



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
CONSTITUTIONAL. PETITION NO 401 OF 2019

OKIYA OMTATAH OKOITI.....PETITIONER

VERSUS

KENYA UNIVERSITY TEACHING,

REFERRAL AND RESEARCH HOSPITAL.....1ST RESPONDENT

THE NATIONAL EXECUTIVE OF THE REPUBLIC.....2ND RESPONDENT

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

AND

KENYATTA UNIVERSITY COUNCIL.....1ST INTERESTED PARTY

UNIVERSITIES ACADEMIC STAFF

UNION (KENYATTA UNIVERSITY CHAPTER).....2ND INTERESTED PARTY

KATIBA INSTITUTE.....3RD INTERESTED PARTY

RULING

1. The Petitioner, Okiya Omtatah Okoiti, filed his petition dated 11th October, 2019 together with a notice of motion of even date filed under a certificate of urgency. Through the said notice of motion he sought orders as follows:-

“ i. THAT the application be certified as urgent and be heard *ex-parte* and service thereof be dispensed with in the first instance.

ii. THAT pending the *inter-partes* hearing and determination of the Application and/or the Petition herein the Honourable Court be pleased to grant an order suspending the official launch of the Kenya University Teaching Referral and Research Hospital Scheduled between 14th – 16th October, 2019, or on any other date.

iii. THAT pending the *inter-partes* hearing and determination of this Application and/ or the Petition herein the Honourable Court be pleased to issue a temporary order of prohibition prohibiting the Respondents, whether by themselves, or any of its employees or agents or any person claiming to act under its authority from proceeding to give effect, in any way whatsoever, to the scheduled official launch of the Kenyatta University Teaching Referral and Research Hospital scheduled between 14th – 16th October, 2019, or on any other date.

iv. THAT costs be in the cause.”

2. When the matter was placed before Makau, J on 11th October, 2019 he indeed certified the same urgent, directed service and ordered that the matter be placed before me on 14th October, 2019. When the parties appeared before me, I directed the respondents and interested parties to file their replies to the application and due to the utmost urgency exhibited in the application, I listed the matter for hearing on 16th October, 2019 at 8.15a.m.
3. During the hearing of the application, Universities Academic Staff Union (Kenyatta University Chapter), which is listed as the 2nd Interested Party and Katiba Institute which is named as the 3rd Interested Party supported the application.
4. The 1st Respondent, (Kenyatta University Teaching, Referral and Research Hospital), the 2nd Respondent (The National Executive of the Republic), the 3rd Respondent (The Hon. Attorney General) and the 1st Interested Party (Kenyatta University Council) all opposed the application.
5. After hearing the oral submissions made by the parties, and taking into account that the application would be rendered nugatory if the decision of the court was not issued promptly, I delivered my opinion on the spot through which I dismissed the Petitioner's application for lack of merit. I promised the parties to give reasons for the decision later and this ruling therefore serves that purpose.
6. The Petitioner's application was supported by the grounds on the face of the application and an affidavit sworn by the Petitioner on the date of the application. In summary, the Petitioner's case was that through an email dated 1st October, 2019 circulated by the Chief Executive Officer of the 1st Respondent (the Hospital) among the chairperson and members of the Board of the 1st Respondent, it was indicated, among other things, that the Hospital would be officially launched between 14th and 16th of October, 2019.
7. It was the Petitioner's case that if a conservatory order was not issued irreversible prejudice would be suffered by the members of the public, as the court would not be able to reverse certain decisions that may have long-term negative impacts on the Hospital and the general population. Cited as examples of such irreversible effects was the fact that individuals resigning from other places to work at the Hospital would suffer irreversible damage were the petition to eventually succeed. Further, that the Board and management of the Hospital may enter into contractual arrangements that would remain binding even if the petition eventually succeeds.
8. Turning to the question of the arguability of his case, the Petitioner stated that under the Constitution, the Universities Act 2012, the Kenyatta University Charter, the Kenyatta University Statutes, and the Kenyatta University Strategic Plan, the Hospital is an integral part of Kenyatta University and the impugned Kenyatta University Teaching, Referral and Research Hospital Order, 2019 (Legal Notice No. 4 of 22nd January, 2019) which purports to establish the Hospital as a separate state corporation or parastatal is a nullity in law *ab initio*.
9. Referring to Article 23(2) of the Constitution, the Petitioner pointed out that the grant of conservatory orders and temporary injunctions is justified by the need to protect and enforce the rights and fundamental freedoms in the Bill of Rights. Further, that in providing that in any proceedings brought under Article 22, of the Constitution, a court may grant appropriate relief, including a declaration of rights, injunction, conservatory order, or order of judicial review, Article 23(3) gives meaning to Article 22 which grants individuals, including groups of individuals, the right to seek redress in the event of a denial, infringement, violation or threat to rights and freedoms.
10. Urging the court to grant the orders sought in the application, the Petitioner stated that such orders would preserve the petition from being rendered nugatory should it eventually succeed. His case was that he had established a *prima facie* case with high chances of success and that granting the orders sought would advance the cause of justice and would not prejudice the respondents in any way.
11. The Hospital filed a replying affidavit dated 14th October, 2019 and a supplementary affidavit dated 15th October, 2019 all sworn by its Chief Executive Officer, Dr. Jacob Andrew Toro. The affidavits are mainly populated with the history and functions of the Hospital.
12. As to why the application should not be allowed, Dr. Toro averred that there was a huge public interest in having the Hospital operationalized as soon as possible in order to meet the public need for medical services. Further, that although the Hospital was completed in 2016, it had remained idle to date yet the government was servicing a loan that was taken to construct the Hospital.
13. In light of these averments, Dr. Toro stated that the Petitioner had not made a *prima facie* case with a probability of success and that the orders sought by the Petitioner were grossly disproportionate to the harm, if any, that the Petitioner and/or any other person would suffer if the orders were not granted.
14. Dr. Toro revealed that the Petitioner had filed **E & L R C Petition No. 66 of 2019 Okiya Omtatah Okioti v The National Executive of the Republic of Kenya** whose contents and prayers were similar with those in the instant petition. Further, that the Petitioner had also sought conservatory orders in the E & L R C matter and the application had been rejected.
15. Based on those averments, Dr. Toro asserted that the Petitioner's actions amounted to forum shopping and re-litigation of issues already determined by a court of equal status with this court. He also averred that there is a real risk of two courts of equal status arriving at conflicting findings, thereby embarrassing the courts. Further, that the court should not exercise its discretion in favour of the Petitioner because of his failure to disclose the existence of the petition in the E & L R Court. He termed the Petitioner's actions as an abuse of the court process.
16. Dr. Toro averred that granting the prayers sought by the Petitioner would result in undesirable and devastating consequences including denial of access to emergency medical attention to Kenyans, waste of public funds and resources already committed to the Hospital, and loss of employment and employment opportunities for Kenyans. He therefore urged that the operationalization of the Hospital was in the public

