



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

PETITION NO. 1 OF 2016

GABRIEL KEYA.....PETITIONER

VERSUS

NICK EMSON.....1ST RESPONDENT

THE AFRICAN HERB COMPANY LTD.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 22nd July, 2016)

RULING

The petitioner filed the petition on 11.04.2016 through Magee Wa Magee & Company Advocates. The petition was titled to be in the matter of the contravention of fundamental rights and freedoms as enshrined under Articles 3, 10, 19, 20, 21, 22, 23, 28, 29, 41, 47, 258 and 259 of the Constitution. The petition was further stated to be pursuant to rule 4(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The prayers in the petition were for orders:

- a) That there be a declaration that the petitioner's fundamental rights and freedom as enshrined under Article 28 of the Constitution have been contravened and infringed upon by the respondents.
- b) That there be a declaration that the petitioner's fundamental rights and freedom as enshrined under Article 29 (d) and (f) of the Constitution have been contravened and infringed upon by the respondents.
- c) That there be a declaration that the petitioner's fundamental rights and freedoms as enshrined under Article 41 of the Constitution have been contravened and infringed upon by the respondents.
- d) That there be a declaration that the petitioner's fundamental rights and freedoms as enshrined under Article 47 of the Constitution have been contravened and infringed upon by the respondents.
- e) General damages, exemplary damages and aggravated damages under Article 23(3) of the Constitution of Kenya be awarded, for the violations of the petitioner's rights by the respondents.
- f) Reimbursement of Kshs.2, 500, 000.00 by the respondents to the petitioners.
- g) The costs be provided for petitioners.

The respondents filed on 03.05.2016 a notice of preliminary objection to the petition through, Mukite

Musangi & Company Advocates. The grounds of objection were as follows:

- a) The petition as filed does not in any way seek interpretation of any constitutional rights or issues and practically there is no constitutional matter between the state and its citizens to be determined in this petition.
- b) The petition as filed seeks to purely advance private rights. In fact it's made up of private rights disguised as constitutional petition. Such private rights between persons can only be determined by a substantive suit for specific performance based on contract where evidence will be called and tested on cross examination.
- c) There is no matter of public interest advanced in the petition to warrant the use of a petition as avenue to seek this court's intervention. The private interest raised can be addressed through lodging a private suit.
- d) That this court lacks jurisdiction in terms of Article 165 of the Constitution of Kenya, 2010.
- e) That the applicant has approached the court through an entirely erroneous process.
- f) On the foregoing grounds the petition should be summarily dismissed with costs.

Parties filed submissions on the preliminary objection. The **1st issue** for determination is whether there is a proper preliminary objection before the court. Both parties agree and submit that the test for a proper preliminary objection was set out in **Mukisa Biscuit Manufacturing Co. Ltd –Versus- West End Distributors Ltd (1969) EA 696** that a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The court has perused the material on record. The petition sets out matters of fact in detail and further facts are set out in the supporting affidavit by the petitioner filed together with the petition. The respondents filed on 10.06.2016 the replying affidavit of Nick Emson substantially denying the facts the petitioner had set out in his petition and the supporting affidavit. There is no doubt that the parties are in serious disagreement on the material facts – the facts in the case are disputed and taking the disputed facts into account, the court returns that the preliminary objection fails to meet the test of the presumption that all facts pleaded by the other side are correct. The preliminary objection would therefore fail on that point alone.

