



Mathenge & another v Inspector General of Police & 4 others; National Commission on Human Rights & 3 others (Interested Parties) (Constitutional Petition E048 of 2023) [2024] KEHC 3125 (KLR) (14 March 2024) (Ruling)

Neutral citation: [2024] KEHC 3125 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION E048 OF 2023**

**A. ONG'INJO, J
MARCH 14, 2024**

BETWEEN

**JOHN MATHENGE 1ST PETITIONER
THE CENTRE FOR MINORITY RIGHTS AND STRATEGIC
LITIGATION 2ND PETITIONER**

AND

**INSPECTOR GENERAL OF POLICE 1ST RESPONDENT
SALIM SAID KARAMA 2ND RESPONDENT
ATHMAN AHMED 3RD RESPONDENT
THE ANTI-LGBTQ MOVEMENT 4TH RESPONDENT
MOHAMED ALI 5TH RESPONDENT**

AND

**THE NATIONAL COMMISSION ON HUMAN RIGHTS . INTERESTED PARTY
AMNESTY INTERNATIONAL KENYA INTERESTED PARTY
THE KENYA HUMAN RIGHTS COMMISSION INTERESTED PARTY
THE NATIONAL COHESION AND INTEGRATION
COMMISSION INTERESTED PARTY**

RULING

1. The Petitioners herein filed an Amended Petition dated 6.10.2023 by leave of the court seeking: -



- i. A declaration that the right under Article 37 of the Constitution of Kenya to assemble, to demonstrate, to picket and to present petitions to public authorities is not available if the participants in the demonstration intend to breach Article 33 (2).
 - ii. A declaration that the 2nd to 5th Respondents are in breach of Article 33(2) of the Constitution in respect to their anti-LGBTQ demonstrations.
 - iii. An order to issue prohibiting the 2nd to 5th Respondents from calling for extra judicial killing, lynching, punishing, stoning, forcible conversion or any other way of harming LGBTQ+ identifying persons, allies, businesses and homes, expulsion from Kenya or any part of Kenya of LGBTQ+ identifying persons or closure of organizations serving LGBTQ+ identifying persons.
 - iv. A declaration that LGBTQ+ citizens are entitled to the protection afforded by Article 12 of the Constitution their sexual and gender orientation notwithstanding.
 - v. A declaration that LGBTQ+ community in Kenya is entitled to without prejudice to any other rights and freedoms that it is entitled to the rights and freedoms in Articles 25, 26, 27, 28, 29, 31, 32, 33, 36, 39, and 43 of the Constitution .
 - vi. An order directed to the 1st Respondent and the 4th Interested Party to remove from public spaces all posters, banners, articles, and other communication that are in vilification of, call for hatred of, and violence against LGBTQ+ community in Kenya.
 - vii. A declaration that the actions of the 2nd, 3rd, 4th and 5th Respondents are in breach of the rights and freedoms of the LGBTQ+ community guaranteed in Articles 26, 27, 28, 29, 31, 32, 33, 36, 39, and 43 of the Constitution .
 - viii. An order of prohibition be issued prohibiting the 1st Respondent from issuing licenses or permission to the 2nd, 3rd, 4th and 5th Respondents to hold demonstrations in public spaces against the LGBTQ+ communities in Kenya.
 - ix. A declaration that the 5th Respondent is in breach of Article 73, 74 and 75 of the Constitution .
 - x. Any other relief that this court deems fit to grant under the circumstances.
 - xi. Costs of the Petition.
2. Concurrent with the above Petition, the Petitioners filed Notice of Motion application dated 14th September 2023 under Certificate of Urgency together with the Petition herein dated 14th September 2023 seeking that the court issues conservatory orders restraining the 2nd, 3rd and 4th Respondents from marching in public spaces in demonstration against LGBTQ+ community in Kenya on the 15th day of September 2023 and on any date thereafter pending the hearing and determination of the application and Petition respectively.
 3. Conservatory order was also sought seeking that the 1st Respondent, the Inspector General of Police be restrained from allowing the 2nd, 3rd and 4th Respondents or anyone acting on their behalf to march in public places in demonstration against LGBTQ+ community in Kenya on the 15th day of September 2023 or on any date thereafter pending the hearing and determination of the application inter partes and the Petition respectively.
 4. The application was supported by grounds on its face and supporting affidavit of John Mathenge.



