



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

MILIMANI LAW COURTS

PETITION NO. 80 OF 2019

IN THE MATTER OF APPLICATION UNDER ARTICLE 22, 23, 27(4)(5), 25(c), 29(d), 35(1,2) 39(3), 40(1), 47(1, 2), 50(1, 2, 3), 53(1b, c, d, e, fii) 53(2) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF CHILDREN'S ACT SECTION 4, 5, 6,7, 13, 48

AND

IN THE MATTER OF BASIC EDUCATION ACT SECTION 4 (a, e, p, q), 28(1, 2a), 36, 51

And

IN THE MATTER OF KNEC ACT SECTION 10 & 10A

AND

IN THE MATTER OF KNEC INSTRUCTIONS, RULES, REGULATIONS & POLICIES

AND

IN THE MATTER OF REGISTRATION OF KCSE CANDIDATES AT STONEBIC HIGH SCHOOL (2018).

BETWEEN

NEHEMIAH STONE BIC MISIANI T/A STONEBIC HIGH SCHOOL..... PETITIONER

VERSUS

THE KENYA NATIONAL EXAMINATION COUNCIL (KNEC).....1ST RESPONDENT

COUNTY DIRECTOR OF EDUCATION, KIAMBU (CDE).....2ND RESPONDENT

SUB-COUNTY/DISTRICT EDUCATION OFFICER (DEO), KIKUYU.....3RD RESPONDENT

THE ATTORNEY GENERAL OF KENYA.....4TH RESPONDENT

JUDGMENT

THE PETITION

1. The Petitioner through an Amended Petition dated 8th June 2020 supported by Verifying Affidavit dated 17th June 2020 and Amended Supporting Affidavit by Mehemiah Stone Misiani sworn on 11th June 2020 seek the following reliefs:-

a. A declaration that the Certificate of Registration No. 22P00300206 issued by the 2nd Respondent and held by the Petitioner is genuine and valid.

b. A declaration that the Petitioner's right to equality and freedom from discrimination as enshrined in Article 27(4, 5) of the Constitution has been infringed.

c. A declaration that the Petitioner's right to fair administrative action as enshrined under Article 47(1) of the Constitution has been violated by the Respondents.

d. A declaration that the Petitioner's economic interest rights as enshrined in Article 46(1)(c) of the Constitution, has been violated.

e. A declaration that the Petitioner's right to dignity and respect as enshrined in Article 28 of the Constitution has been violated by the Respondents.

f. A declaration that the right of the candidates at the Petitioner's school, namely Stonebic High School, to free and compulsory Education as enshrined in Article 53(2) of the Constitution, Basic Education Act and Children's Act, has been violated by the Respondents.

g. A permanent order restraining the Respondents from arbitrarily blocking the Petitioner's registration of KCSE candidates at his school.

h. General damages for loss of business, loss of reputation/dignity/respect and for psychological torture.

i. This Honourable Court be pleased to issue such further or other orders as it may deem just and expedient for the ends of justice.

j. Costs of this suit.

THE 1ST RESPONDENT'S RESPONSE

2. The 1st Respondent filed Replying Affidavit by Befly Jemurgor Bisem, sworn on 16th July 2018 and further affidavit sworn on 17th September 2019.

3. The 1st Respondent urges the Petition is defective and that it is tasked with the responsibility to inter alia; set and maintain examination standards; conduct of public academic; technical and other National examination within Kenya at basic and tertiary levels. In its functions it is authorized under the Act to make rules regulating the conduct of examination and for all purposes incidental thereto.

4. The 1st Respondent pursuant to its powers stipulated under the Act it formulated and published a user guide for the management of Kenya Certificate of Secondary Education Examination (KCSE).

5. It is contended that the Petitioner a private school offered candidates for KCSE in 2016 but the Petitioner did not in 2017 and hence it did not exist in 2017 KCSE date base within the 1st Respondent's records.

