REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A. C. Mrima, J.)

CONSTITUTIONAL PETITION NO. E261 OF 2021

-BETWEEN-

LARRY ODIRA SEKO.....PETITIONER

-VERSUS-

THE SENATE, PAN AFRICA

CHRISTIAN UNIVERSITY & 2 OTHERS.....1ST RESPONDENT

PAN AFRICA CHRISTIAN UNIVERSITY.....2ND RESPONDENT

DR. JOSH T. AMWANGO.....3RD RESPONDENT

JUDGMENT

Introduction:

1. As part of the Pan Africa Christian University Students' leadership, the University holds periodic elections to elect its respective students' representatives.

2. In this instant case, the elected representatives were set to be sworn in on 18th May, 2021. On the day scheduled for the swearing-in, a dispute arose as to who was to be sworn-in as the elect Organizing Secretary.

3. The Petitioner, together with other two students, physically interrupted the occasion, in protest, thereby causing chaotic interference of the ceremony. The three students were forced out of the University's premises.

4. Consequently, the three students were each served with Notice to Show Cause as to explain the happenings of the material day. In response to the letters, the three students chose to reply with a unison note, allegedly in defiance. That response informed the University to initiate a Disciplinary Committee hearing to probe the case, by conducting a disciplinary hearing on the same.

5. As guided by the Students' Manual, the three students were summoned before Disciplinary Committee to present their cases.

6. Of the three students, one had his case proceed to hearing and finalized; with a pardon verdict and a warning given. That allowed him to continue with his studies.

7. It was, however, alleged that the Petitioner was very uncooperative and frustrated the hearings. As a result, the hearing was aborted by the Disciplinary Committee, due to the Petitioner's conduct. Giving its' verdict, the Disciplinary Committee suspended the Petitioner from the University for a period of one year for reason of his indiscipline conduct.

8. The Petitioner then moved to Court on allegation of violation of his rights and fundamental freedoms, thus the instant Petition.

The Parties:

9. The Petitioner herein, *Larry Odira Seko*, is a registered student at Pan African University. The Petitioner was expecting to graduate from the University at the graduation ceremony scheduled for 9th July, 2021 with a Bachelor's Degree in Business Information Technology.

10. The 1st Respondent is one of the University's decision making bodies and it is responsible for the governance of the University.

11. The Pan African University (hereinafter referred to as '***the 2nd Respondent***' or '***the University'***) is a privately owned University established under a Charter.

12. The 3rd Respondent is employed by the University as a Dean of Students and also holds the position of the University Chaplain.

13. In order to have a comprehensive view of the dispute herein, I will reiterate the parties' cases as presented.

The Petitioner's case:

14. The Petition is dated 6th July, 2021. Evenly dated, the Petitioner also filed a Notice of Motion application seeking, *inter alia*, conservatory orders staying further implementation of the decision by the 1st Respondent, dated 25th June, 2021 holding on to the academic documents of the Petitioner as well as baring the Petitioner from graduating on 9th July, 2021.

15. In support of the Petition, the Petitioner filed a Supporting Affidavit he swore on 6th July, 2021 and also a Supplementary Affidavit he swore on 7th July, 2021. The Petitioner also filed written submissions dated 6th July, 2021and highlighted on the same.

16. It was the Petitioner's case and submissions that the Respondents infringed upon and violated his rights and fundamental freedoms by the manner the disciplinary proceedings were conducted. In particular, the Petitioner pointed out that the 3rd Respondent was one of the person whom they had a confrontation with on the day the incident occurred at the swearing-in ceremony; and that the same person was, hence, the complainant. The Petitioner wondered why the same 3rd Respondent was also an active member of the Disciplinary Committee that the Petitioner appeared before.

17. The Petitioner further submitted that he was taken through an unfair trial, that the impugned decision by the Disciplinary Committee rendered on 25th June, 2021 was never communicated to him formally, and that the Petitioner was not allowed to graduate on the 9 th July. 2021 thereby wasting time as he awaited for a future graduation.

