



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
PETITION NO. 8 OF 2016

BETWEEN

NOAH JOSEPH OLERO PETITIONER

AND

35 ELECTED MCA'S OF KISUMU COUNTY 1ST RESPONDENT

THE CLERK COUNTY ASSEMBLU OF KISUMU 2ND RESPONDENT

EXECUTIVE MEMBER FOR FINANCE AND ECONOMIC PLANNING ... 3RD RESPONDENT

CONTROLLER OF BUDGET 4TH RESPONDENT

JUDGMENT

1. The petitioner is a civic minded citizen and has brought the petition dated 14th March 2016 seeking the following orders;

a. The appointment and establishment of ward development fund be nullified.

b. The cost of this petition is provided for.

c. That the 1st, 2nd and 3rd respondents to act on matters rose on its position from number 1 to the last complain which are for public benefits,

d. That this honourable court grants us justice to enable the public to protect the constitution from being manipulated by elected leaders who might think that their office granted them power to violate the constitution.

e. That 4th Respondent to be stopped from approving the ward equalization fund and to help us overcome challenges on this out Affidavit until the case is over.

f. That the 3rd respondent be urgently stopped from releasing the ward development or equalization fund until the case is concluded.

2. The body of the petition is rather prolix but the factual basis of the petition is set out in paragraph 1 of the Petition in which he states as follows;

That the County government of Kisumu and Assembly has not followed the Constitution while establishing Kisumu County Ward Development or Equalization funds committee and implementation regulation and legislation was not done in accordance with the Constitution of Kenya 2010 and we have evidence that the disbursement and utilization of this fund will not be executed within legislation, regulation and the constitution of Kenya public finance management laws due to the fact that we have gathered evidence that 35 MCAs have failed to surrender or accounted for over 55,600,000Ksh Fund for Ward Office Maintenance and note that the same MCAs has also failed to follow to follow the legislation and regulations of the same funds which they themselves put in place to guide the funds.

3. The petitioner then proceeds to set out a litany of complaints, inter alia, against the respondents as follows;

- That the County Assembly has failed to perform its legal mandate of oversight, legislation and representation by accepting suppliers and contractors to do shoddy jobs and exaggerating purchasing price of items for the Kisumu County Assembly.
- That MCAs have been calling unnecessary meetings and foreign trips in a bid to draw hefty allowances without transparency and accountability.
- That the County Government is providing bursary funds in contravention of the Constitution yet education is not a devolved function.
- That the County Government is not accounting for cash being collected from various taxes, fees and charges for services and other revenue.
- That the MCA's have failed to account for over Kshs. 55,000,000 cash disbursement has not been accounted for.'
- Staff working for the Kisumu County Assembly had been confirmed in their positions.
- The Kisumu County has yet to declare all the assets and liabilities of the defunct local authorities.

4. After the filing the petition, the petitioner filed a Notice of Motion dated 24th March 2016 in which he sought the following orders;

[2] THAT this Honorable Court be pleased to compel 1st, 2nd and 3rd Respondent to comply with the provisions of the Public Finance Management Act and Regulations thereunder by surrendering or accounting for over Kshs. 55,600,000.00 being part of funds disbursed and meant for Ward Office Maintenance from April 2013 to 2015.

[3] THAT failure to comply with (1) above the Honorable Court be pleased to compel the 4th Respondent to suspend the approval of withdrawal from the Ward Development Fund funding and disbursement of funds to the 1st, 2nd and 3rd Respondents and to investigate the whereabouts of the nearly 1 Billion shillings which was meant for the construction of a modern Assembly and which apparently has been deposited in a private account.

[4] THAT the Honorable Court be pleased to declare the action of the 1st, 2nd and 3rd Respondents that continue to violate the Constitution and the various legislations relating to Public Finance Management , Access to information, Public Participation and Public Procurement Void and unconstitutional.

[5] THAT this Honorable Court be pleased to compel the 3rd Respondent to declare and avail for public information all the surrendered assets and liabilities of defunct Local Authorities in Kisumu County as per verification report by the Transition Authority.

[6] THAT the 5th Respondent do appropriately advice the Cabinet Secretary to the national Treasury to exercise his constitutional duty of stopping the transfer of funds to the County Government of Kisumu.

[7] THAT the 1st, 2nd and 3rd Respondents do comply with recommendations of the Auditor General's report.

5. The petitioner's notice of motion was supported by the petitioner's own affidavit sworn on 24th March 2016 in which he once again recited the litany of complaints I have set out in paragraph 3 above.

6. All the respondents opposed the petition and the Notice of Motion dated 24th March 2016. The 1st and 2nd respondent filed two sets of grounds of opposition 15th September 2016 through the firm of *Rodi Orege and Company Advocates* and 11th October 2016 through the firm of *Okong'o Wandago and Company Advocates*. They asserted that the petition and application were frivolous, vexatious and an abuse of the court process and could not be cured by amendment or application of **Article 159** of the Constitution. They complained that the petition was grounded on hearsay, false allegations, unsubstantiated facts, untruthful statements which were intended to vex and annoy the respondents and were an attempt to wage political war. They contended that the 35 members of the County Assembly could not be sued as a group without mentioning their names and submitted that the petition does not meet the basic threshold of a petition and should be struck out. The Clerk of the County Assembly, Philip Otiende Adundo, in his replying affidavit sworn on 25th October 2016, denied the allegations against the 1st and 2nd respondents.

