



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CONSTITUTIONAL PETITION NO. 14 OF 2018**

**IN THE MATTER OF ARTICLES 22(1), 23(1) AND (3), 159(2) (A) AND (B) AND 163(B) AND (D) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 10(1), 10(2), 19, 20, 27(1) AND 40(1) AND 47(1) AND (2) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF PENDING BILLS OWED BY THE COUNTY GOVERNMENT OF NANDI**

**BETWEEN**

**ROMA VENTURES TRADING COMPANY**

**LIMITED AND 17 OTHERS.....PETITIONERS**

**AND**

**THE COUNTY GOVERNMENT OF NANDI.....1<sup>ST</sup> RESPONDENT**

**THE COUNTY SECRETARY**

**COUNTY GOVERNMENT OF NANDI.....2<sup>ND</sup> RESPONDENT**

**H.E. HON. STEPHEN SANG.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. By an application dated 11<sup>th</sup> April 2019 **THE COUNTY GOVERNMENT OF NANDI (the 1<sup>st</sup> applicant)**, filed this application under the Notice of Motion seeking for orders that:-

**a) The petition dated 5<sup>th</sup> September, 2018 be struck out for being an abuse of the constitutional jurisdiction of the high court and an abuse of the court process.**

**b) The cost of the application and of the struck out petition be awarded to all the Respondents to be paid by the petitioners jointly and severally**

2. The application was based on the grounds that by a ruling delivered on 5<sup>th</sup> day of 2019 the honorable court dismissed the petitioner's Notice of Motion dated 5<sup>th</sup> September 2018 but did not strike out the petition. In the ruling, the court held that the matter was not a constitutional petition as presented but a commercial dispute, and there are no issues pending before this Honorable court for determination.

3. The application is supported by supporting affidavit sworn by **Dr. Francis Sang** on the grounds that the petitioners filed a constitutional petition dated 5<sup>th</sup> September 2018 together with an application under a Notice of Motion dated 5<sup>th</sup> September 2018.

4. That vide a ruling delivered on 5<sup>th</sup> April, 2019, the court dismissed the petitioners' application on the basis that they had approached the

court by way of a petition in a commercial matter.

5. Further, that the petitioners seek to enforce a simple commercial contract through a constitutional petition without showing that the arbitral clauses in the agreement as well as ordinary civil dispute resolution mechanism is either unconstitutional or inadequate.
6. Lastly, that the petition is un-permitted abuse of the public interest litigation avenue under the constitution and its pendency before the court will negate the values and principles of the constitution, including **Article 159 of the constitution and Rule 31 of the constitution of Kenya (Protection of Rights and Fundamental Freedom practice and procedures rules, 2013)**.
7. The contention is that that the petitioners herein filed a constitutional petition claiming violation of constitutional rights against the respondents, seeking a conservatory order by way of mandatory orders which application was dismissed on 5/4/2019.
8. That there were no orders as regards to the main petition which was also on a commercial issue and should be struck out to the Respondents.
9. The respondents (**ROMA VENTURES TRADING COMPANY LIMITED AND 17 OTHERS**) in the grounds of oppositions state that the application is not provided for in the construction and the Rules made there under. Further, the applicants have to date never opposed the petition dated 5/9/2018 and in any event, the application is misconceived as the findings of the court in an interlocutory application cannot fetter its jurisdiction.
10. In their submission, the applicants state that the courts rulings on a preliminary objection on 5<sup>th</sup> April, 2019 the court indicated that the petitioner's prayers were commercial in nature as they touched on supply of goods and services.
11. That the mere fact of transacting with county government did not translate the dispute into a constitutional petition.
12. The agreement between the parties had an arbitral clause and the petitioners ought to have demonstrated that arbitration mechanism was not adequate means to resolve the dispute.
13. Further, that **rule 19 of the Mutunga Rules** provides that any party is allowed to approach court by a notice of motion to address any issue arising. As regards to the response to the petition, the applicant stated that they have protested the jurisdiction of the court in light of the arbitration clause and as a result, the present application. This would mean that filing a response to the petition at this point would not arise
14. Lastly, that the finding that this is a commercial dispute is unchallenged and the filed documents demonstrates that there isn't sufficient response to the application, so it ought to be allowed with costs to the applicants.
15. In their response the respondents state that there is no provisions under the constitution of the Mutunga Rules for structuring of constitutional petitions. That the jurisdiction of the court is under **Article 165 (3)** which is to determine fundamental rights and freedoms. The procedure of approaching court is provided for under the **Mutunga Rules** and there is no provision for striking out. Once a petition has been filed, the court has to hear the petition and determine it.
16. That if there was an intention to allow striking out, that would have been included in the rules. This is because the threshold of approaching court is very low. It is argued that the findings made by the court in its ruling was made at an interlocutory stage and cannot be used to lock out the petitioner from determining the petition on merit.
17. It is submitted that whereas the court has already made a temporary finding that the dispute is of a commercial nature, the reliefs sought in the petition cannot be granted in the commercial court. The court must determine all alleged violations of the constitution, and also determine which reliefs sought can be granted.
18. The respondents have sought to demonstrate how they got to perform contracts secured through restricted tender system from the county government of Nandi, who inspected and valued the works
19. That the agreements executed by the respondents herein contain an arbitration clause and the applicant had the option of staying the proceedings under **Rule 13 of the practice and procedure rules**. Further, that the court has jurisdiction to refer the matter to Alternative Dispute Resolution without resolving to strike out the proceedings. The respondents insist that the application is filed by the first respondent who has never opposed to the petition and under Rule 15 of the practice and procedure rules a party must file a response to the petition.
20. In response, the first applicant argues that **Rule 19** of the practice rules allows parties to move court for any reliefs. That even if the court was to find there is no need of striking out the proceedings, then the dispute being commercial in nature, renders it impractical for the court to grant the reliefs sought by way of a petition.
21. It is also argued that the issue regarding the jurisdiction of the court can be raised by a party to the proceedings or be raised by the court *suo moto*. In this application the substantial issue which is at the heart of the dispute is whether this court is the appropriate forum to grant the reliefs by the petition.
22. There is no dispute that the jurisdiction of the High Court is provided for under **Article 165 (3) (a) (b) (c) (d) (4) 6 and 7 of the Constitution**. The same Constitution ousted the jurisdiction of the high court under **Article 165 (5)** in respect of matters:

***“(a) Reserved for the exclusive jurisdiction of the Supreme Court under this constitution; or***

*(b) Falling within the jurisdiction of the courts contemplated in Article 162 (2)."*

23. The courts have taken a common approach based on judicial precedents regarding to the jurisdiction. In the locus classic case of ***The Owners of Motor Vessel Litheans v Caltex Oil Kenya Ltd***:

*"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".*

24. In the same issue as discussed in ***Samwel Kamau Macharia v Kenya Commercial Bank Limited & 2 Others [2012] eKLR*** it was held:

*"A court's jurisdiction flows from either the constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submissions that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality. It goes to the very heart of the matter, for without jurisdiction the court cannot entertain any proceedings. This court dealt with the question of jurisdiction extensively in the matter of the Interim Independent Electoral Commission (in Constitutional Application No. 2 of 2011.) Thus where the constitution extensively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation nor can parliament confer jurisdiction upon a court of law beyond the scope defined by the constitution. Where the constitution confers powers upon parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law".*

25. The petition by the respondent give details on what the dispute is all about namely, tenders and supply of goods and services, contracts, work done, evaluation carried out and unpaid bills. How do these then morph into a constitutional issue? I agree with the finding by Nyamu (J) in ***SYLVANA MPABWANAYO NTARYAMIRA Vs ALLEN WAIYAKI GICHUHI AND ANOR [2016] eKLR*** that *"...our Constitution has not, and was not intended to create commercial or contractual rights, instead it secures and guarantees existing constitutional rights."* So a commercial dispute such as this one ought to be determined under the **Civil Procedure Act and Rules**, and not a Constitutional Petition.

26. It is also not clear to me why the respondent does not wish to pursue the arbitration process provided in the contract, instead suggesting that the option be taken up by the court in directing parties to arbitration. In the **SYLVANA case** (supra), the court was categorical that:

*"...a person who has willingly entered into an agreement, with an arbitration clause, ought not to be permitted to fall back on the Constitution in order to avoid his obligation to refer the dispute which properly falls within the arbitration clause to the agreed alternative dispute resolution mechanism"*

27. The Petitioner alleges violation of various Articles of the Constitution of Kenya; namely Articles 10 (1), 10 (2)-national values and principles of governance, 19-the Bill of Rights and fundamental freedoms, 20-application of the Bill of Rights, 27 (1) and (2) equality and freedom from discrimination, 40 (1)-right to property, and 47 (1) and (2) –fair administrative action. Whereas **Article 23** gives this court jurisdiction to grant remedies where there is infringement and/or violation of fundamental rights, with the greatest of respect to the respondents/petitioners, this petition is not about violation of fair administrative action or even protection of property rights as contemplated by the Constitution of Kenya, it is clearly headed as **"IN THE MATTER OF PENDING BILLS OWED BY THE COUNTY GOVERNMENT OF NANDI"**.

28. The case of **ANARITA NJERU KARIMI Vs REPUBLIC [1KLR] 12838**, and echoed in **TRUSTED ALLIANCE SOCIETY OF HUMAN RIGHTS Vs AG and OTHERS** clearly spells out that a constitutional petition must be precise as regards the constitutional provision alleged to be violated, the rights alleged to be violated, the manner of the alleged violation, and the jurisdictional basis. At the risk of repeating the earlier findings made in a separate ruling, this is a commercial dispute with all the characteristics and trappings thereto, and the respondent must stop extrapolating the issue.

29. I am keenly aware of the sentiments expressed by the court in **Tom Odhiambo Achillah T/A Achilla T.O & Co Advocates vs. Kenneth Wabwire Akide T/A Akide & Company Advocates & 3 Others [2015] eKLR**:

*"Summary determinations of cases are draconian and drastic and should only be applied in plain and obvious cases both as regards the facts and the law. In a matter that alleges that the suit is scandalous, frivolous and vexatious, and otherwise an abuse of the court process, I must be satisfied that the suit has no substance, or is fanciful or the Plaintiff is trifling with the court or the suit is not capable of reasoned argument; it has no foundation, no chance of succeeding and is only brought merely for purpose of annoyance or to gain fanciful advantage and will lead to no possible good. A suit would be an abuse of the court process where it is frivolous and vexatious."*

30. However, having considered the issues raised in this petition, this I hold the view that although the respondents/petitioners may well have a valid claim, and not at all frivolous, it cannot be sustained in the constitutional arena.

I must therefore take the only logical and consequential step, and strike out this petition as being an abuse of the court's jurisdiction with costs of this application to the 1<sup>st</sup> respondent/applicant

**Delivered and dated this 3<sup>rd</sup> day of October 2019 at Eldoret**

**H. A. OMONDI**

**JUDGE**