



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

E & L C PETITION NUMBER 17 OF 2019

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE VALUATION FOR RATING ACT

AND

IN THE MATTER OF PHYSICAL PLANNING AND LAND USE ACT

AND

IN THE MATTER OF PREPARATION OF THE UASIN GISHU COUNTY

VALUATION FOR RATING REGISTER WITHOUT A PHYSICAL

PLANNING REGISTER AND LAND USE REGISTER

AND

IN THE MATTER OF LACK OF PUBLIC PARTICIPATION

KIPKORIR ARAP MENJO

MOIRA CHEPKOK

SAMMY MUKIENEI

(Suing as officials and on behalf of Eldoret

Property Owners and Rate Payers Association).....1ST PETITIONER

KENYA NATIONAL CHAMBER OF COMMERCE AND INDUSTRY

NORTH RIFT CHAPTER.....2ND PETITIONER

THE LAW SOCIETY OF KENYA

NORTH RIFT CHAPTER.....3RD PETITIONER

VERSUS

THE COUNTY GOVERNMENT OF UASIN GISHU.....1ST RESPONDENT

THE COUNTY ASSEMBLY UASIN GISHU.....2ND RESPONDENT

RULING

This ruling is in respect of a Notice of a Preliminary Objection dated 12th September 2019 by the 1st and 2nd respondents on the following grounds:

- 1) That the petition infringes on Article 258 of the Constitution and Rule 4 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms Practice and Procedure Rules 2-13 otherwise known as Mutunga Rules for the following reasons:
 - a) That the petitioner lacks locus standi and legal capacity to present this petition on behalf of an unregistered and unknown entity called “Property Owners and Rate Payers Association”
 - b) That the petitioner lacks locus standi, legal capacity and authority to represent unknown persons who are purportedly in an unsigned list for “Rate Payers Consultative Forum” who are not related in any way to the petitioner’s unknown entity.
 - c) That the 1st petitioner lacks locus standi and legal capacity to represent the 2nd and 3rd petitioners who are professional entities and therefore the 1st petitioner cannot adjudicate on their behalf or depone on the representation on their behalf.
- 2) That the petition is defective and a nullity as it is pegged on documents for example the “Draft Valuation Roll, obtained illegally thereby infringing on Article 50 (4) of the Constitution on proper acquisition of evidence.
- 3) That the petition fails to disclose any infringement of the constitution to certainty to warrant description and handling of the suit as such and otherwise what exists is a general pleading on other laws capable of remedies within an ordinary civil suit.
- 4) That the petition contrives the provisions of section 6, 7 and 9 of the Fair Administrative Action Act as to exhaustion of available remedies before filing the petition and no leave has been sought by the petitioner before seeking judicial review remedies in the petition.
- 5) That the petition contravenes the provisions of section 3, 5,9, 10 16, and 19 of the Valuation for Rating Act Cap 266 wherein all remedies lie before instituting a suit.

Before the commencement of the hearing of the Preliminary Objection, Counsel agreed to strike out the name of the 3rd petitioner from the petition which was duly done. Counsel for the Applicant/respondent argued the application and relied on the submissions as filed in court in support of the Preliminary Objection dated 12th September 2019.

Mr. Chepkilot cited the classical case on *Mukisa Biscuit Manufacturing Company Ltd. Versus West End Distributors Ltd* (1969) E.A 696 Law J. A where preliminary objection was defined as follows;

‘in so far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arise by clear implication out of pleadings and which if argued as a Preliminary point may dispose of the suit.’

Counsel further relied on the case of *Oraro v Mbaja* [2005] eKLR whereby Ojwang J (as he then was) cited the below mentioned case by agreeing that:

*“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, **or a plea of limitation**, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration...” (emphasis added)*

Counsel listed the following issues for determination by the court

- a) Whether the 1st Petitioner has locus standi and capacity to present Petition on his behalf and on behalf of the unknown entity called ‘Eldoret Property Owners and Rate Payers Association; ‘Rate Payers Consultative Forum and its alleged members; and the 2nd Petitioner and the 3rd Petitioner;
- b) Whether the Petition is a nullity based on evidence obtained and tendered illegally;
- c) Whether the Petition meets the threshold for a Constitutional Petition;
- d) Whether the Petition infringes on the provisions of *The Fair Administrative Action Act No. 4 of 2015* and the *Valuation for Rating Act Cap 266* and whether the Petition is incompetent, misconceived and otherwise an abuse to the due process of this Honourable Court;