18. In the main, the Petitioner sought the following reliefs: -

> *i) A Declaratory Order that the fundamental rights and freedoms of the Petitioner under Article 25, 27, 29, 32, 33, 46, 47, 50, 55 of the Constitution have been violated by the Respondents.*
>
> *ii) A MANDATORY INJUNCTION directing the Respondents to:*
>
> > *a. Forthwith and unconditionally include the name of the Petitioner herein, LARRY ODIRA SEKO in the 09th July 2021 graduation list and any subsequent documents thereto.*
> >
> > *b. Forthwith and unconditionally release all the academic testimonials and/or certificate belonging to the Petitioner but held by the 2nd Respondent.*
> >
> > *c. Compel the 1st & 2nd Respondents to act firmly and decisively to commence disciplinary action against the 3rd Respondent for his gross violation of the Petitioner's rights in assaulting him.*
>
> *iii) A PROHIBITORY INJUNCTION proscribing the 1st and 2nd Respondents from:*
>
> > *a. Discriminating against the Petitioner on any ground or reason, or treating him at any degree of disadvantage.*
> >
> > *b. Commencing. continuing or concluding any disciplinary process against the Petitioner or otherwise howsoever subjecting the Petitioner to any annoyance or harassment.*
>
> *iv) AN ORDER OF STRUCTURAL INTERDICT for this honourable Court to supervise compliance with its orders.*
>
> *v) General damages for the violation of the Petitioner's Constitutional rights and fundamental freedoms.*
>
> *vi) Costs of this Application be borne by the Respondent.*

The Respondents' case:

19. In opposing the Petition and the Notice of Motion application, the Respondents filed a joint Reply to Petition and a Replying Affidavit sworn by *Prof. Dionysious Kihika Kihambi*, the Deputy Vice Chancellor Academic Affairs of the University. Additionally, the Respondents filed their written submissions, *albeit* undated.

20. The case by the Respondents is that the Petitioner, together with two other students, in full view of all attendants at the Chapel, conducted themselves in an indiscipline manner during the said swearing-in ceremony thus amounting to contravention of the University's Code of Conduct. Their actions necessitated disciplinary proceedings to be initiated against them.

21. The Respondents state that, as per the University's Student manual, the three students were each individually served with Notices to Show Cause, by the 3rd Respondent herein. However, the students chose to respond with a joint note having one sentence. This according to the Respondents was not sufficient to amount to showing cause. They were required to give an explanation why disciplinary actions ought not to be taken against them.

22. The Respondents further posited that thereafter, by the students' failure to comply, the matter was escalated to the University's Disciplinary Committee who issued notices and highlighted the issues to be discussed at the hearing, as per the Students Manual.

23. It was further posited that during the hearing, the Petitioner adamantly frustrated the hearing and dared the Committee to act as it wished. In the given circumstances, the Committee made the decision, which decision was procedurally firm, fair and expedient.

24. The Respondents maintained that the Petitioner did not exhaust all the avenues available to him, in accordance with Student Manual, before moving to Court. The Respondents contended that there was a further available avenue of an appeal just in case the Petitioner was dissatisfied with the decision of the Disciplinary Committee. The avenue was an appeal to the Senate through the University Vice-Chancellor.

25. Accordingly, the Respondents contended that the Petition was premature and ought to be dismissed with costs.

Analysis and Determination:

26. This matter presents several issues for determination. However, this Court will, in the first instance, deal with the preliminary issue as to whether the Petitioner exhausted the dispute resolution mechanism in the University before approaching this Court.

27. The Students' conduct at the University is governed by the *Student Handbook* June 2016 (Revised) (hereinafter referred to as '***the Handbook***').

28. The Handbook provides in Clause 7.4 (i) (c) & (d) as follows on matters discipline: -

> ***7.4 Disciplinary Guidelines:***
>
> ***i. The Student Disciplinary Committee:***
>
> *It is the responsibility of the Student Disciplinary Committee to determine appropriate steps of disciplinary action.*
>
> *a. …*
>
> *b. …*
>
> *c. Any student who is the subject of disciplinary action before the Student Disciplinary Committee,* ***may lodge an appeal with the Vice Chancellor within thirty days*** *of the case being determined by the Senate on one or more of the following grounds:*
>
> *i. The disciplinary process involved a violation of natural justice or a violation of the Charter or Statutes,*
>
> *ii. The Committee's recommendation failed to give due weight to all evidence,*
>
> *iii. Fresh evidence has come to light that could change the verdict materially, and*
>
> *iv. The action recommended was not commensurate with all the circumstances of the offence.*
>
> *d. Provided that the grounds of appeal as stipulated in the preceding section have been specified, the Vice Chancellor shall arrange as speedily as possible for a hearing by an independent body that does not include any members of the Student Disciplinary Committee.*
>
> *The membership of the independent appeal body shall be:*
>
> *I. Vice Chancellor (Chair), and*
>
> *II. Three members of the Senate.*

The findings of this independent appeal body shall be regarded as final.

