Kizuka & 2 others v Cabinet Secretary, Mining, Blue Economy & Maritime Affairs & another; Salim & 3 others (Interested Parties) (Petition E020 of 2023) [2024] KEHC 2160 (KLR) (29 February 2024) (Ruling)

Neutral citation: [2024] KEHC 2160 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

PETITION E020 OF 2023

OA SEWE, J

FEBRUARY 29, 2024

BETWEEN

MWANASHA SULEIMAN KIZUKA ..... 1ST PETITIONER

BAKARI MWAFRIKA MWAKILESHO ..... 2ND PETITIONER

ADDALLA KEA MWAKOMBO ..... 3RD PETITIONER

AND

CABINET SECRETARY, MINING, BLUE ECONOMY & MARITIME AFFAIRS ..... 1ST RESPONDENT

BASE TITANIUM LIMITED ..... 2ND RESPONDENT

AND

TAUHIDA SALIM ..... INTERESTED PARTY

ROSE NZIZA KYALO ..... INTERESTED PARTY

ALI ABDALLAH WEKO ..... INTERESTED PARTY

JAMAL ABDALLAH KIDYOGO ..... INTERESTED PARTY

RULING

1. Before the Court for determination is the Notice of Motion dated 21st March 2023. It was filed by the three petitioners pursuant to Articles 22(2), 48 and 50(1) of the *Constitution of Kenya, 2010*, Sections 1A, 1B, 3A and 63(c) of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, as well as Section 47(g) of the *Mining Act*, Regulation 7(1) of the *Mining (Community Development Agreement) Regulations, 2017* and Order 51 Rules 1, 3 and 4 of the *Civil Procedure Rules*. The petitioners thereby sought orders that:

(a) Spent

(b) The Court be pleased to grant the gazetted Community Development Agreement Committee (CDAC) members of Msambweni, Lunga Lunga and Likoni Sub-counties leave, authority and or permission to continue discharging their mandate pending subsequent gazettement and or conclusion of the application.

(c) The Court be pleased to issue an injunction restraining the respondents from conducting fresh elections and gazettement of new members falling on the mentioned category pending the hearing and determination of the application.

(d) The Court be pleased to grant the gazetted CDAC members of Msambweni, Lunga Lunga and Likoni Sub-counties leave, authority and or permission to continue discharging their mandate pending subsequent gazettement and or conclusion of the suit.

(e) The Court be pleased to issue an injunction restraining the respondents from conducting fresh elections and gazettement of new members falling on the mentioned category pending the hearing and determination of the suit.

(f) Costs of the application be provided for.

2. The application was premised on the grounds that the term of the petitioners as CDAC members lapsed on or around 27th February 2023, notwithstanding that they did not serve their full term of 3 years due to non-operationalization of the CDACs. The petitioner further averred that the CDACs have pending urgent services, programs and projects that have stalled, in respect of which members of the public are in urgent need. They were apprehensive that elections and gazettement of new members would take a long time, thereby jeopardizing service delivery, completion of projects and payment of pending bills. Thus, the petitioners averred that, unless restrained, they will be condemned unheard; in contravention of the principles of natural justice.

3. The application was supported by the averments set out in the affidavit of Fakii Omar, who was the Secretary of Msambweni CDAC at the time. He affirmed that he was one of the gazetted members; and was supposed to serve as a CDAC member for a period of 3 years effective 1st March 2020. Mr. Omar further averred that, other than Msambweni, CDACs were set up and members duly gazetted for the other Sub-Counties of Kwale, namely Lunga Lunga and Likoni, granted that the communities in all the three Sub-Counties are affected by the mining activities conducted by the 2nd respondent.