5. A further application by the petitioners is dated 12th October 2023 and seeks conservatory orders to restrain the 2nd Respondent - Salim Said Karama, 3rd Respondent – Athman Ahmed, 4th Respondent – Anti LGBTQ Movement, and 5th Respondent – Mohamed Ali, from calling on or inciting members of the public to carry out extrajudicial killing, lynching, stoning, forcible conversion or any other means of harming LGBTQ+ identifying persons and their homes, expulsion of LGBTQ+ identifying persons from Kenya or any part of Kenya, or closure of organisations serving LGBTQ+ identifying persons.
6. It is also sought that pending the hearing and determination of the petition, this court issues a conservatory order restraining the 2nd to 5th Respondents from calling on or inciting members of the public to carry out extrajudicial killings, lynching, punishing, stoning, forcible conversion or any other means of harming LGBTQ+ identifying persons and their homes, expulsion from Kenya or any part of Kenya of LGBTQ+ identifying persons or closure of organisations serving LGBTQ+ identifying persons.
7. The application is supported by the annexed affidavit of John Mathenge.
8. The application was premised on grounds on the face of the application that the LGBTQ+ demonstrations were to take place on a weekly basis on every Friday until either all LGBTQ+ identifying persons are expelled from the country, that the 2nd to 5th Respondents incited the public to murder and expel LGBTQ+ identifying citizens from the country without any consequences from the police, that the 1st Respondent was unwilling to take action to stop the incitement and threats despite reporting of the criminal actions, that the 5th Respondent called on demonstrators to ignore the law of the court and to follow the law of God not to wait for the police to act but to quickly deal with LGBTQ+ identifying members in accordance with the Biblical and Sharia law both of which he said required believers to kill LGBTQ+ identifying persons, and that the call for killing of the LGBTQ identifying population has immediate adverse effects on the LGBTQ identifying persons and the rule of law in general.
9. That the said adverse effects include the 2nd to 5th Respondents incitement of members of the public to commit crimes, 2nd to 5th Respondents supporting impunity, members of the LGBTQ+ living in fear, hiding and not going out to work, run errands or seek services, and many have had to flee neighbourhoods, human rights violations against LGBTQ+ identifying members e.g. hate speech, verbal and physical assaults, and eviction from residences, organizations that offer services to LGBTQ+ identifying populations had to close down out of fear of attacks and the latter can no longer access services including ARVs and PEP, that LGBTQ+ identifying members are being subjected to severe mental stress, and businesses suspected to be allied to the LGBTQ+ populations are at risk.
10. In response to the applications, Mr. Makuto, Senior Litigation Counsel for the Attorney General, filed Grounds of Opposition dated 1st October 2023.
11. The 2nd and 3rd Respondents filed a joint Replying Affidavit dated 30th October 2023.
12. The 5th Respondent filed a Replying Affidavit dated 30th October 2023.
13. The 2nd, 3rd and 5th Respondents filed a Notice of Preliminary Objection dated 30th October 2023.
14. The Notice of Preliminary Objection was to the effect that: -
 1. The Amended Petition does not disclose any Constitutional violations or threatened violations and thus the court lacks jurisdiction to hear and determine this matter as the Petitioners have failed to meet the Constitutional threshold as set out in Rule 10 (2)(d) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013* as



enunciated in the well pronounced case of *Anarita Karimi Njeru as cited in the case of Mumo Matemu v Trusted Society of Human Rights Alliance and 5 Other* [2013] eKLR.

2. That the Notice of Motion applications are defective, have no legs to stand on and are incapable of success as they are anchored on an amended Petition which fails to support any of its raised averments contrary to Rules 11(1) and (2) of the of *Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013*.
 3. That the Notice of Motions applications and the Amended Petition are incompetent as against the 4th Respondent as the 4th Respondent is a non-existent legal entity in consonance with Article 260 of the *Constitution* .
 4. That the Amended Petition is an abuse of the court process as it raises outrageous allegations without supporting documentation contrary to Rule 11 (2) of the Constitution of *Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013*.
 5. That the annexures in the Supporting Affidavits to the Notice of Motion applications dated 14th September 2023 and 14th October 2023 amount to hearsay, fabrication and fail to meet the threshold for the production of electronic evidence spelt out in Section 106 A and 106 B (4) of the *Evidence Act*.
 6. That the Petitioners have wrongly invoked the jurisdiction of the Constitutional Court by circumventing alternative redress in law and procedure provided through statute.
15. Directions were taken on 29th November 2023 in regard to the Preliminary Objection to be heard first by way of written submissions. Parties were granted time to file submissions and a date for highlighting fixed for 24.1.2024. On 15.1.2024, additional time was granted to the Petitioners, to the 1st Interested Party and the Attorney General to file their response as they had not complied. A date was fixed for highlighting of submissions on 7.2.2024.
 16. On 7.2.2024, Mr. Hassan Advocate appeared for the 2nd, 3rd and 5th Respondents. There was no representation for the Petitioners, the 1st Respondent and the Interested Parties. This matter was therefore fixed for a ruling on the Preliminary Objection.

