



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

PETITION NO. 19 OF 2016

IN THE MATTER OF ARTICLES 22, 23, 165, 258 & 260 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE ALLEGED VIOLATION OR INFRINGEMENT AND OR THREATENED VIOLATION AND/OR INFRINGEMENT OF CONSTITUTIONAL RIGHTS OF THE PETITIONER UNDER ARTICLES 40, 46 AND 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

MALENIA ITOK.....PETITIONER

AND

NATIONAL CEREALS AND PRODUCE BOARD.....RESPONDENT

JUDGMENT

[1] This petition was filed herein on **6 October 2016** by **Malenia Itok** (the Petitioner) pursuant to the provisions of **Articles 22, 23, 258, 259 and 260 of the Constitution**. She filed the Petition in her own interest as well in her capacity as a person with an obligation to uphold and defend the Constitution in terms of **Article 3 of the Constitution**. She also averred that she brought the Petition in the public interest within the meaning of **Articles 22(2)(c) and 258(2)(c) of the Constitution**.

[2] The petitioner averred that between the months of **March and June 2007**, she supplied the respondent with 614 bags of maize valued at **Kshs. 790,218/=** but that the respondent neglected to pay her for the supply, and has declined to pay her to date. It was her contention that she legitimately expected to be paid the said amount within a reasonable time; and that, since her efforts to pursue the payment have yielded no fruits to date, it is clear that the respondent has declined, refused and or neglected to pay her what is her entitlement for the 614 bags of maize supplied and delivered to the respondent. Accordingly, the petitioner prayed for the following remedies:

[a] A declaration that the respondent's refusal and or neglect to pay her **Kshs. 790,218/=** for 614 bags of maize supplied between the months of **March and June 2007** is in total violation of the respondent's right to services of reasonable quality under **Article 46(1) of the Constitution**;

[b] A declaration that the respondent's refusal and or neglect to pay her **Kshs. 790,218/=** for 614 bags of maize supplied between the months of **March and June 2007** amounts to an infringement of the respondent's right to expeditious, efficient, lawful, reasonable and fair administrative action under **Article 47(1) and (3) of the Constitution**;

[c] A declaration that the respondent's refusal and or neglect to pay the petitioner **Kshs. 790,218/=** for 614 bags of maize supplied between the months of **March and June 2007** is in total violation of the respondent's right to acquire and own property under **Article 40(1) of the Constitution** as read with **Article 260 of the Constitution**;

[d] A mandatory injunction to compel the respondent to pay the petitioner **Kshs. 790,218/=** for 614 bags of maize supplied

between the months of **March** and **June 2007** together with interest thereon from the month of **June 2007** till payment in full;

[e] Any other relief and or order that the Court may deem fit and just to grant; and,

[f] That the respondent be ordered to pay the costs of the petition.

[3] The petition was resisted by the respondent vide its Answer to Petition dated **19 December 2016**. The respondent vehemently denied that the petitioner supplied it with 614 bags of maize between the months of **March** and **June 2007** worth **Kshs. 790,218/=** as alleged or at all. It averred that the petition was filed by the petitioner with the intention to defraud it; and therefore ought not to be entertained by the Court. The particulars of fraud were accordingly set out at paragraph 8 of the Answer to Petition to support the respondent's assertion that no payment is due from it to the petitioner. It was further the averment of the petitioner that the suit is statute-barred under the **Limitation of Actions Act, Chapter 22** of the **Laws of Kenya**; and that it has been brought in misapprehension of the Constitution.

