



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 69 OF 2020

CONSOLIDATED WITH

PETITION NOS. 68, 70, 71, 72, 74, 75 & 76 of 2020

BETWEEN

BEATRICE WANGUI MACHARIA & 6 OTHERS.....PETITIONERS

AND

THE ATTORNEY GENERAL.....RESPONDENT

RULING

THE PETITIONS

1. The Petitioners in the instant Consolidated Petitions dated 26th February 2020 are seeking the following similar reliefs: -
 - a) *A declaration that the Petitioner's rights under section 70, 71(1), 72(1), 75 (1) (2), 79(1), 81(1) and 82(1) (2) (3) (5) of the Repealed Constitution of Kenya 1963 were violated by the Government of Kenya.*
 - b) *A declaration that the Petitioner's rights under Article 31, 12 and 17 of the Universal Declaration of Human Rights, 1948 relating to the protection of private property under the law were violated by the Government of Kenya.*
 - c) *A declaration that the Petitioner's rights under Article 3, 12 and 17 of the Universal Declaration of Human Rights 1948, were violated.*
 - d) *A declaration that the Petitioner's rights and legitimate expectation to fair Administrative action under Article 47 of the Constitution of Kenya have been breached by the Government of Kenya.*
 - e) *Special Damages under Article 23(3) (e) of the Constitution of Kenya 2010 in respect of the value of the properties that were lost and destroyed as under paragraph 6 of the petitions at Kshs. 525,900/=, 965, 159/=, 230,760/=, 987,000/=, 626,400/=, 283,000/=, 292,000/= and 186,2020/= respectively, plus interests thereon at Commercial Bank Rates from 1992 until payment in full.*

- f) *General damages under Article 23(3) (e) of the Constitution of Kenya 2010 in favour of the Petitioner as against the Government of Kenya being compensation for the Government's violation of the Petitioner's rights under Articles 28, 29, 38, 39, 40, 47, 48 and 64 of the Constitution of Kenya 2010 and Articles 3, 12 and 17 of the Universal Declaration of Human Rights 1948.*
- g) *Interest on all monetary awards, at Court rates from the date of judgment until payment in full.*
- h) *Costs of this petition and interests thereon at Court rates from the date of filing suit until payment in full.*
- i) *Any other or further relief that the Court may deem just in the circumstance.*

THE PETITIONERS' CASE

2. The Petitioners' case as presented in the Petitions and supporting affidavits sworn by the Petitioners on 26th February 2020 is that, they were victims of the politically motivated ethnic clashes that erupted in the year 1992 and 1997 throughout the different parts of the country and more specifically in the Rift Valley and as a result they suffered loss as pleaded in their Petitions.
3. The Petitioners herein are registered members of Human Resettlement Disaster Care (HUREDICA) which was founded in the year 1992- 1993 by victims of the politically instigated tribal clashes while living in refugee camps, churches and other settlements in various parts of the expansive Rift Valley province.
4. The said society through its officials on 2nd August 2011 filed Petition 170 of 2011 in the High Court Constitutional and Human Rights Division Court against the Attorney General and were granted leave to each file individual Petitions seeking compensation for the infringement of their constitutional rights which is the basis for these Petitions.
5. The Petitioners averments are that they were deprived of their Fundamental Rights and freedoms as provided for under *Sections 70, 71(1), 72(1), 75(1) (2), 79 (1), 81(1) and 82(1) (2) (3) (5) of the repealed Constitution of Kenya*. Further, the Government failed to carry out its obligations under *Articles 3, 12 and 17 of the Universal Declaration of Human Rights 1948* to respect and protect the Petitioners' private property as well as the Petitioners' safety and security.
6. It is contended that the government of Kenya also failed to observe its obligations enshrined under *Articles 3, 5 and 14 of the African Charter on Human and Peoples Rights* leaving the responsibility on the Government of Kenya to protect and enact legislation that secures equal protection of its citizens before the law, secures dignity or security of the person and right to property.

RESPONDENT'S CASE

7. The Respondent filed Grounds of opposition dated 4th November 2021 on 5th November 2021. The grounds are that-
 - i) *That the petitioner has not demonstrated before the Honourable Court how the respondent has violated her constitutional rights.*
 - ii) *The Petition is time barred and the claim is unlawful detention offends the express provisions of Law i.e Section 3 of the Public Authorities Limitation Act therefore an abuse of the court process and ought to be dismissed.*
 - iii) *It would be difficult for the respondent to obtain relevant public records in opposition of the petition after a period of 33 years since those records are not held by the respondent indefinitely by public entities but are disposed of after sometime as guided by the applicable Acts of Parliament and Regulations.*
 - iv) *The Petition is prejudicial to the Respondent since it will be difficult to procure and trace witnesses 33 years after the occurrence of the alleged events.*