6. It is 1st Respondent's case that under KCSE examination guidelines aforesaid, where a school fails to present candidates for the KCSE examination in any given year, the registration automatically lapses and the school is required to apply as a new centre, whereby it is inspected by the Sub County Quality Assurance officer and the report inform of a questionnaire and application form submitted to the 1st Respondent for reinstatement.

7. It is stated that the Petitioner did not apply for registration of the candidates for the 2018 KCSE examination. After realizing that he could not access his school portal for registration because of the reasons stated herein above, the Petitioner only sent an email containing a list of candidates to the 1st Respondent's Examination Management Division, which email was received on 1st March, 2018.

8. The email was received on 1st March 2018 after the deadline for registration of 2018 KCSE examination candidates which had initially been set for 28th February, 2018 before it was extended to 7th March 2018 on 2nd March, 2018. The email was therefore received outside the initial registration period and before the 1st Respondent extended this period.

9. On 15th March 2018, the 1st Respondent responded to the Petitioner's email hereinabove mentioned and informed him that he should follow the registration procedure as explained to him and submit registration materials through the Sub County Director as per the procedure and not via email. This response was also copied to the Sub County Director, Kikuyu Su County and who is also the 3rd Respondent herein.

10. On 4th March 2018 the 3rd Respondent advised the 1st Respondent, in line with procedure, that the Petitioner should not be recommended for activation since the Petitioner's registration certificate could not be authenticated.

11. The 3rd Respondent had also requested the 2nd Respondent to authenticate the registration certificate of the Petitioner. The Petitioner was also advised to register the candidates under the Kikuyu private center of which he declined.

12. Further on 4th March 2018, the 1st Respondent received official communication from the 2nd Respondent, stating that the Petitioner did not exist and the premises purported to be the Petitioner's School was in fact another school, which is Queen Esther Girls Utafiti High School. This was after Quality Assurance Officer from Kiambu County went to inspect the School.

13. It is 1st Respondent's contention that the Petitioner has at all material time been in violation of the KCSE examination regulations and in particular the 1st Respondent's User Guide for the Management of Kenya Certificate of Secondary Education Examination.

14. It is further 1st Respondent's position that the 1st Respondent has express powers donated by the Act to regulate the conduct of examinations and make rules and regulations thereof. In the instant case, the 1st Respondent exercised this power judicially and rationally.

15. It is contended that the Petitioner is seeking the intervention of this Court through deceit and should not be allowed to obtain any advantage from the proceedings herein. It is urged that this Honorable Court should exercise its discretion in favour of the 1st Respondent, for its own protection and to prevent abuse of the Court process by the Petitioner.

16. It is contended that the Petitioner is only intending to arm-twist the 1st Respondent into considering the Petitioner's demand and or intention to have his school unlawfully registered for the 2018 KCSE examinations.

THE 2ND, 3RD AND 4TH RESPONDENTS RESPONSES

17. The 2nd, 3rd, and 4th Respondents are opposed to the Petition and in doing so filed grounds of opposition dated 12th July 2018 being as follows:-

a. That the prayers ought in the Application if granted will undermine the statutory functions conferred upon the 1st Respondent by law.

b. This application is bad in law, frivolous and an abuse of the Court process.

PETITIONER'S RESPONSE TO RESPONDENTS REPLYING AFFIDAVITS

18. The Petitioner filed response to 1st Respondent's Replying Affidavit through an affidavit by himself sworn on 2nd August 2018, and further affidavit in opposition of 2nd, 3rd and 4th Respondents affidavit sworn on 2nd August 2018.

PETITIONERS CASE

19. The Petitioner is a Director of Stonebic High School, a private school located in Kikuyu sub-County, Kiambu County.

20. The Petitioner contend that the Petition became necessary since the 1st, 2nd and 3rd Respondents have destroyed the Petitioners school by:-

a. Blocking him from registering his candidates for KCSE in his schools.

b. Publishing false information about him and his schools.

c. Chasing away students from his schools.

d. Punishing his students by forcefully transferring them to mediocre schools, supplying them with sub-standard materials for KCSE Chemistry Practical examination and denying them KCSE question papers.

