REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

PETITION NO. 7 OF 2018

PETER NDEGWA GATHIRWA.....1ST PETITIONER

GOLDMINE STONE CRASH CONSTRUCTION LTD.....2ND PETITIONER

-VERSUS-

COUNTY GOVERNMENT OF NYERI.....RESPONDENT

JUDGMENT

The dispute between the petitioners and the respondent revolves around payment or non-payment of cess levied by the respondent against the petitioners. According to the petition filed in this court on 6 June 2018 the petitioners harvest and crushes stones on land referred as No.12907/2. It is the petitioners' case that the location of the crusher is separate and distant from where they harvest the stones and for this reason it is necessary that the stones have to be transported from one point to the other.

The primary bone of contention is that while the petitioners argue that the access roads for purposes of transporting the stones to the crusher are within the same parcel of land and are maintained by the petitioners themselves the respondent insists, on the other hand, that these are public access roads which are best described as county roads in part 2 of the fourth schedule to the Constitution and which, by that very description, are not only within the jurisdiction of the respondent but the latter also maintains them; accordingly the petitioners are bound to pay cess levied in respect of those roads for their maintenance.

In the course of the stand-off, the respondent is alleged to have taken what the petitioners think is a rather drastic step of seizing their lorry registered as KAQ 145 Z which they employ in transportation of the raw stones to the crusher; they have therefore petitioned this court for a declaration that the seizure of the lorry is unlawful and unconstitutional; that the levy of cess is punitive, unlawful and illegal. They have also sought for an order compelling the respondent to release the lorry and damages for trespass and loss of user. In their bid, they have invoked articles 20,21, 22, 23, 40, 43, 47 and 50 of the Constitution.

The facts upon which the petition is mounted are contained in the affidavit sworn by 1st petitioner on 7 June 2018 and are hotly contested. According to this petitioner he purchased part of L.R. No. 1290/2 in 2009 and on this part, he has constructed the crusher plant; he leased another part of the same land from where he harvests the rocks or stones. In between these two parcels he has constructed and maintains roads apparently for use by the vehicles plying between these two places. On 9 May 2018, their lorry was impounded by the respondent's agents while transporting the stones; it was taken to Kiganjo police station where it was still held at the time the petitioners filed the present petition.

It is the petitioner's argument that he is entitled to a fair administrative action before the respondent can purportedly levy cess and impound his vehicle to force a payment of what, in his view, is an unlawful or illegal levy.

Rehema Salim, the respondent's acting director of county revenue swore a replying affidavit in which she has retorted that what the petitioner's claim to be a private road is in fact a public road next to 14 parcels of land that have been subdivided from LR 12907/2. The road is clearly marked on a what appears to me to be a survey plan exhibited on the affidavit of the 1st petitioner and, therefore, the petitioners are under obligation to pay cess as soon as their lorries leave the quarry; for this reason, the respondent has stationed its officers at the quarry outlets to enforce these payments. In so doing, so the acting director has sworn, the respondent is acting within the Nyeri County Revenue Administration Act, 2014 on whose authority the respondent is entitled to levy cess such as the one demanded from the petitioners. It therefore follows that the levy imposed upon the petitioners is neither illegal nor unlawful.

Both counsel for the petitioners and respondent made oral arguments in support of and in opposition to the petition basically reiterating the depositions in their respective clients' affidavits whose depositions are, as noted, contested.

