



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO 338 Of 2012

STEPHEN SAITOTI KAPAIKU

.....PETITIONER

VERSUS

COCACOLA SABCO NAIROBI BOTTLERS LIMITED1ST
RESPONDENT

COCACOLA AFRICAN LIMITED 2ND
RESPONDENT

AND

MINISTRY OF PUBLIC HEALTH & SANITATION.....INTERESTED
PARTY

RULING

Introduction

1. The petitioner has filed this matter alleging violation of his rights under Article 46(1)(c) of the Constitution. In his petition dated 3rd August 2012, he seeks the following orders:

- a. *An order for compensation, general damages as assessed by the court and special damages (Ksh500).*
- b. *Cost of the suit.*
- c. *Such other order(s) as this Honourable Court shall deem just.*

The Facts

2. The basis of the petitioner's claim as set out in his petition and the affidavit in support sworn on 3rd August 2012 is that on 5th November 2011, he bought two bottles of coca cola soda brand, manufactured by the respondents, in a shop in Ngong Township. He alleges that he consumed the contents of one of the bottles and then noticed that it had an impurity and or foreign object; that he was seriously injured after consuming the soda but survived the ordeal and was taken to hospital by well-wishers. He avers that he therefore claims general and special damages with respect to the incident.

3. The petitioner claims that he retained the unopened bottle of soda and after he recovered, he made a report to the Ministry of Public Health; that the unopened bottle of Coca Cola was confiscated by public health officials who advised that he should seek a court order to enable them conduct investigations to ascertain the nature of the foreign object in it. He alleges that the respondents have refused or failed to take action and remedy the situation despite demand being served upon them that his rights have been violated, and he therefore seeks compensation for the violation.

4. On 10th August 2012, the 2nd respondent issued a notice of preliminary objection in the following terms:

1. *The Petition does not raise any Constitutional issues for deliberation as envisaged under Article 46, Chapter 4 of the Constitution of Kenya 2010 and as such should be dismissed with costs.*

2. *The issues raised by the applicant are issues of Tortious Liability which are disputed which can be adequately canvassed in the Civil Division of the High Court of Kenya.*

3. This Honourable Court is being converted to a trial court to determine issues of liability and quantum which can only be done through viva voce evidence, and cross examination: until the tortious liability is determined if at all, this honourable court cannot be seized of the matter.

4. This Honourable court can only grant preservatory/ conservatory orders at the Preliminary stage, and not orders of mandamus as prayed for in the petitioner's application.

5. The Petition as drawn contravenes Rule 11-18 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court practice and Procedure Rules 2006.

6. The Petition as drawn does not meet the criteria set down by the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules 2006, as the facts therein are disputed.

7. The Petition as drawn does not meet the threshold of constitutional litigations as it does not disclose any public law issues. It falls squarely in the realm of private Law.

8. That the application is an abuse of the court process ad should thus be dismissed with costs.

The Submissions

5. In its written submissions dated 6th February 2013, the 2nd respondent contends that the petition as filed does not meet the threshold of constitutional matters as it does not raise any constitutional question. According to Mr. Njoroge, Counsel for the 2nd respondent, the claim is in essence between two private parties which should be litigated in the civil courts; that Article 21, which provides for implementation of the Constitution, imposes a duty on state and state organs to implement the Constitution and the Bill of Rights; and that it does not allow private individuals as parties to implement the Constitution.

6. The respondent submitted that the court may face a scenario in which all claims will be filed as constitutional petitions alleging violation of constitutional rights and that the constitutional court will lose its purpose as it will be deliberating on private rights instead of matters of public interest. Mr. Njoroge contended that there should be a minimum threshold with regard to what constitutes a constitutional question.

7. In his reply, Mr. Njenga, Counsel for the petitioner, relied on the petitioner's written submissions dated 16th April 2013. He contended that the petition, which is based on Article 46 of the Constitution, does in fact raise constitutional issues; that there are valid claims sought to be prosecuted; that the Preliminary Objections seek to challenge the jurisdiction of the court; that while the 2nd respondent calls for a minimum threshold to be established, no rights are weightier than others and any person with a valid claim has a right to present his claim; and whether such claim satisfies the constitutional threshold can be determined at the hearing.

8. According to Mr. Njenga, whether a claim meets such a threshold would require an evaluation that would entail making findings of fact, which is outside the purview of a preliminary objection. He therefore urged the court to allow the petitioner to have his day in court, but that should the court find that this is not a constitutional matter, it should not strike it out but should transfer it to the appropriate forum. He argued that the Constitution enjoins all parties, not just the state, to obey and apply the constitution; and there is no legal basis for saying that a constitutional petition cannot be brought against an individual.

9. Mr. Avedi for the 1st respondent associated himself with the submissions by the 2nd respondent.

Determination

10. The objections before me in effect raise one issue: Whether the petition before the court raises any constitutional issues or it is simply a private law claim dressed in constitutional garb for presentation before this court.

