



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

CONSTITUTIONAL PETITION NO. 29 OF 2015

IN THE MATTER OF ARTICLE 22 (1) & (2) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF ARTICLES 10, 19, 20, 21, 22, 23, 24, 25 AND 259 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 27, 28, 32, 40 AND 44 AND OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

BETWEEN

YASMIN RASHID GANATRA.....1ST PETITIONER

TARIQ ABDUL RASHID.....2ND PETITIONER

AND

GULZAR ABDUL WAIS.....1ST RESPONDENT

RESHMA SALIM GANATRA.....2ND RESPONDENT

RULING

1. BACKGROUND :-

1st Petitioner is mother of 2nd Petitioner and is also a daughter in law of Amina Juma Kasaam (deceased). Respondents are daughters of Amina Juma Kassam. At the heart of the dispute is land parcel No. NTIMA/IGOKI/5686 in Meru where the petitioners and Respondents have been residing on.

2. There was a Succession Cause No. 290/10, where a grant of letters of administration was issued to 1st Petitioner and 1st Respondent on 29:11:10 in respect of the estate of Amina Juma.

3. An application to have the grant annulled was however made by Respondents, after it was found that Amina had left a will. The grant was annulled by the High Court after a full hearing. Petitioners were

aggrieved by this decision and challenged the decision in the Court of appeal where the case was heard by Judge Waki, Judge Nambuye and Judge Kiage. The majority decision of Judge Waki and Nambuye upheld the High Court decision and gave directions that probate proceedings be instituted by executors of the will.

4. The Court of Appeal decision was delivered on 14.10.2015 and less than a month thereafter on 11.11.15, this petition was filed.

THE PRELIMINARY OBJECTION

5. The Respondents filed a notice of Preliminary Objection on 02:01:16 where the grounds set out there in are as follows:

i. That the suit is Res Judicata. It is averred that the suit contravenes the provisions of Section 7 of Civil Procedure Act Cap 21 as the matter was conclusively determined in Probate Administration Succession Cause No. 290 of 2010 and subsequent Appeal in C.A No. 45 of 2014, Respondents aver that Petitioners are intent on bringing successive actions in respect of the same subject matter yet there is an appropriate Statutory alternative appellate process that is clearly provided.

ii. That the scope of the Petition falls outside the jurisdiction of the Court as espoused under article 165 of the Constitution. It is also averred that the Petition contravenes article 21 of the Constitution since the bill of Rights cannot be enforced by a private individual as against another private individual as sought by Petitioners.

6. On 17.07.17 directions were given for the Preliminary Objection to be canvassed by way of written Submissions.

RESPONDENT'S SUBMISSIONS

7. Respondents aver that the Petitioners took out a citation addressed to Respondents herein in Meru High Court Succ C. No. 290 of 2010 on 04.06.2010 requiring the Respondents to accept or refuse letters of Administration in respect of the estate of Amina Juma Kassam (Deceased).

8. In response to the citation, 1st Respondent Petitioned for a grant of letters of administration to the estate of Amina, and a grant was issued thereafter on 29.11.10 jointly in the names of 1st Respondent and 1st Petitioner here in.

9. Before the grant was confirmed, it was discovered that deceased (Amina) had left a will and hence 1st Respondent made an application for annulment of the grant which application was opposed by the present Petitioners.

10. The matter was heard by Lessit J who delivered Judgment on 08.07.14, where by the grant of letters of administration issued to GUZAR ABDUL WALIS (1st Respondent) and YASMIN RASHID GANATRA (1st Petitioner) was annulled.

11. The Petitioners were aggrieved by that decision and they lodged an appeal at the court of appeal case No. C.A 45 /2014 in Nyeri. The Appeal was dismissed and the Court affirmed the annulment of the grant and also ordered for institution of probate proceedings for the estate of deceased. The Court of appeal had found that Amina's will was a valid one.

12. Respondents contend that the Court cannot determine whether the validity of the will has infringed on the Petitioner's Constitutional Rights as the matter is Res- judicata. On this point, Respondents rely on the case of *Okiya Omtata vs Communications Authority of Kenya Vs 14 others Petition No 59 of 2015* where it was held that:-

“a matter is res judicata if it seeks to canvass a subject which was also canvassed in another suit.

13. Respondent have also relied on case of *Maharaf vs Ag of Trinidad and Tobago (1978) z ALL ER.*

14. Respondent’s state that this Petition is geared towards to re –opening litigation on matters that were adjudicated upon before the High Court and the Court of appeal.

15. Respondents further also contend that a Constitutional Petition cannot be lodged between two private individuals as is the case in the present matter. To this end, Respondents have relied on the Case of *Uhuru Muigai Kenyatta vs. Nairobi Star publications Ltd. Petition No. 187 of 2012* where it was held that.

“fundamental rights and freedoms set out in the bill of rights are enforceable by a private individual by way of a Constitutional reference only as against the state and state organs and not by a private individual against another private individual and that if a party has a claim against another, they should pursue such action under private law”.

16. Respondents contend that the scope of the Petition falls outside the jurisdiction of this Court as the same concerns two private individuals seeking to enforce the Bill of Rights against the Respondents.

17. Against this background, Respondents pray that the Petition be dismissed with costs to Respondents.

SUBMISSIONS OF PETITIONERS

18. Petitioners contend that the Petition is brought under article 22(1), article 23(1) and article 165 of the Constitution (interalia).

19. It is averred that Amina Juma Kassam’s decision to will away the property of her later husband Juma Kassam (including land reference NO.NTIMA IGOKI 5685 brought the properties within the realm of the operation of law of Succession Act (LSA), yet the properties were supposed to devolve under Muslim law. The Petitioners submit that such actions constituted an infringement of the Petitions right to freedom of their Islamic religion as enshrined under article 32 of the Constitution.

