



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

PETITION NO. 6 OF 2014

ARTICLES 22(1) OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013 RULES 4**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOM UNDER ARTICLE 35(1)b OF THE CONSTITUTION OF KENYA, 2010**

BETWEEN

DAVID OGOTI.....1ST PETITIONER

NYARAMBA NYAGWORA.....2ND PETITIONER

OTWORI NYAKWARA.....3RD PETITIONER

RUTHIA M. NYAMWANDA.....4TH PETITIONER

ALFRED N. ONTERI.....5TH PETITIONER

SAMWEL M. RAGIRA.....6TH PETITIONER

OKONE MIRIERI.....7TH PETITIONER

-VERSUS-

KIAMOKAMA TEA FACTORY.....1ST RESPONDENT

KENYA TEA DEVELOPMENT AGENCY.....2ND RESPONDENT

RULING

1. The Petition is dated 3rd March 2014, and is presented by seven persons viz **David Ogoti, Nyaramba Nyagwora, Otwori Nyakwara, Ruthia M. Nyamwanda, Alfred N. Onteri, Samwel M. Ragira** and **Okone Miriera** (herein 1st to 7th Petitioners respectively).

The respondents are **Kiamokama Tea Factory** and **Kenya Tea Development Agency** (herein, the 1st and 2nd respondents respectively).

2. From the pleadings, the genesis of the petition are the elections of directors conducted by the respondents particularly in respect of Ikorongo Electoral Zone on the 7th January 2014.

The petitioners contended that being shareholders of the first respondent they were entitled to vote in all the elections of the company and to participate in key decision making meetings of the company.

3. They also contended that being such shareholders they were entitled to access any data and crucial information kept by the company which is in its sole and exclusive possession so as to enable them exercise their mandate in the activities of the company and to also enable them make informed decisions while deliberating and making resolution to the decision making organs of the company as stipulated by the Company Act (Cap 484 LOK) and the Memo and Articles of Association of the Company.

4. It was further contended by the petitioners that it is within their Constitutional and Fundamental rights under Article 35(1) (b) of the Constitution to access and/or receive crucial and material information in the sole custody of the respondents when needed. That, the elections organized and conducted by the respondents were predetermined and rigged so as to give their preferred candidates and/or directors of choice an advantage over other candidates for directorship of the first respondent's company.

5. The petitioners alleged that due to mismanagement at the first respondent's factory they have suffered losses in that the payable dividends and bonuses have diminished thereby violating their rights to income and decent living. They contended that it is their right under Article 38 of the Constitution to participate in a democratic elective process within the ranks of the first respondent by either voting for a candidate of their choice or offering their candidature.

6. The petitioners averred that in their bid to exercise their alienable constitutional right of access to information in regard to the concluded election they requested to be furnished with certified and/or officially declared results and a copy of the voter's register respecting Ikorongo electoral zone for purposes of verification and satisfying themselves that the elections were done in accordance with the Constitution and the Articles and Memorandum of Association.

7. The petitioners also averred that they need the requested documents for purposes of interrogating the same through a court process. They contend that despite the request, the respondents have declined, refused and/or ignored to supply or avail the said documents thereby violating and/or infringing their fundamental rights provided under Article 35(1) (b) of the Constitution.

8. It is further contended by the petitioners that the respondents' conduct of concealing and hiding material information amounts to fraud and/or abuse of office and power and is without justifiable reasons and informed by ulterior motives.

The petitioners therefore pray for declaratory orders in terms of prayers (1) and (2) of the Petition. They also pray for costs of the Petition and any other order that the court may deem fit and just to grant.

9. The Petition was supported and fortified by the averments and annexures contained in the supporting affidavit dated 3rd March 2014, deponed on behalf of all petitioners by **David Ogoti** (first petitioner).

The respondents opposed the Petition vide their response dated 8th December 2014, in which they contended that the right of petitioners as shareholders of the first respondent is qualified and dependant on proof that they are indeed such shareholders and intent in participating in due process as by the Articles and Memorandum of Association and relevant attendant statutes.

10. The respondents also contended that the management structure of the first respondent has provision for division of the management to various electoral areas represented by various directors and that

through the directors the decisions of the board are communicated by way of board resolutions and meetings of the committee of the buying centre.

11. It is further contended by the respondents “inter-alia” that the petitioners are busy-bodies intent on a mission to disrupt the otherwise proper management of the first respondent and have failed to state with certainty the documents required and the legal basis for such request.

That, they (respondents) have held the operations of the Company transparently and that the disputed elections have stood the test of time and were conducted within the relevant armpit (sic) of the Law.

12. The respondents contended that being private companies they have their “modus-operandi” which the petitioners have failed to adhere to for purposes of channeling their concerns, if any.

The respondents therefore pray for the dismissal of the Petition with costs and contend that this court has no jurisdiction to entertain the matter.

13. It was the consent of the parties to canvass the Petition by way of written submissions. In that regard, **Messrs O.M Otieno & Co. Advocates**, filed written submissions on behalf of the petitioners while **Messrs Nyachiro Nyagaka & Co. Advocates**, likewise filed submissions on behalf of the respondents.

The rival submissions have been given due considerations by this court and so have the grounds in support of the Petition and those in opposition thereto.

14. Apparently, the basic issue for determination is whether this court has the necessary jurisdiction to deal with this matter and if so, whether the petitioners’ rights under Article 35 of the Constitution stand to be infringed and/or violated by the respondents’ refusal to furnish them with the required documents viz the official results of the concluded elections and the relevant voters register.

15. The question of jurisdiction was raised in the reply to the Petition dated 8th December 2014 (see, paragraph 14 of the reply).

