



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 311 OF 2018

OKIYA OMTATAH OKOITI.....PETITIONER

VERSUS

THE REFUGEE AFFAIRS SECRETARIAT (RAS) KENYA....1ST RESPONDENT

THE UNHCR KENYA.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

1. Through his petition and supporting affidavit both dated 10th September, 2018 the Petitioner, Okiya Omtatah Okoiti, seeks orders as follows:

“43. A DECLARATION THAT:

43.1. The 1st and 2nd respondents are bound by the Constitution, Statutes, Rules, and Regulations of the Republic of Kenya.

43.2. The Refugee Community Leader Election Guidelines are unconstitutional and, therefore, invalid, null and void.

44. AN ORDER:

44.1 Prohibiting the respondents and their agents and any persons howsoever acting from giving effect howsoever to the Refugee Community Leader Election Guidelines.

44.2 Quashing the Refugee Community Leader Election Guidelines.

44.3 Quashing the results and/or outcomes of any elections held under the Refugee Community Leader Election Guidelines;

44.4 Compelling the respondents to pay to the Petitioner the costs of this suit;

45. Any other relief the court may deem just to grant.”

The Petitioner’s Case

2. The petition is filed on behalf of representatives of various refugee groups in Kenya, which approached the Petitioner who is the Executive Director of Kenyans for Justice and Development (KEJUDE) Trust seeking intervention in resolving a dispute revolving around the Refugee Community Leader Election Guidelines (hereinafter simply referred to as the Guidelines) issued by the the Refugee Affairs Secretariat (RAS) Kenya (1st Respondent) and UNHCR Kenya (2nd Respondent). The Attorney General is the 3rd Respondent.

3. The Petitioner’s case is that the representatives of the refugee communities raise concern over the Guidelines, which require leaders of refugee groups in Kenya to be elected solely based on their areas of residence as opposed to the previous practice whereby refugee communities elected leaders based on their ethnicity or nationality. According to the Petitioner, the new Guidelines deny the refugees true representation. Further, that the requirement by the Guidelines for the candidates to apply for nomination and clearance online in order to vie

for the elective positions denies the refugee communities the opportunity to vet and nominate the candidates of their choice.

4. The Petitioner aver that Articles 10(2)(a), 118, 201(a), 221 and 232(1)(d) of the Constitution were violated by the respondents as there was no public participation in the enactment of the Guidelines. It is further the Petitioner's case that Article 24 of the Constitution has been infringed as the Guidelines do not meet the threshold for the limitation of the enjoyment of rights and fundamental freedoms in the Bill of Rights, including the right to freedom of association under Article 36, and the right to fair administrative action under Article 47(1).

5. It is also averred that the 1st and 2nd respondents have violated sections 3, 4 and 5 of the Fair Administrative Action Act, 2015; and sections 4, 5, 6, 7 and 8 of the Statutory Instruments Act, 2013.

6. The Petitioner filed a supplementary affidavit dated 23rd October, 2018 in support of the petition and in response to the 1st Respondent's replying affidavit.

The 1st Respondent's Response

7. The 1st Respondent opposed the petition through a replying affidavit sworn by Kodeck Makori on 8th October, 2018. It is deposed that prior to the implementation of the Guidelines the 1st Respondent, and other stakeholders involved in the administration and protection of the refugee community in urban centres, undertook broad and extensive sensitization exercise within the refugee community.

8. The 1st Respondent asserts that the purpose of conducting the election of refugee community leaders based on areas rather than ethnicity or nationality is to foster unity among the diverse refugee tribes and nationalities. It is further asserted that the Guidelines do not bar refugees from having their own internal structures of leadership as the Guidelines were only intended to give general directions as to how refugee elections would be conducted and not to impose leaders on the community. The 1st Respondent assures the Court that the choice of leaders is still within the control of the refugees.

9. It is contended that if the petition is allowed, it would deny refugees the right to elect and be represented by persons of their choice. Further, that the right to freedom of association is not an absolute right and can be limited for purposes of public order.

10. The 1st Respondent asserted that the petition is deficient, does not disclose a justifiable cause to warrant intervention by this Court and should be dismissed with costs to the respondents.

