



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL PETITION 115 OF 2017

BETWEEN

JACOB NYANDEGA OSORO.....PETITIONER

VERSUS

THE HON. CHIEF JUSTICE OF KENYA.....1ST RESPONDENT

THE CHIEF REGISTRAR OF THE JUDICIARY.....2ND RESPONDENT

JUDGMENT

1. In petition dated 22nd March 2017 and amended on 19th September 2017 *Jacob Nyandega Osoro* sued the *Hon. Chief Justice of the Republic of Kenya*, the 1st respondent and *Chief Registrar of the Judiciary*, the 2nd respondent, challenging the constitutionality of some rules 3(5)(c), 33 and 34 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, The *Mutunga Rules*, which prescribe payment of Court fees on filing of constitutional petitions challenging violation of fundamental rights and freedoms.

2. The petitioner contends that although rule 3(5) (c) of the Rules states that the court should handle all matters presented before it with a view to achieving timely disposal of proceedings, at an affordable cost, rule 33 requires parties to pay the same fees as that paid in respect of civil proceedings in in the High Court in so far as the same is applicable to constitutional petitions.

3. The petitioner states that rule 34 (1) provides that a person who wishes to be exempted from paying court fees may apply to the registrar for exemption. On that basis the petitioner contends that rule 3(5) (c), 33 and 34(1) violate of his rights and fundamental freedom under Articles guaranteed under Articles 19(3)(a), 21(1), 22(1) and 22(3)(c) of the Constitution when the rules require that petitioners challenging violation of fundamental freedoms be instituted at a cost. He also faulted rule 33 for prescribing court fees contending that it violates the right granted under Articles 22(1) and 22(3) (c) of the Constitution.

4. The petitioner avers that rule 34(1) which requires that a person apply to the registrar for exemption from paying fees violates the values in Article 19(3) (a) of the Constitution which provide that rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the state. He therefore sought the following reliefs:-

a) That Rule 3(5)(c) of the Constitution of Kenya(Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 be declared unconstitutional in so far as it states that court shall handle all matters presented to it at a cost affordable by the respective parties, contrary to Articles 22(1) and (3)(c) of the constitution.

b) That Rule 33 of the constitution of Kenya (Protection of Rights and Fundamental Rights) Practice and Procedure Rules, 2013 be declared unconstitutional in so far as it states that there shall be paid in respect of all proceedings under these rules the same court fees as are payable in respect of civil proceedings in the High Court in so far as the same are applicable, contrary to Article 22(1) and (3) (c) of the constitution.

c) That Rule 34(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure, 2013 be declared unconstitutional in so far as it states that a person who wishes to be exempted from paying court fees may apply to the Registrar, contrary to Articles 19(3) (a) and 21(1) of the constitution.

d) That pending the preparation, publishing and enforcement of Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules that do not violate the constitutional rights of petitioners to the High Court of Kenya, the 2nd respondent and her agents, employees and servants or anyone else under her control or otherwise with the power to demand that court fees be paid before a person institute court proceedings for the enforcement of the Bill of Rights be restrained from charging such fees.

e) That pending the preparation, publishing and enforcement of Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules that do not violate the constitutional rights of petitioners to the High Court of Kenya, the 2nd respondent and her agents, employees and servants be compelled to accept documents commencing court proceedings for the enforcement of the Bill of Rights and undertake all necessary procedures to ensure that the proceedings are properly commenced notwithstanding the fact that the person wishing to institute court proceedings has not paid any court fees.

Respondent's response

5. The respondents filed grounds of opposition dated 11th October 2017 and filed in court on the same day contending that the petition does not disclose constitutional violations and or breaches; that Article 22 (3) of Constitution confers upon the 1st respondent authority to make rules of procedure to be used by Courts in the adjudication of Constitutional infringement, violation or threatened breach of human rights and fundamental freedoms; that section 10 of the judicature that is also clear that the 1st respondent can make rules of court regulating the practice and procedure of the High Court; that rule 34 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provide a window for a person who wishes to be exempted from paying fees to apply to the Registrar and that rules 3(5) (c), 33 and 34 (1) of the rules are firmly founded on the Constitution and the rule of law.

6. The respondents contend that the petitioner has not demonstrated or adduced evidence that an applicant has ever applied for exemption from payment of court fees but was denied without justification; that the impugned rules are intended to provide a framework to facilitate access to justice for all persons and that the petition is incompetent, misconceived, misplaced and is an abuse of the court process.

