



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

PETITION NO. 21 OF 2013

IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS

UNDER ARTICLE 26 AND 40 OF CONSTITUTION OF KENYA

SOLOMON MWORIA.....PETITIONER

VERSUS

INTEX CONSTRUCTION COMPANY LIMITED....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. This Ruling is in respect of the preliminary constitutional question raised by 1st Respondent dated 5.2.14 where it is stated that: -
 - i) The Petition does not raise any Constitutional issues for deliberation as envisaged under Article 26 and 40, of the Constitution of Kenya 2010, and as such the petition should be dismissed with costs.
 - ii) What is raised by the applicant are issues of the Tort of Trespass and Nuisance which are disputed and which can be adequately canvassed in the Civil Division of The High Court of Kenya.
 - iii) The Petition as drawn does not meet the threshold of Constitutional litigation as it does not disclose any public law issues. It falls squarely in the realm of Private law.
 - iv) That the application is an abuse of the court process and should thus be dismissed with costs.
2. Way back on 28.10.14 directions were given for the Preliminary question to be dealt with by way of written submissions. 1st Respondent was given 21 days to file their submissions while petitioner was given a similar period thereafter. The 1st Respondent did not file their submissions until one and half years later on 4.8.16. For the petitioner, their submissions were filed 3 years and 3 months later on 8.5.17. None of the parties have made an attempt to explain this inordinate delay or why the orders of 28.10.14 were not complied with.
3. That notwithstanding, I will still proceed to consider the issues raised in the preliminary question.

Submissions of 1st Respondent

4. It has been submitted that the petition does not raise any constitutional issues for deliberation as envisaged under Article 26 and 40 of the Constitution and hence the same ought to be dismissed. To this end, 1st Respondent has raised three issues: -
 - i. **Is the petition premised on private law and does the petitioner have a remedy under the Constitution?**
 - ii. **Does the Constitutional Court have jurisdiction to handle the petition or should the same be canvassed in the Civil Division of the Court?**

iii. Has the Petitioner specifically pleaded the breaches?

5. Whether the petition is premised on private law? Does the petitioner have a remedy under Article 26 and 40 of the Constitution?

6. 1st Respondent has submitted that the dispute between the parties is one that falls within the ambit of Tort Law and Trespass and Nuisance, that Its pursuit is provided for under Common Law under the Civil Procedure Act, Cap 21 of the Laws of Kenya, and as such, it should be dealt with by the ordinary Civil Courts through a plaint and not clothed as a reference under the constitution.

7. 1st Respondent avers that the suit herein is a private law claim. To this end. It has been submitted that although Article 22 of the Constitution gives the right to enforce the Bill of Rights to an individual by way of a Constitutional Petition, there are limits on how a person can seek redress. The case of *Kenya Bus Services Ltd vs Attorney General & 2 others (2005) 1 KLR* has been cited where Nyamu J stated that:-

“...Fundamental rights and freedoms are contained in the Constitution and are principally available against the State because the constitution’s function is to define what constitutes Government and it regulates the relationship between the Government and the Governed. On the other hand the rights of individual interests are taken care of in the province of private law and are invariably redressed as such....”

Further, it has been submitted that in *Francis Gathungu Waithaka vs Kenyatta University (2011)* Lenaola J adopted the decision of the High Court Kiribati in *Teitnang vs Ariong (1987) LRC(Const)577*

“Dealing now with the question, can a private individual maintain an action for declaration against another private individual or individuals for breach of fundamental rights provisions of the Law? The rights and duties of individuals and between individuals are regulated by private laws.

The constitution on the other hand is an instrument of government. It contains rules about the Government of a country. It is my view therefore that the duties imposed by the Constitution under the fundamental rights provisions are owed by the Government of the day to the governed. I am of the opinion that an individual, as in this case, cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or group of individuals. Since no duty can be owed by an individual or group of individuals to another individual under fundamental rights provisions of the Constitution, no action for a declaration that there has been a breach of duty under that provision can lie or be maintained in the case before me and so I hold.....”

8. Other authorities relied on by the 1st Respondent are **UHURU MUIGAI KENYATTA V NAIROBI STAR PUBLICATION LIMITED [2013]e KLR** and *Stephen Saitoti vs Coca Cola Sabco Nairobi Bottlers Ltd & Another (2013) e KLR*, Ngugi . The emphasis here is that under Article 21 of the Constitution, it is the state and every organ of the state which has a fundamental duty to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the bill of rights.

9. 1st Respondent contends that the petitioner cannot seek to enforce the Bill of Rights as against the Respondent who is a private individual and hence, his petition should thus be struck out.

Whether the petition should be handled by a constitutional court or in the Civil Division of the Court?

