



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CONSTITUTIONAL PETITION NO. 10 OF 2016

IN THE MATTER OF BREACH OF THE CONSTITUTION AND

FUNDAMENTAL RIGHTS AND FREEDOMS ARTICLES 10,

19(2), 20(1), (2), (3) AND (4), 21(1), 40, 47(1) AND (2), 50 AND

165(1) AND (2) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

(PROTECTION OF RIGHTS AND FUNDAMENTAL

FREEDOMS) PRACTICE AND PROCEDURES RULES, 2013

AND

IN THE THE MATTER OF ARTICLES 2, 3, 4, 7, 13 AND 19 OF THE

AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS

AND OTHER PROVISIONS THEREON

AND

IN THE MATTER OF THE STANDARD ACTS, CHAPTER 96 OF THE LAWS OF KENYA

AND

IN THE MATTER OF STANDARDIZATION MARKS REGULATIONS

AND

IN THE MATTER OF BEEKE SUPPLIES LIMITED AND DEVKI STEEL MILLS LIMITED

BETWEEN

BEEKEY SUPPLIES LIMITED.....1ST PETITIONER

DEVKI STEEL MILLS LIMITED.....2ND PETITIONER

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

THE KENYA BUREAU OF STANDARDS.....2ND RESPONDENT

RULING

1. This is a ruling on a preliminary objection raised by the 2nd respondent against the hearing of this petition on grounds that this court has no jurisdiction to determine this matter, among other issues. Parties argued this objection through written submissions. The firm of Fatuma Wanjiku represented the petitioner while that of Goretti Nyariki is for the respondents.

2. The respondent cites section 16 A(1) of the Standards Act which establishes the Standards Tribunal and sets out its jurisdiction as follows:-

(i) On any dispute as to the decisions and/or actions of the Kenya Bureau of Standards or its officers as provided for in Section 11 of the Standards Act;

(ii) On any dispute as to the decisions to seize and detain goods as provided for in Section 14A(4) of the Standards Act;

(iii) The power to confirm, set aside or vary the decision or act in question and the Standards Tribunal may make such other order as the Standards Tribunal considers appropriate, including an order with respect to the payment of costs as provided for in Section 16C of the Standards Act;

(iv) On any matter involving a point of law or of unusual importance or complexity as provided for in Section 16D of the Standards Act.

3. It is further argued that the African Commission on Human and Peoples' Rights possess of the jurisdiction to oversee the implementation and interpretation of the 1979 African Charter on Human and Peoples' Rights, 1979 as set out in Article 45.

4. It is the respondent's contention that this petition lacks the mandatory specificity required of Constitutional Petitions and References. It is further argued that the supporting affidavit contravenes Section 5 of the Oaths and Statutory Declarations Act, Cap 15. It is further noted that this application is brought by way of Chamber Summons contrary to Order 51, Rule 1 of the Civil Procedure Rules, 2010.

5. It was submitted by the respondent that the Standard Tribunal has power to preside over any matter involving a point of law or of unusual importance or complexity under Section 16 D (1) of the Act.

6. The respondent further submitted that the application is fatally defective for it has been brought by way of chamber summons instead of by notice of motion contrary to Order 51 rule 1 of the Civil Procedure Rules, 2010. Further that the supporting affidavit is not dated as requested by the law. For this reason the said affidavit should be

expunged from the record.

7. As for the petition, the respondent argues that the petition is fatally defective for it lacks the mandatory specificity required of the constitutional petitions. The case of *ANARITA KARIMI NJRU VS ATTORNEY GENERAL [1979] KLR 54* where it was held that any petitioner who seeks redress under the constitution must state his claim with precision by reference to the provisions of the constitution allegedly violated and explain how the provisions were violated. The *MUMO MATEMU VS TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE [2013] eKLR* and that of *MEME VS REPUBLIC [2004] 1 EA 124* were cited in support of the argument.

8. The respondent further argued that the petitioner should meet the costs in the event that the petition is struck out or dismissed.

9. The applicant opposed the objection on grounds that the petition is based on the inherent constitutional rights of the applicant which have been violated thereby denying him a conducive trading environment. The violation occurred when the respondent entered the business premises of the applicant and marked his tell products for destruction for being sub-standard. The applicant has pleaded that his right to property under Article 40 and 47 have been violated.