Petitioner's submissions

7. **Mr. Nyauchi**, learned counsel for the petitioner, submits highlighting their written submission dated 17th November 2017 and filed in court on the same day, that rules 3(5)(c), 33 and 34(1) of the impugned rules are unconstitutional in so far as they provide for payment of court fees in petitions challenging violation of human rights and fundamental freedoms. According to learned counsel, Article 22 (3) (c) of the Constitution allows the 1st respondent to make rules regulating court proceedings referred to in the Article and that no fee may be charged for commencing proceedings. Counsel contended that rule 33 provides that there shall be paid in respect of proceedings under the rules same court fees payable in respect of civil proceedings in the High court in so far as the same are applicable is unconstitutional.

8. **Mr. Nyauchi** contends that whereas the constitution uses the word “*No fees may be charged in commencing proceedings,*” the impugned rule states that there shall be fees charged in respect of proceedings. Learned counsel argues that Article 20(5) of the Constitution provides that in applying any right under Article 43, if the state claims that it does not have resources to implement the right, a court, tribunal or other authority shall be guided by the principle that the Court, tribunal or other authority should be guided by the principles set thereunder including one that the court may not interfere with a decision of state organs concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.

9. Counsel contends, relying on Article 24(1) of the constitution that a fundamental rights and freedoms may not be limited and, in his view, introduction of court fees is a limitation. He further contends that according to Article 32 (3), a person ***may not be*** denied access to any institution, employment or facility or enjoyment of any right because of the person's beliefs or religion as showing another instance where the Constitution uses the word ***may not***.

10. Learned counsel relied on the case of ***Eric Gitari v Non-Governmental or Sanitization Co-ordination Board & 4 others***, [2015] eKLR arguing that the words "may not" were interpreted in a prohibitive manner. He also relied on the case of ***Ceical Growen Association & Another v County Government of Narok & 10 others*** [2014]eKLR where it was held that collection of fees was unconstitutional for lack of legislation.

Respondents' submissions

11. ***Miss Wawira***, learned counsel for the respondents, submits also highlighting their written submissions, dated 9th May 2018 and filed in court on the same day, that the impugned rules are constitutional and do not violate the right of access to justice. Learned counsel contends that the petitioner had not demonstrated that the rules contravene the Constitution either. According to learned counsel, rules 3(5) (c), 33 and 34 (1) cannot violate the constitution and in any case the rules were promulgated pursuant to the powers conferred on the 1st respondent by Article 23 (3) of the Constitution. In learned Counsel's view, rule 3(5) (c) requires matters presented to Court to be disposed of timely as a way of achieving the objective of timely and expeditious disposal of cases.

12. ***Miss Wawira*** submits that the petitioner had not demonstrated that fees charged to institute proceedings is not affordable and as a result, the principle in rule 3(5) (c) cannot be achieved. With regard to rule 33, learned counsel contends that fees to be paid in respect of proceedings in constitutional petitions is the same as that paid in civil proceedings filed in the High Court hence the rule was enacted in accordance with the 1st respondent's Constitutional discretion.

13. Learned counsel submits, pointing out at rule 34(1), that anyone who is unable to pay court fees can apply to the Registrar for exemption hence the rule is not unconstitutional. ***Miss Wawira*** argues that the petitioner did not adduce any evidence to show that a litigant had been turned away from accessing the court on grounds of lack of court fees. Learned counsel is of the view that where a petitioner is short of means for paying court fees, they can apply for exemption and, therefore, the petitioner had not shown he had applied for exemption but was turned away. According to ***Miss Wawira***, the petitioner's application for exemption was never prosecuted and it cannot form the basis for rendering the rules unconstitutional.

14. Learned counsel further contends that there is no evidence that the petitioner is not a person of means who is unable to pay court fees. Counsel relied on the decision in ***George M. Ndirangu v Kenya Revenue Authority & another Misc. App No 355 of 2012*** for the submission that mere statements without evidence cannot be used to determine such status, and that Article 159 was not intended to rubbish all other statutory procedural requirements and would only come into aid where it is clear that the procedural technicality it is sought to cure would be for the wider interest of justice.

Determination

15. I have considered this petition and the responses thereto. I have also considered submissions by counsel for the parties and the authorities relied on. The single issue raised in this petition is whether the requirement for payment of court fees in petitions challenging violation of fundamental rights and freedoms is unconstitutional.

