



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU.

PETITION NO. 41 OF 2015

IN THE MATTER OF ARTICLES 2, 3, 19, 20, 21, 22(1), (2)(b), 23 (1), (3), 25, 27, 28, 29, 31, 47, 48, 159 (1) (2) (a), (b) and (e) & 165 (3)(a), (b) OF THE CONSTITUTION OF KENYA, 2010.

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 20, 21, 22, 24, 25, 27(1), (2), (4), (5), 28, 29 (c), (d), (f), 31, 40(1) (a), (b), 47 (1), 48 OF THE CONSTITUTION OF KENYA, 2010.

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA.

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE
CONSTITUTION.**

AND

IN THE MATTER OF VIOLATION OF THE RIGHT TO PROPERTY, DIGNITY AND PROTECTION OF FREEDOM AND SECURITY OF PERSON

AND

IN THE MATTER OF ALL THAT PIECE OF LAND AT THE KRC FORMER LOADING YARD (PART B) IN NAKURU MEASURING ONE DECIMAL NOUGHT ACRES.

BETWEEN

NAKEL INVESTMENTS LIMITED.....1ST PETITIONER

MOHAMED SURAW ISSAK.....2ND PETITIONER

YUSSUF SURAW ISSACK.....3RD PETITIONER

-VERSUS-

HON. DAVID GIKARIA.....1ST RESPONDENT

INSPECTOR GENERAL OF THE

NATIONAL POLICE SERVICE.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

NATIONAL COHENSION AND INTERGRATION

COMMISSION.....4TH RESPONDENT

JUDGMENT

1. *The Petitioner filed a Petition under certificate of urgency dated 12th August 2015 seeking for orders that;*

a. A declaration that the actions of the 1st Respondent are brazen, illegal, egregious, discriminatory and in violation of the Petitioners' constitutional rights.

b. A declaration that the actions of the 1st Respondent above have out rightly violated the rights of the Petitioners' under Articles 26, 27 (1), (2), (5), 28, 29 (c), (d), (f), 40 (1) (a) and (b) of the Constitution.

c. An order directing the 2nd Respondent to provide security to the Petitioners and their property,

d. A declaration that the actions of the 1st Respondent are in breach of Chapter 6 of the Constitution and Article 10 of the Constitution of Kenya hence unfit to hold public office anywhere in Kenya.

e. A declaration that the 3rd and 4th Respondent have abdicated their Constitutional and legal roles and are therefore escapists.

f. General damages.

g. The Petitioners be paid costs of this Petition.

2. The 2nd Petitioner swore a supporting affidavit and stated that the 1st petitioner is the registered leasehold proprietor of the **Land parcel at the KRC former loading yard (part B) in Nakuru Measuring One decimal nought acres**, having leased it from Kenya Railways Corporation for a period of 15 years from 1st October 2012 for a sum of Kshs. 425,000/= annually and a stand premiums of Kshs. 1,700,000/=. He was a former mayor of the defunct Nakuru Municipal Council from the year 2011 and 2013 and from the political rivalry he has been having bad blood with the 1st Respondent who was a councilor then.

3. That on diverse dates in the year 2012 the 1st respondent with his hired goons had physically assaulted the 2nd Petitioner, was charged with stealing contrary to Section 275 of the Penal Code and incitement to violence contrary to Section 96 of the Penal Code. And on several occasions threatened the Petitioner of destroying his property in the above mentioned parcel of land and further issued threats against his life. The 1st Respondent vandalized the Nakuru municipal council's property

4. As a result in the year 2012 the petitioner wrote a letter to the police requesting for security over threats directed to him and he affirms that investigations of the vandalism and the threats to his life never kicked

off.

5. The petitioners are therefore seeking protection from court as the 2nd Respondent who is bestowed with the responsibility of providing security to his life and property have failed to do so.

6. In opposition the 1st Respondent filed a replying affidavit deponed on 1st February 2016, he objected to the 2nd Petitioner being a director of the 1st Petitioner as no evidence was adduced, also swearing the affidavit on behalf of the other Petitioners as no authority was attached authorizing the 2nd Petitioner to swear the said affidavit on their behalf.