- v) *The Petitioner has not disclosed why it took her so long to bring this Petition to court and therefore is guilty of laches.*
- vi) *The orders sought by the petitioner are not tenable against the Respondents because the petitioner has not identified the perpetrators or the names of the perpetrators involved in the alleged acts complained of.*
- vii) *The exact dates of the occurrence of the acts complained of are not disclosed in the petition or supporting affidavit and it is difficult to ascertain if indeed they occurred.*
- viii) *The Petitioner has not disclosed if she reported the acts complained of in any police station or post and hence it is difficult to ascertain the veracity of her allegations.*
- ix) *The Petitioner has not disclosed how the government instigated or supported the alleged tribal clashes and hence her allegations remain unsupported.*
- x) *The Petitioner has failed to disclose the exact role played by the unnamed administration police officers or national government administrative officers in the tribal clashes and this render her allegations unproved.*
- xi) *The petition offends the provisions of sections 106 and 107 of the Evidence Act on the burden of proof as mere generalized assertions and allegations have been made without any such supporting evidence and hence the Petition is fundamentally defective.*

RESPONDENT'S APPLICATION

8. The Attorney General filed an application dated 6th December 2021 seeking the following orders:-

- a) *Spent*
- b) *that this Honourable Court be pleased to review, set aside, and / or vary the directions made on 2nd December 2021 directing that since the Petition was undefended, judgment be delivered on the matter on 10th March, 2021 and all consequential orders thereto.*
- c) *that cost of the application be in the cause.*

9. The Application is premised on the grounds on the face of the application and on the Affidavit of Patricia A. Chibole sworn on even date. The grounds are, that:-

- i) *This Court issued directions on 2nd December 2021 directing that judgment in the matter be delivered on 10th March 2022.*
- ii) *The aforementioned direction was issued on the wrong indication that the Respondent had not defended the petitions yet it had filed its grounds of opposition dated 4th November 2021 on 5th November 2021 and served on the petitioners' counsel on even date.*
- iii) *On 2nd December 2021, the Respondent's counsel logged into the proceedings but was unable to address the court on the issue of filing and services of responses due to technological difficulties.*
- iv) *Unless granted the orders sought, it will be derived an opportunity to be heard contrary to the principles of Natural justice.*
- v) *It is in the interest of justice that the orders sought be granted.*
- vi) *The Petitioners will not suffer any damage that is not curable by award of costs in this application.*

vii) *Application has been made without undue delay hence orders sought should be granted.*

10. The deponent reiterated the facts and the grounds on the face of the application. The Respondent further deposed that the delay in filing the response was occasioned by a colleague and as such mistake of counsel should not be visited upon the Respondent.

PETITIONERS' RESPONSE

11. The Petitioners filed a Replying Affidavit by Allan George Kamau sworn on 19th January 2022. He deposed that the Respondent on 10th June 2020 sought for 60 days to file response to the Petition which was granted but the Respondent failed to file response.

12. On 12th July 2021, the Respondent was granted a final chance to file its response and the matter scheduled for hearing on 13th October 2021 where upon it proceeded ex parte and the Petitioners granted 21 days to file written submissions which they did awaiting judgment slated for 10th March 2021.

13. It is further averred that the objections by the Respondent were filed after the hearing and during the filing of submissions stage without leave of court as required. Hence, allowing this application will greatly prejudice the petitioners and should not be granted.

ANALYSIS AND DETERMINATION

14. Having carefully considered the parties pleadings and submissions I find that a single issue arise for determination:-

A. WHETHER THE RESPONDENT HAS MET THE THRESHOLD FOR REVIEW OF THE COURT'S ORDER.

15. It is not disputed in this matter that the Respondent was granted numerous chances to be able to file its response to the Petitions. The Respondent has indicated that it filed its grounds of opposition dated 4th November 2021 on 5th November 2021 and served the same upon the Petitioners' counsel. It is also Respondents case that during the hearing on 13th October 2021, the Counsel for Respondent, experienced technological issues as a result of which she was unable to address the Court on the said filed documents. The Petitioners' counsel on the other side did not bring to the attention of the court the said filed document.

16. The Petitioners have argued that the Respondent has displayed laxity on its part and that the application if allowed will prejudice them. The Petitioners have also argued that leave was never sought before the Respondent filed its documents as pleadings had already closed.

17. ***Rule 16 (1) of The Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and procedure Rule 2013*** (otherwise referred to as the "***Mutunga Rules***") provides:-

"If the Respondent does not respond within a time stipulated in Rule 15 the Court may hear and determine the petition in the Respondents absence."