[4] Pursuant to the directions given herein on **6 March 2019**, the Petition was canvassed by *viva voce* evidence. Thus the petitioner testified herein on **29 May 2019** and adopted her witness statement dated **28 May 2019**. Her testimony was that between the months of **March** and **June 2007**, she supplied the respondent with 614 bags of maize valued at **Kshs. 790,218/=** at the respondent's Kapsowar buying centre as follows:

[a] On **9 March 2007**, she supplied 92 bags of maize valued at **Kshs. 118,404/=** vide Voucher No. 4043929;

[b] On **5 April 2007**, she supplied 86 bags of maize valued at **Kshs. 110,682/=** vide Voucher No. 4043993;

[c] On **16 April 2007**, she supplied 226 bags of maize valued at **Kshs. 290,862/=** vide Voucher No. 2047805;

[d] On **14 May 2007**, she supplied 91 bags of maize valued at **Kshs. 117,117/=** vide Voucher No. 2047839; and,

[e] On **15 June 2007**, she supplied 119 bags of maize valued at **Kshs. 153,153/=** vide Voucher No. 4043993.

[5] It was thus the evidence of the petitioner that, whereas she had legitimate expectation that she would be paid the aforesaid amount of **Kshs. 790,218/=** within a reasonable time, the respondent declined, refused and or neglected to pay her; thereby violating her constitutional rights. She pointed out that she is but a peasant farmer who struggles to make ends meet; and that she now lives in abject poverty on account of the respondent's unreasonable conduct. In support of her evidence, the petitioner produced the five vouchers aforementioned as exhibits along with the demand notices issued to the respondent on her behalf by her Advocates. They were marked the Petitioner's Exhibits 1(a)-(e), and 2-4 herein). She accordingly prayed that her petition be allowed and the orders sought therein granted to her.

[6] The petitioner called **James Cheruiyot Cheptoo (PW2)** as her witness. He adopted his witness statement dated **28 May 2019** and confirmed that he not only sold 130 bags of maize to the petitioner, but also sourced for some additional 234 bags of maize on her behalf; all of which the petitioner sold to the respondent at its Kapsowar depot.

[7] On its part, the respondent relied on the evidence of its Eldoret Silo Manager, **Erick Kipleting Rop (DW1)**. He testified on **16 July 2019** and adopted his witness statement dated **18 March 2019**. He denied that the petitioner delivered maize to the respondent and urged the Court to disregard the delivery vouchers produced by her. It was his assertion that the said documents are forgeries, lacking not only the respondent's logo but also the signature of the responsible officer. He also pointed out that, as a matter of policy, the respondent only accepts deliveries between the months of **October** and **April**.

[8] In addition to the foregoing, **DW1** questioned the serial numbers of the vouchers and posited that it was illogical that the "4" series of vouchers were issued in **March 2007** before the "2" series, which were purportedly issued in **June 2007**. It was further the testimony of **DW1** that the documents in use at the respondent's depots are known, not as Crop Produce Vouchers as purported by the subject documents, but as Crop Purchase Advice. He therefore pointed to these various discrepancies as proof that the petitioner is simply out to defraud the respondent on the basis of forged documents. He consequently prayed for the dismissal of the petition with costs.

[9] In the light of the foregoing, **Mr. Nabasenge** for the petitioner proposed the following three issues for determination, in his written submissions filed on **29 October 2019**:

[a] Whether the Court has jurisdiction to deliberate on the instant application;

[b] Whether the petitioner's constitutional rights have been violated by the respondent; and,

[c] Whether the petitioner is entitled to the orders sought.

[10] **Mr. Nabasenge** submitted that the petitioner's claim is anchored on **Articles 40, 46 and 47** of the **Constitution**; and therefore that it is immaterial that this petition was filed after the 6-year limit provided for in **Section 4** of the **Limitation of Actions Act** had lapsed. He relied on **Article 159(2)(d)** of the Constitution as well as the cases of **W.J. & Another vs. Astarikoh Henry Amkoah & 9 Others** [2015] eKLR and **Rose Wangui Mambo & 2 Others vs. Limuru Country Club & 17 Others** [2014] eKLR for the proposition that the petition can be entertained notwithstanding that the grievance could also have been canvassed as an ordinary civil suit.