7. He also objected to the lease document annexed and termed it as just a mere document as the same has not been registered or having any registration marks of the land registrar nor stamps as proof of payment of the relevant stamp duty.

8. The Petition before court is as a result of political competition between the 2nd Petition and the 1st Respondent and as a result the 2nd, 3rd and 4th Respondents have been caught in the middle of the political contest as they maintain law and order and ensure that politics are conducted within the confines of the law. The 2nd Respondent has on several occasions made efforts to protect the Petitioners and their property against the alleged actions of the 1st Respondent and in furtherance of the 2nd Respondent's duty to maintain law and order, the 1st Respondent has been charged in court. The Petitioners remedy is being availed to them and the general public but they want it all for themselves to the exclusion of all others.

9. The 2nd and 3rd Petition argue that the orders sought is a sham, vexatious and an embarrassment to the court and to the Respondents, the Petition is based on mere allegations and the Petitioners have failed to state or lay the basis on which of their constitutional right or fundamental human right they are entitled to and has been contravened, denied or violated by the Respondents. They relied on the case of **MATIBA v ATTORNEY GENERAL HC MISC APPL. NO. 666 OF 1990** where the court held that;

"...An applicant in an application under Section 84(1) of the Constitution is obliged to state his complaint in the provision of the Constitution he considers has been infringed in relation to him and the manner in which he believes to have been infringed. Those allegations are the ones which if pleaded with particularity invoke the jurisdiction of this court under the Section. It is not enough to allege infringement without particularizing the details and the manner of infringement..."

10. From the Petition and the Supporting Affidavit filed by the Petitioners, it appears that they are making four separate sets of claims:

(a) The first set of claims regards the parcel of land at the KRC Former Loading Yard (Part B) in Nakuru Measuring one decimal nought acres which is leased from Kenya Railways Corporation for a term of 15 years from 1st October, 2012 ("Suit Property"). The claim here is that the 1st Respondent through his "goons, hirelings and hoodlums" invaded the Suit Property on 11/08/2015 at around mid-day and again in the evening. In the process, they assaulted the 3rd Petitioner. There is a further claim that there is an on-going threat that the 1st Respondent will maliciously destroy the property.

(b) The second set of claims is that the 1st Respondent through the same "goons, hirelings and hoodlums" assaulted the 3rd Petitioner and occasioned harm to him. An attached P3 Form shows that the 3rd Petitioner suffered a "bruise on the left periumblical region".

(c) The third set of claims is that on 21/08/2012, the 1st Respondent assaulted the 2nd Petitioner occasioning him injuries. The 2nd Petitioner attached a P3 Form although it does not contain the second page which exhibits the injuries suffered. The 2nd Petitioner says that he reported the assault to the Police and the same was booked under OB No. 16/25/08/012.

(d) The fourth set of claims is that the 1st Respondent is generally a person who has no integrity and has, over the course of time, engaged in several acts of lawlessness and illegal activities. The Petitioners claim that the 1st Respondent has been charged severally with different offences flowing from his “unlawful” activities. For example:

i. The Petitioners say that in *Nakuru Chief Magistrate’s Criminal Case No. 4470 of 2010*, the 1st Respondent was charged with the offences of stealing and incitement to violence. They have attached the charge sheet as evidence of this.

ii. The 2nd Petitioner also claims that the 1st Respondent vandalized the Nakuru Municipal Council’s property in 2012 when the 2nd Petitioner was a mayor. The 2nd Petitioner says that he wrote a letter to the then Minister for Local Government complaining about the vandalism. He further alleges that he reported the matter to the Police but the vandalism continued unabated prompting his advocate to write to the DPP.

iii. The Petitioners also claim that the 1st Respondent hired “goons” to attack and destroy business premises belonging to Somali business ladies in Nakuru town on 11/08/2015.

iv. The Petitioners further claim that during the alleged invasion of the Suit Property on 11/08/2015, the 1st Respondent addressed the media and indicated that Somalis and Indians should not hold property in Nakuru.