On the first issue as to whether the 1st Petitioner has locus standi and capacity to present the Petition on his behalf and on behalf of the unknown entity called ‘Eldoret Property Owners and Rate Payers Association; ‘Rate Payers Consultative Forum and its alleged members; and the 2nd Petitioner and the 3rd Petitioner; Counsel submitted that the petitioners has not provided any registration documents to prove the legality of the entity and further that the petitioner relies on authority to present the Petition on an unsigned list of members of ‘Rate Payers

Consultative Forum’.

Counsel also submitted that such actions infringe on *Article 258 and Rule 4 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms-)* Practice and procedure Rules 2013 otherwise hereinafter called *Mutunga Rules* and as such there is no identifiable interest by the 1st Petitioner.

Mr. Chepkilot submitted that the 1st Petitioner lacks capacity to sue on behalf of the 2nd and 3rd Petitioner, such authority allegedly deponed to by one Kikorir Arap Menjo creates a misjoinder of the 2nd and 3rd Petitioners since their authority is not presented hence an infringement of *Article 258 and Rule 4 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms-)* Practice and procedure Rules 2013 otherwise hereinafter called *Mutunga Rules*.

On the second issue as to whether the Petition is a nullity based on evidence obtained and tendered illegally, Counsel submitted that the documents (copies of alleged Draft Valuation Roll) which are not within the control of the Petitioners have been presented as evidence. Whilst *Article 35 of the Constitution* gives right for provision of documents, such provision has to be demonstrated within the provisions of *Article 50(4) of the Constitution*. before any court entertains the correctness or otherwise at hearing.

On the third issue as to whether the Petition meets the threshold for a Constitutional Petition, Counsel submitted that no redress can lie herein before existence of a threat or commission of an infringement. That the alleged Valuation Roll is a Draft that can only take effect after going through the County Assembly and the subsequent provisions of the *Valuation for Rating Act*. The Petition fails to disclose any infringement of the *Constitution, The Valuation for Rating Act Cap 266* and any other law. The Petitioner’s Pleadings on the face of it acknowledge it is a Draft Valuation Roll. Further that the Petition can be likened to an attack on a Bill before it becomes an Act. Thus the petition would infringe on the process laid down in the *Valuation for Rating Act*.

Counsel cited the case of *Godfrey Paul Okutoyi versus Habil Olaka* [2018] eKLR where it was stated that rights;

‘...must be expressly or impliedly recognized and protected rights and fundamental freedoms under the bill of rights. They must be the sort of rights and fundamental freedoms that belong to each individual, that are not granted or grantable by the state, and belong to individuals by virtue of their being human. These are rights and fundamental freedoms enjoyed by each individual and not collectively’

On the fourth issue as to whether the Petition infringes on the provisions of *The Fair Administrative Action Act No. 4 of 2015* and the *Valuation for Rating Act Cap 266* and whether the Petition is incompetent, misconceived and otherwise an abuse to the due process of this Honourable Court Counsel submitted that in the affirmative and stated that relied on the section 6 of the Fair Administrative Act offers an opportunity for redress and *section 7* provides an appeal mechanism while *section 9* offers a Judicial Review remedy. Mr. Chepkilot relied on the Court of Appeal of Trinidad and Tobago case *Damian Delfonte v The Attorney General of Trinidad and Tobago CA 84 of 2004* where it was stated that;

“Where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a general rule, there must be some feature, which at least arguably, indicates the means of legal redress otherwise available would not be adequate. To seek constitutional reliefs in the absence of such a feature would be a misuse or abuse of the Court’s process. A typical but by no means exclusive example of such a feature would be a case where there has been arbitrary use of state power. Another example of a special feature would be a case where several rights are infringed. Some of which are common rights and some of which protection is available only under the Constitution, and it would not be fair, convenient or conducive to the proper administration of justice to require an applicant to abandon his constitutional remedy or to file separate actions for the vindication of his rights.”

Counsel submitted that *Section 3, 4, 9,10 , 16 and 19 of the Valuation for Rating Act* provides an elaborate procedure and remedies to the Petitioner none of which is acknowledged or denied. Further that there is even an option for objection to a valuation court and an appeal to this Honorable court.