29. Before this Court ventures into the merits or otherwise of the objection, a consideration of the doctrine of exhaustion is of essence.

30. The doctrine of exhaustion in Kenya traces its origin from **Article 159(2)(c)** of the Constitution which recognizes and entrenches the use of alternative mechanisms of dispute resolution in the following terms: -

> *159 (2) In exercising judicial authority, the Courts and tribunals shall be guided by the following principles-*
>
> *(a)…*
>
> *(b)…*
>
> *(c) alternative forms of dispute resolution including resolution, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause 3.*

31. The Clause 3 referred herein above is on traditional dispute resolution mechanisms.

32. The doctrine of exhaustion was comprehensively dealt with by a 5-Judge Bench in *Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019* ***William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)*** (2020) eKLR**.** The Court stated as follows:

> *52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with* ***Article 159*** *of the Constitution and was aptly elucidated by the High Court in* ***R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR,*** *where the Court opined thus:*
>
> > *42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in* ***Speaker of National Assembly v Karume [1992] KLR 21*** *in the following oft-repeated words:*
> >
> > > ***Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.***
> >
> > *43. While this case was decided before the Constitution of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine.*
> >
> > *This is* ***Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others [2015] eKLR,*** *where the Court of Appeal stated that:*
> >
> > > *It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews…The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with* ***Article 159*** *of the Constitution which commands Courts to encourage alternative means of dispute resolution.*

33. The Court also dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

> *59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In* ***R. Vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte The National Super Alliance Kenya (NASA) (supra),*** *after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:*
>
> > *What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the* ***Shikara Limited Case (supra)****, the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also* ***Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others****.)*

60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in ***Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] eKLR****.*

62. In the instant case, the Petitioners allege violation of their fundamental rights. ***Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion****.* ***This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.***

34. The above decision was appealed against by the Respondents. The Court of Appeal in upholding the decision and in dismissing the appeal in Mombasa Civil Appeal No. 166 of 2018 ***Kenya Ports Authority v William Odhiambo Ramogi & 8 others [2019] eKLR*** held as follows: -

The jurisdiction of the High Court is derived from ***Article 165 (3)*** *and* ***(6)*** *of the Constitution. Accordingly, the High Court has unlimited original jurisdiction in criminal and civil matters, including determination of a question of enforcement of the bill of rights and interpretation of the Constitution encompassing determination of any matter relating to the Constitutional relationship between the different levels of government.*

At the High Court, we note that the learned Judges dealt with this matter under the question framed as follows: Is the court barred from considering the suit at present by virtue of ***Article 189*** *of the Constitution and* ***Sections 33*** *and* ***34*** *of Inter-Governmental Relations Act of 2012 (IGRA)? The parties have advanced similar arguments as before the learned Judges of the High Court. The High Court went further than just looking at the ruling by Ogola J. They also took into account the doctrine of exhaustion as enunciated in* ***Republic vs. Independent Election and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR****. They applied a dual pronged approach before concluding that the dispute was not an inter-governmental dispute under IGRA. First, they considered that the test for determining the matter as an inter-governmental dispute for purposes of application of IGRA was not simply to look at who the parties to the dispute were, but the nature of the claim in question and; secondly, they considered that the claimed Constitutional violations seeking to be enforced are not mere "bootstraps." We have keenly addressed our minds to the learned Judges' decision and are satisfied that they stayed within the expected contours and properly directed themselves. Once they determined that the dispute was not inter-governmental in nature, we do not think it is necessary to consider whether the petitioners had exhausted their legal avenue. Jurisdiction by the High Court under* ***Article 165 (5)*** *of the Constitution became automatic. And in our view, it could not be ousted or substituted.*

35. Further, in Civil Appeal 158 of 2017, ***Fleur Investments Limited -vs- Commissioner of Domestic Taxes & another*** [2018] eKLR, the Learned Judges of the Court of Appeal relied on an earlier decision in ***Speaker of National Assembly vs Njenga Karume (1990-1994) EA 546*** to assume jurisdiction by by-passing the mechanism under Income Tax Tribunal. They observed as follows: -

23. For the reasons we have given earlier and others that will become apparent, there were definitely exceptional circumstances that existed in this case that were outside the ambit of the Income Tax Tribunal which called for intervention by way of judicial review. Whereas courts of Law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the Constitution and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.