(e) The fifth set of claims is addressed at the 2nd, 3rd and 4th Respondents. It is a claim of omission: that despite their various statutory and constitutional roles, the 2nd, 3rd and 4th Respondents have failed to take appropriate actions to ensure that Petitioners enjoy their constitutional rights. Differently put, the Petitioners claim that due to the omissions of the 2nd, 3rd and 4th Respondents, the 1st Respondent has been able to violate the Petitioners’ rights as outlined above.

11. As outlined above, the 1st Respondent’s response to the Petition is to deny the allegations made by the Petitioners. In essence, the 1st Respondent has put the Petitioners to strict proof of their allegations. In particular, the 1st Respondent has replied as follows:

(a) First, he contests that the 1st Petitioner is a valid proprietor of the Suit Property. He says that the attached Lease Agreement which is the supposed evidence of the 1st Petitioner’s interest in the property is not registered and there is no evidence of stamp duty payment for it.

(b) Second, the 1st Respondent submitted that the Petitioners have not particularized the right infringed and the manner in which they have been infringed as required by our decisional law.

(c) Third, the 1st Respondent denies each and every allegation of unlawful conduct made by the Petitioners. In particular, the 1st Respondent replies as follows:

i. Regarding the alleged assault on the 3rd Petitioner, the 1st Respondent responds that no case has been established as the Police OB referred to (OB No. 16/25/08/2012) is not annexed. The 1st Respondent argues that it is, therefore, not possible to demonstrate what complaint the OB referred to.

ii. Regarding the alleged invasion of the Suit Property, the 1st Respondent replies that no evidence has been adduced to show that it was the 1st Respondent who invaded or planned the invasion.

iii. Regarding the criminal cases the 1st Respondent is allegedly facing, the 1st Respondent

argued that no evidence has been brought to show that he was convicted of the said offences. The 1st Respondent argues that Article 50 of the Constitution obliges the Court to presume the 1st Respondent as innocent until proven guilty.

iv. Regarding the allegations of lack of integrity, the 1st Respondent responds that no proof to that effect has been brought to the Court's attention and further that if there was any iota of truth in the allegations, the issue would have been raised to bar the 1st Respondent from vying for parliamentary elections in 2017. Instead, the 1st Respondent argues, he was duly cleared to vie for the elections.

12. As aforesaid, the 2nd and 3rd Respondents find the Petition wholly lacking in merit – both factually and legally. Factually, they say that the Police have always acted with due diligence to maintain law and order and that there is no basis to drag them into what is essentially a “political competition” between the Petitioners and the 1st Respondent. The 2nd and 3rd Respondents say that it would appear that what is in issue is a civil dispute between the Petitioners and the 1st Respondent and that it ought to be settled as such and not in the guise of a constitutional petition in which they are dragged in as proxy Respondents. Further, the 2nd and 3rd Respondents say that when acts of lawlessness have been brought to their attention, they have acted and that the Petitioner's affidavit itself makes clear that the 1st Respondent is facing various criminal charges. To this extent, the 2nd and 3rd Respondents argue that the Petition is moot and the remedies sought are superfluous.

13. Legally, the 2nd and 3rd Respondents argue that the allegations made in the Petition cannot be tied to any fundamental right in the Constitution. They argue that the Petition lacks specificity and does not substantiate which rights have allegedly been deprived. In colourful language, Counsel for the 2nd and 3rd Respondents points out that:

Lack of specificity is also confirmed by the particulars of violations which are worded using words: threatening, demeaning, overthrowing the constitution, attempting to use politics which are superfluous and meant to attract the attention, draw sympathy and create smoke where there is no fire.

14. The principal question presented by this Petition is whether the Court can make a finding that the Petitioners' constitutional rights were violated. If so, the Court would have to go to the next question which is to determine the appropriate reliefs.

15. After due analysis of the Petition, the evidence presented to the Court and the submissions by the parties, I have come to the conclusion that the Petition is without merit. I base my findings on two grounds.