18. ***Rule 16 (2) of the Mutunga Rules*** states that "***the Court may set aside an order made under sub-rule 1 on its own motion or upon an application of the Respondent or a party affected by the order."***

19. ***Rule 25 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*** provides for setting aside, varying or discharging Courts orders. It states that "***an order issued under Rule 22 may be discharged, varied or set aside by the Court either on its own motion or on application by a party dissatisfied with the order."***

20. The instant application is brought pursuant to ***Rule 25 of the Mutunga Rules***. The Respondent is clearly dissatisfied with the order issued by this court on 2nd December 2021. On the said date, this court directed that this matter be slated for judgment on 10th

March 2022. The Respondent had by then filed its Grounds of opposition to the Petition on 5th November 2021 but was unable to address the Court on the issue due to technological issues.

21. It is the Respondents case that the court in error proceeded to grant the said judgment date assuming that these matters were unopposed/undefended. The Petitioners' counsel did not address the Court on the said grounds of opposition or at least inform the court of the same. It is clear that the hearing proceeded on 13th October 2021 and the grounds of opposition were filed way later and without the leave of the Court. It is also clear that the Grounds of opposition were not brought to the attention of the court on 2nd December 2021. The Court therefore made its order based on the prevailing circumstances.

22. The Respondent has urged that it is in the interest of justice that it should be heard and that any delay or inconvenience on the Petitioners can be remedied by way of costs. The issue to address is whether the Respondent has met the threshold for setting aside the order or to arrest the judgment so to speak. The Respondent like any other party in any proceedings, and on considering the facts and circumstances of this application I no doubt find that the Respondent has the right to be heard and has met the threshold for setting aside or removing the orders made herein as was held in *Gulf Energy Limited v Rubis Energy Kenya PLC [2021] eKLR*. Further, the *Constitution of Kenya, 2010* provides for the right to be heard and fair administration of justice (see **Article 47 and 50 of the Constitution of Kenya, 2010**). *Article 25 of the Constitution of Kenya* also provides for the rights that cannot be limited being right to fair hearing.

23. The Respondent had also in its Supporting Affidavit sworn by Patricia Chibole, indicated that the failure by the Respondent to file responses to the Petition despite numerous chances from the Court was occasioned by the previous counsel handling the matter and as such pleads for leniency of this court and urges it not to visit the mistake of counsel upon it. In my view, I do agree with the Respondent that the mistake of counsel should not be visited upon an innocent litigant as was rightly observed in the case of *Philip Chemwolo & Anor. Vs Augustine Kubende (1982 – 88) KAR 103* where Apolo, Judge rendered himself thus:-

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merits I think the broad equity approach to this matter is that unless there is fraud or intention to overreach there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline”.

24. The Petitioners herein have not adduced any evidence to the effect that there is any fraud or any intention to overreach as cited in the above case. The Petitioners have also not proved that the error or default cannot be put right by payment of costs.

25. I have also looked at the grounds of opposition and I note that the Respondent has substantively responded to the Petitions. The issues raised therein can only be challenged when the matter is set down for hearing and each party be afforded an opportunity to ventilate its case so that the Court can determine the matter on merit.

26. The Petitioners stands to suffer no prejudice if the orders sought for by the Respondent are granted as prayed. The Petitioners have not in any case demonstrated how they will be prejudiced or any hardship they will face if the Respondent is granted the opportunity to buttress its case. In any event at the hearing thereof, the Petitioners will have an opportunity to adduce evidence to successfully prove their claims and challenge the Respondent's evidence and assertions before the Court makes a final determination on the matter. This will in my view result in fair trial for both sides.

27. The Petitioners in this case I find that they can reasonably be compensated by way of costs for any delay occasioned. In my view, the application should be allowed subject to the Respondent paying costs for the inconvenience on the Petitioners.

28. *The upshot is that the Notice of Motion dated 6th December 2021 is allowed in following terms:-*

a) The Courts decision made on 2nd December 2021 directing that since the Petitions were undefended Judgment be delivered on the matter on 10th March 2022 and all consequential orders thereto be and are hereby reviewed, set aside and accordingly varied by arresting the judgment set for 10th March 2022.

b) The Respondents responses are accordingly admitted and matter taken as defended.

c) Parties do put in submission. The Petitioner do file and serve submission within 14 days from the date of this Ruling. The Respondents do file submission in response within 14 days from the date of service with Petitioners submissions.

d) The Petitioners are awarded throw away costs assessed at Kshs.20,000/- to be paid by Respondents within 60 days from the date of the Ruling.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 10TH DAY OF MARCH, 2022.

.....

J. A. MAKAU

JUDGE OF THE HIGH COURT OF KENYA



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