



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 7 OF 2018

KATIBA INSTITUTE.....PETITIONER

VERSUS

ATTORNEY GENERAL,

CABINET SECRETARY, MINISTRY OF INTERIOR AND COORDINATION OF

NATIONAL GOVERNMENT.....2ND RESPONDENT

PUBLIC SERVICE COMMISSION.....3RD RESPONDENT

DIRECTOR GENERAL NATIONAL

INTELLIGENCE SERVICE OF KENYA.....4TH RESPONDENT

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS....INTERESTED PARTY

Coram: Hon. Justice R. Nyakundi

Ms. Lutta for the A. G.

Mr. Nyange for the interested party

RULING

This is a Preliminary Objection dated 28/1/2019 and filed on the same day seeking orders of the court:

1. That Kenya National Commission of Human Rights ought not to be given a chance to participate at the hearing of Petition No. 7 of 2018
2. The directions issued that the Interested Party proceeds to highlight their submissions offends the constitution in particular article 25(1) and Article 50 of the constitution and the rule of law
3. That the orders and directions made on 21/1/2019 are in contravention of the mandatory provisions of law and the constitution of Kenya (Protections of Rights and fundamental Freedoms) practice and procedure rules 2013.
4. The Interested Party does not have the requisite locus standi to file any submissions should therefore strike out with costs.
5. Granting the Interested Party, a chance to participate would totally prejudice the respondents.

The Petitioner, on his part contested the Preliminary Objection raised by the 1st respondent aimed at barring the Interested Party from participating in these proceedings. The Petitioner averred that the Preliminary Objection on the basis of Article 25 and 50 of the constitution

suffers from a threshold and errors in law which renders it fatally defective. It was therefore submitted that the Preliminary Objection ought not to be allowed for lack of merit. It was further submitted that the 3rd respondent needed to satisfy the court that Interested Party participation would occasion prejudice or a failure of justice. He stated that the petition concerns the interpretation of the constitution on the role of the respondents' failure to comply with section 66 of the National Intelligence Service Act.

It was counsel's view that the Preliminary Objection has not satisfied the ambit of the law to warrant the orders being sought by the 1st respondent. The Petitioner in asking this court to dismiss the Preliminary Objection invited the court to consider the legal principles set out in the following authorities: **Mukisa Biscuit Manufacturing Co. Ltd V west end distributors Ltd 1969 CEA 696, Kalpana Rawal & Others V Judicial Service Commission & Another 2016 KLR, Independent Electoral & Boundaries Commission V Jane Chepogeno & 2 Others 2015 KLR G4S Security Services K Ltd V Joseph Kamau 2018 eKLR Kenya Bankers Association & Others V Minister for finance & another.**

Counsel urged this court to find that the petition was in the public interest and there is no competent Preliminary Objection as defined in accordance with the decision in Mukisa Biscuits Case (supra). He submitted that it would be imprudent for this petition to proceed to full hearing without the participation of the Interested Party who has already been permitted by an order of the court to join the proceedings.

Counsel for the Interested Party argued and submitted that the Preliminary Objection fails both on account of threshold issue and further on locus standi of the Interested Party to address the integral constitutional issues in the petition. Counsel for the Interested Party further submitted and relied on the legal proposition in **Aviation & Allied Workers Union Kenya V Kenya Airways Limited & 3 Others 2015 EKLR, Mukisa Biscuits (Supra)**, That the 1st respondent contest on what constitutes a Preliminary Object and locus standi does not meet admissibility of the application to explicitly deny them a chance concerning the filing of a response to the petition.

Analysis

I have taken note of the Preliminary Objection and submissions by the respective counsels. The question before this court is whether the Preliminary Objection meets the test already settled in Law.

The law regarding a Preliminary Objection is clear as can be seen from the case of **Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd 1969 EA 696, 700** where the court held:

First Law J. A – observed:

“So far as I am aware, a Preliminary Objection of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Further Sir Charles Newbold added:

“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 which is sought is the exercise of judicial discretion.” (See also **Hassan Nyanje Charo V Khatib Mwashetani, & 3 Others Supreme Court Application No. 23 of 2014 Aviation & Allied Workers Union Kenya V Kenya Airways Ltd & 3 Others 2015 eKLR**).

The petition before this court dated 14/6/2018 seeks orders of Mandamus and declarations against the 1st Respondent under Article 156 of the constitution as chief Legal Counsel of the National Government in court or any other proceedings. The 2nd Respondent is the Cabinet Secretary in-charge of the Ministry of Interior and Co-ordination of National Government charged with the responsibility of internal security, public administration and civilian oversight who exercises authority over the 4th respondent. The 3rd respondent as an Independent Commission established under Article 233 of the constitution of Kenya and read with section 2 of the Public Service Act 2017. The 4th Respondent as the organization with the overall management and administration of National Intelligence Service.

