



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 205 OF 2019

SALIM ALLI.....PETITIONER

VERSUS

KENYA WILDLIFE SERVICE.....RESPONDENT

RULING

1. By the Notice of Motion herein dated 27/11/2019 the Applicant prays for the following orders:

(i) That service of the application herein be dispensed with for reasons of its urgency.

(ii) That pending the hearing and determination of the application herein, a conservatory order restraining the Respondent from prohibiting the Petitioner from lawfully operating motor vessel Valais within the Mombasa Marine Reserve does issue.

(iii) That pending the hearing and determination of the petition herein, a conservatory order restraining the Respondent from prohibiting the Petitioner from lawfully operating motor vessel Valais within Mombasa Marine Reserve does issue.

(iv) That costs be provided for.

2. The motion was filed together with the petition also dated 27/11/2019.

3. The motion is premised on grounds set out therein, and is supported by affidavit sworn by the Applicant on 27/11/2019.

4. The Applicant's case is that he has owned and operated glass-bottomed boats from which he earned a living for the past 20 years, while operating at the Mombasa Public Beach, and purchased his latest boat last year from one Sarah Owera. His daily vocation involves taking both local and foreign tourists for recreational ocean excursions to various spots in the Marine Reserve where they may view and appreciate the beauty that lies underneath the ocean. The Applicant therefore claims that he is a stakeholder of the Marine Reserve and has vested interest in its protection and conservation. In order to commence operating the said boat he satisfied all legal requirements with the Kenya Maritime Authority and the Respondent herein as managers of the Marine Reserve issued him with all requisite licences and permits required by law. The Applicant avers that being a boat operator, he enrolled with the Mombasa Boat Operators Association, which is his vocation's umbrella body, and whose offices are stationed at the same public beach zone. The Applicant claims to have satisfied all laws or rules and regulations that are made by the Respondent and which relate to the operation of the boat operation vocation in the Marine Reserve, and has never breached or violated any of them. The Applicant avers that the Respondent also maintains a well staffed office within the Marine Reserve which is responsible for management and overseeing the affairs of the Marine Reserve.

5. The Applicant avers that on 19/11/2019 at about 1.00 p.m. or thereabouts, and while at his usual place of work in the reserve, the Reserve's Warden, a Mr. John Wambua, in the company of his assistant Mr. Julius Ngeti verbally confronted him and his colleague Joshua Salanah and ordered them to cease their beach operations with immediate effect; that Joshua Salanah and him requested to know the reason for such abrupt oral notice but the Respondent's officers were not willing to interact with them. They followed up the said Respondent's officials in their offices for the purpose of securing the reasons for such order but the officials declined to reduce any reasons in writing. The Respondent also refused to respond to Applicant's lawyer's demand for reasons for order to cease operations. However strangely, the Respondent has since allowed the Applicant's colleague Joshua Salanah to continue operating his boat while the Applicant is irregularly restrained from operating. That is so despite the fact that the Respondent has even issued the Applicant with this year's operating licence. The Applicant avers that he has been unfairly treated by the Respondent and if allowed to stand, the Respondent's irregular action will financially cripple the Applicant because the boat was his only source of income and that the Respondent's actions are so unreasonable that the Petitioner feels like the Respondent's officials are unlawfully elbowing him out of business for ulterior and personal motives and this

may amount to abuse of their offices in addition to the unfair treatment suffered at their hands.

6. The Applicant avers that Article 47 of the constitution grants every Kenyan the right to fair administrative action from the whims or excesses of Government and its officials. Additionally, the Fair Administrative Actions Act No. 4 of 2015 was legislated to affirm the rights under Article 47 of the constitution. The Applicant states that Section 4 (2) of the said Act provides that every Kenyan citizen has a right to be given written reasons why administrative action has been taken against him. The Applicant avers that the Respondent violated the Applicant's Article 47 right on the afternoon on 19/11/2019 when the Respondent's officials, during a casual stroll at the Mombasa Marine Reserve, on the whim, without giving any reasons whatsoever, chanced upon, informed the Petitioner and another, that both can no longer operate their glass-bottomed boats, forthwith.