21. The Petitioner urge that on various dates between 25th February 2011 and 2018 the 3rd Respondent influenced the closure of the School; refused to register students of the school for KCSE; published a document titled "investigation Report for Stonebic Girls High School, alleging that there was sexual harassment at the school.

22. The Petitioner is aggrieved by alleged closure of the school by the 3rd Respondent and blocking the Petitioner's; students from returning to the school and also chasing the students from the school.

23. Further the Petitioner is aggrieved by 1st and 3rd Respondents de-registration of KCSE candidates of the Petitioner's school. Further it is alleged the 3rd Respondent through its Quality Assurance and Standards Officer disrupted KCSE Examination at the Petitioners School on 22nd October 2012.

24. In addition it is Petitioner's case that between January and March 2015, the 1st and 3rd Respondents refused to register the Petitioner's candidates from KCSE examination and maliciously claimed the Petitioner's school was operating with a fake certificate of registration. The Petitioner therefore contend the 2nd Respondent discriminately failed to perform its duty of ensuring that the Petitioner's candidates were registered for KCSE.

25. The Petitioner in the amended Petition urge that he has suffered psychological torture; financial loss; injured in his reputation and in the way and standing in public.

26. That the Petitioners candidates suffered psychological torture, their performance compromised due to hostility, sub-standard facilities and strange environment.

ANALYSIS AND DETERMINATION

27. I have carefully considered the Petition; the response as well as parties rival submissions, and from the aforesaid I find that a single issue arise for consideration thus:-

a. Whether the Petition as drawn and filed meets the required threshold for constitutional Petition.

28. The 2nd, 3rd and 4th Respondents aver that the Petition lacks merit and ought to be dismissed. Further it is urged the Petition has been overtaken by events given that the students who registered for 2018 KCSE examinations have already sat for examination and issuing the orders sought would only disrupt the KCSE examination and disrupt the students who have since been placed in other school.

29. In the instant Petition and before proceeding any further, I find it prudent to consider the question as to whether or not there is a competent constitutional Petition for determination by this Court. The principle of what constitutes a constitutional Petition was sufficiently enunciated in the case of *Annarita Karimi Njeru vs. Republic (1970) eKLR* in which principles were last restated by the Court of Appeal in the case of *Mumo Matemo vs. Trusted Society of Human Rights Allied & 5 others (2013) eKLR*.

30. The Principle established in the *Annarita Karimi Njeru case (Supra)* was that a Constitutional Petition should set out with a degree of precision the Petitioner's complaint, the provisions infringed, and he manner in which they are alleged to be infringed. The *Mumo Matemo case (supra)* simply reaffirmed the principle in the *Anarita Karimi case* when the Court at paragraph 44 of the Judgment stated as follows:-

“(44) We wish to reaffirm the principle holding on this question in Anarita karimi Njeru (supra). In view of this, we find that the Petition before the High Court did not meet the threshold established in that case. At the very least, the 1st Respondent should have seen the need to amend the Petition so as to provide sufficient particulars to which the Respondents could reply. Viewed thus, the Petition feel short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these short comings, it was not enough for the Superior Court below to lament that the Petition before it was not the “epitome of precise, comprehensive or elegant drafting, without remedy by the 1st Respondent.”

31. The 2nd, 3rd and 4th Respondents placing reliance in the principles set in the aforesaid cases contend that the current Petition does not meet the requisite threshold of a constitutional Petition. Looking at the Petition as drawn and filed it is clear that the Petition has not cited the Constitutional provisions violated nor has it set out the relevant particulars of the alleged infringements; in what manner and by which particular party to enable the Respondents to be able to respond to and/or answer the allegations on complaints.

32. In dealing and determining the issue herein, this Court is called upon to peruse the instant Petition, as drawn and filed and confirm whether the 2nd, 3rd and 4th Respondents is correct or not in their averments.

33. Upon perusal of the Petition, it is clear that the Petitioner has not demonstrated with precision the rights that he claims to have been infringed, the person who have infringed on his rights. The Petitioner has not quoted any single Article in the body of the Petition as having been violated by any of the Respondents, nor has he demonstrated how any of the Articles have been violated by the Respondents. The Articles quoted in the Petitions are under prayers but not in the body of the Petition as required.

