorable Court.

ii) It is not known in law that a deceased person, to wit, the late Timothy Mwandu Muumbo, or any other deceased person enjoys any fundamental rights and freedoms under Chapter IV of the Constitution, as such no rights can be claimed to have been violated in that regard.

iii) The Petition is vague as the petitioners have failed to demonstrate with precision against whom and which rights have been violated.

iv) The Petitioners have failed to demonstrate how Article 11 and their fundamental rights under Articles 27, 28, 35 and 40 of the Constitution have been violated by the 6th and 7th Respondents.

v) By dint of Article 165(5) (b) of the Constitution, the issues raised by the petitioners under Article 64 of the Constitution cannot be determined by this Court.

vi) Issues regarding property dispute of a deceased, if any, ought to be determined by the family division of the High Court and Not this division of the Court.

vii) No reasonable cause of action has been raised by the Petitioners as against the 6th and 7th Respondents.

viii) The Petition is clearly an abuse of the due process of this Honourable Court and should be dismissed and / or struck out forthwith.

3RD RESPONDENT'S APPLICATION

16. The 3rd Respondent's filed an application dated 9th March 2021 seeking the following reliefs:-

a) Spent.

b) That this Honourable Court be pleased to strike out the petition dated 23rd May, 2016 and filed on 24th May, 2016 in its entirety for failure to raise any bonafide issues.

c) That in the alternative, this Honourable Court be pleased to strike out the name of the 3rd respondent from the petition and have it discharged from the proceedings in this matter as there are no issues raised against it that require its response or participation.

d) That the costs of the application be provided for.

17. The application is premised on the grounds on the face of the application and on the 3rd Respondent's supporting affidavit sworn by Herman Omiti on even date.

GROUNDINGS IN SUPPORT OF THE APPLICATION

18. The summary grounds in support of the application are that:-

i) The Petition goes against statute law and jurisprudence of this Court as to what constitutes a Constitutional Petition.

ii) The petitioners have neither specified in any way or sufficiently in detail which of the rights or fundamental freedoms each of the respondents and particularly the 3rd Respondent have violated, infringed or denied or threatened to deny, violate or infringe nor have they specified with precision how the said breach has been committed by each of the Respondents and specifically the 3rd respondent.

iii) The Petition does not raise any material that discloses denial, violation, infringement of a right or fundamental freedom as envisaged in the Bill of Rights and the reliefs sought in the Petition are obtainable and fall under civil law.

iv) The issues raised in the Petition are civil disputes against the 1st, 2nd, 4th and 5th Respondents and do not in any way involve the 3rd respondent. The Petitioners have not disclosed the violation attributed to the 3rd Respondent.

v) The 3rd Respondent has not been faulted for anything in the Petition and the prayer sought against it is therefore misplaced and baseless. It cannot therefore be considered a necessary party in these proceedings.

vi) It is therefore necessary to strike out the petition or in the alternative strike it from the proceedings to avoid unnecessary wastage of court's resources as well as to avoid prejudicing the 3rd respondent as to incur unnecessary costs to participate in these proceedings.

PETITIONERS' RESPONSE

19. The Petitioners filed a replying affidavit by 3rd Respondent, one Carolyn Kalunde Muumbo sworn on 11th June 2021. She deposes that the petition is at an advanced stage, the order issued on 24th June 2017 directed the manner in which the matter was to proceed and that the matter is part heard, the 3rd Petitioner having testified on 25th September 2018.

20. The 3rd Petitioner deposes that the 3rd Respondent's advocates are improperly on record and Mr. Herman Omiti has breached **Section 8 of the Advocates (Practice) Rules** by purporting to give evidence on behalf of the 3rd respondent.

21. The 3rd Petitioner further deposes that the 3rd Respondent is adversely mentioned at paragraphs 12 and 18 of the Petition and the 1st prayer in the Petition is for the return of the deceased's missing body parts by some of the respondents who include the 3rd Respondent.

ANALYSIS AND DETERMINATION

22. Having carefully considered the 3rd respondent's application, the petitioners' response, and parties' submissions and from the same the following issues arise for determination:-

a) Whether the 3rd Respondent application for striking out the Petition is properly before Court in view of the Court's directions in force.

b) Whether the 3rd Respondent is a necessary party in these proceedings.