[11] While acknowledging that the transactions in question took place in **2007** before the promulgation of the current **Constitution of Kenya**, **Mr. Nabasenge** was confident that the remedies sought are nevertheless available because **Section 75** of the **retired Constitution**

guaranteed and protected the right to property. He therefore took refuge in **Sections 6 and 7** of the Sixth Schedule of **the 2010 Constitution** and urged the Court to find that the respondent's failure to pay the petitioner for the 614 bags of maize supplied amounted to a violation of her right to property under **Articles 40(1), 46(1) and 47(1)** of the **Constitution** for which the petitioner is entitled to the prayers sought; including a mandatory injunction.

[12] **Mr. Omwenga**, learned counsel for the respondent, relied on the written submissions filed by him on **18 September 2019**, wherein he proposed the following issues for determination:

- [a] Whether or not the petitioner's claim raises constitutional issues;
- [b] Whether or not this Court has the jurisdiction to hear and determine the matter; and,
- [c] Whether or not the petitioner has proved her case against the respondent to the required standard.

[13] In **Mr. Omwenga's** view, this is a simple civil claim disguised as a constitutional petition; and therefore that no infringement of the Constitution has been demonstrated by the petitioner to warrant intervention by the Court. He relied on **Anarita Karimi Njeru vs. Republic (No. 1)** [1979] eKLR in urging the Court to find that the petitioner has failed to set out with a reasonable degree of precision the constitutional violation complained of. Counsel also relied on the following authorities to augment his submission that the mere fact that the Constitution is cited or invoked does not necessarily convert a purely civil claim to a constitutional issue:

[a] **Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and all past and present customers of banking institutions in Kenya) vs. Habil Olaka & Another** [2018] eKLR;

[b] **Sylvana Mpambwanayo Ntaryanayo vs. Allen Waiyaki Gichuhi & Another**, Judicial Review No. 449 of 2015.

[14] Thus, it was the submission of **Mr. Omwenga** that the petition is not only lacking in merit, for having been brought in misapprehension of the Constitution, but is also time barred and therefore ought to be dismissed with costs.

[15] I have carefully considered the Petition, the Answer thereto, the evidence adduced by the parties in respect thereof and the written submissions filed by learned counsel. I note that although pertinent issues were raised in connection with the jurisdiction of the Court and the competence of the petition, these were not taken *in limine* by the parties before directions were given on **24 July 2017**. Nevertheless, it is imperative that the issues be given preference before engaging in a merit-consideration of the Petition. This is because, as was aptly stated by **Hon. Nyarangi, JA**, in **The Owners of Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Ltd** [1989] 1 KLR:

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

[16] **Mr. Omwenga** for the respondent raised the issue of jurisdiction from the purview of **Section 7(1)(a)** of the **Magistrates Courts Act, 2015** by which the pecuniary jurisdiction of the subordinate courts was enhanced, such that a subordinate court presided over by a chief magistrate now has the jurisdiction to handle civil claims of up to **Kshs. 20,000,000/=**. He also made reference to **Section 11** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**, which provides that suits should be instituted in a court of the lowest grade competent to try it. Clearly, the argument was premised on the basic fact that the Petition is in respect of some 614 bags of maize valued at **Kshs. 790,218/=**. The argument however is completely oblivious of the fact that, *ex facie*, this is not a civil suit for recovery of the aforementioned amount; but a constitutional petition for purposes of **Articles 22, 23 and 165(3)** of the **Constitution**. In the premises, I find **Mr. Omwenga's** point on jurisdiction implausible and would dismiss it without further ado.

[17] On the issue of limitation, the argument was raised that since the sale that is the subject of the Petition took place between **April and June 2007**, the cause of action was already stale by **6 October 2016** when this Petition was lodged. Again, that argument is untenable in so far as it was predicated on **Section 4** of the **Limitation of Actions Act**. Authorities abound for the principle that there is no time limitation for the filing of constitutional petitions; and that the **Limitation of Actions Act** is inapplicable in the context of the constitutional petitions. For instance, In **Chief Land Registrar & 4 Others vs. Nathan Tirop Koeh & 4 Others** [2018] eKLR, the Court of Appeal held thus after reviewing the relevant case law:

"Guided and convinced of the sound jurisprudence that there is no time limit for filing a constitutional petition, we find the ground that the trial judge erred in failing to dismiss the Petition on account of delay, acquiescence and laches has no merit. Unless expressly stated in the Constitution, the period of limitation in the Limitation of Actions Act do not apply to violation of rights and freedoms guaranteed in the Constitution. The law concerning limitation of actions cannot be used to shield the State or any person from claims of enforcement of fundamental rights and freedoms protected under the Bill of Rights. (See Dominic Arony Amolo vs. Attorney General Nairobi HC Misc. Civil Case No. 1184 of 2003 (O.S) (2010) eKLR; Otieno Mak'Onyango vs. Attorney General & another Nairobi HCCC No. 845 of 2003). In our view, subject to the limitations of Article 24 of the 2010 Constitution, fundamental rights and freedoms cannot be tied to the shackles of Limitation of Actions Act. However, each case is to be decided on its own merits...."

[18] It is instructive that in the above matter, the petition was filed some 35 years after the cause of action arose. The Court Appeal recognized that:

"...in Kariuki Kiboi vs. Attorney General [2017] eKLR, Nairobi Civil Appeal No. 90 of 2015, this Court heard and determined a claim which arose in the mid-1980s and was lodged by a petition dated 26th August 2010. This Court

observed:

“Kariuki Kiboi (the appellant) was among six other persons who filed Constitutional petitions against the Attorney General (the respondent), who was sued on behalf of the Government of Kenya at the Constitutional and Human Rights Division of the High Court at Milimani Law Courts in Nairobi. The petitions were based on events that took place in this country in the mid-1980s and 90s, a period which some historians like to refer to as the dark days of the Moi era. The appellants were claiming in the main that some of their Constitutional rights, guaranteed them by the retired, and not so robust Constitution of Kenya, had been violated. It is not evident, why they did not sue earlier, but one can only surmise that they felt encouraged by the promulgation of the new Constitution on 27th August, 2010, which came with broader democratic space, an expanded Bill of rights, and a more vibrant and seemingly impartial judiciary.”

[19] In the premises, it cannot be said that there was unreasonable delay in the filing of this Petition. In the same vein, I find no merit in the argument that the issues raised herein were not pleaded and proved with as much clarity and specificity as expected. The Anarita Case was cited in this regard, for the holding that:

“...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.”

[20] A perusal of the Petition shows that in paragraph 2 thereof, the petitioner made a justification of her *locus standi* for purposes of **Articles 3, 22 and 258** of the Constitution; and in paragraphs 7 – 27, the petitioner explicitly set out the infringements complained of from the backdrop of the specific provisions of the **Constitution**. Accordingly, there is absolutely no merit in the argument that the petition is imprecise. In any case, a lot has changed since the Anarita Case; such that the current constitutional order favours, not a legalistic approach, but a simplified merit-based approach to the administration of justice; a point aptly made by **Hon. Odunga, J.** in Michael Osundwa Sakwa vs. Chief Justice and President of the Supreme Court of Kenya & Another [2016] eKLR thus:

“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...”

[21] And, in the case of Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR the Court of Appeal expressed the view that:

“We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note 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.”

[22] **Mr. Nabasenge** also raised the point that the response to the Petition is incompetent from the point of view of **Rule 15** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**; in that the respondent ought to have filed a Replying Affidavit as opposed to an Answer to Petition. However, for the same reasons stated herein above, I have no hesitation in rejecting that argument, given the clear provisions of **Article 22(3)(b) of the Constitution**, that formalities relating to proceedings for the enforcement of the Bill of Rights be kept to the minimum.

[23] That said, the only remaining issue for consideration is the question whether the matters complained of by the petitioner raise constitutional issues; and if so, whether the petitioner is entitled to the remedies prayed for by her. It bears repeating that the Petition is anchored on **Articles 40, 46 and 47** of the **Constitution**. **Article 46** guarantees a consumer’s right to goods and services of reasonable quality, and **Article 47** guarantees fair administrative action. **Article 40**, which is the key anchor of the Petition, provides thus in Sub-article (1):

“Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property...”