Analysis And Determination

17. In consideration of the Preliminary Objection and the Submissions filed herein by the parties, the issue for determination is whether the 2nd, 3rd and 5th Respondents have satisfied the court to sustain the Preliminary Objection.
18. In the case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* [1969] EA 696, it was observed 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. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case Sir Charles Newbold, P. stated:

“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise



of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

19. In *Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & 3 Others*, Application No. 50 of 2014, [2015] eKLR it was held that: -

“Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”

20. In consideration of the authorities cited above on what constitutes pure points of law, the court is to determine whether:
- a. Any pure point of law has been raised in the preliminary objection; and
 - b. The facts in issue are settled
21. The 2nd, 3rd and 5th Respondents have claimed that the amended Petition does not disclose with precision any Constitutional violations or threatened violation in the manner prescribed in Rule 10(d) of *Mutunga Rules* and that the procedure is mandatory and if not observed, the Petitioners cannot hide or be saved by the oxygen principles. For the Petitioners to convincingly demonstrate how their Constitutional rights have been infringed, there has to be hearing of the substantive Petition. They have to be put in the witness box so that they give evidence of the injuries suffered as shown in page 10 of the Petition. The fact that the 2nd, 3rd and 5th Respondents have said that the Petitioners have not demonstrated how their constitutional rights have been infringed is a contested fact.
22. In regard to ground 2, the defect of pleadings is not a ground upon which a preliminary objection can be raised and that ground cannot sustain the preliminary objection.
23. On the 3rd ground, the identity of the 4th Respondent is in question and the court will require to verify whether the 4th Respondent is a legal entity that can be sued and can sue. Being that the status of the 4th Respondent is contested again, that is a ground that cannot sustain a preliminary objection.
24. On ground 4 whether an amended petition is an abuse of the court process because allegations are said to be outrageous and without any supporting documentation and goes against the Mutunga Rules. The provisions of Mutunga Rules are not cast on stone and they are not mandatory. The same rules provide that a petition may be filed orally or by way of a letter or in any other informal documentation which discloses a denial, violation, infringement or threat to a right or fundamental freedom. Under Rule 12, the Registrar is obligated to avail in the registry a prescribed form to assist petitioners who bring oral applications to have them deduced in writing.
25. On the 5th ground, the 2nd, 3rd and 5th Respondents are arguing that the annexures to the supporting affidavits amount to hearsay, fabrication and fail to meet the threshold for the production of electronic evidence as spelt out in Section 106 A and 106 B of the *Evidence Act*. This matter is still at its infancy and it is premature to preempt that the Petitioners will produce electronic evidence before pre-trial proceedings are conducted and directions taken on how the matter will be heard.
26. On the issue of whether jurisdiction of this court has been invoked prematurely as shown in ground 6, this court has not been shown that there is any other matter in court whether civil or criminal that would address the grievances that are alleged by the Petitioners herein and as such, the court cannot deny them an audience by sustaining the preliminary objection.



27. The upshot of the analysis of the preliminary objection is that the petitioners have not shown that there is any pure point of law that warrants the striking out of the petition herein. There are also many issues of fact that are contested as is shown by the several grounds raised by the 2nd, 3rd and 5th Respondents, and the long submissions by the Petitioners, the Respondents and the 2nd Interested Party.
28. In the circumstances, the preliminary objection herein is dismissed. This matter will be mentioned before the presiding judge in Constitutional Human Rights and Judicial Review Division of the High Court for directions for the hearing of the pending applications and/or petition on 16.4.2024. Mr. Maundu Advocate to issue Mention Notice to parties who are absent.
29. Costs of the Preliminary Objection to be borne by the parties.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 14TH DAY OF MARCH 2024**

**HON. LADY JUSTICE A. ONG'INJO
JUDGE**

In the presence of: -

Etropia- Court Assistant

Mr. Maundu Advocate for the Petitioners

Mr. Makuto present for the 1st Respondent

Ms. Natasha Advocate for the 2nd, 3rd, 4th and 5th Respondents

Ms. Nabwana present for the 2nd Interested Party

**HON. LADY JUSTICE A. ONG'INJO
JUDGE**