10. It is further argued that under Article 22, 23, and 165(3) of the Constitution, this court has jurisdiction to hear and determine the petition. On whether the petition meets the threshold of a constitutional petition, the applicant relies on Rules 10 and 11 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules, 2013,

11. As for bringing the application contrary to Order 52 Rule 1, the respondent argues that this is a procedural technicality curable under Article 159 (2) of the Constitution.

12. It is further argued that the supporting affidavit is signed contrary to the allegations to the contrary.

13. I have looked at the affidavits of the petitioner in support of the petition and the application. I note that the affidavits bear signatures. This sorts out this issue because the issue of the authenticity or forged signature did not arise.

14. Order 52 Rule 1 provides that the application shall be brought by way of notice of motion. The applicant did not comply with the law in instituting his application by way of chamber summons. The question is whether this anomaly is curable under Article 159(2)(d) of the Constitution. The provision provides 159(2)(d):-

Justice shall be administered without undue regard to procedural technicalities.

15. In addition to the constitutional provision, the overriding objective Section 1A and 1B of the Civil Procedure Act call for:-

1A. Objective of Act

(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

1B. Duty of Court

(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology.

16. In view of the provisions of Article 159(2)(d) and the overriding objective, the court must be slow in striking out pending on non-compliance with the procedure provided that the flaw does not affect the substance of the application.

17. The general trend since the enactment of the overriding objective provisions and Article 159(2)(d) is that courts should as much as possible to sustain rather than striking out pleadings on technicalities.

18. I therefore decline to strike out the application for the foregoing reason in the interest of justice.

19. The other issue is whether this court has jurisdiction to hear and determine the petition. The applicant argues that there is a procedure provided for under the Standard Act, Cap 496 where any party aggrieved by a decision of the Bureau or the Council may seek a remedy in the standards Tribunal. Such a remedy shall be sought within 14 days from the date of the action complained of.

20. The applicant also states that there is a procedure of dealing with an point of law that may arise by the Director of Kenya Bureau of Standards may refer such a matter to the Tribunal for a general direction.

21. The respondent cites Article 165(3) of the Constitution arguing that this court has jurisdiction to hear this petition. It provides:-

(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

22. The right of every person to institute proceedings on denial, violation or infringement of any constitutional right is provided for under Article 22 and 23 and is not in question in this application. The provisions of Article 165(3) (a) and (b) give the High Court unlimited original jurisdiction to determine any question in this application. The provisions of Article 165(3)(a) and (b) give the High Court unlimited original jurisdiction to determine an question on violation, denial and infringement of constitution rights.

23. The case of **ROYAL MEDIA SERVICES LTD VS ATTORNEY GENERAL & 6 OTHERS [2015] eKLR** relied by the respondent made the question of jurisdiction of the High Court clear on determination of violation of rights. From the arguments of the parties, the issue is clear in their minds that this court has jurisdiction under Article 165(3)(a) and (b) provided the petition meets the threshold of Article 23(2) of a constitutional petition.

24. The main issue herein is whether this petition meets the constitutional threshold of a constitutional petition for this court to hear and determine as opposed to the matter being handed by the Standards Tribunal.

25. The main prayer in the petition reads as follows:-

An order of prohibition or injunction permanently restraining the respondents from seizing, confiscating, impounding, harassing, interfering, searching, holding, carrying way or destroying the propety/wares/goods of the 1st petitioner and or interfering with the Petitioners lawful operation of their business.

26. Prayer 5, 6, 7, 8 and 9 of the petition explains the cause of action thus:-

5. That the 2nd respondent herein has contravened the petitioners Constitutional rights under Article 40 Protection of Right to Property, 47(1) and (2) Fair Administrative Action and 50 fair hearing.

6. That on 12/04/2016 the 2nd respondent herein came to the 1st petitioner's premises and conducted an inspection on steel products for building and construction that were being offered for sale sourced from the 2nd petitioner herein Devki Steel Mills to wit; Y-12 which are 1,500 pieces and R5.5 which are 2,500 pieces which are worth over Kshs.3,000,000/=.

7. That all the said steel products for building and construction had standardization marks imprinted by the 2nd respondent yet they issued a Seizure Notification.

8. That acts by the 2nd respondent negate the values as enshrined under chapter 5 of the Constitution; the bill of

Rights under which the Petitioners are entitled to a fair hearing and Protection to Right to Property.