16. The petitioner contends that the requirement for payment of court fees violates the constitutional intent of Article 22 which provides for the mechanism for enforcing the Bill of Rights and in particular Article 23(3)(c) which provides that no ***fee may be charged*** for commencing proceedings under Article 22. The respondents on their part contend that there is no violation of the constitution and that the provision in the ***Mutunga Rules*** requiring payment of court fees is the same as that in the Civil Procedure Rules hence there is no unconstitutional intent. According to the respondents, there is still an opportunity for any person who is unable to pay court fees to seek exemption from the registrar thus no one suffers for reason of inability to pay court fees.

17. Article 23 is important in our constitutional dispensation as it provides for the authority of courts to uphold and enforce the Bill of Rights. Article 22(3) confers on the 1st respondent power to make rules for the manner of initiating proceedings for enforcement of the Bill of Rights and states that (c) "***no fee may be charged***" for commencing such proceedings. Pursuant to Article 22(3), the 1st

respondent promulgated The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, *The Mutunga Rules*, which govern proceedings initiated under Article 22 of the Constitution for protection and enforcement of fundamental rights and freedoms.

18. Rule 3(1) of the Rules provides for the extent of the application of the rules stating that the rules apply to all proceedings made under Article 22 of the constitution. Sub rule 2 states that the overriding objective of the rules is to facilitate access to justice for all persons as required under Article 48 of the constitution. According to rule 3(3) the rules are to be interpreted in accordance with Article 259(1) and are to be applied with the aim of advancing and realizing (a) rights and fundamental freedoms embodied in the Bill of Rights and (b) values and principles in the constitution. Sub rule 4 states that the court in exercising its jurisdiction under the rules should facilitate the just, expeditious, proportionate and affordable resolution of all cases. Rule 3(5) provides that for purposes of furthering the overriding objective, the court should handle all matters presented before it to achieve;- (a) just determination of the proceedings, (b) efficient use of the available and administrative resources (c) timely disposal of proceedings ***at a cost affordable by the respective parties*** and use of appropriate technology among others.

19. Rule 33 provides that ***there shall be paid in respect of all proceedings under these rules the same court fees as are payable in respect of the civil proceedings in the High Court in so far as the same are applicable***. That notwithstanding, Rule 34 provides that ***a person who wishes to be exempted from paying court fees may apply to the registrar***. The petitioner contends that rules 3(5) (c) 33 and 34(1) violate Article 22 of the Constitution in so far as they prescribe for payment of court fees in petitions challenging violation and or infringement of fundamental rights and freedoms.

20. This being a challenge to the constitutionality of the rules, the court has to bear in mind principles underlying statutory interpretation. First, rule 3(3), of the rules states that the rules be interpreted in accordance with Article 259(1) so that they advance the purposes and values which they stand for. In that regard, the rules should be given a purposive interpretation to advance the values and principles in the Bill of Rights.

21. The Court should also as much as possible read a statute or statutory provision in a way that will aid in achieving its fundamental values as well as examine the object and propose of the Act or statutory provision including rules. Most importantly, the court should read the statute or statutory provision in so far as is possible to be in conformity with the Constitution. In ***re Hyundai Motor Distributors (Pty) Ltd v Smit No [2000] ZALC12:2001(1)SA545(CC),200(10)BCL1079 CC ZALC12:2001(1)*** the Constitutional court of South Africa observed that it is the duty of a judicial officer to interpret legislation to be in conformity with the constitution so far as this is reasonably possible. That means the court should as much as possible read the statute or a statutory provision to be consistent and only declare it unconstitutional or void where it is impossible to rationalize or reconcile it with the constitution or the Act.

22. 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. It states at sub Article (3) that the Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that—(a) the rights of standing provided for in clause (2) are fully facilitated; (b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation; and more importantly, that (c) ***no fee may be charged for commencing the proceedings***;

23. Flowing from this Article, the 1st respondent promulgated the *Mutunga Rules* whose rule 33 provides that ***there shall be paid in respect of all proceedings under these rules the same court fees as are payable in respect of the civil proceedings in the High Court in so far as the same are applicable***. The petitioner argues that this rule in so far as it requires that one pays fees before instituting a petition challenging violation of his rights and fundamental freedoms, is violative of Article 22(3)(c) and the constitutional principle of access to justice.