7. The 3rd respondent filed the Notice of Motion dated 14th April 2016 seeking to strike out the petition because the advocate who signed and filed the petition Odhiambo Gwada Clifford did not have a practicing certificate at time he signed and filed the petition. The other ground is that the petition does not meet the basic threshold of what a petition should contain. In addition, George Ongaya filed affidavit titled, "*Response to Petition*" in which it denied the petitioner's allegations. The thrust of his affidavit was the County Government of Kisumu complies with the provisions of the Constitution and **Public Financial Management Act, 2012** in the manner it manages public funds.

8. The 4th and 5th respondent were represented by the Attorney General. According to the replying affidavit filed by Waweru Tutu of the Office of the Controller of Budget, the matters raised by the petitioner are matters of an audit nature and are outside the authority of the Controller of the Budget. Ms Langat, counsel for the 4th and 5th respondents, submitted that the Senate has responsibility of oversight over County Governments and may take appropriate action over the matters complained of. Counsel further submitted that the application and petition were incompetent.

9. When I fixed the matter for directions to deal with the petition, I requested the petitioner to review the petition as the prayers he sought in the Notice of Motion were couched as final orders which were not prayed for in the petition. Furthermore, the Notice of Motion appeared to be filed as an amendment to the petition as it was underlined in red and was inconsistent with the petition itself. I also asked the petitioner to consider amending the petition to clarify what he was seeking from the court. The petitioner insisted on proceeding with the Notice of Motion as the petition and I heard the same together with the Notice of Motion filed by the 3rd respondent seeking to strike out the petition.

10. As the respondents raised threshold issues, these must be determined first as they are likely to dispose of the petition. The two issues are as follows;

- a. Whether the petition is incompetent for being filed by an unqualified person.
- b. Whether the petition discloses a cause of action.

11. It is not disputed that Odhiambo Clifford Gwada did not have practicing certificate. The Law Society of Kenya stated in a letter dated 12th April 2016 addressed to Mr Amondi, counsel for the 3rd respondent, that, "*Gwada Clifford Odhiambo Advocate has never taken out a valid practicing certificate since his admissions to the Roll of Advocates. He is therefore not licenced to practice law.*"

12. The law does not allow an unqualified person to act as an Advocate. **Section 2** of the **Advocates Act (Chapter 16 of the Laws of Kenya)** defines the term ‘unqualified person’ as, “a person not qualified under section 9 to act as an advocate.” **Section 9** of the **Act** is clear on qualifications that one must possess to practice as advocate. The section reads thus;

9. Subject to this Act, no person shall be qualified to act as an advocate unless;

(a) he has been admitted as an advocate; and

(b) his name is for the time being on the Roll; and

(c) he has in force a practicing certificate and for the purpose of this Act a practising certificate shall be deemed not to be in force at any time while he is suspended by virtue of section 27 or by an order under section 60 (4).

13. It is therefore not in doubt that the law requires that for an advocate to qualify, he or she must have in force a practicing certificate. **Section 31** of the **Act** creates an offence for unqualified persons acting as advocates while **section 34** makes it an offence for unqualified persons to draft certain documents. The collectivity of the provisions I have cited have been interpreted by the courts to mean that it is illegal for an unqualified person to prepare and sign certain legal documents and the only option for the court when confronted with a document prepared and signed by an unqualified is to strike it out.

14. Following several decisions by the Court of Appeal among them **National Bank of Kenya Ltd v Ayah [2009] KLR 762**, **Kenya Power & Lighting Company v Chris Mahinda T/A Nyeri Trade Centre [2005] 1KLR 753** and **Geoffrey Orao Obura v Koome [2001] KLR 109**, the courts consistently held that pleadings drawn and filed by an unqualified person were liable to be struck out. In **National Bank of Kenya Ltd v Ayah (Supra)**, the Court of Appeal explained the position thus:

[It] was public policy that Courts should not aid in the perpetuation of illegalities. A failure to invalidate an act by an unqualified Advocate was likely to provide an incentive to repeat the illegal Act; the interests of the innocent party should not be swept under the carpet in appropriate cases.... The innocent party has remedies against the guilty party to which he may have recourse.

15. The long held position elucidated by the Court of Appeal and applied by the High Court and subordinate courts was mitigated in by the Supreme Court in **National Bank of Kenya Limited v Anaj Warehousing Limited Petition No. 36 of 2015 [2015]eKLR**. In that case the Supreme Court re-assessed the rationale for the **Ndolo Ayah Case** and concluded that;

[68] facts of this case, and its clear merits, lead us to a finding and the proper direction in law, that, no instrument or document of conveyance becomes invalid under Section 34(1)(a) of the Advocates Act, only by dint of its having been prepared by an advocate who at the time was not holding a current practising certificate. The contrary effect is that documents prepared by other categories of unqualified persons, such as non-advocates, or advocates whose names have been struck off the roll of advocates, shall be void for all purposes.