In the case of **Owners of the m/v “Lillian S” Vs. Caltex Oil (K) Ltd (1989) KLR 1**, it was stated that a question of jurisdiction once raised must be determined forthwith on the evidence before the court and it matters not whether the evidence is limited or scanty.

16. In the same case, it was also stated that where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

In matters constitutional a court, in this court’s opinion, would examine whether the dispute before it relates to the interpretation and/or violation or infringement of a Constitutional right by one party against the other and in such instance the court would go further and examine whether the constitutional threshold of proof has been established to enable hearing and determination of a constitutional petition.

17. “Locus-standi” of the person or persons bringing the Petition is also a vital point in establishing whether or not a court would have necessary jurisdiction to deal with a Petition.

It was the respondents’ submission that the Constitutional threshold of proof has not been established in this case due to the failure by the petitioners to give details and particularize the alleged violation of Article 35 of the Constitution. In that regard, reference was made to the case of **Anarita Karimi Njeru Vs. Republic (1976 - 1980) KLR 1272**.

18. The petitioners did not address any of the foregoing issues relating to jurisdiction. Instead, they concentrated on the issues pertaining to the alleged violation of their constitutional rights under Article 35 of the Constitution by the respondents.

It is this allegation against the respondents that forms the substratum of this petition and pursuant to Article 22 of the Constitution, every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or threatened.

Under Article 258 of the Constitution, every person has the right to institute court proceeding claiming that this Constitution has been contravened or is threatened with contravention.

19. In as much as the Petition relates specifically to Article 35 of the Constitution, the petitioners were entitled to move the court accordingly.

Suffice to say that they do have the necessary “locus-standi” to bring this matter to court and by dint of Articles 23 and 165(3)(b) of the Constitution this court is vested with jurisdiction to deal with the matter.

20. Article 23(1) provides that the High Court has jurisdiction in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

Sub-section (3) of the said Article provides for remedies which may be granted by the court in any proceedings brought under Article 22, such as the present petition.

21. Under Article 165(3) (b), the High Court has jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

The petitioners are asking this court to exercise its constitutional powers to declare that the respondents have violated their right to access information as provided by Article 35 of the Constitution.

22. However, the court can only exercise its powers if it is shown that the Petition falls within the constitutional threshold of proof in terms of the principles set out in the case of **Anarita Karimi Njeru Vs. Republic (supra)**. It was stated in this case that 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.

23. This means that the mere citing of relevant provisions of the Constitution allegedly breached by a person without providing details and proper particulars of the alleged breach would not be sufficient enough for a just and proper determination of the dispute by the court.

The foundation of any case is laid by the pleadings and it was herein expected that the petitioners’ pleadings would provide sufficient details and particulars of the alleged violation of their constitutional rights by the respondents and further show that the remedy for such breach is only available in the Constitutional Court as opposed to any other court.

24. It is trite law that where the Constitution or an Act of Parliament provides for a mechanism for resolving certain disputes in specified courts or tribunals, no person should be allowed to ignore such courts and tribunal to bring his dispute to a Constitutional Court.

In the case of **Mumo Matemu Vs. Trusted Society of Human Rights Alliance & Others (2013)e KLR**, the Court of Appeal stated that the principle in the Anarita case (supra) underscores the importance of defining the dispute to be decided by the court.

25. The same court went further to state as follows:-.

***“In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under section 1A and 1B of the Civil Procedure Act (Cap 21) 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.”

26. In their submissions, the petitioners indicated that the information sought by them was contained in specified documents held by the respondents. These included a copy of the voters register used in the impugned elections and a copy of the certified official and declared results of the election.

The petitioners further indicated that the documents were required for purposes of demonstrating that the elections were marred with a lot of irregularities.

27. These factors are however, not specified in detail and precision in the pleadings and if this was done, there was no indication that the documents were required for purposes of being used in an existing court action against the respondents aimed at nullifying the impugned elections. Indeed, there was no indication that such action had already been taken. In any event, matters related to conduct of elections would fall within the ambit of civil courts.

28. At most, the petitioners’ pleadings show that the subject documents were required by the petitioners for them to exercise their mandate as shareholders in the activities of the first respondent in accordance with the Company Act and the Company’s Memorandum and Articles of Association. If this was indeed the real intention then any dispute pertaining to the election would fall within the jurisdiction of the ordinary civil courts and not a Constitutional Court.

29. This court must therefore find that the Petition raises issues which are suitable for determination by a civil court. It is far from being a constitutional petition in as much as it is not set out with a reasonable degree of precision within the principles stipulated in the Anarita Karimi Njeru Case (supra). It does not fall within the constitutional threshold of proof and even if it did, Article 35(1) (b) provides that every citizen has the right of access to information held by another person and required for the exercise or protection of any right or fundamental freedom.

30. As observed hereinabove, there is no existing court action by the petitioners against the respondents in relation to the impugned election. It is therefore ironic for the petitioners to say that the information required is for the purpose of exercising or protecting their right or fundamental freedom.

31. It would therefore follow that even if the information required by the petitioners was requested for and denied by the respondents, there was no breach of Article 35 (1) (b) of the Constitution by the respondents.

In sum and for all the foregoing reasons this Petition is lacking in merit and is hereby dismissed with costs to the respondents.

Ordered accordingly.

[Read and signed this 11th day of May 2017].

J.R. KARANJAH

JUDGE

In the presence of

Mohe CC

Mr. O.M Otieno for Petitioners

Mr. Nyasimi holding brief for Mr. Nyachiro for Respondent

J.R. Karanjah , Judge

15/11/16