The Petitioner's Submissions

11. The Petitioner through his written submissions dated 23rd October, 2018 relies on Articles 2(1), 2(4), 3(1), 10(1) and 20(1) of the Constitution in urging that the respondents are bound by the Constitution and other laws of the land.

12. Turning to his claim that the Guidelines were not a product of public participation, the Petitioner submits that the 1st Respondent admitted that there was no public participation but that it instead undertook civic education on the Guidelines. The Petitioner asserts that the legal requirement for public participation cannot be overlooked and therefore the Guidelines should be quashed *in toto*.

13. The Petitioner supports his argument by reference to Articles 10, 47, 73(1)(b) and 232(1)(d) of the Constitution; sections 2, 3, 4 and 5 of the Fair Administrative Action Act; and the Public Service Commission's "*Guidelines for Public Participation in Policy Formulation*." The Petitioner further relies on several national and international decisions on the matter of public participation including **Republic v Ministry of Finance & another Ex Parte Nyong'o Nairobi [2007] KLR 229**; **Kenya Union of Domestic, Hotels, Education and Allied Workers (Kudhehia Workers) v Salaries and Remuneration Commission, Petition No. 294 of 2013**; **Doctors for Life International v Speaker of the National Assembly & others [2006] ZACC 11**; and **Minister of Health & another v New Clicks South Africa (Pty) Ltd & others 2006 (2) SA 311 (CC)**.

14. The Petitioner additionally contend that because the Guidelines were enacted through a flawed process, they are unconstitutional and therefore invalid, null and void *ab initio*. Further, that the Guidelines are void to the extent that they negatively impact on the Bill of Rights and in particular the rights under Articles 27, 28, 29(d), 47 and 56(a) of the Constitution.

15. The Petitioner also submit that there existed a legitimate expectation that the 1st and 2nd respondents would execute their mandate strictly in accordance with the Constitution and statutory law. Further, that it was expected that the two respondents would subject the proposal to change the system of electing the leaders of refugees to substantive debate by the stakeholders and the general public.

16. The Petitioner urge that because the respondents acted *ultra vires* the provisions of the Constitution in holding the election for refugee leaders on 11th and 12th September, 2018, the elections were invalid, null and void. Reliance is placed on the decision in **Anand Prakash and Anr v Assistant Registrar, 27 January 1996**.

17. Finally, the Petitioner ask the Court to award him costs stating that the petition has merit and the orders sought ought to be granted. He additionally submitted that since this is a suit between a private citizen and the State, costs should not be awarded to the respondents even if the Court finds in their favour. The Petitioner supports his arguments by relying on the decisions in **Erick Okeyo v County Government of Kisumu & 2 others [2014] eKLR**; and **Boiwatch Case [2009] ZACC 14**.

The 1st and 3rd Respondents' Submissions

18. The 1st and 3rd respondents through their submissions dated 20th December, 2018 argue that State agencies have discretion in developing a programme for public participation that is coherent with the nature of the subject matter. They state that in this instance, upon issuing the Guidelines, the respondents jointly undertook extensive public awareness exercise through public forums and sensitization campaigns among the refugee communities.

19. It is asserted that the persons represented by the Petitioner were afforded reasonable opportunity to be involved in the review and sensitisation process and had adequate say in the implementation of the Guidelines. The respondents support their submissions by reference to the decisions in **John Muraya & 501 others v Minister for State for Provincial Administration & Internal Security & 4 others [2014] eKLR**; **Matatiele Municipality & others v President of the Republic of South Africa & others [2006] ZACC 12**; **Land Access Movement of South Africa Association for Rural Development & others v Chairperson of the National Council of Provinces & others [2016] ZACC 22**; **Minister of Health & another v New Clicks South Africa (Pty) Ltd & others 2006 (2) SA 311 (CC)**; and **Electronic Cargo Tracking System (ECTS) Providers Association of Kenya & 9 others v Kenya Revenue Authority [2017] eKLR**.

20. It is further contended that the Petitioner has not demonstrated to this Court how the respondents failed to achieve public participation. Further, that public participation does not mean that particular public views must prevail.

21. On the Petitioner's claim that the doctrine of legitimate expectation was violated, the respondents retort that the Petitioner did not establish that a legitimate expectation arose from the previous practice of conducting elections based on ethnicity. The respondents opine that the elections in the refugee community are not a matter of right.

