



**Khaemba Contractors v Sun King Co Ltd & 2 others (Constitutional Petition
E013 of 2023) [2025] KEHC 1635 (KLR) (28 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1635 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CONSTITUTIONAL PETITION E013 OF 2023
AC MRIMA, J
FEBRUARY 28, 2025**

BETWEEN

KHAEMBA CONTRACTORS PETITIONER

AND

SUN KING CO LTD 1ST RESPONDENT

SAMUEL K NDUNG'U 2ND RESPONDENT

JOHN KALONZO 3RD RESPONDENT

RULING

1. The application by way of Notice of Motion, subject of this ruling, was lodged by Sun King Co. Ltd, the 1st Respondent herein (hereinafter referred to as 'the Applicant'). It is dated 17th November 2023 and is supported by the Affidavit of Joseph Mugera, deposed to on a similar date.
2. The application seeks the following orders.
 1. Spent
 2. The Petition dated 9th October 2023 be struck out.
 3. Costs of the application be awarded to the Respondents
3. In the grounds in support of the application, the Applicant pleaded that the Petitioner has no capacity to sue or be sued since it is registered as a business name under the *Registration of Business Names Act* and not an association for purposes of Article 21(2) of *the Constitution* and Rule 4 of *the Constitution* of Kenya) Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (hereinafter referred to as 'the Mutunga Rules'). It further was its case that the Petitioner had not demonstrated that Florence Nangila was a member of the alleged Association.



4. The Applicant pleaded that the Petition does not disclose any violations of the Petitioner's constitutional rights since the issue in dispute is purely a commercial dispute on an alleged breach of a sale agreement between Florence Nangila and the Respondents. It was, therefore, its case that the Petition does not meet the strict test of *Anarita Karimi Njeru v Republic* [1979] eKLR for failing to particularize the details and manner of the alleged infringement. The Applicant further posited that this Court is divested of jurisdiction, and that the application is without basis, an abuse of Court process and ought to be struck out.
5. The Applicant filed written submissions dated 15th December 2023. It was its case that the cause of action in the Petition is a commercial issue disguised as a constitutional petition. It urged the Court to be guided by the decision in the case of *James Kuria v Attorney general & 3 Others* [2018] eKLR and the Supreme Court decision in *Communications Commission of Kenya & 5 Others v Royal Media Services Limited* where in the former it was observed that constitutional litigation is not open for every claim which may properly be dealt with under alternative existing mechanisms for redress in civil or criminal law.
6. As regards the lack of specificity in the Petition, the Applicant submitted that it is sued for alleged contravention of rights and fundamental freedoms under Articles 26 and 40(1) of the Constitution but the Petitioner does not indicate how the rights have been violated, a requirement in constitutional petitions as established in the case of *Anarita Karimi Njeru v Republic* [1979] eKLR and later in *Mumo Matemu -vs- Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR.
7. The Applicant further submitted that the Petitioner does not have locus standi in the suit since it describes itself as an association but is not one such institution for purposes of Article 21(2) of *the Constitution*. To that end, the Applicant drew support from the case of *Agricultural Finance Corporation v Lengentia Limited & Jack Mwangi* [1985] eKLR where it was inter-alia held: -

.... As a general rule a contract affects only parties to it and cannot be enforced by or against a person who is not a party... the fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.
8. In conclusion, the Applicant urged the Court to allow the application and to strike out the Petition with costs.
9. The Petitioner challenged the application through the Replying Affidavit of one Zaddock Mukhanu Khaemba deposed to on 23rd November 2023 and written submissions dated 7th December 2023. Mr. Khaemba deposed that the application was unconstitutional, fatally defective and time barred. He claimed that under Articles 22(2)(d) and 258 of *the Constitution* and *Registration of Business Names Act*, one can institute proceedings. He deposed that the 'defence' to the Petition was filed outside 14 days and by filing it outside 14 days, the Applicant's intention is to delay the process and to defeat justice. It urged the Court to expunge the defence and to dismiss the application with costs and that judgment in the Petition be entered in its favour.
10. In the written submissions, the Petitioner argued that he is the Managing Director of Khaemba Company, duly registered under No. 279711/1998 for business and of constructions and renovations and that Florence Nangila is a member of the Association. It was its case that on 30th May 2023, Florence Nangila bought from the Applicant the dispute device, a TV and other components in conformity with an agreement. However, without notice, on 10th June 2023, the Petitioner repossessed the device with the rest of the components and destroyed other property resulting in a global loss of Kshs. 181,500/-, an infringement of *the Constitution* and breach of the contract.