[24] Looking at the context of the **Article 40**, it is plain that one of the outstanding examples contemplated thereby is a situation where a person is arbitrarily deprived of property by way of compulsory acquisition. With that in mind, I have given due consideration to the facts relied on herein. There is no denying that the petitioner has the right to goods and services of reasonable quality; that she is entitled to fair administrative action; or that she is entitled to acquire and own property. It is not her assertion that the respondent arbitrarily acquired her the 614 bags of maize. To the contrary, the allegation by the petitioner is that she willingly supplied maize to the respondent; but which the

respondent has vehemently denied, alleging fraud.

[25] Thus, there is disputation as to whether or not the petitioner supplied maize to the respondent's depot at Kapsowar as alleged by her. It is for this reason that the respondent, through its Eldoret Silo Manager, **Erick Kipleting Rop (DW1)**, urged the Court to disregard the delivery vouchers produced by her, contending that the said documents are forgeries, lacking the respondent's logo or signature of the responsible officer. It is noteworthy, too, that in cross-examination, the petitioner conceded that the vouchers she relied on bear no signature of the receiving officer. Under those circumstances it would not be in tune with the Constitution to compel the respondent to pay the petitioner before the underlying dispute is resolved.

[26] It is therefore manifest that no property rights had crystalized for enforcement as at **6 October 2016** when the petitioner filed her Petition; and therefore that no constitutional issues present themselves herein for determination. Instead, the Court was called upon to make a determination on the alleged contractual transaction, as opposed to the vindication of a constitutional right. The bottom line is that Court is being called upon to find that the petitioner delivered maize to the respondent for which the respondent has not paid; and to issue orders for enforcement of payment. This, in my view is untenable in a constitutional petition; and I entirely agree with **Mr. Omwenga** that the sole reason this approach was taken by the petitioner was to sidestep the strictures of the **Limitation of Actions Act**. Indeed, the petitioner conceded in cross-examination that:

“It is true that by the time I filed this Petition the limitation period for filing a civil claim had lapsed. I got delayed because of the promises that NCPB gave me that it would pay met.”

[27] In the circumstances, the petition is misconceived; and, in this respect, I fully agree with the position taken by **Hon. Chacha, J.** in **Godfrey Paul Okutoyi vs. Habil Olaka** (supra), that:

“It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a Court of law in the manner allowed by that particular statute or in an ordinary suit as provided for by procedure. It is not every failure to act in accordance with a statutory provision or where an action is taken in breach of a statutory provision that should give rise to a constitutional petition. A party should only file a constitutional petition for redress of a breach of the Constitution or denial, violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum and in the manner allowed by the applicable law and procedure.”

[28] Likewise, in **Kanzika vs. Governor, Central Bank of Kenya & 2 Others** [2006] 2 KLR 545, it was held that:

“While a liberal and not an overly legalistic approach should be taken to constitutional interpretation the Charter should not be regarded as an empty vessel to be filled with whatever meaning we might wish from time to time. The interpretation of the Charter as of all constitutional documents is constrained by the language, structure and history of the constitutional traditions and by the history, traditions and underlying philosophies of our society...Textually there is no reason for constitutional vindication of commercial or contractual matters unless there is compulsory acquisition or a “taking away” as the American would call it. The parties and the courts have a responsibility not to trivialize constitutional jurisdiction. This is a claim that was well provided for under the general law of the land and in particular contract law but the applicant now wants to go behind that law ostensibly to escape from the applicable or available defences on limitation. This Court will not allow it...Our Constitution has not and was not intended to create commercial or contractual rights, instead it secures and guarantees existing constitutional rights...”

[29] For the foregoing reasons, it is my finding that the Petition is completely devoid of merit; and that the petitioner is not entitled to the remedies sought by her. The Petition is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 3RD DAY OF SEPTEMBER 2020

OLGA SEWE

JUDGE