



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 419 OF 2015

BETWEEN

C O D (suing on his behalf and on behalf of his children (both minors)

MMOD and CHAD).....1STPETITIONER

A S-D.....2NDPETITIONER

AND

NAIROBI CITY WATER & SEWERAGE CO. LTD.....RESPONDENT

RULING

1. The Notice of Motion application before me is dated 30th September, 2012. It seeks the following orders;

- a. **THAT** this matter be certified as extremely urgent and service be dispensed with in the first instance.
- b. **THAT** pending the hearing of this application *inter-partes*, this Honorable court be pleased to issue interim orders directed to the Respondent compelling them by themselves, servants or agents to reconnect the water supply services of the Petitioners/Applicants in relation to water account number [particulars withheld] in Orchard Court, House number [particulars withheld] located along Ole Odume road.
- c. **THAT** pending the hearing and determination of the Petition, this Honorable Court be pleased to issue interim orders directed at the Respondent compelling them by themselves, servants or agents to reconnect the water supply services of the Petitioners/Applicant in relation to water account number [particulars withheld] in Orchard Court, House number [particulars withheld] located along Ole Odume Road.
- d. **THAT** this Honorable court be pleased to issue interim orders directed at the Respondent compelling them to supply the 1st Petitioners with the statements of his water account number [particulars withheld] from the time it was registered in the year 2011 to the time it was disconnected on the 25th day of August 2015.
- e. Any other order that this Honorable court deems just and fair in the circumstances.
- f. **THAT** costs of the application be provided.

2. The 1st Petitioner contends that he has since August 2011 been paying for water supply services to the Respondent through his water account number 1884863. He alleges that on 25th August, 2015 the

Respondent disconnected his water supply allegedly due to unpaid water bills on another account number [particulars withheld] which does not belong to the Petitioner in any way but was for the previous tenant who who was earlier occupying the house the Petitioners currently reside in, being Apartment [particulars withheld] Orchard Court along Ole Dume Road in Nairobi. It is his contention that the Respondent has stated that it would only reconnect his water supply upon payment of the outstanding water bill of Ksh. 25, 517.02 on account number [particulars withheld] which had never been operated by the Petitioners. They therefore allege that the Respondent caused them great suffering, loss and discomfort as they have been unable to access water which is a necessary commodity for human survival.

3. He further claims that the Respondent has failed to issue them with a statement of account on account number [particulars withheld] but has refused to do so. It is also his contention that it has also has refused to issue the Petitioners with information regarding water account number [particulars withheld] against which account the Petitioners are being forced to pay for an outstanding water bill of Ksh. 25, 517.02.

4. The Respondent did not file any response to the application but made oral objection to the jurisdiction of the Court.

5. Ms. Mwangi, learned counsel for the Respondent submitted that the Court did not have jurisdiction to adjudicate the matter. It was her position that the instant dispute does not raise any constitutional issue as the present dispute is based on a contract as between the parties and therefore the only question to be raised is whether there has been a breach of the contract calling for specific performance. Further that the obligation of the Respondent to supply water to the Petitioners was not absolute. She contends that water is supplied to those who have met their contractual obligation of making payment for the same which obligation the Petitioners had not fulfilled.

6. In reply Mr R.J.O. Change asserted that the Petition raised substantial constitutional issues which only this court could address. He particularly pointed out Articles 35,43(1)(a), 47 and 50 of the Constitution as to the right of access to information, right to clean and safe water, fair administrative action and fair hearing respectively. Mr Change stated that the Petitioners were not given a hearing before the disconnection of their water supply and further that the Respondent has failed to avail information on the contested water account number [particulars withheld] despite requests and demands.

7. The only singular issue I am to determine at this stage is whether this Court has jurisdiction to consider the Petition and the Motion. Jurisdiction is everything and without it the Court has no mandate to take any further step: see *The Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Ltd [1989] KLR*. I have no doubt in my mind that by dint of the provisions of Article 165(3) of the Constitution this court, meaning the High Court, has an unlimited jurisdiction to determine criminal and civil disputes. The court also has jurisdiction to deal with matters constitution as may fall for determination under Article 165 (3) (b),(c) & (d). The question of this court's remit ,as I understood Ms. Mwangi to submit, is whether the Petitioners can seek to redress their grievance(s) through a constitutional petition under Article 165(3)(c).

8. The parties in this dispute are in agreement that the spectrum of the dispute before me revolves around a contract for supply of water to the Petitioners. In that regard ,the Petitioners contend that they are entitled to supply of water since they have paid all their outstanding bills and that the alleged account with arrears does not belong to them in any way. In that context, where is the constitutional issue that the Court is called upon to determine?