The Response

7. The Respondent opposed the application through grounds of opposition filed on 13/1/2020. The Respondent's case is that the Petitioner has no *locus standi* to institute these proceedings; the Petition discloses a purely civil dispute which is disguised as a constitutional petition; the conservatory orders sought lack the requisite substratum on which to survive and that the proceedings are misconceived, frivolous and an abuse of the court process. The Respondent also filed a list and bundle of authorities together with the Grounds of Opposition.

8. The Petitioner filed a Reply to the Grounds of Opposition dated 15/1/2020 insisting that he has the *locus standi* to approach the court by way of a constitutional petition since the Respondent's officials had violated his constitutional right to fair administrative action.

Submissions

9. Parties filed submission which I have considered. The issues for determination in this application are:

- (i) Whether the Petitioner has the locus to file this petition; and
- (ii) Whether the complaints herein amount to constitutional complaints

10. On the issue as to whether the Petitioner/Applicant has *locus standi*, Dr. Khaminwa, learned Counsel for the Petitioner submitted that the Petitioner has instituted the suit in his capacity and has met the constitutional threshold of **Anarita Karimi Njeru vs. Republic (No. 1) [1979] KLR 154**, which establishes the principle of law that anyone who wishes the court to grant a relief for violation of a right or fundamental freedom, must plead in a precise manner the constitutional provision said to have been violated or infringed, the manner of infringement and jurisdictional basis for it. Dr. Khaminwa submitted that the Applicant stated in both the application and petition that his constitutional rights under Article 47 were violated by the Respondents when they informed the Applicant he could no longer operate his boat business without giving any reason. Counsel referred the court to Article 22 of the constitution which states that every person has a right to institute court proceedings claiming that a right or fundamental freedom in the bill of right has been denied, violated or infringed or is threatened. The right to Fair Administration Action is recognized under Article 47 of the constitution of Kenya, 2010. The right entitles every citizen to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. It obliges public officers to adhere to these principles when taking administrative action. Dr. Khaminwa submitted that in addition to the constitutional provisions on fair administrative action, a Fair Administrative Action Act was enacted in 2015. The Act applies to state and non-state actors in their exercise of various powers under the law. Dr. Khaminwa further referred to Article 232 which provides for the values and principles of public service to include high standards of professional ethics, efficient, prompt, impartial, equitable provision of service, accountability for administrative acts, transparency and provision to the public of timely, accurate information. Counsel submitted that the Respondents totally disregarded the provision of the law and violated the Applicant's rights under the constitution forcing the Applicant to seek conservatory orders. Counsel cited **Kenya Human Right commission vs. Non-Governmental Organization Coordination Board** which decided that a person whose interests and rights are likely to be affected by an administrative action has a reasonable action that they will be given fair hearing before any adverse action is taken as well as reasons for the adverse administrative action as provided for under Article 47 of the constitution.

11. In response Mr. Mugambi, learned Counsel for the Respondent submitted that an issue of *locus standi* raised in a constitutional petition is akin to a Preliminary Objection on a point of law raised in ordinary civil proceedings and must be determined on the outset before other issues raised are considered and determined. See Anyara Emukule J, in **Kiluwa Limited & another vs. Commissioner of Lands & 3 others [2015] eKLR**. Mr. Mugambi submitted that *Locus Standi* signifies a right to be heard. It means a right to appear in court. A person must have sufficiency of interest to sustain his standing to sue in a court of law and conversely to say that a person has no *locus standi* means that he has no right to appear or be heard in such and such proceedings. Therefore, if a party is found to have no *locus standi*, then it means she/he cannot be heard even on whether or not she/he has a case worth listening to. Counsel submitted that if this Court finds that the Petitioner has no *locus standi*, then he cannot be heard and that point alone may dispose off the petition.