10. The 1st Respondent has submitted that this being a private right it should be pursued in a civil action through a plaint. The suit therefore ought to have been filed in the civil division of the High court since such a court would still consider the constitutional issues arising out of the claimed injuries.

11. Reference has been made to the case of *Kenya Bus Services Ltd vs Attorney General, (2005) 1 KLR* (supra) where Nyamu J in agreement with the decision *in the case of Re Application by Bahadur (1986) LRC 297* at page 298 stated:-

“The constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringement of rights can found a claim under substantive law, the proper course to bring the claim under that law and not under the constitution.”

12. Also cited is the case of **Alphonse Mwangemi Munga & 10 Others VS African Safari Club Limited, (2008)eKLR**, where it was stated that;

“we find that this dispute does not raise any constitutional question but a pure question or Contract and should have been filed in the right forum, the Industrial Court ...”.

13. Further reference has been made to the case of **Richard Nduati Kaziuki vs Leonard Nduati Kaziuki & Another (2006) air** where it was held:-

“.....However the Constitution as drafted only recognises vertical application perhaps for practical reasons and for historical reasons concerning the nature of state power. Thus, the constitution had its origins in a desire to protect people from the misuse of power by the State rather than from the actions of private individuals.

In the cases where an individual is capable of violating fundamental rights and freedoms, I believe the courts have a duty to invoke the common law to enforce the private rights of an individual in such a way that the private causes of action are expanded to incorporate appropriate remedy against the private individual or agency violating or contravening such rights.....”

Has the petitioner specifically pleaded the breaches?

14. 1st Respondent avers that the Petitioner has merely quoted omnibus provisions of the Constitution (article 26 and article 40) which are alleged to have been contravened without stating how they have been contravened.

15. Reference has been made to the case of *trusted Society of Human Rights Alliance V Attorney General & 2 Others [2012]eKLR* where Justices Trevelyan and Hancox adopting the case of *Annarita Karimi Njeru (1976-1980)*¹ KLR, stated that;

“a constitutional petition must state, with reasonable e provisions of the Constitution, subsections or even sub-paragraphs which are alleged to have been contravened and the manner in which they are infringed so as to enable the Respondent prepare for the challenge ahead of him.

We would, however, against stress 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.

In the matter at hand, regrettably the petitioner has not endeavoured to plead the specific breaches but has only sought remedy under various sections of the constitution”.

16. The 1st Respondent has further relied on the case of *Alphonse Mwangemi Munga & 10 Others vs Africa Safari Club Limited (Supra)* where the Judges held that notwithstanding the Court of Appeal’s decision in *Rashid Odhiambo Aloggoh & 245 Others vs HACO Industries CA 110/01* where the court stated that once one alleges violation or threatened violation of his fundamental rights the court should hear him, does however not give the licence to every litigant to come to court by way of a constitutional application even where there is no constitutional issue arising and where there are adequate remedies provided in other laws to cover such situations.

17. 1st Respondent has also relied on a Trinidad-Tobago case of *Harriki’s son VS Attorney General of Trinidad and Tobago (1980) AC 265*, where the privy council in rejecting the petitioner’s Appeal stated as follows:-

“The right to apply to the High Court under Section 6 (our Article 22) of the constitution for redress when any human right or fundamental freedom is or is likely to be contravened is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action...”.

Petitioner’s Submissions

18. Petitioner contends that while 1st Respondent was undertaking the tarmacking of the Njouné K.K Road, his buildings were pulled down and there were blockages such that the natural flow of rain run off was diverted unto his land resulting in flooding. Petitioner contends that his life and that of his family have been put at risk, his livestock drowned and he was not compensated for the portions of land that were taken.

19. On article 40 of the constitution, petitioner contends that the 1st Respondent took portions of the Petitioners land without re-compense and it therefore acted inimical to the provisions of Article 40 of the Constitution.

20. On article 26, it is contended that the respondents proceeded to build civil works whose ultimate effect was to endanger petitioner’s life and that of his family and animals.

21. Petitioner also contends that as long as the state is a party to the petition, then the suit does fall in the ambit of constitutional determination. It is further submitted that the petition has clearly set out the breaches in paragraph 7-19 and 20-23 of the petition.

Determination.

22. I find it necessary to deal with the second and third issues raised by the 1st Respondent simultaneously. This is because the nature of the breach and the relief sought thereof have a bearing on where the suit should be filed. However, I will deal with the first issue separately.

23. **Is the petition premised on private law and does the petitioner have a remedy under the Constitution?**

Article 21 of the constitution provides that;

“it is a fundamental duty of the state and every state organ to OBSERVE, RESPECT, PROTECT, PROMOTE AND FULFILL the rights and fundamental freedoms in the bill of rights.”

24. The petitioner claims that the violations were occasioned by the 1st Respondent at the behest of the 2nd Respondent. There is a claim that his land was compulsorily acquired. That being the case then the claim against the Respondents is intertwined. This is therefore not a pure case of one individual against another since the state is involved. The preliminary Objection to these proceedings fails on this point.