9. I have seen the Petitioners' Petition which is premised under the provisions of Articles 26, 27, 28, 35, 43, 46, 47, 48 and 50 of the Constitution. As much as the Petitioners have alleged a violation of those rights it must be remembered that the crux of their case is based on a contract for supply of water which has allegedly been terminated. It has not been alleged in any way that the Respondent has refused to grant access to the Petitioners to clean and safe water. It is indeed admitted that the Petitioners had been connected and had not only access but supply of water before a dispute arose between the parties. The question then would be whether the Parties had performed their respective obligations under the contract to supply water. In my judgment, the court can do so but not through a constitutional petition.

10. The High Court in *International Centre for Policy and Conflict and 5 Others –vs- The Hon. Attorney-General & 4 Others* [2013]eKLR observed as follows;

***“[109] An important tenet of the concept of the rule of law is that this Court before exercising its jurisdiction under Article 165 of the Constitution in general, must exercise restraint. It must first give an opportunity to the relevant constitutional bodies or State organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act.*”**

11. Similarly, in *Papinder Kaur Atwal -vs- Manjit Singh Amrit Nairobi Petition No. 236 of 2011* where after considering several authorities on the issue, Justice Lenaola remarked as follows:

***“All the authorities above would point to the fact that the constitution is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within administrative processes..... I must add the following; Our Bill of Rights is robust. It has been hailed as one of the best in any Constitution in the World. Our Courts must interpret it [with] all the liberalism they can marshal. However, not every pain can be addressed through the Bill of Rights and alleged violation thereof.”* (Emphasis added)**

12. The Supreme Court of India has also held that ordinary remedies available under common law and statutes must be pursued in the ordinary manner or as provided under statute. For instance, in *Re Application by Bahadur*[1986] LRC (Const) the Court expressed itself as follows at page 307;

***“The Courts have said time and again that where infringements of rights are alleged which can be founded in a claim under substantive law, the proper course is to bring the claim under such law and not under the Constitution. This case highlights the un-wisdom of ignoring that advice.... The Constitution sets out to declare in general terms the fundamental concepts of justice and right that should guide and inform the law and the actions of men. While an infringement of the Constitution might in certain cases give rise to the redress provided for at section 14, yet, as has been proclaimed by the highest Court in the land, it is not, “a general substitute for the normal procedures for invoking judicial control of administrative action.”* (See *Harrikissoon v A-G* [1979] 3 WLR 62).**

13. It was further observed in the case of *Minister of Home Affairs vs Bickle & Others* (1985) LRC Const(per (Georges C.J));

***“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights.”* (emphasis)**

14. The law above is crystal clear that where there exist sufficient and adequate mechanisms or forums to deal with a specific issue or dispute by other designated constitutional organs or under a statute, the jurisdiction of the High Court under Article 165(3) (b) of the Constitution should not be invoked until such mechanisms have been exhausted. To my mind therefore, not every litigant ought to come to court by way of a constitutional petition even where there are no constitutional issue arising and where there are adequate remedies provided in other laws to determine such situations.

15. The Constitution cannot be used as a general substitute for the normal procedures. The mere allegation that a human right has been contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the High Court under Article 165 of the Constitution: *See Harrikissoon v A-G* [1979] 3 WLR 62. Where it is possible to decide any case or dispute, civil or criminal, without reading a constitutional issue then that is the course that should be followed. The court sitting as a constitutional court must through the doctrine of avoidance steer clear of determining such disputes as if there were constitutional questions being raised: see *S v Mhlungu*[1995] 3 SA 867 (CC) and also *Ashwander v Tennessee* 297 US 288.

16. The Petitioners remedy in the instant case would lie in an ordinary suit brought to enforce contractual obligations and the forums have been established both under the Constitution and under statute. The dispute herein involves substantially private law rights but somehow the infringement of constitutional freedoms and rights has been made a collateral question and pushed to the fore, albeit unnecessarily. The Petitioners may opt to move the High Court or the subordinate court through an ordinary suit for breach of contract under the Civil Procedure Act or even prompt the relevant tribunal or Appeals Board under the Water Act.

17. I have said enough to show that there is nothing constitutional about the instant Petition save for the repertory of various Articles of the Constitution cited and outlined in the Petition.

18. In the circumstances, I therefore find that this Court ought not entertain the current action brought by way of a petition. It is an abuse of the process of the court and the inherent jurisdiction of the court ought to be prompted to prevent such abuse. It certainly may be deemed only as a pyrrhic victory as the Petitioners are entitled to and are bound to file another suit but even with the fact that there may be disproportionate expenditure in such filing , the apposite and fitting course would be to strike out the Petition.

19. The petition is struck out but with no order as to costs.

Orders accordingly.

Dated, delivered and signed at Nairobi this 8th day of October, 2015

J.L ONGUTO

JUDGE