36. The High Court has variously reiterated the position that it is only the High Court and Courts of equal status which can interpret the Constitution. (See ***Royal Media Services Ltd. -vs- Attorney General & 6 Others*** **(2015) eKLR** among others).

37. Turning back to the instant case, the Petitioner's main contention is that his rights to fair hearing and fair administrative action were violated. Mainly, the Petitioner submitted that since a member of the Disciplinary Committee was the one who conflicted with the Petitioner at the ceremony, then that member was not suitable to sit in the Committee and determine the Petitioner's case.

38. The Petitioner was obviously dissatisfied with the finding of the Committee. However, there is no evidence that the Petitioner made any appeal to the University Senate.

39. One of the grounds of appeal from the Disciplinary Committee to the Senate as provided for by the Handbook at **Clause 7.4(i)(c)(i)** is impugning the disciplinary process on violation of the principles of natural justice or a violation of the Charter or Statutes.

40. As the Petitioner's complaint rested on the composition of the Committee and whether a complainant can be a Judge in his or her own case, the Petitioner's case rested on violation of the principles of natural justice. That was a perfect ground of appeal before the Senate.

41. In applying the doctrine of exhaustion and its exceptions against the instant case, it's clear that the exceptions do not apply in this case for two reasons.

42. The first reason is that there is no evidence to suggest that the University's internal dispute resolution mechanisms will not serve the values enshrined in the Constitution or law. The second reason is that there is evidence that the internal mechanisms provide for elaborate appeal avenues, such that all issues in contention can be reasonably determined. The process presents the Petitioner with adequate and reasonable audience which is sufficient to all the parties' interests.

43. The Petitioner, however, gave a reason why he did not prefer an appeal. To him, since the Vice-Chancellor had already made up her mind on his case, lodging an appeal to her was an action in futility. The Petitioner reiterated his conversation with the Vice-Chancellor in her office when he had gone to enquire of the outcome of his disciplinary hearing.

44. According to the Handbook, once an appeal against the decision of the Disciplinary Committee is lodged, the Vice-Chancellor convenes an appellate body to hear and determine that appeal. The body is comprised of four persons. They are the Vice-Chancellor and three other members of the Senate. Further, none of the members of the Disciplinary Committee are supposed to sit in the appellate body.

45. Even if it is assumed that indeed the Vice-Chancellor truly expressed her position on the Petitioner's matter, still that was not a bar to the filing of the appeal. The Petitioner would have nevertheless filed the appeal and raised his objection on the composition of the appellate body.

46. Further, the Vice-Chancellor was not the only member of the appellate body. There are four members in total. It cannot be the case that the Petitioner knew in advance that the three other members of the appellate body, who were yet to be appointed, would not rule in his favour in the appeal. That assumption is a dangerous speculative trajectory which cannot hold.

47. This Court does not, therefore, uphold the Petitioner's reasons as to why he did not lodge the appeal. Surprisingly, even when the Petitioner filed the current Petition the time for lodging the appeal was still running and the Petitioner ought to have been properly so guided. The upshot is that the Petitioner chose not to appeal against the decision.

48. In close examination of the Petition, it comes to the fore that the Petitioner was intent in by-passing the University's internal dispute mechanism by framing the Petition in the language of the Bill of Rights, hence a pretext to engaging the Courts. Such pursuits must be estopped by the application of the doctrine of exhaustion.

49. Having stated as such, this Court now determines and holds that it is barred by the doctrine of exhaustion from further dealing with the Petition and the Notice of Motion. The Petitioner must first submit to the clearly established University's internal dispute resolution mechanisms.

50. Having so held, a consideration of any other issue can only be an academic exercise. This Court, therefore, opts to end this discussion at this point.

Disposition:

51. From the foregoing analysis and findings, the Petition and Notice of Motion dated 6th July, 2021 are determined as follows: -

(a) This Court lacks jurisdiction to hear and determine the Petition herein on account of the doctrine of exhaustion.

(b) The Petition and the Notice of Motion dated 6th July, 2021 be and are hereby struck out with costs.

Orders accordingly.

DELIVERED, DATED and **SIGNED** at **NAIROBI** this **17th** day of **February, 2022.**

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Shisanya, Counsel for the Petitioner.

Mr. Kitheka, Counsel the Respondents.

Elizabeth Wanjohi – Court Assistant.