20. Petitioners aver that they have lived on the Suitland for over 15 years and hence Amina Juma Kassam’s will threatens to take away the Petitioners’ family home and turn them (Petitioners) into destitute yet this is where Petitioners lived on first floor while Respondents lived on ground floor on same apartment as at the time of demise of Amina on 16.04.10.

21. Petitioners contend that Res judicata does not apply in Constitutional matters in the same manner as it would apply in civil claims. Petitioners have on this point cited the case of *Okiiya Omtatah vs Ag Pet 593 of 2013* where it was held that:

“whereas these principles of Res judicata have generally been applied liberally in civil suits, the same cannot be said of their application in Constitutional matters”.

22. On whether a Constitutional Petition can be lodged between two private individuals, Petitioners contend that the availability of other lawful causes of action is not a bar to a party who alleges a contravention of his rights under the Constitution and Petitioners have cited the case of *Rashid Odhiambo Aloggah & 245 others vs Haco Industries Civil Appeal No. 110 of 2001.*

23. Petitioners have also cited the Kenya Bus case and the case of *Teitiwnnang and Ariang & Others (1987) L.R.C.*

DETERMINATION

24. In line with the Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd (1969) I am alive to the Principle that a Preliminary Objection consists of point of law which has been pleaded or arises by clear implication out of pleadings and which if argued may dispose of the suit.

25. I therefore proceed to frame the issues for determination as follows.-

i. Whether this suit is Res judicata.

ii. Constitutional Threshold; Whether a Constitutional Petition can be lodged between two private parties?

Res judicata

26. What emerges from the Petition is that the application of the law of succession Act in distribution of deceased property is being challenged. Petitioners aver that the applicable law is the Muslim law.

Petitioners are also staking a claim of proprietorship in respect of the land No. NTIMA /IGOKI/5685. In essence Petitioners are challenging the will of Amina Juma Kassam.

27. I find that in paragraph 23 of the Petition, it is stated that :-

“the will’s validity was contested in a Probate and Administration Succession Cause No. 290 of 2010, all the way to the Court of appeal through Civil Appeal No.45 of 2014.

It follows that Petitioners are knowingly re-opening litigation on this issue. (Validity of the will) through this Petition.

28. In the Succession Cause No. 290 of 2010, the Judge had noted as follows:-

“It is important to note that the estate of Juma Kassam was distributed under the LSA and not Islamic law No one complained at that stage.....”

C.A J. Nambuye in the Court of appeal case had noted as follows:

“The appellants also raised two other pertinent complaints against the said will. One THAT IT HAD NOT BEEN DRAWN IN ACCORDANCE WITH ISLAMIC LAW...I note that from the record, the learned trial Judge interrogated those issues fully and made a conclusive pronouncement on them”.

29. This again shows that the issue of the applicable law (Islamic law or LSA) was dealt with in so far as the validity of the will is concerned.

30. It is also evident that Petitioners are the ones who set in motion the proceedings in succession cause No. 290 of 2010, whereby they took out a citation on 04:06:10 against the Respondents. The Petitioners were content with the grant of letters of administration issued to 1st Petitioner and 1st Respondent and that is why they vehemently opposed the application for the annulment of the said grant. Petitioners cannot now turn round to claim that the applicable law is not the Law of Succession Act.

31. The decision of the Court of appeal in C.A No. 45 /14 directed the Executors of the will to forthwith process the succession in respect of deceased’s estate by institution of probate proceedings. The filing of this Petition less than a month thereafter on 11.11.15 was clearly meant to derail the orders of the court of appeal.

32. In the *Omtatah Okoiti case No. 593 of 2013* relied upon by the petitioners, it is stated that:-

“in my view the Principle of Res Judicata can and should be invoked in constitutional matters

in the clearest of caseswhile therefore the Principle is a Principle of law of wide application, therefore, it must be sparingly invoked in rights based litigation.....”

33. This is a crystal clear case to invoke the Principle of Res judicata. I say so because the Judgments in the succession case and the court of appeal matter have been availed herein and are clear on the issues raised in the petition.

34. I therefore conclude that this Petition is Res judicata.

Constitutional Threshold; Whether a Constitutional Petition can be lodged between two private parties?

35. Article 21(1) of the Constitution provides that :-

“It is a fundamental duty of the State and every state organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights”.

It follows that duty is bestowed upon the state and every state organ to comply with the aforementioned article.

39. 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* where it was stated;

“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 Constitution? 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.....”

The Kiribati case has been cited by the Petitioners. The holding therein is however in favour of the Respondents Notice of Preliminary Objection.

40. In the case of *Kenya Bus Services Ltd vs Attorney General, (2005) 1 KLR* Nyamu J in agreement with the decision *in the case of Re Application by Bahadur (1986) LRC 297* at page 298 stated thus:-

“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 is to bring the claim under that law and not under the constitution.”

41. It follows that whereas availability of alternative remedy is no bar to the enforcement of fundamental rights,(as cited by petitioners in *Rashid Odhiambo Alogoh & 245 others vs. Haco industries ltd. Civil appeal no. 110 of 2001*), it must be kept in mind that the bill of rights are sacrosanct. They should be safeguarded to be invoked only when it is extremely necessary to do so. I therefore conclude that the Petition has not met the threshold of a constitutional petition.

CONCLUSION

The Notice of Preliminary Objection is merited. The Petition is hereby struck out with costs to Respondents.

**SIGNED, DATED AND DELIVERED IN OPEN COURT AT MERU THIS 8TH DAY
NOVEMBER, 2017 IN THE PRESENCE OF:-**

CA: Janet/Haway

Miss Makaya for Petitioners

Gichuki H/B for Kilonzo for Respondent

HON. L. N. MBUGUA

ELC JUDGE