22. The respondents assert that to demand refugee elections based on ethnicity would be tantamount to eroding Kenya's national system of elections which is based on regional delimitations and not ethnic groups.

23. According to the 1st and 3rd respondents, the Petitioner is not entitled to the reliefs sought as he has failed to establish violation of the Constitution and the relevant law on public participation as alleged, and has failed to establish that there is a legitimate expectation capable of sustaining the claim in this petition. The 1st and 3rd respondents are therefore of the firm view that the Petitioner is not entitled to the reliefs sought.

The Analysis and Determination

24. The eminent question for the determination of the Court in this petition is whether the Guidelines were subjected to public participation. The debate between the parties herein is whether the election sensitization exercise undertaken by the 1st Respondent from 30th July, 2018 to 4th August, 2018 amounted to public participation.

25. The 1st and 3rd respondents argue that the refugee community members were afforded reasonable opportunity to be involved in the review and sensitisation process and had an adequate say in the implementation of the Guidelines. However, the Petitioner submit that the civic education carried out by the respondents is not equivalent to the public participation that was required in the development of the impugned Guidelines.

26. The parties have submitted extensively on the meaning and significance of public participation and therefore I see no need to reflect too much on the matter. Article 10 of the Constitution establishes public participation as a national value and principle of governance. State organs, State officers, public officers and all persons are therefore bound to engage in public participation when making or implementing public policy decisions, such as the Guidelines herein.

27. In the case of **Doctors for Life International v Speaker of the National Assembly & others [2006] ZACC 11**, the Court held:

“90. The right to political participation is a fundamental human right, which is set out in a number of international and regional human rights instruments. In most of these instruments, the right consists of at least two elements: a general right to take part in the conduct of public affairs; and a more specific right to vote and/or to be elected....

91. Significantly, the ICCPR guarantees not only the ‘right’ but also the ‘opportunity’ to take part in the conduct of public affairs. This imposes an obligation on states to take positive steps to ensure that their citizens have an opportunity to exercise their right to political participation.”

28. Furthermore, in the case of **Republic v County Government of Kiambu Ex parte Robert Gakuru & another [2016] eKLR** the Court held that:

“50. However, it must be appreciated that the yardstick for public participation is that a reasonable opportunity has been given to the members of the public and all interested parties to know about the issue and to have an adequate say. It cannot be expected of the legislature that a personal hearing will be given to every individual who claims to be affected by the laws or regulations that are being made. What is necessary is that the nature of concerns of different sectors of the parties should be communicated to the law maker and taken in formulating the final regulations. Accordingly, the law is that the forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.”

29. Public participation, therefore, means that before any public policy decisions are made, the public and particularly those who will be

directly affected by those decisions should be granted an opportunity to take part in the development of such policy decisions either by raising suggestions or concerns about the same.

30. The 1st Respondent submitted exhibit 'KM-2' which is a report of the events that took place during the election sensitization exercise that took place from 30th July, 2018 to 4th August, 2018. The objectives of the exercise according to the report included raising awareness on election of refugee community leaders, and sharing the Guidelines on the conduct of elections, campaigns and eligibility to participate in the elections. It is evident that the exercise was not intended to involve the refugee communities in the formulation of the Guidelines and seek their input on how elections should be conducted, but was intended to inform them of the existence of the Guidelines and how they were to be implemented.

31. Furthermore, according to the election sensitization report, one of the communities involved in the exercise argued for elections based on community/ethnicity but was informed that the "*new dispensation is based on locations.*" It is clear to me that the intention of this exercise was not to gather input from the refugee communities to inform the development of the Guidelines, as the criticism of the community was met by the directive that the elections will be held as per the impugned Guidelines. It is apparent that the Guidelines had been finalised by the time the refugee community was being involved and any views provided by the refugee community could not have informed the generation of the document.

32. The evidence submitted by the 1st Respondent does not prove that the requirements for public participation were met before and during the formulation of the impugned Guidelines and I therefore find that public participation did not happen prior to the formulation of the Guidelines. A draft of the Guidelines was not put to the public for approval. The document was done and dusted by the time the sensitisation exercise was conducted.