11. The Petitioner urged the Court to allow the Petition with costs.
12. Having appreciated the application, the response and the respective parties' depositions and submissions, the only issue for determination is whether the application has merit. The Applicant's business is the distribution, installation and financing of solar energy solutions. It is not in dispute that on 30th May 2023, Florence Nangila also known as Florence Nangila Wanyonyi and the 1st Respondent herein entered into a Sale agreement, annexed to both the application and the Petition, for the purchase of a solar panel, control unit sensor, 2 head lamps and 2 tube lights, 24-inch TV and an antenna.
13. As expressed in the contract agreement, the client paid Kshs. 6,750/- as down payment and the unit was installed in her home. As captured in Clause 5 as read with Clause 7, the client was required to pay a daily charge of Kshs. 100/- until payment was made in full to enable the title of the unit to pass to her. Clause 8 of the agreement allowed the 1st Respondent to repossess the unit in the event a client failed to make payment on the due date and failed to remedy such a breach within seven (7) days of being notified to do so.
14. The Applicant deposed that the said Florence Nangila failed to make regular payments, but instead made irregular and inconsistent payments. As evidenced by the notifications sent to her by the 1st Respondent, there indeed was failure to make timely payments. Various reminders, spanning the period between 30th May 2023 and 16th October 2023, were sent to her. Eventually, the 2nd Respondent and the 1st Respondent's Area Collection Executive, one Francis Khaoya visited the Florence Nangila's premises and repossessed the solar panel, control unit, a sensor and 2 tube lights.
15. The Petitioner was aggrieved on the basis that the 1st Respondent repossessed the items aggressively and unlawfully and as such, Florence Nangila, a member of the Petitioner (Khaemba Contractors), had right to institute a constitutional petition through the company name to vindicate violation of her constitutional rights.
16. The Applicant sought to strike out the Petition on the basis that the Petitioner does not have capacity, that the Petition does not disclose violations violated and therefore this Court is divested of jurisdiction.
17. This Court will look into the foregoing arguments in turn.
18. The Applicant's first limb is essentially a challenge on the Petitioner's locus standi to institute the Petition on behalf of Florence Nangila. The Black's Law Dictionary, 9th Edition at page 1026 defines the term as: -

“the right to bring an action or to be heard in a given forum”

19. Upon the promulgation of *the Constitution* in 2010, the concept of locus standi received a wider spectrum courtesy of Article 3(1) as read with Articles 22 and 258 of *the Constitution*. The said provisions allow every person the leeway to defend *the Constitution* and to institute Court proceedings to protect a right or fundamental freedom or *the Constitution* itself. In *Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & another* [2016] eKLR the Court while referring to *The matter of Ms. Priscilla Nyokabi Kanyua vs. Attorney General & Interim Independent Electoral Commission Nairobi HCCP No. 1 of 2010* held as follows: -

...In Kenya the Court has emphatically stated that what gives locus standi is a minimal personal interest and such interest gives a person standing even though it is quite clear that he would not be more affected than any other member of the population....



20. Similarly, in *Khelef Khalifa El-Busaidy v Commissioner of Lands & 2 others* [2002] eKLR the Court discussed locus standi thus: -

...for an individual to have a locus standi, he must have an interest either vested or contingent in the subject matter before the court, which interest must be a legal one. Such interest must be above that of other members of the public in general.