A. WHETHER THE 3RD RESPONDENT APPLICATION FOR STRIKING OUT THE PETITION IS PROPERLY BEFORE COURT IN VIEW OF THE COURT'S DIRECTIONS IN FORCE.

23. The 3rd Respondent's application seeks to strike out the Petition for failing to raise *bonafide* issues. The application is premised on three main grounds; first, that the petition goes against statute law and jurisprudence of this Honourable Court as to what constitutes a Constitutional Petition. Secondly, that the Petitioners have neither specified in any way or sufficiently in detail which of the rights or fundamental rights of each of the Petitioners and particularly the 3rd Petitioner have been violated, infringed, or denied or threatened to be denied, violated or infringed nor have they specified with precision how such a breach has been committed by each of the Respondents. Lastly, that the remedies sought in the Petition are obtainable and statutorily fall under civil law actions.

24. The Petitioners through the Replying Affidavit deposed upon by Carolyn Kalunde Muumbo, the 3rd Petitioner have deposed that the 3rd Respondent's application for striking out the Petition is unfortunate as it has been brought at an advanced stage of the proceedings and when all parties had filed documents in response to the Petition.

25. Looking at the Court record, it is clear that on 24th June 2017, this Honourable Court gave clear and unequivocal directions directing, that this case be determined by way of viva-voce evidence and parties were required to file their respective witnesses statements, list of documents and authorities within 30 days. The 3rd Respondent was granted 14 days to file response to the Petition.

26. Further the Court record reveal, that on 25th September 2018 this Petition proceeded to oral hearing before Hon. Lady Justice W. A. Okwany, who heard PW1 - Carolyn Muumbo and who was cross-examined and re-examined.

27. The instant Petition is therefore part-heard, the evidence of PW1 having been adduced, the position remains as stated herein above as

Court's directions had not been set aside or varied or discharged when the 3rd Respondent filed the instant application for striking out the Petition. It is further contended that the firm of Njeri, Omiti and Bush Advocates LLP, purporting to act for the 3rd Respondent have not filed Notice of Appointment as Advocates and/or Memorandum of Appointment hence it is contended the firm of the Advocates have filed the application without authority to represent the 3rd Respondent.

28. Upon consideration of the Court proceedings, it is clear that the 3rd Respondent application dated 9th March 2017 was filed together with Notice of Appointment of Advocates by Njeri, Omiti and Bush Advocates LLP. The application was filed after several directions and orders on how to proceed with the Petition had been given including hearing and determination of the Petition through oral evidence. At the time of filing the application the matter was part-heard. The directions and orders as regards oral hearing are still in force and have not been set aside or varied. Applications for striking out of a matter should essentially be filed at the earliest opportunity and before a matter is part-heard. I find that it is illogical and unfortunate to seek striking out a matter in which evidence has already been adduced and the hearing has not been concluded, as such as the instant Petition herein.

29. The Petition having proceeded to hearing and evidence having been given in this Petition, I find that the application by the 3rd Respondent to have been overtaken by Court's clear direction, for the Petition to be determined by way of viva-voce evidence. I cannot on my own motion vary or discharge the orders issued by a Judge of concurrent jurisdiction and proceed to hear and determine the application for striking out the Petition. The application has been brought too late in the day. The application is in my view an afterthought and intended to frustrate clear directions of this Court issued on 24th June 2017 having been brought after 4 clear years since directions for viva—voce hearing had been issued. I find no prejudice if the Petition proceeds to full hearing as directed and matter be determined after all parties have given evidence in support of their rival positions.

30. In view of the above, I find the 3rd Respondent's application for striking out the Petition to be malicious; frivolous, vexatious and not properly before this Court, in view of the Court's clear directions and in view of the application being filed four (4) years after the case had proceed to hearing by way of viva-voce evidence.

B. WHETHER THE 3RD RESPONDENT IS A NECESSARY PARTY IN THESE PROCEEDINGS.

31. **Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules , 2013** (otherwise referred to as **Mutunga Rules, 2013**) defines a Respondent to mean a person who is alleged to have denied, violated or infringed, or threatened to deny, violate or infringe a right or fundamental freedom.

