



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.243 OF 2018

IN THE MATTER OF ARTICLES 22 & 23 OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF CONTRAVENTION OF THE RIGHTS UNDER ARTICLES 27(2) (4) (5), 29(C), 31(A) (B), 47 AND 50(1)
OF THE CONSTITUTION OF KENYA**

CHARLES MWIVUYA CHAHILU.....PETITIONER

VERSUS

DEPUTY COUNTY COMMISSIONER MAKADARA SUB-COUNTY.....1ST RESPONDENT

PRINCIPAL SECRETARY, MINISTRY OF TRANSPORT & INFRASTRUCTURE,

HOUSING & URBAN DEVELOPMENT.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

Petitioner's Case

1. The petitioner through a petition dated 5th July 2018 sought amongst other orders a declaration, that notices to vacate premises known as **LG 921 C** at Jogoo Road Phase I were illegal and further the attachment and seizure of the petitioner's goods were unlawful and violated his constitutional rights including the right to equality and freedom from discrimination under Article 27, Freedom and Security of person under Article 29, Right to privacy under Article 31, Right to fair administrative action and the right to a fair hearing under Article 50, compensation for breach of the petitioner's constitutional rights.

2. The petitioner's petition is supported by an affidavit of Charles Bwivuya Chahilu sworn on 5th July 2018 and annexures thereto.

Respondents Case

3. The Respondents in response to the petitioner's petition filed a Replying Affidavit sworn by James Ngugi, the acting Director of Housing in Nairobi County under the state department of Housing and Urban development sworn on 12th March 2019.

4. The Respondents case is, that on 6th December 2017, the Department of Housing and Urban Development issued Charles Bwivuya Chahilu **P/No. 1996037891**, an employee of the Ministry of Foreign Affairs with an "operation permit *"to operate "A canteen"* at **LG 921 C** at Jogoo Road Phase 1 Estate for a period from 1st January 2018 to 31st December 2018 as per a letter **Ref. No. MTHUD/DH/ED/NRB/8/S Vol. 1 (4)** dated 6th December 2017, with specifically specialization terms and conditions of the operation permit issued to the petitioner.

5. The Respondents contend, that the petitioner failed to adhere to the terms and conditions and blatantly disregarded them by operating a bar/disco and constructing a **GC 1** streets temporary extension. The operation of a bar/disco at the Estate was a nuisance to tenants adjoining **LG 921C** and Estate as a whole and was reported that alcohol was being sold to youths and levelers the whole day as per emails to Housing

Secretary dated 1st and 4th April 2018; 7th May 2018, 12th and 19th July 2018. That due to breach on the terms and conditions of the operation the 2nd respondent through the Department of Housing and Urban Development issued a notice to the petitioner to cease operations of the canteen and to vacate the premises.

6. That as a result of the petitioner's failure to adhere to cease the illegal operation of a bar/disco the Respondents made a decision to evict the petitioner by closing down the unauthorized bar/disco and have the temporary structures demolished as per letter Ref. No. **MTIHU/DH/ED/1/51/3/VOL.V (172)**. That the Respondents at that stage sought the assistance of the Deputy County Commissioner, Makadara Sub County, Nairobi to provide security in evicting the petitioner; as the premises had been in existence for 30 years as a grocery shop and it was the petitioner who started the bar/disco operations.

7. It is Respondents contention, that in Shauri Moyo Government Pool Houses all the bars that were in the midst of the Houses were closed; upon the demolition of the temporary extension the operators vacated the premises on their own volition and the units were allocated to market rate rent paying tenants as residential units, see a letter **Ref No. MTIHU/DH/ED/NRB/8/2 VOL. 5 (17) & (18)** dated 20th July 2018). It is further the respondent's case, that under section 12 of the Alcoholic Drinks and Control Act, it is prohibited to issue licence for sale of alcoholic drinks in any residential areas.

8. The Respondents contend, that this petition does not raise any constitutional issues, further the Respondents are contending the petitioner has not in any way or at all specified with precision the manner, in which the Respondents have denied, infringed and violated his fundamental rights; urging further the petition is deficient and discloses no justifiable cause to warrant the intervention by this court.

Analysis and Determination

9. I have very carefully considered the petition, the Respondents replying affidavit, the Advocates rival submissions and from the aforesaid the following issues arises for consideration:-

a. Whether the Respondents violated the Petitioners constitutional rights as claimed?

b. Whether the petition raises any constitutional issues?

c. What reliefs is the petitioner entitled to in this petition?

A. Whether the Respondents violated the Petitioners constitutional rights as claimed?

10. The petitioner in this petition is a civil servant who by virtue of his employment, was issued with an "*operation permit*" to operate "*A canteen*" at **LG 921C** at Jogoo Road Phase I Estate for the period from 1st January 2018 to 31st December 2018 with clearly spelled out terms and conditions. The relationship between the petitioner and the Respondents was that of a Landlord/Tenant. The tenancy agreement between the two could be terminated in accordance with the law governing such tenancy. The petitioner fell in a category of tenants described in law as "*service tenants*", a general term which describe an occupant, who also happens to be employed by his/her landlord; which tenancy can be terminated either upon termination of employment or by issuance of a notice.

11. In this petition the 2nd Respondent urges, that it issued and served termination notice which the petitioner has not disputed in accordance with the relationship to terms and conditions, to which the parties had entered into, a binding contract. The notice was based on the petitioner's breach of terms and conditions stipulated in the operation permit.