11. Before determining this issue, I believe it is important to address, albeit briefly, the question whether a claim for violation of constitutional rights can be brought against a private individual. This court has taken the view that in appropriate cases, a claim for violation of a constitutional right can be brought against a private individual. This view is premised on the provisions of Article 2(1) and 20(1) of the Constitution which provide that the Bill of Rights applies and binds all state organs and all persons-see the decision of the court in **Abdalla Rhova Hiribae & 3 Others-vs-The Hon Attorney General & 6 Others High Court Civil Case No. 14 of 2010; Law Society of Kenya –v- Betty Sungura Nyabuto & Another Petition No. 21 of 2010 B.A.O & Another –v-The Standard Group Limited & 2 Others Petition No. 48 of 2011 and Duncan Muriuki Kaguuru & Another –vs- Baobab Beach Resort & Spa Ltd High Court Petition No. 233 of 2012.**

12. However, whether or not a claim can be made against an individual person or company by another individual, rather than against the state, will depend on the nature of the right.

13. Tied in with this consideration is the question whether, even in those cases involving the state or public entities, every claim presented to court as a constitutional issue will be determined as such. As was stated in the case of **Minister of Home Affairs vs Bickle & Others (1985) L.R.C. Cost. 755**, cited with approval by Lenaola J in **Hon. Uhuru Kenyatta –vs- The Nairobi Star Limited High Court Petition No 187 of 2012:**

“It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be involved at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so (Wahid Munwar Khan vs. The State AIR (1956) Hyd. 22).....Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights.” (Emphasis added)

14. I also agree fully with the sentiments expressed in the case of **NM & others vs Smith and Others (Freedom of Expression Institute as Amicus Curiae) 200 (5) S.A. 250 (CC)**, which were also cited with approval by Lenaola J in **Hon. Uhuru Kenyatta –vs- The Nairobi Star Limited** (supra) that:

“It is important to recognise that even if a case does raise a constitutional matter, the assessment of whether the case should be heard by this Court rests instead on the additional requirements that access to this court must be in the interests of justice and not every matter will raise a constitutional issue worthy of attention.”

15. In the present case, the petitioner is seeking compensation for personal injuries that he allegedly suffered following his consumption of a soda manufactured by the respondents, which he alleges had impurities that made him ill. His principal claim is really a tortious claim for damages, and ultimately, the court will be called upon to decide, on the basis of the evidence tendered before it, whether there is a legitimate claim for damages against the respondents. It may well be that there was a failure by the respondents to take adequate care to protect the constitutional rights of consumers by ensuring that their products did not contain impurities, but that, in my view, is a secondary issue which a civil court, in determining the principal issue, also has jurisdiction to determine.

16. In my view therefore, the respondents are correct that this matter should never have been filed as a constitutional petition alleging violation of fundamental rights. The issue that it raises properly belongs to the Civil Division as a claim in tort.

17. Having found that this matter falls for determination before the Civil Division, what is the best course of action to follow? In the case of **Prof. Daniel N. Mugendi-vs- Kenyatta University & Others Court of Appeal Civil Appeal No. 6 of 2012**, the Court of Appeal stated as follows:

‘And in order to do justice, in the event where the High Court, the Industrial Court or the Environment and Land Court comes across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that court for hearing and determination. These three courts with similar/equal status should in the spirit of harmonization, effect the necessary transfers among themselves until such time as the citizenry is well-acquainted with the appropriate forum for each kind of claim. However, parties should not file “mixed grill” causes in any court they fancy. This will only delay dispensation of justice.

18. I agree that in order to do justice expeditiously, it is prudent to transfer cases to the appropriate division of the High Court for determination. The challenge that will doubtless arise is that given the form and procedure required for the filing of petitions alleging violation of constitutional rights by the **Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of The Individual) High Court Practice and Procedure Rules, 2006 (The Gicheru Rules)**, there may be practical difficulties in aligning petitions such as this with the requirements of the Civil Procedure Rules applicable to civil matters. This is because matters brought before the Civil Division are required to comply with the provisions of the Civil Procedure Act and Rules in order to facilitate expeditious hearing.

19. It may perhaps be more prudent for the petitioner to withdraw this petition and file a civil claim in tort against the respondents under the Civil Procedure Rules. This, however, is an option that I will leave to the election of the petitioner and his counsel.

20. The directions that I give in this matter are as follows:

i. *That this matter be and is hereby transferred to the Civil Division of the High Court for hearing and determination in accordance with the provisions of the Civil Procedure Rules.*

ii. *That the petitioner shall prior to the first appearance before the said Division make the requisite amendments to his claim in order to bring it into compliance with the provisions of the Civil Procedure Rules.*

iii. *As an alternative, the petitioner is granted leave to withdraw this petition and file a civil claim in tort in the Civil Division of the High Court or in the Chief Magistrate's Court.*

21. There shall be no order as to costs in this matter.

Dated Delivered and Signed at Nairobi this 21st day of June 2013

MUMBI NGUGI

JUDGE

Mr.Njenga instructed by the firm of Muchoki Kangata & Co. Advocates for the Petitioner

Mr. Avedi instructed by the firm of Okulo, Avedi & Co. Advocates for the 1st Respondent

Mr. Njoroge instructed by the firm of Igeria & Ngugi Advocates for the 2nd Respondent

No appearance for the Interested Party



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