



**Patron IDPS Gusii Regional Steering Committee Kisii & Nyamira Counties
Rev Brethren Nemwel Momanyi v Egesa FM Radio Programmer, Kisii &
another; Managing Director Royal Media Citizen (Third party) (Constitutional
Petition 2 of 2022) [2024] KEHC 1883 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1883 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CONSTITUTIONAL PETITION 2 OF 2022
PN GICHOHI, J
FEBRUARY 29, 2024**

BETWEEN

**PATRON IDPS GUSII REGIONAL STEERING COMMITTEE KISII &
NYAMIRA COUNTIES REV BRETHREN NEMWEL MOMANYI PETITIONER**

AND

**EGESA FM RADIO PROGRAMMER, KISII 1ST RESPONDENT
ALLOYS OCHARO MOMANYI 2ND RESPONDENT**

AND

MANAGING DIRECTOR ROYAL MEDIA CITIZEN THIRD PARTY

RULING

1. The Petition dated 22nd June, 2021 is haphazardly drawn but having taken time to sift through the pleadings, this Court understands the Petitioner to complain that on 03rd June, 2021 07.00 pm, 2nd Respondent aired some false information concerning Nairobi Petition No. E167 of 2021 on Egesa FM Radio owned by the 3rd Respondent, which was not only false but also defamatory and in contempt of Nairobi Petition No. E167 of 2021.
2. By a Notice of Preliminary Objection dated 27th August, 2021, 1st Respondent and the 3rd Party contend that:
 1. This Court lacks jurisdiction to entertain the said petition and originating summons herein
 2. This Court does not have jurisdiction to hear claims of alleged contempt of court orders made by this Court in Nairobi Constitutional Petition No. E167 of 2021: The Gusii Regional



IDPs Steering Committee Kisii/ Nyamira Counties and the IDPs Fraternity & Patron vs The Cabinet Secretary, Ministry of Interior and Co-ordination of National Government & Anor.

3. By virtue of sub judice rule, this Court has no jurisdiction to hear and determine the very issues which are pending in:
 - a. Nairobi Constitutional Petition No. E167 of 2021: the Gusii Regional IDPs Steering Committee Kisii/ Nyamira Counties and the IDPs Fraternity & Patron vs The Cabinet Secretary, Ministry of Interior and Co-ordination of National Government & Anor;
 - b. Nyamira CMCC Civil Suit No.206 of 2018: The Patron Gusii Regional IDPs Steering Committee and the IDPs Fraternity vs The County Commissioner Nyamira & 2 Others .
 - c. Kisii Misc. Application No.27 of 2020: The Patron Gusii Regional IDPs Steering Committee and the IDPs Fraternity vs Equity Bank Manager, Nyamira Branch & Anor.
4. The petitioners claim if any is a claim in the tort of defamation and the same is best canvassed in a civil suit or a complaint before the *Media Council Act*, 2013 and not through a Constitutional Petition.
3. In his response dated 01st September, 2021, Petitioner maintained reiterated that the Court had jurisdiction to determine his Petition.

Submissions

4. In their submissions dated 09th December 2021 and filed on 26th July 2022, the 1st Respondent and the 3rd Party maintained that this lacks jurisdiction to handle this matter.
5. Likewise, and in his submissions dated 15th December 2021, the Petitioner filed invited the Court to consider the reliefs sought in the Petition and note that no relief stands on its own. He urged that jurisdiction to strike out a suit should be exercised sparingly.
6. On whether the Petition is sub-judice, the Petitioner submitted the 1st Respondent and the 3rd Party have conveniently avoided to disclose to this Court who the parties are in those other Petitions of suits. Lastly, he urged the Court to strike out the Preliminary Objection and order that the Petition proceeds to full hearing.

Analysis And Determination

7. This Court has considered the Preliminary Objection, the Responses by the Petitioner and the submissions filed by the parties. It is noted that though on 24th November 2022 the 2nd Respondent filed a Memorandum of Appearance dated 20th November 2022, they did not file a response or submissions .
8. On the doctrine of sub judice, the Black's Law Dictionary 9th Edition defines the term as to mean “-before a court for determination.” Though the Petitioner argues that the parties to the three suits listed are not disclosed by the 1st Respondent and the 3rd Party, full citation of the said suits has been disclosed on the face of the Preliminary Objection.



