



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL PETITION NO. 5 OF 2016

GOLD SUN GENERAL TRADING LLCPETITIONER

VERSUS

KENYA REVENUE AUTHORITY RESPONDENT

1. STONE AND HENCH TRADING CO. LIMITED

2. WESTMILL AFRICA LIMITED INTERESTED PARTIES

RULING

1. Through a Notice of Preliminary Objection filed in court on 4th March, 2016 the respondent has moved this court to make a finding on the following points of law:-

- (i) The Petitioner has no locus standi to institute a Constitutional petition in Kenya;
- (ii) The court has no jurisdiction in the matter.

2. Mr. Shabala, Learned Counsel for the respondent submitted that the petitioner lacks locus standi to file a Constitutional petition in Kenya as importation and exportation of sugar is regulated by the Sugar Act, 2001 and in order for one to be entitled to import and export sugar, the Sugar Board has to issue import and export licences after registration by the said Board. He referred the court to regulation 3(1) of the Sugar (Imports, exports and by products) (Amendment) Regulations, 2013. The court was informed that under section 18(2) of the East Africa Customs Management Act, sugar is defined as a restricted commodity. It was submitted that the petitioner allegedly imported sugar but no license had been issued for the specific consignment and no licence was attached to the petitioner's pleadings. Since the petitioner was not licensed, it could not import sugar. It was argued that as such the petitioner has no legal authority to institute a claim and due to the lack of an identifiable claim or stake, the petitioner is not entitled to bring this petition.

3. Mr. Shabala further submitted that under the provisions of sections 34 – 46 of the East Africa Customs Management Act (EACMA), once goods are imported and land at the port, the owner has 21 days to ensure that the goods are entered by the owner by producing the original bill of lading to confirm the type of goods that were loaded aboard the ship. He emphasized that only the owner of the goods will have the original bill of lading, which is submitted to the customs officials to begin the process of entry. The court was informed that the petitioner has not produced the said document to show ownership of the goods thus the petitioner is a stranger who is trying to assert rights he does not possess.

4. It was further argued that under article 22 of the Constitution, the petitioner has not demonstrated his interest in the subject goods for lack of documents. On the issue of jurisdiction, the respondent's counsel contended that it was challenging the cause of action as the issues that arise herein are purely administrative in nature as under the provisions of section 229 of the EACMA the Commissioner General has powers to seize such goods. A dispute resolution mechanism is also provided for in the said Act whereby the petitioner should have addressed any grievances within thirty (30) days. Counsel submitted that instead of following the procedure provided, the petitioner has moved to court. Counsel cited the case of **Samuel Kamau Macharia & Another vs Kenya Commercial Bank & 2 Others [2012] eKLR** where the Supreme Court held that where the Constitution provides for jurisdiction of a court, the court must operate within the Constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.

5. He also referred to the case of **Re Application by Bahadur [1986] LRC (Const) 297** (From Trinidad and Tobago) which stated that the constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action and that where infringement of rights can found a claim under substantive law, the proper cause would be to bring the claim under that law and not under the Constitution.

6. It was submitted for the respondent that the petitioner is claiming a consignment of sugar which for all intents and purposes is a commercial transaction. It cannot purport to have acquired constitutional rights and assert those rights whereas it is a shipper and that once the goods were put in the high seas and an invoice was issued, the title passed from the petitioner to the person importing the goods. Mr. Shabala prayed for the preliminary objection to be upheld.

7. In response to the foregoing, Mr. Gikandi, Learned Counsel for the petitioner opposed the application by arguing that the allegation that the bill of lading has never been produced is one of the reasons why he was submitting that the petition needs to be heard so that the court decides the matter on merits. Counsel contended that the respondent did not request for the bill of lading but condemned the consignment before giving the petitioner/shipper a right to be heard.

8. He submitted that the original bill of lading is being held by the petitioner as he has not been paid the agreed price for the consignment, for the said reason, the petitioner has an interest in the goods. In his view, title is not transferred to the owner after shipment of the goods until payment is made. He added that was an arguable point that should be canvassed at the hearing of the petition. In reference to the **S.K. Macharia case** (supra), Mr. Gikandi submitted that the court should not use judicial craft to restrict its jurisdiction. He further submitted that the petitioner is a person in line with article 260 of the Constitution. In addition, Article 20 of the Constitution provides that the bill of rights apply to all persons. He cited the case of **Republic vs Cabinet Secretary for Ministry of Interior and Coordination of National Government & 2 Others Exparte Patricia Olga Howson [2013] eKLR** where the court held that the applicant was entitled to the rights enshrined in article 47 of the Constitution of Kenya.

9. Mr. Gikandi submitted that the petitioner has locus standi to bring the petition as it has a lot of interest in the goods thus it has a legal right to follow up and ensure that the sugar is not destroyed. He stated that there was a genuine mistake of misshipment when sugar was erroneously shipped to Kenya. He cited the case of **Murai vs Wainaina** (No. 4) [1982] KLR where in dicta Madan J.A stated that a mistake is a mistake and is no less a mistake because it is an unfortunate slip

10. He asserted that the provisions of article 165(3) (b) of the Constitution vests this court with original unlimited jurisdiction in both criminal and civil matters. He cited article 23 of the Constitution which gives the court wide powers on enforcement of constitutional rights. Counsel for the petitioner cited the case of **Ndyanabo vs Attorney General** (2002) AH RLR 243 (TZCA 2002) where the Court of Appeal in Tanzania held that the right of access to court as being foundational to the stability of an orderly society that ensures the peaceful, regulated and institutionalized mechanism to resolve disputes, without resorting to self-help. He prayed for the preliminary objection to be dismissed.