9. *That unless the orders sought are granted the Petitioners stand to suffer irreparably as he would lose steel products for building and construction worth over Kshs.3,000,000/= without being afforded a fair hearing which is against the petitioner's Constitutional rights.*

27. Paragraph 5 cites the violation of Articles 40, 47(1) and (2) and 50 which provides:

Article 40

(1) *Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—*

(a) of any description; and

(b) in any part of Kenya.

(2) *Parliament shall not enact a law that permits the State or any person—*

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).

(3) *The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-*

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) *Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.*

(5) *The State shall support, promote and protect the intellectual property rights of the people of Kenya.*

(6) *The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.*

Article 47

(1) *Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*

(2) *If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.*

Article 50

(1) *Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.*

28. The rest of the paragraphs allege that the 2nd respondent entered the premises and conducted an inspection on the steel products of the petitioner being offered for sale and declared that products worth Kshs. 3,000,000/= had not complied with the required standards. It is also claimed that the petitioner was not accorded a fair administrative contrary to Article 47(1) and was denied a fair hearing.

29. The Standards Tribunal has powers under Section 16(A) “ *to confirm, set aside or vary decision or act in question and may make such other orders as it considers appropriate, including an order with respect to the payments of costs.*” The decisions of the Tribunal are applicable to the High Court.

30. Section 14(A) empowers an Inspector to order destruction of goods detained under Section 14(1) if the following orders are satisfied:-

(a) *Testing indicates that the goods do not meet the relevant Kenya Standard, and*

(b) *It is reasonably necessary to destroy the goods because the goods are in a dangerous state or injurious to the health of human beings, animals or plants.*

31. An Inspector is empowered by Section 13 to enter any premises and carry out inspection. Article 165(3) gives this court unlimited jurisdiction.

32. However, the Standards Act provides that matters arising from inspection of goods where a decision has been made by the Officers concerned be dealt with by the Appeals Tribunal.

33. This court must respect the law and restrict its jurisdiction to its supervisory powers over tribunals under Article 165. The court must not encourage parties to ignore the Tribunal and rush to court where the Tribunal is possessed of the powers to give a remedy. This court has the duty to promote other methods of dispute resolution provided for by Acts of Parliament.

34. In my view, Section 23(3) empowers this court to give remedies in a Constitutional Petition founded on Article 22 for violation or denial of rights as follows:-

(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 (e) threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;*

(f) *an order for compensation; and*

(g) *an order of judicial review.*

35. The petitioner herein prays for an Order of Prohibition or a permanent injunction to restrain the 2nd respondent from seizing, confiscating, impounding, harassing, or interfering with its lawful operation of its business.

36. The petitioner attached the seizure notification with the notice to destroy the goods within 14 days. It is pleaded that the 2nd respondent had earlier declared the goods as having met the required standards through the 1st petitioner who was the manufacturer. The certificate to that effect was not annexed and in any case the petitioners would have to prove at an appropriate time that the certificate was in respect of the goods seized by the 2nd respondent.

37. Paragraph 5 of the petition is the only one which alleges violation of rights under Articles 40,47 and 50. It does not expound how each right was violated . The right and the violation ought to be stated and explained specifically for any person looking at the pleading to understand the nature and the claim in the petition.

38. The case relied on by the petitioners of **ROYAL MEDIA SERVICES LTD** (*supra*) may be distinguished from the one before me in that the HIV Aids Tribunal was not possessed of by the jurisdiction to determine the issues of violation or denial of rights in the petition and that the petition met the threshold of a Constitutional Petition. As for the petition before me, the Standards Tribunal is possessed of the powers to determine the issues and that his petition falls short of the threshold of a Constitutional Petition.

39. The Standard Tribunal was created for a purpose and it is best placed to determine issues relating to compliance of the relevant law.

40. The court must guard against improper transmission of normal disputes or ordinary issues of litigation being clothed in Constitutional petitions. I am aware that the existence of an alternative remedy or procedure may not oust the jurisdiction of the court. But the court in deciding whether to entertain a suit must take into account the existence of such a remedy and its application to the issues at hand.

41. Nevertheless, the High court will not hesitate to determine sound Constitutional petitions and toe exercise it supervisory powers over the Subordinate Courts and Tribunals.

42. It is my finding that the petition before me does not meet the threshold of a Constitutional Petition and for these reasons, I uphold the preliminary objection and strike out the petition with costs.

43. It is hereby ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 14TH DAY OF NOVEMBER, 2017.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Muriuki for Gorette for the 2nd respondent

Ms. Mbwiria for Fatuma for petitioner



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