Upon much reflection I am persuaded to come to the conclusion the petitioners' petition should have been filed and determined as an ordinary suit; I say so because first, in the face of the contestation about what the basic facts are, it would be appropriate to call oral evidence that ought to be tested within the parameters known in law including cross-examination of the affidavits' deponents and their witnesses if any. Secondly, the prayers sought are the sort of prayers that can properly be granted in an ordinary suit and nowhere is this clearer than in the petitioners' own advocates' letter dated 29 May 2019 addressed to the respondent notifying the latter of the intention to file suit for recovery of their lorry and damages for loss of user; the pertinent parts of that letter read as follows:

> ***We have addressed your office on this issue as per the copy of our letter dated 9/1/2018, herewith enclosed for ease of reference.***
>
> ***Your officers on 9/5/2018 through brute force had the above motor vehicle impounded as it removed quarry materials from our clients (sic) land onto the crusher plant on the same land; only that the roads through the land have become impassable because of the rains.***
>
> ***To date your office has not preferred any charges as by law provided.***
>
> ***The law would never allow; leave alone contemplate, a situation where your office is accuser, the judge and jailer.***
>
> ***Your office has until close of business Wednesday 30th May 2018 to either charge our client or release the impounded lorry failure to which we shall file suit for recovery thereof to include loss of user.***
>
> ***This is a final notice.***
>
> ***Signed***

A suit for recovery of a seized lorry or for damages for loss of user does not have to be a constitutional petition; assuming they can prove their claim the petitioners have cause of action against the respondent in detinue; in the same suit they could have sought for injunctions whether mandatory to compel the respondent to release the seized lorry or a restraining injunction to stop it from seizing the lorry in future. The question of loss of user could have been determined in such a suit.

The point is this; not every grievance calls for invocation of the constitution for a remedy. It must be appreciated that the assertion of constitutional rights through a petition is always a solemn process that is employed in those rare cases where it is obvious that the petitioner's constitutional rights have been violated, are being violated and are likely to be violated and the remedy sought cannot be granted through any means other than a constitutional petition. Put another way, a constitutional petition should not be relegated to such level as being an alternative form through which parties seek remedies for grievances that would have properly been determined through other forms of suits.

While a constitutional petition may appear to be the most expedient and convenient way to approach court, it should not be employed to avoid the necessary but what may appear as 'inconvenient' legal and procedural prerequisites that the claimants have to comply with if they pursue their claims through, for instance, statements of claims, plaints, originations summons or through judicial review. To lodge a constitutional petition when one's claim can be competently determined through any of these other forms of suit is, in my humble view, not only demeaning to the sanctity of a constitutional petition but it is also an abuse of the process of the court.

It does not really matter that under article 23(3) of the Constitution the High Court may very well grant some of the reliefs that are otherwise available through an ordinary suit or in a judicial review when determining a constitutional petition. The availability of these reliefs in a constitutional petition proceeding has more to do with the expanse of the scope of the court's powers in such a proceeding than with provision of a window for alternative means of institution of suits the forms of which have been specifically prescribed.

It has been held that to invoke the provisions of the Constitution to allege breach of constitutional rights in addition to or as an alternative to laid down procedure of seeking a particular remedy is considered frivolous, vexatious or an abuse of this court's process. **Lord Diplock** made reference to this sort of proceedings in his pronouncement in **Harrikson versus Attorney General of Trinidad & Tobago (1980) AC 265** where he said: -

> ***The notion that whenever there is failure by an organ of government or public authority or public officer to comply with the law this entails contravention of some human right or fundamental freedom guaranteed to individuals by the chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6 (1), the mere allegation that a human right fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for the unlawful administrative action which involves no contravention of any human right or fundamental freedom.***

I am satisfied that the petitioners petition is one such suit that is misusing the constitution as a general substitute for the normal procedures for invoking judicial control of administrative action.

I have already noted that it was open to the petitioners to lodge an ordinary plaint or a statement of claim for appropriate reliefs.

I hasten to add that having contended that they are entitled to a fair administrative action from the respondent yet they have taken the path of

a constitutional petition rather than a judicial review application, I am persuaded that they have invoked the jurisdiction of this this court under article 22 of the Constitution partly because they intended to avoid the necessity of applying in the normal way for appropriate judicial remedy for the unlawful administrative action.

For the foregoing reasons I am of the humble view that the petitioners' petition is misconceived and it is hereby struck out. Parties will bear their respective costs. It is so ordered.

Dated, signed and delivered in open court this 6th December 2019.

Ngaah Jairus

JUDGE