Is this a civil matter to be handled by way of a plaint? What are the breaches pleaded in the petition?

25. In the case of **Annarita Karimi Njeru V Attorney General 1979 KLR (supra)**, it was established that a petitioner who seeks redress under the Constitution must state his claim with precision by reference to the provisions of the Constitution that have been violated.

26. This principle was restated in the **Mumo Matemu V Trusted Society of Human Rights Alliance and others Nairobi CA Civil Appeal No. 290 of 2013** where it was stated:-

“where a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important that he should set out with a reasonable degree of precision that, of which he complains, the provisions said to have been infringed and the manner in which they are alleged to have been infringed.....”

27. Petitioner’s case is anchored under Article 26 and 40 of the Constitution.

28. The right to life (Article 26 of the Constitution).

It is the petitioner’s case that the works carried out by the Respondents have exposed the petitioner’s family to immediate and imminent danger of being swept by floods. In paragraphs 12 and 13 of the petitioner’s affidavit, he has raised the issue of non-compliance with the Environment Management and Co-ordination Act, while in paragraph 21, petitioner has captured the nature and extent of the damages occasioned to him and his family. As rightly submitted by the 1st Respondent, these are issues in the ambit of civil litigation. That is why petitioner is able to even quantify damages with regard to the tortious acts set out in paragraphs 11 and 12 of the petition.

29. I therefore find that the cases cited by the 1st Respondent, particularly the **Alphonso Mwangemi Munga** case and the **Kenya Bus Services Ltd** case are very relevant on this point. In so far as article 26 of the constitution is concerned, this petition does not meet the threshold in the **Annarita case** and therefore, this matter ought to be filed as an ordinary suit via a plaint and not as a constitutional Petition.

30. Article 40 (Protection of Right to Property)

Petitioner contends that he has a right to be fully compensated for the land compulsorily acquired by the 2nd Respondent. This is captured in paragraph 2 of the petition where he has prayed for **“A declaration that the 2nd Respondent acts of omission by inter-alia failure to rule the 1st Respondent and compensate the petitioner has violated the Petitioner’s Rights as enshrined under article 26 and 40 of the Constitution”**. Petitioner has gone ahead to make his own assessment of the damages that should be payable to him.

31. The issue of compulsory acquisition of private land without compensation is indeed a constitutional one. **Article 40 (3)** provides that;

“The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that -

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law”.

32. The starting point of the petitioners claim with regard to the aforementioned provisions of the constitution should be the deprivation of the property, occasioned by acquisition of land or for a public purpose.

33. From the petition itself and the supporting affidavit there is no clarity on the nature and extent of the alleged acquisition of the petitioners land. For instance, petitioner states that his land is 1.2 acres. So to what extent was he deprived off his land? There is no mention of a valuation report, there is no indication of the acreage of the affected portion of the land and there is no indication that petitioner engaged the Respondents on this issue of land acquisition.

34. I have carefully scrutinized the final prayers sought by the Petitioner. What comes close to the definition of the breach is what is to be found in prayer 2 of the Petition.

There is no prayer for a declaration that there was illegal compulsory acquisition of petitioners land and hence the prayer for compensation is not properly anchored in this suit.

35. The petitioner has therefore not laid a basis for invoking the provisions of article 40 of the constitution and the Petitioner has also not met the threshold set out in the **Annarita** case. This dispute falls in the arena of a civil process. To this end I am again in agreement with the submissions of the 1st Respondent and the authorities cited there on particularly the **Hon Uhuru Kenyatta vs. The Nairobi Star case (supra)** where it was stated that;

“it is an established practice that where a matter can be disposed of without recourse to the constitution, the constitution should not be involved at all.....the courts will not normally consider a constitutional question unless the existence of a remedy depends on it. If a remedy is available to the 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”..

36. I conclude that the constitutional question raised by the 1st Respondent has merits. The petition before me is hereby struck off.

37. Seeing that the Petitioner has alluded to the none compliance with provisions of environmental Management and Co-ordination Act, then petitioner is granted leave to pursue his claim before the Environment and Land Court or any Court or tribunal of competent jurisdiction and the period of limitation for the claims will run from the date of delivery of this ruling.

38. As to costs, I have considered that the dispute has not been settled and that there are cross cutting issues. Each party is then to bear their own costs of this suit.

39. It is so ordered.

DELIVERED, DATED AND SIGNED AT MERU THIS 24TH DAY OF OCTOBER, 2017 IN THE PRESENCE OF:-

Court Assistant: Janet

Mwiti H/B Mbogo for Petitioner present

Kiango for 2nd Respondent present

Hon. L.N.MBUGUA

ELC JUDGE