32. **Rule 5 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** provides for addition, joinder, substitution and striking out of parties. It provides that:-

“5. The following procedure shall apply with respect to addition, joinder, substitution and striking out of parties—

(a) Where the petitioner is in doubt as to the persons from whom redress should be sought, the Petitioner may join two or more Respondents in order that the question as to which of the Respondent is liable, and to what extent, may be determined as between all parties.

(b) A Petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.

(c) Where proceedings have been instituted in the name of the wrong person as Petitioner, or where it is doubtful whether it has been instituted in the name of the right Petitioner, the Court may at any stage of the proceedings, if satisfied that the proceedings have been instituted through a mistake made in good faith, and that it is necessary for the determination of the matter in dispute, order any other person to be substituted or added as Petitioner upon such terms as it thinks fit.

(d) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just—

(i) order that the name of any party improperly joined, be struck out; and

(ii) that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.

(e) Where a respondent is added or substituted, the Petition shall unless the court otherwise directs, be amended in such a manner as may be necessary, and amended copies of the Petition shall be served on the new Respondent and, if the court thinks, fit on the original Respondents.”

33. In the case of **Pizza Harvest Limited V Felix Midigo 2013 eKLR** Justice Havelock (as he then was) while considering the case of **Amon V Raphael Tuck & Sons 1956 I All ER 273, in which Devlin J held at p. 286-287** stated as follows concerning who is a necessary party, stated thus:-

“What makes a person a necessary party” It is not of course merely that he has relevant evidence to give on some of the questions involved: that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately... the court might often think it convenient or desirable that some of such persons be heard so that the

court could be sure that it had found the complete answer, but no one would suggest that it would be necessary to hear them for that purpose. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore must be a question in the action which cannot be effectually and completely settled unless he is a party”

34. The Court in *John Henry Kariuki & 11 others v County Government of Nyeri & another [2021] eKLR* while adopting the decision in *Pizza Harvest Limited V Felix Midigo (supra)* stated that:-

“14. The main question for adjudication is whether or not the alienation or forcible takeover of the suit property by the predecessor in title of the 1st Respondent was unconstitutional and unlawful. The material on record shows that the 2nd Respondent or its predecessor had nothing to do with the alleged compulsory acquisition. The court is of the opinion that the question as to whether due process was followed in the acquisition of the suit property or whether compensation was ever paid for it can only be answered by the 1st Respondent. The presence of the 2nd Respondent shall not be necessary for the purpose of resolution of the issue.”

35. The Court further stated at paragraph 18:-

“18. The Court has already found and held that the 2nd Respondent is not a necessary party and that its presence is not required to enable the court to adjudicate upon and determine the issues in controversy in the petition. The court has also found and held that the 2nd Respondent was merely an agent of a disclosed principal hence it could not be sued together with the principal in respect of the same cause of action. It would, therefore, follow that the 2nd Respondent was wrongly joined in the petition hence it ought to be struck off the Petition.”

36. The 3rd Respondent has submitted that it is not a necessary party to the suit. The 3rd Respondent has further submitted that it has not been faulted for any denial, violation, infringement or threat of any of the petitioners’ constitutional rights.

37. The Petitioners have on the other hand submitted that this is a misrepresentation of facts and a misapprehension of facts as the 3rd Respondent has been adversely mentioned in its Petition and that one of the prayers sought involves it to the proceedings.

38. In view of the provisions **Rule 5 of the Mutunga Rules 2013**, I find that the 3rd Respondent in view of the pleadings herein is a necessary party as provided under paragraphs 12 and 18, in which the 3rd Respondent is mentioned adversely and further under prayer no. 1 in which a relief is sought against the 3rd Respondent for return of the deceased missing body parts by some of the Respondents who include the 3rd Respondent.

39. The upshot is that I find the 3rd Respondent’s application dated 9th March 2021 is intended to frustrate hearing and determination of the Petition as directed by the Court through viva voce hearing. It is without merits and is accordingly dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 2ND DAY OF DECEMBER, 2021.

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J. A. MAKAU

JUDGE OF THE HIGH COURT OF KENYA