21. Speaking to the concept, the Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR settled the issue of locus standi in constitutional Petitions in the following manner: -

(28) It still remains to reiterate that the landscape of locus standi has been fundamentally transformed by the enactment of *the Constitution* in 2010 by the people themselves. In our view, the hitherto stringent locus standi requirements of consent of the Attorney General or demonstration of some special interest by a private citizen seeking to enforce a public right have been buried in the annals of history. Today, by dint of Articles 22 and 258 of *the Constitution*, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in the public interest. Pursuant to Article 22 (3) aforesaid, the Chief Justice has made rules contained in Legal Notice No. 117 of 28th June 2013 – *The Constitution* of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013– which, in view of its long title, we take the liberty to baptize, the “Mutunga Rules”, to inter alia, facilitate the application of the right of standing. Like Article 48, the overriding objective of those rules is to facilitate access to justice for all persons. The rules also reiterate that any person other than a person whose right or fundamental freedom under *the Constitution* is allegedly denied, violated or infringed or threatened has a right of standing and can institute proceedings as envisaged under Articles 22 (2) and 258 of *the Constitution*.

(29) It may therefore now be taken as well established that where a legal wrong or injury is caused or threatened to a person or to a determinate class of persons by reason of violation of any constitutional or legal right, or any burden is imposed in contravention of any constitutional or legal provision, or without authority of law, and such person or determinate class of persons is, by reason of poverty, helplessness, disability or socio-economic disadvantage, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Articles 22 and 258 of *the Constitution*.

(30) It is our consideration that in filing the petition the 1st respondent was acting not only on behalf of its members and in accordance with its stated mandate, but also in the public interest, in view of the nature of the matter at hand. The 1st respondent, its members and the general public were entitled to participate in the proceedings relating to the decision-making process culminating in the impugned decision.

22. A common thread that runs through the pronouncements of various Courts is the fact that locus standi is widened with respect public interest litigation. The same standard equally apply to private



constitutional litigation as long as the dispute raises at least a constitutional issue. In this case, the Petitioner brought the Petition on behalf of his wife one Florence Nangila. He contended that the wife was part of an association in the name of the Petitioner, Khaemba Contractors, thereby relying on Article 22(2)(d) of *the Constitution* in claiming appropriate locus standi in the matter.

23. Article 22 of *the Constitution* is on the enforcement of the Bill of Rights and essentially deals with the aspect of locus standi. Sub-Article 1 gives a person 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. Sub-Article 2 covers instances where such proceedings may be brought on behalf of a party. It states as follows: -

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.
24. Returning to the case at hand, this Court has to ascertain whether the Petitioner fits within Article 22(2)(d) of *the Constitution*. In doing so, care must be taken so that a party is not unfairly restrained from accessing justice. There is no evidence that Khaemba Contractors is an association, a fact that would entitle it to institute the Petition on behalf of its members. What is on record is a Certificate of Registration issued under the *Registration of Business Names Act*. The name of Florence Nangila is not in the certificate and no other evidence has been adduced connecting the Petitioner with the said Florence Nangila. Further, no other reason was tendered as to why the said Florence Nangila did not institute the proceedings in person save that she was a member of the Petitioner association. However, and as said, evidence has it that the Petitioner is a registered business name and not an association. On that score, the Petition suffers a false start and disqualifies the Petitioner from maintaining the Petition on the basis of Article 22(2)(d) of *the Constitution*.
25. The Petitioner has, therefore, failed to satisfy the appropriate locus standi in this matter and the instant Petition cannot be maintained in its current stature. That is, however, not to say that the said Florence Nangila may not have a constitutional claim against the Respondents or any of them; no; what this Court is saying is that she has approached the Court through a wrong entity otherwise the gates of justice are always open.
26. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 and later elected to the Judicial Service Commission thereby mostly being away from the station. Apologies galore.
27. In the end, the following final orders hereby issue: -
- a. The Notice of Motion dated 17th November 2023 is merited and the Petition dated 9th October 2023 is hereby struck out.
 - b. The Petitioner shall bear the costs of the Petition.



28. It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF FEBRUARY, 2025.

A. C. MRIMA

JUDGE

Ruling virtually delivered in the presence of:

Zaddock Khaemba, representing the Petitioner.

Mr. Njiru, Learned Counsel for the Respondents.

Duke – Court Assistant.