12. The petitioner contention is that the Respondents actions are not only inconsistent with the objection and purpose of the constitution expected of public officers, as they lack accountability to the public. It is further urged the petitioner business was targeted and discriminated against by the 1st respondent despite the fact that they had given the petitioner authority to operate the business and the petitioner had the right to operate the business upon payment of the rent.

13. The petitioner has not controverted the respondents averment that he failed to adhere to the terms and conditions stipulated in the operation permit, that was binding upon the parties. It has not been demonstrated that the Respondents breached the terms and conditions set out in the operation permit. It has, however been demonstrated that the 2nd Respondent discharged its obligation under the law by serving notices as required, and which notices the petitioner has not repudiated. I find upon the expiry of the notices, and which notice were in accordance with the provisions of the law, the petitioner became an illegal occupant in the premises he was in occupation, and as such his eviction was lawful and he was being evicted in accordance with the provisions of the law hence he was not being discriminated. The petitioner sought to rely on Article 27 of the Constitution, however he was not stated on what grounds he was being discriminated. Article 27 of the constitution clearly states every person is equal before the law and has right to equal protection and equal benefit of the law. It is further provided that state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. The petitioner did not state on what grounds he alleges the Respondents discriminated against him. The Respondents by issuing of notice in terms and conditions of "*operation permit*" that action do not amount to breach of the petitioner's bills of rights nor can it amount to discrimination. There is no violation of any party's constitutional rights when any of the party acts in accordance to parties binding agreement in a commercial dealing.

B. Whether the petition raises any constitutional issues?

14. The petitioner's petition is premised on Articles 27(2) (4) (5); 29(c), 31 (a) (b), 47 and 50(1) of the Constitution of Kenya as indicated on the face of the petition. The Articles relied upon are also set out in the body of the petition from paragraph 18 to paragraph 24 of the petition. It is Respondents contention that this petition does not raise any constitutional issues and that it does not meet the test of a

constitutional petition laid down in the case of **Anarita Karimi Njeru vs Republic (No. 1) (1979) KLR 154** and emphasized in the case of **Mumo Matemu vs. Trusted Society of Human Rights Alliance (2014) eKLR**. In **Anarita Karimi Njeru vs Republic (No.1) (1979) KLR 154** where the court stated:-

"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." (See also Meme vs Republic & another [2004] 1 KLR 637)."

15. The principle was emphasized by the Court of Appeal in **Mumo Matemo vs. Trusted Society of Human Rights Alliance (2014) eKLR**, where it stated that:-

"...The principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court....Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle."

16. I have had an opportunity to look at the petition and indeed it is clear to me that apart from citing the omnibus provisions of the constitution, the petition has not provided particulars of the alleged complaints, nor the manner of alleged infringement or the jurisdictional basis of the action before this court. It is now an established principle of law as enunciated in the above-mentioned cases, 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 provisions said to have been violated or infringed, the manner of infringement and the jurisdictional basis for it. I find from a cursory look of the petition and the supporting affidavit as well as the manner of pleading therein, there is no semblance of a constitutional petition pleading breach of known constitutional provisions, or violation of and or infringement of rights and fundamental freedoms. I find to the contrary what the petitioner has preceded to do is to outline Articles of the constitution without stating how those Articles have been violated.

17. In the case of **Justus Mathumbi & 9 others vs Cabinet Secretary, Ministry of Land, Housing and Urban Development & 4 others (2018) eKLR** Hon. Justice Mativo held that:-

"A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute. The issues raised in this can be resolved by interpreting the facts and the relevant statute. Clearly, the issues in this case do not raise constitutional questions at all.... As demonstrated by the facts in the petition this is a case of termination of service tenancies. That is legal relationship governing the petitioners and their employer and the notices to vacate are admitted to have been served."

18. From the petition herein and as drawn and filed, I find the issue raised herein do not require any interpretation of the constitution, hence it cannot be said to raise any constitutional question requiring the interpretation of the constitution. The issue raised in this petition is one which can be resolved purely by interpreting the facts and the relevant statute and as such the issue in the petition do not raise constitutional questions for consideration by the court. This as per facts of the petition is a case for termination of an *"operation permit"* and is a clear case of termination of tenancy agreement between Landlord and Tenant. This is a legal relationship governing the petitioner as a tenant and the Respondent as a Landlord and issuance of notice to terminate the relationship and vacate the premises. This clearly is not a constitutional matter but a matter that should have been preferred in a different forum.

19. The issues raised in the petition before this court fall in the realm of *"service contracts"* and the manner in which service contract can be terminated. It is purely a contractual issue between a Landlord and a tenant and not a constitutional issue. I find and hold that this petition raises no constitutional issue and is an abuse of the court process.

C. What reliefs the petitioner is entitled to in this petition?

20. From the undisputed facts of the operation permit between the Petitioner and the Respondents and facts of this suit, there were agreed terms and condition between the Petitioner and the Respondents. That upon breach of the terms and conditions of operation permits the Respondents served the petitioner with notice to vacate. He has not disputed the wrong doing. Both the Petitioner and the Respondents are bound by terms and conditions entered into and this court cannot change such terms as by doing so would amount to rewriting a contract for the parties. This court should not allow a wrong doer to benefit from his own wrong doings. I am alive to the fact that the doctrine of illegality, going back to Lord Mansfield, is based on two principles, first a person should not be allowed to benefit from his/her own wrong and secondly, that the law should not condone illegality. In view of the aforesaid and upon considering the facts of this petition, I am satisfied that the petition is without basis and lacks merit and accordingly the same is ripe for dismissal.

21. The petition is dismissed with costs to the Respondents.

Dated, signed and delivered at Nairobi this 5th day of December, 2019.

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J .A. MAKAU

JUDGE