12. Mr. Mugambi submitted, correctly in my view, that the subject matter of this petition is motor vessel Valais. The question to consider is whether the Petitioner has demonstrated a sufficiency of interest in motor vessel Valais to give him the standing to sue over it in this court. The Petitioner alleges that he purchased the boat in 2018 from one Sarah Owera. He exhibited copies of what he termed to be his ownership documentation and photographs of the boat which he marked as SA-1. The document marked SA-1 is a Boat Selling Agreement dated 5/12/2018 between Sarah Atieno Owera as the seller and White Shark Self Help Group as the buyer. The documents indicate that the officials of White Shark Self Help Group are Kheri Ibrahim (Chairperson), Charles Opii (Secretary), Cavin Saranga (Treasurer). Other members of this self-help group are indicated to be Agnes Machache (Charlady), Joshua Salahno (committee), Job Ole Kirui (member), Ann Cheboen (member), Phylis Nasimiyu (member), Peter Ngeah (member), Vincent Rikata (member), Duncan Mwamsanga (member), Hellen Wairimu (member), Judith Lugongo (member) and Obonyo Linet (member). I have perused this agreement, and I note that the Petitioner's name does not appear anywhere on it. The inevitable conclusion is that he did not buy the boat from Sarah Atieno and he is not an official or a member of White Shark Self Help Group whose sale agreement he has exhibited. There is no connection whatsoever between the Petitioner/Applicant and the boat in question.

13. The Petitioner avers that the Kenya Maritime Authority (KMA) and the Respondent issued him with the requisite licenses and permits required to operate the boat business. He exhibited copies of what he termed to be his licenses and permits which he marked as SA-2. The Local Safety Certificate serial number 1326 issued by the KMA in accordance with the Merchant Shipping (Small Vessel Safety) Regulations, 2012 regarding motor vessel Valais is in the name of Sarah Atieno Owera. The Vessel Licence serial number K No 2349 issued by the KMA in accordance with the provisions of section 57 of the Merchant Shipping Act, No. 4 of 2009 regarding motor vessel Valais is in the name of Sarah Atieno Owera. Mr. Mugambi submitted correctly again in my view, that these two documents are both dated 24/7/2019 meaning that they were issued to Sarah Atieno Owera after the period when the Petitioner alleges to have bought the boat from her. It is the finding hereof that annexures SA-1 and SA-2 which the Petitioner has relied on to demonstrate his proprietary interest in the boat show no connection whatsoever between him, the seller of the boat, the buyer of the boat and the boat. It is inevitable to conclude that the Petitioner has not demonstrated any sufficient interest in motor vessel Valais so as to give him the standing to sue over it in this court. In **Gabriel Mutava & 2 Ors. vs. Managing Director Kenya Ports Authority & Another [2016] eKLR**, the Court of Appeal settled it that constitutional litigation is not open for every claim which may properly be dealt with under the alternative existing mechanism for redress in civil or criminal law. A corollary to the foregoing is the principle of constitutional avoidance. The principle holds that where it is possible to decide a case without reaching a constitutional issue that should be done.

14. It is the finding hereof that the Petitioner is undeserving of the conservatory orders herein. He has not demonstrated a *prima facie* case with a likelihood of success for reasons that he had not shown any connection with the subject matter of this Petition. He has not shown what prejudice he stands to suffer if he is not granted the conservatory orders. In any event, he will suffer no prejudice because the boat does not belong to him. If the court declines to grant the conservatory orders sought in the application, the Petition will not be compromised at all since the conservatory orders sought in the application are not sought to preserve the subject matter pending the hearing of the Petition. In any even I have already found that there are no constitutional issues for determination in this Petition and as such, granting the conservatory orders will not enhance any constitutional values and objects.

15. From the foregoing it is the finding hereof that the preliminary objection raised by the Respondent succeeds with the result that the application herein is dismissed, and the petition herein struck out with costs.

Dated, Signed and Delivered at Mombasa this 3rd day of June, 2020.

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Mr. Mugambi for Respondent

Dr. Khaminwa for Petitioner

Mr. Kaunda Court Assistant