11. In response to the above, Mr. Shabala stated that the matter in issue is a commercial transaction and

that section 229 of the EACMA gives the petitioner a right to be heard. That procedure was not followed. He added that the consignee in the bill of lading has not been joined as an interested party yet the petitioner alleges that it was not paid. In his view, the petitioner has not come to court with clean hands and is trying to subvert the cause of justice by its failure to avail a corresponding bill of lading to show that the sugar was destined to another part.

ANALYSIS AND DETERMINATION

12. The issues for determination are:-

- (i) If the petitioner has locus standi to file the constitutional petition herein; and
- (ii) If this court has jurisdiction to hear the petition.

LOCUS STANDI

13. In order to determine the question of whether the petitioner has locus standi, I here below outline the provisions of articles 22 and 258 of the Constitution of Kenya:-

“22(1) 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 is threatened.

(2) In addition to a person acting on their own interest, court proceedings under clause (1) may be instituted by –

- (a) a person acting on behalf of another person who cannot act on their own name;***
- (b) a person acting as a member of, or in the interest of, a group or class of persons.***
- (c) a person acting in the public interest; or***
- (d) an association acting in the interest of one or more of its members.” (emphasis added).***

14. Article 258 of the Constitution provides as follows:-

“1. Every person has the right to institute court proceedings claiming that this constitution has been contravened, or its threatened with contravention.

2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by –

- (a) A person acting on behalf of another person who cannot act in their own name;***
- (b) A person acting as a member of, or in the interest of, a group or class of persons;***
- (c) A person acting in the public interest; or***
- (d) An association acting in the interest of one or more of its members.” (emphasis added).***

15. In article 260 of the Constitution, **the word person is interpreted to include a company, association or other body of persons whether incorporated or unincorporated.** (emphasis added).

16. In the case of **Mining Temoi & Another vs Governor of County of Bungoma & 17 Others** [2014] eKLR, Judge Mabeya held thus:-

***“I am of the view that article 22(1) and (2) of the Constitution has expanded the horizons of locus standi in matters of enforcement of fundamental rights and freedoms. A literal interpretation of articles 22 and 258 in my view confers upon any person a right to bring action in more than two instances firstly in the public interest, and secondly, where breach of the Constitution is threatened in relation to a right of fundamental freedom. Where one purports to enforce the rights of another, it is my view that there must be a nexus between the parties*”**

17. In the arguments advanced in the preliminary objection, Counsel for the respondent is of the view that the property in the consignment of sugar shifted to the owner/consignee after the shipping agent put the goods aboard the ship. On the other hand, the petitioner’s Counsel submitted that property in the goods has not yet shifted to the consignee as the shipper/consignor has not been paid for the shipment; thus the sugar should not be destroyed. Considering the views outlined in the foregoing argument and the provisions of articles 22(1), 258(1) and 260 of the Constitution of Kenya, I am of the opinion that the petitioner has locus standi to file the petition that is awaiting hearing in this court. The said petitioner has filed the petition in his own right.

18. Judge J.B. Ojwang (as he then was) in the case of **Oraro vs Mbaja** [2005] eKLR stated the following on preliminary objections:-

***“I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreementthat where a court needs to investigate facts, a matter cannot be raised as a preliminary point.*” (emphasis added).**

19. In the present application, the Counsel for the respondent alleges that the petitioner has at no time availed the original bill of lading. In response to this assertion, Counsel for the petitioner argued that they attached a copy of the original bill of lading to the further affidavit dated 6th June, 2016. In my view, this is a matter that the court will have to legally determine after hearing the parties. The issue of whether the ownership of the goods presently lies with the consignee or the petitioner, can only be determined after parties have been heard on the petition. It is my finding therefore that it would be prejudicial to the petitioner if this court was at this point in time to hold that the petitioner has no locus standi to file the petition.

JURISDICTION

20. On the issue of whether this court has jurisdiction to hear the petition, I need not belabour the point. Article 23(1) of the Constitution of Kenya provides as follows:-

“The High court has jurisdiction to 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.”

21. It is my finding therefore, that this court has jurisdiction to hear the petition filed on 29th February, 2016. It is not lost to this court that the petitioner has opted not to follow the procedure laid down in the EACMA or the avenue of the Commercial Court but has chosen to file a constitutional petition. The manner in which a litigant decides to move the court in any dispute is a matter within the purview of such a litigant. It will be upon the court hearing the said petition to determine the matter on merit.

22. For the reasons outlined in this ruling, the preliminary objection dated 4th March, 2016 is hereby dismissed with no order as to costs.

DELIVERED, DATED and SIGNED at MOMBASA on this 7th day of October, 2016.

NJOKI MWANGI

JUDGE

Delivered in open Court in the presence of:-

Ms. Murage holding brief for Mr. Gikandi for the Petitioner

Mr. Maundu holding brief for Ms Burugu for the respondent/applicant

Mr. Oliver Musundi Court Assistant