9. While that may be the case, the parties do not appear to be exactly the same. Further, the full particulars of the said pleadings have not been highlighted or annexed to enable this Court would confirm whether the issues raised in this matter are issues pending determination before another court.
10. The main issue for determination here, however, is whether this court has jurisdiction to hear and determine this Petition. In celebrated case of *Mukisa Biscuit Mukisa Biscuit Manufacturing Co Ltd v West End Distributors* (1969) EA 696 , it was held that:

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.”
11. Jurisdiction of the court in Kenya is regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent. Jurisdiction means the power conferred by law upon the court to try and hear the cases and give appropriate judgements. (See *In the Matter of Interim Independent Electoral Commission* [2011] eKLR and *Samuel Kamau Macharia & Another v. Kenya Commercial Bank & 2 Others*, Application No. 2 of 2011 [2012] eKLR.
12. It therefore follows that whether or not this court has jurisdiction to hear and determine this matter is a pure point of law properly raised by the Respondents.
13. As to what constitutes a constitutional petition , Mativo J (as he then was) had this to say in the case *Hakizimana Abdoul Abdulkarim v Arrow Motors (EA) Ltd & another* [2017] eKLR :-

“A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute...”
14. From the pleadings in the petition, the cause of action appears to be defamation and breach of the of sub judice rule and not any matter that requires the interpretation of *the Constitution*.
15. Defamation is a civil tort that can be determined in a civil suit whereas any commentary or publication relating to active judicial proceedings that would bring the Court into disrepute or substantively prejudice or undermine the administration of justice amounts to breach of the sub judice rule and is punishable, for contempt of Court, by the court handling the matter in issue.
16. Regarding Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR explicated at paragraph [256] that: -

“... The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis.”
17. Whereas is trite that the doctrine of constitutional avoidance does not strip this Court of the jurisdiction to hear and determine this matter, it implores the court to restrain itself from hearing a matter where there exists another appropriate forum that can hear and determine the matter effectively.
18. Concerning alternative remedy in lieu of constitutional remedies, Chacha J in *Godfrey Paul Okutoyi & others vs Habil Olaka & Another* (2018) eKLR stated at paragraph 65: -

“It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a court of law in the manner allowed by that particular statute or in an ordinary suit as provided by procedure. It is not every



failure to act in accordance with a statutory provision or where action is taken in breach of a statutory provision that should give rise to a Constitutional petition. A party should only file a constitutional petition for redress of a breach of *the Constitution* or denial, violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure.”

19. Further, Mutungi J expressed himself as follows on the same issued in *Grays Jepkemoi Kiplagat v Zakayo Chepkoga Cheruiyot* [2021] eKLR:-

“I need to observe that parties are increasingly filing matters that are essentially Civil matters and christening the same as Constitutional Petitions which is not proper. Where there is the alternative remedy of filing a suit in the ordinary Civil Courts, a party ought not to invoke the jurisdiction of the Constitutional Court.” - (See also the case of *Abraham Kaisha Kanziku -vs- Governor of Central Bank & others* [200] eKLR).

20. This Court fully associates itself with the persuasive decisions of the learned justices in the above referenced cases and I agree with the Respondents that matters that do not call for the Court’s Constitutional interpretative mandate under the Bill of Rights should not be disguised as Constitutional Petitions seeking enforcement of the Bill of Rights. The constitutional jurisdiction of the court is a very specific jurisdiction which is not open to general claims. It is invoked pursuant to Articles 22 (1) and 23 of *the Constitution* by filing a Petition.
21. The doctrine of constitutional avoidance frowns upon the practice of bringing ordinary disputes to the constitutional court. (See *Mutyaene v KCB Bank Ltd & another* (Petition 412 of 2020) [2023] KEHC 2205 (KLR) (Constitutional and Human Rights) (17 March 2023) (Judgment)). From the foregoing analysis, this Court has come to the conclusion that the Preliminary Objection is merited. The same is upheld and the Petition dated 22nd June, 2021 is struck out with costs to the 1st Respondent and the 3rd Party.

DATED, SIGNED AND DELIVERED (VIRTUALLY) AT KISHI THIS 29TH DAY OF FEBRUARY, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of

The Petitioner/Applicant in person

Mr. Munyori for the 1st Respondent and the 3rd Party

N/A for the 2nd Respondent

Saewa/ Aphline, Court Assistant