16. First, and more significantly, the Petitioners have simply not placed sufficient material before the Court to entitle them to a finding that they have discharged their burden of proof respecting the allegations they have made. Without the factual proof, the claims for a finding of constitutional violations must fail.

17. I outlined above the five sets of claims the Petitioners made in their Petition. Like any other suit, in order for them to be entitled to a favourable finding, they bore the burden of proof.

18. In *Kiambu County Tenants Welfare Association v Attorney General & another* while dismissing the Petition, Justice Mative, quoted the case of *Britestone Pte Ltd vs Smith & Associates Far East Ltd {2007} 4 SLR (R) 855 at 59:-*

“The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”

With the above observation in mind, the starting point is that whoever desires any court to give judgement as to any legal right or liability, dependant on the existence of fact which he asserts, must prove that those facts exist. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.:-

“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”

19. The same judge, in **A M v Premier Academy [2017] eKLR**, stated the following:

*In my view the petitioner has failed to discharge the burden of prove to the required standard. To my mind the burden of establishing all the allegations rests on the Petitioner who is under an obligation to discharge the burden of proof. All cases are decided on the legal burden of proof being discharged (or not). Lord Brandon in **Rhesa Shipping Co SA vs Edmunds {1955} 1 WLR 948 at 955***

“No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take.”

Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case.

20. Similarly, a three-judge bench in **Dock Workers Union & 2 others v Attorney General & 2 others; Kenya Ports Authority & 4 others (Interested Parties) [2019] eKLR** stated that “...The Petitioners would want this Court to believe that the MOU infringes upon the Constitutional rights of the persons they represent. The burden of proving the allegations lay squarely upon the Petitioners.”

21. The judges quoted **Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) vs. Habil Olaka – Executive Director (Secretary) of the Kenya Bankers Association Being sued on behalf of Kenya Bankers Association) & another [2018] eKLR**, where the Court stated:

“It is a principle of law that he who asserts must prove, and in this regard, Section 107(1) of the Evidence Act (Cap 80) provides that “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist”. It is therefore the duty of the person who asserts that there is a breach of section 44 of the Banking Act to prove by evidence that that indeed is the case. That is why section 109 of the Evidence Act again provides that “The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”

In order to discharge their burden of proof, it was incumbent upon the Petitioners to produce the MOU for the Court’s perusal, consideration and determination as to its Constitutionality or otherwise.

22. All these cases establish an immutable principle of law and litigation: he who asserts must prove. This principle applies in equal force to constitutional Petitions as it does to “ordinary” civil and criminal suits. The burden does not magically get lighter when a suit is brought as a constitutional petition.

23. In the present case, the Petitioners have made many allegations. They have also brought little evidence to substantiate the allegations. I will brief outline how the Petition and supporting documents fall far short of discharging the burden of proof for each of the five sets of claims the Petitions made:

(a) First, the Petitioners claim that the 1st Respondent and others under his instructions or command invaded the Suit Property on 11/08/2015, and further that there remains a serious and credible threat of future invasions by the 1st Respondent and his associates. However, no evidence at all was presented to the Court as proof of the said invasion. In addition, other than general innuendo that the 1st Respondent is a man fond of and given to violence and lawlessness, no credible evidence was presented that there is any real threat that he will, in fact, invade the Suit Property. Further, if, indeed, there was an invasion, there was no evidence linking those who invaded and the 1st Respondent. Perhaps the association was to be made in the form of a video recording in which the 1st Respondent allegedly said he would make sure that no Somali or Indian owned property or ran a business in Nakuru town. However, that video recording was ultimately not produced or made available to the Court. Without any evidence whatsoever, the Court must come to the conclusion that the allegation of invasion was not proved. Further, regarding the claim of credible fears of invasion, I note that it has now been more than four years since the case was filed and the imminent threat has not been actualized.