Section 7 of the Fair Administrative Action Act provides;

‘7 (1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to—

(a) a court in accordance with section 8; or

(b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law.’

The Valuation Court is the preferred Tribunal above as given powers by the *Valuation for Rating Act*.

Counsel finally concluded that where remedies lie in any law then it is fair that the remedies be exhausted and therefore urged the court to strike out the petition and uphold the preliminary objection.

Petitioner’s Submissions

Counsel for the petitioner opposed the Preliminary Objection and submitted that the Petitioners have complied with Article 22 and 23 of the

Constitution of Kenya more specifically Article 22(2)(b) which grants any person or persons acting as a member of a group. Counsel submitted that the petitioners have come to court as members of Rate Payers Association.

Mr. Angu submitted that the drafters of the “*Mutungu Rules*” were alive to the fact that there would be parties like the current petitioners hence came up with rule 5 for expeditious disposal of petitions. Rule 5 allows the court to substitute or add a petitioner if an error or mistake in suing a respondent in good faith is established.

Counsel submitted that the rules have joinder, addition and striking out of parties and that a petition may not be defeated due to joinder or misjoinder parties. That there are two types of association incorporated and non-incorporated people acting on behalf of others having the same interest.

Further that Article 159 enjoins this court to do substantive justice and We have enclosed the notice of the Valuation Roll. The notice inquiring people to inspect refers to final Draft Valuation Roll.

On the second issue on the illegal acquisition of the Draft Valuation Roll Counsel submitted that their request to the County Secretary to get the copy of the Valuation Roll has not been responded to and as such the court should compel the Respondent to supply a fair copy of the Draft Valuation Roll.

Mr. Angu further stated that the petitioner has established a cause of action and that the law allows the County Government to collect rates but the exercise must be open and accountable further that there has to be Public Participation which is a constitutional principle.

Counsel also submitted that the resultant process must be on equitable sharing of the load of the revenue realized. Counsel went into arguing the substantive petition in opposing the preliminary objection which I will not deal with at this juncture. I would have dealt with it if Counsel had agreed to hear the petition together with the Preliminary Objection. Counsel therefore urged the court to dismiss the preliminary objection and allow the petitioners to ventilate their issues.

Analysis and Determination

From the onset it should be noted that Counsel agreed by consent to strike out the name of the 3rd petitioner in this petition which was done. What the court is faced with is the issue of the Preliminary Objection and not the full petition.

I will therefore deal with the Preliminary Objection of which if it is upheld then the petition suffers a blow of being struck out.

The guiding principles on Preliminary Objections are now well settled and there is no need of reinventing the wheel. I am guided by the principle that Preliminary Objections are on pure points of law and not fact which will require adducing of evidence. When dealing with facts then it is one party’s word against the other which has to be subjected to cross examination. In a Preliminary Objection it is only the law that suffices. I am guided by the **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696** which enunciated the principles of preliminary objections.

It is therefore trite that for a Preliminary Objection to succeed, as earlier stated, the points raised should be purely on law, and that it cannot be raised if facts have to be ascertained or if what is sought is the exercise of judicial discretion of the court.

One of the issues raised in the Preliminary Objection is on locus standi of the petitioner.

Article 22 of the **Constitution** provides as follows:

22. Enforcement of Bill of Rights

(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 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

(3) The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that—

(a) the rights of standing provided for in clause (2) are fully facilitated;

(b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;

(c) no fee may be charged for commencing the proceedings;

(d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities;

Article 258 of the Constitution also provides for similar provision on the right of persons to institute court proceedings claiming that the Constitution has been contravened or is threatened with contravention. Pursuant to the Article 22(3) the Chief Justice gazetted Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. Also known as “Mutunga Rules” which define “person” thus:

“person” includes an individual, organization, company, association or any other body of persons whether incorporated or unincorporated.

The Preliminary Objection was premised on the ground that the petitioner is unregistered and unknown entity which does not have locus standi and therefore the petition is an abuse of court process. From the reading of Article 22 on the right of persons with right to file petitions if they feel that their rights have been contravened or are likely to be contravened, it is clear that this section read together with the “Mutunga Rules” envisages a wide range of parties.