In the course of the pre-trial hearings and directions the court granted leave to the Interested Party to join the proceedings. The learned litigation counsel appearing for the 1st respondent raised a preliminary objection to the maintainability of the petition with the interested party who has not shown the cause of action, interest or filed any pleadings in accordance with procedural dictates of the law.

The approach taken by the 1st respondent counsel is inconsistent with the provisions under Article 59, 259 of the constitution and section 8 of Kenya National Commission of Human Rights Act 2011 which gives the commission a specific mandate in respect of promotion and protection of Human rights. The more consequential function is that of observance of human rights in private and public institutions.

The petition filed contains a number of declarations against the respondents that they have jointly or severally acted unlawfully and or in breach of their constitutional duties and obligations under the constitution to constitute Intelligence Service Complaints Board in terms of section 66(1) of the National Intelligence Service Act 2012.

In the instant petition the facts as conceptualized by the petitioner hinge on public interest litigation under the objects and purposes of the constitution. In the case of **J. v Wanywela & Kenya Bankers Association V the Minister of Finance, AG and Central Bank of Kenya 2001 EA** the court held inter alia:

“That in public interest suit if the person established a minimal interest even in a case where the person could not show that he or she was more affected, than any other member of the public. There are also the provisions of Article 22 and 258 of the constitution that allow persons with or without direct interest in a matter to approach the courts.”

In the instant petition, the situation is not any different since the Interested Party mandate flows from Article 249 of the constitution and section 8 of KNHCR Act.

A core idea of public interest litigation is to demystify the concept of *locus standi* by making the rules so as to permit any person to petition the court to protect and defend the violation of any fundamental freedoms in the bill of rights which may go un-redressed without a remedy. Under Article 3 (1) of our constitution the protection and defence of this constitution is an inalienable right of every citizen including the Interested Party.

While construing the order of the court granting joinder of the Interested Party it appears in my view Article 249 of the constitution was invoked to aid in matters relevant to the pending petition. Furthermore, in making the determination, the Interested Party became a necessary and indispensable party to raise any questions of public importance in enforcement of fundamental rights instrumental in Articles 2, 3, 10, 165, 232, 238, 239, 242, 248 and 249 of the constitution.

On perusal of the record under section 80 of the Civil Procedure Act and Order 45(1) of the rules there is no apparent error, discovery of new matter or evidence of illegality or sufficient reason given by the 1st Respondent for this court to exercise discretion to vary or set aside, by striking out with ease the interested party from acting as such in the pending petition.

In the opinion of this court if there were any lapses as to the sustainability of the Interested Party to equally deal with the issues at stake, the directions can be reviewed by enlargement of time. As no suit shall be defeated by reason of non-joinder or mis-joinder of parties.

The Interested Party requested the court that it be enjoined as a party on the petition communicated in this court on 21/6/2018 on claims of violation and section 66(1) of NISA 2012. The court in its opinion granted the relief which entitled the Interested Party to join and argue the petition from the perspective of its mandate under the authority of the constitution and statute.

The 1st respondent plea on the Preliminary Objection has failed to show on the pertinent question under Order 1 rule 10 of the civil Procedure Rules that the Interested Party is precluded in being part of the petition yet to be determined by the court. The legal sufficiency of the Interested Party to be allowed to continue ventilating its stake on the synopsis of the essential facts to support the petition as asserted is in conformity with Rule 2 of the constitution of Kenya (Protection of the Fundamental Rights and Fundamental Freedoms) Practice and Procedure Rules of 2013.

In resolving the Preliminary Objection as framed and canvassed, it is abundantly clear that the 1st respondent failed to bring himself within the principles and test in the case of **Mukisa Biscuits Manufacturing Co. Ltd (Supra) E. C Busaldy V commissioner of Lands and Others 2002 IKLR 58**. It follows that a demurrer does not raise issues of fact instead its determined on the basis of the claim and pleadings. Hence this objection does not qualify as a Preliminary point of law nor is the Interested Party claim scandalous, vexatious or an abuse of the court process.

As such the 1st respondent Preliminary Objection on these grounds is dismissed and the complaints raised are hereby struck out as it relates to the cause of action. I make no orders as to costs.

DATED SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF SEPTEMBER, 2019.

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R. NYAKUNDI

JUDGE