(b) Turning to the second set of claims which respect allegations that the 1st Respondent and his associates assaulted the 3rd Petitioner on 11/08/2015, as the Respondents point out, while a P3 Form was adduced showing that the 3rd Defendant was injured, there has been no showing that the injury was caused by the 1st Respondent. Indeed, the affidavit on record is sworn by the 2nd Petitioner who does not say how he learnt the facts he is deponing to in this regard. Additionally, as noted above, there is no evidence whatsoever linking the 1st Respondent with the mob that allegedly invaded the Suit Property on 11/08/2015.

(c) With regard to the set of claims related to alleged assault on the 2nd Petitioner, as mentioned above, the second page of the P3 Form attached was missing. Additionally, the referenced OB number was of no use because no OB extract was produced to provide the necessary linkage. In the circumstances, it is not possible to make a finding that on a balance of probabilities the claim was established.

(d) The fourth set of claims revolved around various allegations, unrelated to the Petitioners, which the Petitioners say taken together, make the 1st Respondent unfit to hold office by virtue of lack of integrity. The same problem which afflicts the first three sets of claims afflicts this one as well: no concrete evidence is offered for the allegations. For some of the allegations, by the Petitioners' own rendering, there are criminal cases pending in Court. For others no evidence is produced to substantiate the acts complained of.

(e) The fifth set of claims are, in essence, claims of omission: the claim is that the 2nd, 3rd and 4th Respondents failed to play their roles leading to violation of the rights of the Petitioners. These claims are quite general but the mantra seems to be that the Police has failed to respond appropriately to the violations of the rights of Petitioners by the 1st Respondent and his associates. However, the Petitioners failed to demonstrate how the Police failed to protect them. Indeed, as aforesaid, there is evidence that the Police acted and charged the 1st Respondent with particular offences. No specific evidence was adduced to lead to a finding that there was a systematic failure by the Police to respond to the Petitioners' claims. As for the complaint against the 4th Respondent, no evidence was adduced, despite the promise to do so in the affidavit, to show that the 1st Respondent uttered words meant to cause disaffection among members of particular ethnic groups and that the 4th Respondent failed to act.

24. The upshot, then, is that the Petition fails for failure to discharge the evidential burden of proof by the Petitioners who bore that burden.

25. The Petition would still fail for a second reason. While this Court does not adhere to a technically form of the doctrine of specificity announced in the famous *Annarita Karimi Njeru*, as the Court of

Appeal stated in *Mumo Matemu v Trusted Society of Human Rights*, a Petitioner approaching a Court claiming that his human rights have been violated must state their case with such concise concreteness that it puts the other side on fair notice on the case he is facing. As Courts have recently appreciated, the standard is a substantive one; a pragmatic principle rather than a dogmatic rule.

26. In the present case, it is fair to say that looking at the Petition in totality, it is hard to tell what abiding constitutional issues were presented that the Petitioners wished the Respondents to answer to. In my view, what this case has done is to cobble up different grievances spawned by a conflictual relationship between the 2nd Petitioner and the 1st Respondent and attempted to transglorify them in to a constitutional Petition. It may be that some of the grievances could be meritoriously established in ordinary suits – with the normal rules of discovery and adduction of evidence. However, cumulated in this way as a constitutional petition, the suit collapses under the weight of its own plasticity and opacity. In attempting to do too much in a single suit, the Petition ended up doing too little for any of the causes of action it hoped to espouse. Differently put, the controversies between the core litigants (the Petitioners and the 1st Respondent) are so fact-intensive that a constitutional petition would be an inappropriate procedural vehicle for establishing the facts and their legal signification. Each of the alleged acts of violation of rights which gives rise to a different cause of action will need to be pursued in an appropriate civil suit where the issues will be phrased, investigated, developed, adjudicated and determined. A constitutional petition is not the appropriate forum for the development, evaluation and determination of these questions. As presented before the Court in this Petition, the Court is unable to make any judicious determinations on these factual questions. Differently put, the fact-intensive nature of the dispute between the parties makes it inappropriate for determination as a constitutional Petition.

27. The end, therefore, is without a denouement. The Petition is without merit. It is hereby dismissed with costs.

28. Orders accordingly.

Dated and delivered at Nakuru this 5th day of December, 2019

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JOEL NGUGI

JUDGE