34. It should be noted and appreciated in any suit, it is not for the Court to aid the Petitioner to present his case before the Court. It is the duty of the Petitioner to do so. In view of the aforesaid, it is evidently clear that the instant Petition, falls short of the established threshold of a constitutional Petition as it fails to disclose, with a reasonable degree of precision, the manner in which the 1st, 2nd, 3rd & 4th Respondents has violated any of the Petitioner's rights.

35. To buttress the above reliance is placed in the case of *Annarita Karimi Njeru vs Republic (No.1) [1979] KLR* 154 in which the High Court set out the considerations which should guide parties as they seek to file a constitutional reference in the high Court. The principle in this decision is that a party who alleges that his or her rights under the Constitution have been violated must demonstrate, with a reasonable degree of precision, the Articles of the Constitution that have been violated, and the manner of violation with respect to him.

36. Further the same principles were adopted in the case of *Mumo Matemu vs. Trustees Society of Human Rights Alliance & 5 others [2013] eKLR (Civil Appeal No. 290 of 2012)* where the Court of Appeal underscored the need to have a reasonable degree of precision in drafting of pleadings in constitutional litigation.

37. The mere allegation by Petitioner of violation of human right or fundamental freedoms of the applicant has been violated or is threatened with violation or has been contravened without compliance with principles set out in *Annarita Njeru case (Supra)* is not in itself sufficient to entitle an applicant to invoke the jurisdiction of this Court, it is apparent that the allegation is frivolous or vexatious or an abuse of the

process of the Court for solely for purpose of avoiding the necessity of applying in the normal way for appropriate Judicial remedy for unlawful action which involves no contravention of any human right or fundamental freedom.

38. From clear perusal of the Petitioner’s Petition, I find that it is purely civil claim disguised as constitutional Petition. Considering the current Petition the Petitioner is aggrieved by Respondents action and/or omissions, which have resulted to financial loss, defamation, closure of the institution and deregistration. The claim is civil in nature since it raises no constitutional issue and have not met the principles set out in the *Annarita Karimi Njeru case (Supra)*.

39. On reading the Petition and considering the Petition as a whole, I find the Petitioner’s claim as pleaded is premised on law of tort and is purely civil claim with clear civil remedies. To buttress the foresaid reliance is placed in the case of *Uhuru Muigai Kenyatta v. Nairobi Star Publications Limited (2013) eKLR*, cited by Githua J in *Veronica Sum v National Bank of Kenya Ltd (2016) eKLR*, where Lenaola J (as he then was) applied the holding in the Re application by *Bahadur (1968) LR C (Cost) 297* and held that;

“Where there is remedy in civil law, a party should pursue that remedy and I say so well aware of the decision in Haco Industries (Supra) where the converse may have bene expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction...”

40. In the Re-application by *Bahadur case (supra)*, the Court in *Trinidad and Tobago* it was held as follows:-

“The Constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can found a claim under substantive law, the proper course is to bring the claim under that law and not under the Constitution.”

41. In view of the aforesaid, I find that the Petition do not meet the required threshold for a Constitutional Petition. Secondly the Petition is purely civil claim disguised as a Constitutional Petition. In view whereof, I find that the doctrine of avoidance relevant. This Court therefore find that there is remedy in civil law, and the Petitioner should pursue that remedy in the civil law since not every ill in society should attract a Constitutional structure. I find that the Constitution cannot always be a general substitute for normal procedures for invoking judicial control of administrative action. The Petitioner has to follow the normal procedures in putting his claim against the Respondents. Time and again Courts have clearly expressed themselves that where infringements of rights can found a claim under substantive law, the proper cause is for the Petitioner to bring a claim under the law and not under Petition disguised as a constitutional Petition as is the case in this matter.

42. The upshot is that the Petition is without merit and is dismissed. I direct each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF FEBRUARY, 2022

.....

J. A. MAKAU

JUDGE OF THE HIGH COURT OF KENYA