24. I have given due consideration to the petitioner's arguments in support of this contention but I am not persuaded that the impugned rules are unconstitutional. First, Article 259(1) requires that the constitution be interpreted in a manner that promotes its purpose and principles; advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law and contributes to good governance. This must also be the case with regard to the impugned rules which are normative derivatives of the constitution and they state that they be so interpreted in rule 3(3). Second, the constitution is a living document and, therefore, it must not be given a rigid and technical interpretation. Rather it should be broadly, liberally and purposively be interpreted to meet the values and principles of our constitution.

25. Article 22(3) (c) provides in plain language, that no fees *may be paid* in cases of enforcement of fundamental rights and freedoms. It is important to note that the Article does not state that no fees “*shall*” be paid. By using the words “*no fees may be paid*”, the words are, in my view, permissive and must be interpreted to mean fees should be paid except where circumstances may not allow. That is Article 22(3) (c) should be interpreted to mean fees may not be payable only in certain instances. Taking Article 22(3) (c) into account, the 1st respondent promulgated rule 34 which provides that a person who wishes to be exempted from paying court fees may apply to the registrar for such exemption. This view is in line with the rules of construction that require words be given their true and natural meaning where necessary and avoid a technical interpretation that would distort the intention of the law giver.

26. In that regard, while interpreting a statute or statutory provision, the court must look at both the text and context in order to ascertain the true legislative intent. In *Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd.*, [1987] SCR (2) 1, the Supreme Court of India stated that interpretation must depend on the text and the context because they are the basis of interpretation; that if the text is the texture, context is what gives the colour. Neither can be ignored but both are important and that a statute is best interpreted when we know why it was enacted.

27. Ngcobo, J. writing for the Constitutional Court of South Africa, stated in *Bato Staff Fishing (PTY) Ltd v Minister of Environmental Affairs and Tourism and others* [2004] ZACC 15; 2004(4) SA 490(CC); 2004(7) BCLR 687(CC) that the technique of paying attention to context in statutory construction is now required by the Constitution section 39(2) that provision introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the spirit purport and objects of the Bill of rights. And In *Commercial Tax Officer, Rajasthan v M/s Binan Cement Ltd* [2014] SCR, the Supreme Court of India emphasized on the importance of context in the interpretation of statutes observing that the court should examine every word of a statute in its context and must use context in its widest sense.

28. The petitioner’s complaint as I have already pointed out is that whereas the constitution states that no fees may be charged, rule 33 provides that fees shall be paid. *Mr. Nyauchi* has interpreted the words used in Article 22(3) (c) *no fees may be paid to* mean “*no fees shall be paid*” and has made extensive submissions on it arguing that rule 33 is in conflict with the constitution. In my respectful view, I don’t agree with learned counsel’s interpretation. As already adverted to above, the constitution as the foundation of all laws must not be interpreted in a technical and constricted manner as learned counsel seems to suggest. The words *no fees may be paid* are used in a permissive manner that cannot be interpreted to mean *no fees shall be paid* as that would distort the true intention of the framers of our constitution.

29. Article 22 of the constitution being at the core of the Bill of Rights, provides that no fees may be paid and that should be read in context as an exception to those persons that would wish to institute claims for violation of their rights and fundamental freedoms but are unable to pay fees so that payment of court fees should not be a hindrance to the right of access to justice as provided for in Article 48 of the Constitution. It was in that context that the 1st respondent enacted rule 34 that enables those unable to pay court fees to apply to the registrar for exemption. This is so given that inability to pay fees is a matter of fact that must be established otherwise the essence of Article 22(3) (c) would be defeated if everybody was exempted from paying court fees.

30. The rationale of Article 22(3) (c) was that all persons have and must exercise their right of access to justice regardless of their financial status. However, those able must pay court fees while those that are unable, must not be denied the right to access courts. I am therefore not persuaded by the petitioner’s contention that the impugned rules are unconstitutional nor have an unconstitutional effect.

31. As a principle of statutory construction it is the duty of the court where possible, to construe a statute or statutory provision (including rules and regulations) in a manner that brings them in harmony with the constitution, and only declared them inconsistent or invalid where the court is unable to reconcile them with the constitution or the statute.

32. Having taken the totality of the petition into account, considered parties’ submissions and applied my mind to the constitution, the law and precedent, I come to the inescapable conclusion that this petition is unmeritorious and is for dismissal. Consequently, the petition dated 22nd March 2017 and amended on 19th September 2017 is declined and dismissed with no order as to costs.

Dated, Signed and Delivered this 17th Day of September 2018.

E C MWITA

JUDGE



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