4. Thus, on behalf of all the CDAC members, Mr. Omar deposed that none of them served their full term of 3 years as gazetted due to non- operationalization of the CDACs, which was then a new concept in Kenya. He further stated that the Community Development Agreement was not signed until 24th May 2023, about 1 year and 2 months later. Hence, the petitioners asserted that by the time their appointment lapsed, there were ongoing projects, programs and services whose completion would be imperiled, unless the extension sought by them was granted. They further deposed that the 1st respondent had declared his intention and readiness to gazette new members of the CDACs; and that to that end, the 2nd respondent had commenced community engagement activities in preparation for the elections.

5. The petitioners annexed the relevant documents to their affidavit, including copies of the pertinent Community Development Agreements for the three Sub-Counties as well as copies of the pertinent Gazette Notices.

6. On behalf of the 1st Respondent, a Replying Affidavit was filed herein, sworn by the Ag. Deputy Director of Mines, Mr. Gregory N. Kituku. He made reference to Regulation 7(3) of the Mining (Community Development Agreement) Regulations, 2017 to underscore his averment that members of the CDAC were intended to serve for a renewable period of three (3) year period. It was therefore the averment of the 1st respondent that, since the petitioners have been in office from the 28th February 2020; a term that lapsed on the 28th February 2023, elections of new office holders were due. The 1st respondent further averred that elaborate plans had been made for the elections, including extensive stakeholder engagements involving members of the concerned communities.

7. Mr. Kituku further deposed that the elections of the CDAC representatives were in fact held between the 6th April 2023 and 13th April 2023 for Likoni, Msambweni and Lunga Lunga Sub County Committees in which the 2nd and 3rd petitioners participated and emerged victorious in respect of the Mrima Bwiti CDAC, Lunga Lunga Sub County and Likoni Sub County CDAC, respectively. Hence, it was the averment of the 1st respondent that, to that extent, the Petition has been overtaken by events. The 1st respondent was consequently of the view that the applicants did not approach the Court with clean hands, given the fact of their re-election; hence the prayer that the application and Petition be dismissed with costs.

8. The 2nd respondent relied on the Replying Affidavit sworn on 14th April 2023 by its General Manager, External Affairs, Mr. Simon Wall. He confirmed that on 21st February 2020 by way of Gazette Notice No. 1629, notification of members of the Community Development Agreement Committees for Msambweni, Likoni and Lunga Lunga was made by the then Cabinet Secretary for Petroleum and Mining for a 3-year term with effect from 1st March 2020. Mr. Wall further averred that on the 24th May 2021, the 2nd respondent entered into separate Community Development Agreements with the affected communities in Mswambweni, Likoni and Lunga Lunga; and that the 2nd respondent has no legal obligation or right to appoint the members of the CDACs.

9. The interested parties echoed similar sentiments as those of the 1st respondent vide their joint Replying Affidavit sworn by Jamal Abdalla Kidyogo on 8th August 2023. They averred that the petitioners were appointed to serve for a period of 3 years; which period lapsed in March 2023. They explained that the delay in the operationalization of the CDACs was due to the Covid 19 pandemic; and was therefore not intentional. The interested parties further contended that the delay in the operationalization of the CDAC cannot be the reason to extend the petitioners' terms as it was beyond the control of the Ministry.

10. Further to the foregoing, the interested parties deposed, as did the respondents, that the application has been overtaken by events as the elections for the three CDACs were held on 5th April 2023, 17th April 2023 and 19th April 2023, respectively, prior to the Court's orders of 19th April 2023. They further asserted that the elections were conducted legally, freely and transparently and with the knowledge of the petitioners, who also willingly and voluntarily participated in the said elections. Accordingly, the interested parties posited that the application is not only malicious, but is also an afterthought; and therefore merely intended to delay the work of the incoming committee. In their view, the petitioners have not met the threshold set out in *Giella v Cassman Brown & Co. Ltd* [1973] EA 358.