33. It must be noted that even where public participation takes place, it does not automatically follow that concerns expressed by the stakeholders will be incorporated in the policy or law. On this point, the Court of Appeal in **British American Tobacco Ltd v Cabinet Secretary for the Ministry of Health & 5 others [2017] eKLR** expressed itself as follows:

"49. Public participation does not necessarily mean that the views given must prevail. It is sufficient that the views are taken into consideration together with any other factors in deciding on the legislation to be enacted."

34. Similarly, it was postulated in **Republic v County Government of Kiambu Ex parte Robert Gakuru & another [2016] eKLR** that:

"54. What the Courts are saying was that whereas the views expressed by the public are not necessarily binding on the legislature due consideration must be given to them before they are dismissed. In other words public participation ought not to be taken as a mere formality for the purposes of meeting the constitutional dictate."

35. The respondents have replied to the allegation that there was no public participation in the enactment of the Guidelines by arguing that to demand refugee elections based on ethnicity would be tantamount to eroding Kenya's national system of elections that is based on regional delimitations and not ethnic divisions. Although this may be true, this does licence the respondents to forgo procedures that are set out within the Constitution. The respondents are not bound by the views of the public but are bound to give the stakeholders an opportunity to be heard, which did not happen in this case. The essence of public participation is to imbue a sense of ownership of a policy or law. The public agency is not being told to incorporate views that may be unconstitutional or unlawful.

36. Public participation in the decisions of administrators is confirmed as a national value and principle of governance under Article 10 of the Constitution, and therefore every one would anticipate that all policy decisions and administrative actions would involve their input. By failing to hold any public forum to gauge the concerns and obtain the input of the refugee community, the respondents did infringe the legitimate expectation held by the refugees that the Guidelines governing the election of their leaders would be subjected to public participation.

37. On the alleged violation of the rights under Articles 27, 28, 29(d) and 56(a) of the Constitution, I find that the Petitioner has not supported this argument with evidence.

38. It has been determined above that the impugned Guidelines were not subjected to the input and review of the members of the refugee community before they were promulgated. The Petitioner argues that by dint of this the respondents acted *ultra vires* the Constitution and statute. I must now determine whether the lack of public participation in the legislative process renders the legislation invalid, null and void.

39. In **Okiya Omtatah Okoiti v Communications Authority of Kenya & 8 others [2018] eKLR** it was held that:

"115. It is trite that Regulations or policy guidelines must conform to the Constitution and the statute in terms of both their content and the manner in which they are adopted. Failure to comply with manner and form requirements in enacting Regulations or policy guidelines renders the same invalid. Courts have the power to declare such Regulations or policy guidelines invalid. This Court not only has a right but also has a duty to ensure that the Regulation or guideline making processes prescribed by the Constitution and the Statute(s) is observed. And if the conditions for Regulation-making processes have not been complied with, it has the duty to say so and declare the resulting statute, regulation, policy or guideline invalid.

116. I find and hold that the Regulation or policy guidelines introducing the DMS system were adopted in a manner inconsistent with the constitutional and statutory requirements. The provisions of the Statutory instruments act were not complied with, hence, the regulation, or policy guideline lack legal basis to stand on. Courts are enjoined by the Constitution to uphold the rights of all and to ensure compliance with constitutional values and principles, a duty this court cannot shy

away from.”

40. I am in agreement with the cited decision. The requirement for the participation of the public in policy decisions is an important constitutional principle and failure to comply with it renders the policy unconstitutional. This means that the impugned Guidelines and the elections held pursuant to the Guidelines are unconstitutional and contrary to the law.

41. I therefore hold and find that the Petitioner has established a case against the 1st and 3rd respondents so as to entitle him to appropriate reliefs. An order of certiorari is hereby issued removing into this Court and quashing the Refugee Community Leader Election Guidelines. Any election held under the said Guidelines is also declared null and void. In order to avoid chaos and confusion, any actions undertaken by those elected under the quashed Guidelines shall remain valid and lawful.

42. In this particular case, I find no reason why costs should not follow the event. As such, the Petitioner is awarded costs of the petition against the 1st and 3rd respondents.

Dated, signed and delivered virtually at Nairobi this 26th day of November, 2020

W. Korir,

Judge of the High Court