Further the court is alive to the provisions of Article 259 which enjoins it interpret the Constitution in a manner that promotes its purposes, values and principles; advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; permits the development of the law and contributes to good governance.

Article 159 (d) also enjoins the court to administer justice without undue regard to procedural technicalities. Parties should not be locked out of the seat of justice merely for lack of form which can be cured by amendment. This does not mean that the courts should throw caution to the wind and accept all cases including the ones with glaring abuse of court process. Procedures are important for case management and predictability in court processes.

In the case of **Michael Osundwa Sakwa vs. the Chief Justice and President of the Supreme Court of Kenya [2016] eKLR, Odunga, J.** expressed himself thus on the matter of *locus standi* as follows:

"It is therefore clear that over time the issue of standing, particularly in public law litigation has been greatly relaxed and in our case the Constitution has opened the doors of the Courts very wide to welcome any person who has bona fide grounds that the Constitution has been or is threatened with contravention to approach the Court for an appropriate relief. In fact, since Article 3(1) of the Constitution places an obligation on every person to respect, uphold and defend the Constitution, the invitation to approach the Court for redress as long as the person holds bona fide grounds for believing that the Constitution is under threat ought to be welcome. I must however hasten to add that the liberal interpretation does not mean that the rule on locus standi is no longer relevant in Constitutional petitions. Where it is clear that the Petitioner has completely no business in bringing the matter to Court to permit such proceedings to be litigated would amount to the Court itself abetting abuse of its process. In this case the Petitioner not only contends that his rights and the rights of others are threatened with violation but that the national values and principles of governance have been violated. In light of such allegations I cannot fault the Petitioner for instituting these proceedings and I hold that he was within his right to commence these proceedings. As to whether his case is merited is another matter. Locus standi is a totally different thing from the merits of the petitioner's case."

In the case of **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others [2014] eKLR**, the Supreme Court held that:

"It is to be noted that the promulgation of the 2010 Constitution enlarged the scope of locus standi, in Kenya. Articles 22 and 258 have empowered every person, whether corporate or non- incorporated, to move the Courts, contesting any contravention of the Bill of Rights, or the Constitution in general...The intent of Articles 22 and 23 of the Constitution is that persons should have free and unhindered access to this Court for the enforcement of their fundamental rights and freedoms. Similarly Article 258 allows any person to institute proceedings claiming the Constitution has been violated or is threatened."

Further on the issue of locus standi the Court of Appeal held in the case of **Law Society of Kenya, Nairobi Branch vs. Malindi Law Society of Kenya & 6 Others [2017] eKLR**, that:

"It seems to us ...that the issue as to who has locus standi before a court of law has now been crystallized. It is any aggrieved party...this creates no doubt in our minds that a person, association, body corporate or an unincorporated body, have the locus standi, not only to institute original proceedings but also appellate proceedings provided that such a party is aggrieved by the decision intended to be challenged. The respondent branches asserted that they were aggrieved by the impugned decision as the same had impacted negatively on their legal practice in particular and the general welfare of their members. In our view, such an assertion was sufficient justification for them to intervene irrespective of its ultimate outcome."

Having analyzed the provisions of the Constitution, the Mutunga Rules and the relevant judicial authorities on locus standi I find that the petitioner falls amongst the prescribed persons who can file petition either on their own behalf or on behalf of others be it as an incorporated or unincorporated groups.

Counsel for the respondent cited the provisions of Fair Administrative Action Act stating that the petitioner has not exhausted the remedies before filing the petition. I will not go into the other issues having found that the petitioner has locus standi to file this petition. All the other

issues raised as grounds of opposition boils down to the suitability of the petitioner having locus to file the petition which I have already ruled on. The other issues on whether there Draft Valuation Roll was obtained legally goes to the heart of the petition which requires proof by way of evidence and cannot be dealt with at a preliminary stage.

I find that the preliminary objection lacks merit and is therefore dismissed with no orders as to costs. The petition be set down for hearing and meanwhile the status quo be maintained pending the hearing and determination of the petition.

DATED and DELIVERED at ELDORET this 26th day of September, 2019

M.A. ODENY

JUDGE

RULING READ in open Court in the presence of Mr.Songok holding brief for mr.Angu for Petitioner and Mr.Chepkilot for the Respondent.

Mr.Mwelem – Court Assistant