11. Directions were thereafter given on the 15th May 2023 that the application be canvassed by way of written submissions. Accordingly, written submissions were filed herein by the petitioners, the 2nd respondent and the interested parties. No submissions were filed by or on behalf of the 2nd respondents. Hence, having perused and considered the petitioner's written submissions dated 22nd May 2023, I noted that they proposed the following issues for determination:

(a) When exactly did CDAC operationalize; was it from the date of Gazettement of CDAC members or from the date of execution of the Agreement?

(b) What orders should be issued by the Court?

12. The petitioners insisted that they have a *prima facie* case with a good chance of success, in that although their term commenced on 1st March 2020 as gazetted, the operationalization of CDAC did not take effect immediately; granted that funds were only availed in May 2021. In the premises, they submitted that the orders prayed for are warranted and ought to be granted pending the hearing and determination of the Petition.

13. On behalf of the 2nd respondent, written submissions were filed herein dated 16th June 2023. The submissions touched on how the Community Development Agreements were negotiated and the role of the CDACs. The 2nd respondent also acknowledged the participation of the petitioners in the Community Development Agreement negotiations on behalf of their respective sub-counties. It submitted however that the petitioners have narrowly and incorrectly interpreted their specific roles under Regulation 7(4) of the *CDA Regulations*. Consequently, it was the assertion of the 2nd respondent that the petitioners failed to make out a plausible justification for extension of their terms.

14. It was further the submission of the 2nd respondent that, since the elections had taken place in which the 2nd petitioner was re-elected for a second term in office no *prima facie* case has been made out by the petitioners, as that position is in stark contrast to the petitioners' own claims in the Petition. The 2nd respondent placed reliance on *East African Industries v Trufoods* [1972] EA 420 and *Giella v Cassman Brown & Co. Ltd* [1973] EA 358 in urging the Court to dismiss the application dated 21st March 2023.

15. On their part, the interested parties proposed the following two issues for determination:

(a) Whether the application is merited; and,

(b) Whether the petitioners have met the threshold for the grant of temporary injunction as per the principles set out in Giella v Cassman Brown.

16. I have looked at the application dated 21st March 2023 and the averments set out in the affidavit filed therewith. I have likewise given careful consideration to the responses filed in respect of that application; and what is clear therefrom is that the petitioners were all along aware that the elections of the CDAC members had already been conducted by the time this Petition was instituted. Indeed, their counsel, Ms. Oguna, is on record as having affirmed this position on 15th March 2023 to the effect that if the elections had been held then that was the status quo they were seeking to maintain pending the hearing and determination of the application.

17. Needless to mention that the Court does have the jurisdiction to issue an order of injunction as sought by the petitioners should justifiable cause be shown for such an order; for Article 23 of the Constitution is explicit that:

(1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review."

18. Hence, in *South Imenti Bar Owners S.H.G through its Chairman James Gikunda Ntaragwi v County Government of Meru* [2018] eKLR, it was held: -

> Provision of the relief of an injunction in constitutional petitions is doubtless a development of law...Such development of law on injunctions orchestrated by the new Constitution justifies what Ojwang Ag. J. (as he then was) stated in the case of *Suleiman v Amboseli Resort Ltd* (2004) eKLR 589 at page 607 that:-
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> > '...counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago in Giella v Cassman Brown, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel on that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover International made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780-781:-
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> > > "A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong"..."
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> Traditionally, on the basis of the well accepted principles set out by the court of Appeal in *Giella v Cassman Brown* the court has had to consider the following questions before granting injunctive relief.
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> i. Is there a *prima facie* case...
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> ii. Does the applicant stand to suffer irreparable harm...
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> iii. On which side does the balance of convenience lie? Even as those must remain the basis tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice.....

19. As to whether the a *prima facie* case has been made out by the applicants, I note that there is not a single reference to the *Constitution* in the Petition dated 21st Marc 2023. Hence, there is no allegation at all in the Petition of breach or threatened violation of the petitioners' constitutional rights or any other provision of the *Constitution*. The question to pose therefore is whether the Petition, as crafted,

meets the basic threshold for constitutional petitions. In this regard, it was held in *Anarita Karimi Njeru v Republic* [1979] eKLR, 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."