interest.

17. Dr. Toro accused the Petitioner of approaching the court after inordinate delay stating that the order (Legal Notice No. 4 of 22nd January, 2019) challenged in the petition was gazetted in January, 2019 and the Petitioner had not given any reason whatsoever for filing the petition ten months later. He also averred that 160 persons were already employed by the Hospital and contracts entered with service providers and the things the Petitioner seeks to stop through the conservatory orders had already happened.

18. It was the Hospital's position that non-issuance of conservatory orders would not render the petition nugatory because if the same succeeds the Hospital would still be handed over to Kenyatta University.

19. The 2nd and 3rd respondents filed 16 Grounds of Opposition dated 15th October, 2019 which in summary are: that the Petitioner lacks the legal capacity to institute the proceedings on behalf of the 1st Interested Party; that the Petitioner was fomenting conflict between two public institutions; that the Petitioner had failed to disclose the pendency of litigation over the same subject matter; that the 3rd Interested Party had no identifiable interest in the matter and ought to be struck out of the case; that the Petitioner would suffer no prejudice if no orders were granted; and that the petition had been brought after inordinate delay.

20. The 1st Interested Party filed a notice of Preliminary Objection dated 14th October, 2019 in which the petition is challenged on the grounds that there was in existence another matter (E & LRC Petition No. 66 of 2019) between the same parties which the Petitioner had failed to disclose to the court thus rendering the petition an abuse of the court process. Further, that the opening of the Hospital by the President was a non-justiciable issue and a grant of orders would go against the public's interest of having the Hospital operationalized.

21. The Vice-Chancellor of Kenyatta University, Prof. Paul K. Wainaina also swore an affidavit dated 15th October, 2019 on behalf of the 1st Interested Party opposing the application on grounds similar to those found in the Preliminary Objection. The 2nd and 3rd interested parties did not file any pleadings in response to the application.