16. The Supreme Court was of the view that a reading of the **Advocates Act** could not support the conclusion that documents prepared by unqualified persons must be invalidated and the public policy of deterring illegal conduct could not withstand the demands of the Constitution particularly the imperative to administer justice without undue regard to technicalities and the right of access to justice in **Articles 159** and **40** of the Constitution respectively. Although the Supreme Court decision dealt with instruments or documents of conveyance, the reasoning and rationale of the decision, being grounded on constitutional principles and provisions, can be applied to other situations and documents.

17. When confronted with an objection that the advocate who prepared a pleading did not have a practicing certificate, Ngugi J., in **R v Resident Magistrates Court Kiambu ex-p. Geoffrey Njuguna KBU JR No. 1 of 2016 [2016]eKLR** concluded that lack of a practicing certificate did not invalidate the

pleading prepared and signed by the advocate. He observed as follows;

35. *A claim in law and a course of action belongs to the client and not the advocate. It is hard to justify, in this era where the Constitution (at Article 159) commands the courts to privilege the ideals of substantive justice as opposed to legal formalism, statutory interpretation which bereaves a party of a valid substantive claim because his or her lawyer failed to adhere to a procedural requirement unrelated to the claim in question. The case would be different, of course, if there is evidence that the client acted in bad faith or with knowledge of the failure of the lawyer to take out a practicing certificate but still persisted in having the lawyer represent them. No such evidence was presented here. Instead, we have a group of innocent members of the public who instructed a law firm – not even a particular lawyer – to file a claim on their behalf. The law firm so instructed, then, assigned the file to a lawyer in the firm who happened not to have taken a practicing certificate. In my view, to paraphrase the Supreme Court, the fact of this case, and its clear merits lead me to a finding that the pleadings drawn and signed by Mr. Nyanyuki as well as the submissions he made in the two suits are not invalid merely by dint of Mr. Nyanyuki's failure to take out a practicing certificate.*

18. I agree entirely with the reasoning. I decline to strike out the petition because Gwada Clifford Odhiambo did not have a practicing certificate. Clearly, the petitioner in this matter is ready to present his case and he should not be shut out on that ground.

19. I now turn to the second ground for attacking the petition. It is that it does not disclose a cause of action in that the petitioner's claim is not pleaded with the precision required. It is now established that a petitioner who comes to court seeking relief based on the Constitution must plead his case with reasonable precision to enable the court as well as the respondent understand the case and respond to the claims. The petitioner must state the specific provisions of the Constitution violated and set out how those provisions are violated in relation to him. This principle established in the case of **Anarita Karimi Njeru v Republic (No. 1) [1978] KLR 154** was reiterated by the Court of Appeal in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others NRB CA Civil Appeal No. 290 of 2012[2013] eKLR**.

20. As Onguto J., stated in **Peter Michobo Muiru v Barclays Bank of Kenya Ltd & Another NRB Petition No. 254 of 2015 [2016]eKLR**,

The principle, as this court has previously stated, does not however equate absolute precision. There is no need for absolute and artificial specificity: see Kevin Turunga Ithagi v Hon. Justice Fred Ochieng & 5 Others (No.1) HCCP No.442 of 2015 [2015]eKLR. The general approach should be that each case must be independently viewed and understood by the court and where the court as well as the Respondent can painlessly identify and understand the petitioner's case as well as the constitutional trajectory the case takes, then the merits of the case ought to be ventured into. Stalling the case through the technicality of want of formal competence will take a back seat.

21. I have looked at the petition, supporting affidavit and the Notice of Motion dated 24th March 2016 and I find that they contain general complaints mismanagement, corruption and maladministration by the respondents and other named persons. The petitioner does not plead how specific provisions of the Constitution have been violated. In fact, the entire petition does not cite any provision of the Constitution that has been violated. It refers to violation of the Constitution in vague and general terms. Likewise, the Notice of Motion is silent on any provisions of the Constitution. It not the duty of the court or the respondents to trawl through the pleadings and depositions to divine which provisions of the Constitution the petitioner could possibly have meant to invoke. It is for this reason that I find and hold that the petition is fatally deficient. I gave the petitioner an opportunity to amend the petition to clarify his claims before the hearing but he declined the entreaty.

22. I strike out the petition.

23. I have reflected on the issue of costs. The petitioner is civic minded individual who has genuine grievances which have been misdirected. It is not in the interests of justice to mulct him with costs.

DATED and DELIVERED at KISUMU this 5th day of December 2016.

D.S. MAJANJA

JUDGE

Petitioner in person.

Mr Rodi and Ms Aron instructed by Rodi Orege and Company Advocates and Okong'o Wandago and Company Advocates for the 1st and 2nd respondents.

Mr Amondi instructed by Amondi and Company Advocates for the 3rd respondent.

Ms Langat instructed by the Office of the Attorney General for the 4th and 5th respondent.