20. The same position was reiterated by the Court of Appeal in the case of *Mumo Matemu* (supra) thus:

> (42) It was the High Court's observation that the petition before it was not the "epitome of precise, comprehensive, or elegant drafting." Yet the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the *Constitution* and the overriding objective principle under section 1A and 1B of the *Civil Procedure Act* (Cap 21) and section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principles. What Jessel, M.R said in 1876 in the case of *Thorp v Holdsworth* (1876) 3 Ch. D. 637 at 639 holds true today:
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> > "The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing."
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> (43) The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of the *Constitution* in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the *Constitution*, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the *Constitution* and the rule of law, without any particulars.
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> (44) We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference..."

21. Similarly, In the case of *Robert Amos Oketch v Andrew Hamilton & 8 others (Sued in their Personal Capacities and as Trustees of the National Bank of the Kenya Staff Retirement Benefit Scheme) & 4 others* [2017] eKLR, the court held: -

63. First, this being a constitutional petition, the petitioner is required to show with precision that it meets the test set in the case of Anarita Karimi Njeru v Republic (supra). In that case, the court stated that where the Court stated that a party who wishes the Court to find in his favour must plead with a reasonable degree of precision the rights he claims to have been violated the constitutional provisions allegedly violated and the jurisdictional basis for it...

65. Applying the above principles to this case, I have considered the petitioner's pleadings, the evidence as well as submission by his counsel and in my respectful view this is not a proper constitutional petition challenging violation of fundamental freedoms. I say so because although the petitioner has pleaded provisions of the *Constitution*, he has not demonstrated to the required standard how his rights and fundamental freedoms have been violated infringed or are threatened to come within the ambit of Article 23(1) of the *Constitution* for redress..."

22. In the premises, it is plain that without any allegation of infringement of the provisions of the *Constitution* as well as a clear indication as to the nature thereof, it cannot be said that the petitioners have made out a *prima facie* case. I am therefore in total agreement with the position taken by Hon. Mabeya, J. in *Husus Mugiri v Music Copy Right Society of Kenya & another* [2018] eKLR, that: -

> "...other than submitting as counsel for the petitioner did, that holding the elections at Machakos was an infringement of Articles 27, 26 and 47 (1) of the *Constitution*, it was incumbent upon the petitioner to state with precision how the holding of the said elections as aforesaid infringed upon the right to equality, freedom from discrimination, right to life and fair administrative action of the petitioner. It was imperative for the petitioner to plead these matters in the petition and offer evidence through or by way of his verifying affidavit. This he did not.
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> 23. In so far as the petition fell short of the test in the Anarita Karimi's Case, it is doubtful if the first test of Giella v Cassman Brown can be met."

23. More importantly, it has been demonstrated that elections already occurred on the 6th April 2023, 8th April 2023, and 11th to 13th April 2023 for Likoni, Msambweni and Lunga Lunga Sub County Committees respectively, even before the court issued interim orders on the 19th April, 2023. It is trite that a court cannot issue an order of injunction to intercept that which has already happened. In *Moses M Wairimu & 24 others v Kenya Power & Lighting Co Ltd & another* [2020] eKLR, it was held: -

> 12. On whether they will suffer injury which will not be compensated, there is no doubt that the structures which they were seeking to protect have already been demolished. If the Applicants will succeed to show that their buildings were unlawfully brought down, they will always be compensated in monetary terms. An injunction cannot therefore be granted and in any case an injunction cannot issue to prevent what has already happened..."

24. Consequently, it is my considered view that the application for injunction is belated as the elections in question have already been conducted. Accordingly, I find the application dated 21st March 2023 to be without merit and the same is hereby dismissed. Costs thereof to be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 29TH DAY OF FEBRUARY 2024

OLGA SEWE

JUDGE