22. The Petitioner came back through a supplementary affidavit sworn on 16th October, 2019. His averment was that the Hospital was conceived and established as a University Hospital owned and managed by Kenyatta University hence in gazetting the Hospital as a parastatal, the President acted *ultra vires* Articles 40, 47(1), 73, 129, 131(2)(a) and 259(1) of the Constitution and sections 27, 48, 80 and 81 of the Universities Act, 2012. He averred that the loan used to construct the Hospital was taken by Kenyatta University and it is the institution that is required to pay the loan and not the Government as averred by the 1st Respondent. Further, that the Hospital was conceived and established as a facility for training and research and to downgrade it to an ordinary hospital will not serve the public interest.

23. The Petitioner averred that conservatory orders are required to preserve these proceedings and they will also act to deny legitimacy to the Hospital.

24. In respect of Nairobi E& L R C Petition No. 66 of 2019, the Petitioner averred that the said petition was limited to challenging the creation of the Hospital's Board and the appointment of its chairperson and members. Further, that the validity of the Legal Notice of 22nd January, 2019 has not been challenged in those proceedings. He therefore averred that the two petitions are totally different though based on overlapping facts.

25. It was the Petitioner's disposition that the conservatory orders declined in the E&L R C petition sought to block assumption of office by some of the interested parties' therein and had nothing to do with the stoppage of the launching of the Hospital as a parastatal.

26. In response to the claim that there was inordinate delay, he averred that there was no delay at all given that the cause of action arose on 1st October, 2019 when an email surfaced indicating the date for the official launch would be between 14th – 16th October, 2019.

27. The parties made oral submissions at the hearing. I will address those submissions as I proceed to determine the application. In order to succeed in an application for conservatory orders, a petitioner ought to establish:-

- a. A prima facie case;
- b. Real and imminent breach or threat to constitutional rights and fundamental freedoms;
- c. The prejudice to be suffered if orders are not granted; and
- d. If the matter touches on public affairs, that it is in the public interest to grant orders.

28. I only need to cite the case of **Kenya Small Scale Farmers Forum v Cabinet Secretary, Ministry of Education, Science & Technology & 5 others [2015] eKLR** where Onguto, J reiterated the principles for grant of conservatory orders as follows:-

“30. For the grant of conservatory orders under Article 23(3) of the Constitution as read together with Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 the court ought to consider certain pertinent factors. A series of cases may be stated to have laid down the proper guidelines applicable. I would state the principles, which govern a court considering an application for interim or conservatory relief to be the following:

- **The applicant ought to demonstrate a prima facie case with a likelihood of success and that he is likely to suffer prejudice**

as a result of the violation or threatened violation if the conservatory order is not granted: see Centre for Rights Education and Awareness & 7 Others –v- The Attorney General HCCP No. 16 of 2011. It is not enough to show that the prima facie case is potentially arguable but rather that there is a likelihood of success: see Godfrey Mutahi Ngunyi –v- The Director of Public Prosecution & 4 Others NBI HCCP No. 428 of 2015 and also Muslims for Human Rights and Others –v- Attorney General & Others HCCP No. 7 of 2011.

· The grant or denial of the conservatory relief ought to enhance Constitutional values and objects specific to the rights or freedoms in the Bill of Rights: see Satrose Ayuma & 11 Others –v- Registered Trustees of Kenya Railways Staff Benefits Scheme [2011] eKLR and also Peter Musimba –v- The National Land Commission & 4 Others (No. 1) [2015] eKLR.

· If the conservatory order is not granted, the Petition or its substratum will be rendered nugatory: see Martin Nyaga Wambora –v- Speaker of the County Assembly of Embu & 3 Others HCCP No. 7 of 2014.

· The Public interest should favour a grant of the conservatory order: see the Supreme Court of Kenya’s decision in Gatirau Peter Munya –v- Dickson Mwenda Githinji & 2 Others [2014] eKLR.

· The circumstances dictate that the discretion of the court be exercised in favour of the applicant after a consideration of all material facts and avoidance of immaterial matters: see Centre for Human Rights and Democracy & 2 Others –v- Judges and Magistrates Vetting Board & 2 Others HCCP No. 11 of 2012 as well as Suleiman –v- Amboseli Resort Ltd [2004] 2 KLR 589.”

29. I heard the Petitioner try to explain why the success of his petition in the E & L R Court will not grant the reliefs he seeks in this case. His argument was that this court will still have to determine the constitutionality and legality of the Legal Notice of 22nd January, 2019 even if his E& L R C petition succeeds.