The **2nd issue** is whether the claimant should have filed an ordinary action and not a constitutional petition. It was submitted for the respondents that a constitutional petition could only be brought against the government or a public body or agency and a public interest had to be established in that regard. Article 3(1) of the Constitution states that every person has an obligation to respect, uphold and defend the Constitution. Article 10(1) provides that the national values and principles of governance in the Article bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions. Article 20(1) provides that the Bill of Rights applies to all law and binds state organs and all persons. Article 22(1) provides that 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 (the court considers that the provision does not limit the right to institute court proceedings to instances where denial, violation, infringement or threat is by the state, state organ, state officer or public officer-proceedings could be instituted even where the denial, violation, infringement or threat is by any other person, natural or artificial, and proceedings in such cases would be against such individual person). The court has considered the cited provisions of the Constitution and returns that nothing in the Constitution precluded the petitioner from filing the petition against the respondent and seeking the kind of remedies that were prayed for. As was held in **Satrose Ayuma & 11 Others –Versus- Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others [2013]eKLR** the Bill of Rights binds all state organs and all persons, whether they are public bodies or juristic persons. Further, as was held in that case, from the wide definition of the word “**person**” in Article 260, the intention of the framers of the

Constitution was to have both a vertical and horizontal application of the Bill of Rights. Thus, the court returns that the petitioner was entitled to file the petition under Article 22 seeking remedies as provided for in Article 23 of the Constitution. As submitted for the petitioner, under rule 20(1) of the the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 the hearing of the petition is by way of affidavits, written submissions or oral evidence and the parties will have chance to take directions in that regard towards ends of justice in the present petition.

While making those findings the court upholds its opinion in **Peter Muchai Muhura –Versus- Teachers Service Commission [2015]eKLR** thus,

“It is the opinion of this court that the barriers or ridge or valley between judicial review proceedings and the ordinary actions as they were has been collapsed by the Constitution of Kenya, 2010. The Constitution has opened avenues to access to justice and all stipulated remedies in the same proceedings; ordinary action or prescribed application. Thus, litigants need not file separate processes to access the different available remedies. It is true that universal procedural rules have not yet fully evolved in our judicial system to keep pace with the constitutional liberation of litigants; a legitimate and urgent project towards full realization of the constitutional principles in Article 159 that justice shall not be delayed; justice shall be administered without undue regard to procedural technicalities; and the purpose and principles of the Constitution shall be protected and promoted.” It is the further opinion of the court that the opinion applies to judicial review applications, ordinary actions as much as to petitions like in the instant case.

The court, on the procedural manner litigants should invoke and approach the court’s jurisdiction, further upholds its opinion in **Professor Elijah Biama –Versus- University of Eldoret and 2 Others [2014]eKLR** thus,

“...The court holds that a venture to distinguish the manner a litigant approaches or ought to approach the court merely on the basis of the remedy or the situ (prescription of the right or fundamental freedom as embedded in the Constitution or legislation or other formal source) of the right or fundamental freedom in issue is long dead under the former constitutional dispensation as the new constitutional order prescribes and favours universal approach towards the realization of the rights and fundamental rights irrespective their primary formal situ. In the opinion of the court, future measures of aligning court procedures to the new constitutional order will entail universal procedure for realization and enforcement of the rights and freedoms irrespective the formal source or residence of the right or fundamental freedom because the Constitution incorporates all as part of the Bill of Rights. If every dispute that comes to court entails enforcement of some legitimate right or fundamental freedom which the Constitution has incorporated in the constitutional Bill of Rights, then, in the court’s opinion, time for a universal procedure by which parties should move the court has come and it would be pursuit in vanity to look for and attempt to sieve rights and fundamental freedoms that are expressly provided for in the Bill of Rights as was the case in the days of Harrikson –Versus- Attorney General of Trinidad and Tobacco (1980) AC 265. For the time being that the universal procedure is not in place, it is the opinion of the court that litigants will not be faulted for the option they shall adopt of the myriad procedural options that continue to peep their souls from the former constitutional dispensation to the new constitutional order.”

The respondents’ counsel withdrew the objection based on the issue of jurisdiction and the court will not delve into that ground as the same was thereby surrendered.

In conclusion the respondent’s preliminary objection dated 28.04.2016 and filed on 03.05.2016 is hereby dismissed with costs and parties are now invited to take directions on further steps towards the hearing and determination of the petition.

Signed, dated and delivered in court at Nyeri this **Friday, 22nd July, 2016**.

BYRAM ONGAYA

JUDGE