30. A perusal of the petition filed before the E& L R Court clearly shows that the Petitioner’s case is founded on alleged unconstitutionality or illegality of Legal Notice No. 4 of 22nd January, 2019. Among the several orders sought in the petition dated 9th April, 2019 and amended on 15th April, 2019 are:-

“(c) A Declaration be and is hereby issued that the Kenyatta University Teaching, Referral and Research Hospital Order, 2019 (Legal Notice No. 4 of 22nd January, 2019) cannot oust the Kenyatta University Charter, 2013; or the Kenyatta University Statutes, 2013.

(d) A Declaration be and is hereby issued that the Kenyatta University Teaching, Referral and Research Hospital Order, 2019 (Legal Notice No. 4 of 22nd January, 2019) is void for violating the Kenyatta University Strategic and Vision Plan (2016 -2026).

(f) A Declaration be and is hereby issued that under Articles 94(5) and (6) of the Constitution of Kenya, 2010, Executive Orders are subsidiary legislation (statutory instruments) subject to the Statutory Instruments Act, 2013.

(g) A Declaration be and is hereby issued that the failure to subject to public participation the Kenyatta University Teaching, Referral and Research Hospital Order, 2019 (Legal Notice No. 4 of 22nd January, 2019) rendered it unconstitutional and, therefore, invalid, null and void.

(h) A Declaration be and is hereby issued that the failure to subject the Kenyatta University Teaching, Referral and Research Hospital Order, 2019 (Legal Notice No. 4 of 22nd January, 2019) to parliamentary scrutiny and approval rendered it invalid, null and void pursuant to Section 11 (4) of the Statutory Instruments Act 2013.

(i) A Declaration be and is hereby issued that the Kenyatta University Teaching Referral and Research Hospital Order, 2019 (Legal Notice No. 4 of 22nd January 2019) is unconstitutional and, therefore, invalid, null and void.

(j) A Declaration be and is hereby issued that the Kenyatta University Teaching, Referral and Research Hospital Order, 2019 (Legal Notice No. 4 of 22nd January, 2019) violates sections 3, 4, 5, 6, 7, 8, 9, 11, and 24 of the Statutory Instruments Act No. 23 of 2013; Section 4(1) of the Fair Administrative Action Act 2015; sections 3, 25, 26, 27, 28, 30, 34, 37 and 55(2) of the Public Service Commission Act No. 10 of 2017; Sections 4(B) and 10(1) of the Public Service (Values and Principles) Act No. 1A of 2015; Sections 13(1)(a), 15(1), 20(1)(a) and 48 of the Universities Act No. 48 of 2012; Section 25(1) and the First Schedule to the Health Act, 2017; the Kenyatta University charter, 2013; and Statute 1 paragraph 2, Statute IV paragraph xi, Statute XXII, Statute XXIV, Statute XXVIII paragraphs v, vi and xx, Statute XXXIV paragraph 1, and Statute LII paragraphs 3, 14, 15, 16 and 17 of the Kenyatta University Statutes, 2013.

(v) The Honourable Court do issue and hereby issues a mandatory order quashing the Kenyatta University Teaching, Referral and Research Hospital Order, 2019 (legal Notice No. 4 of 22nd January, 2019).”

31. The prayers sought in the instant petition are:-

“(a) A Declaration be and is hereby issued that the Universities Act No. 42 of 2012, the Kenyatta University Charter, and the Kenyatta University Statutes, have primacy over and supersede the Kenyatta University Teaching, Referral and Research

Hospital Order, 2019 (Legal Notice No. 4 of 22nd January, 2019).

(b) A Declaration be and is hereby issued that the Kenyatta University Teaching, Referral and Research Hospital order, 2019 (Legal Notice No. 4 of 22nd January, 2019) violates Sections 27, 48, 80 and 81 of the Universities Act No. 42 of 2012 and the Kenyatta University Statute LII 3, 14, 15, 16 and 17.

(c) A Declaration be and is hereby issued that the Kenyatta University Teaching, Referral and Research Hospital Order, 2019 (Legal Notice No. 4 of 22nd January, 2019) is invalid, null and void and, therefore, of no legal effect.

(d) The Honourable Court be pleased to issue an order ordering the respondents to bear the costs of this Petition.

(e) Consequent to the grant of the prayers above the Honourable Court be pleased to issue any other or further remedy (directions and orders) that the Honourable Court shall deem necessary to give effect to the foregoing orders, and/ or favour the cause of justice.”

32. Any person reading the two petitions can easily conclude that the aim of the Petitioner is to obliterate Legal Notice No. 4 of 22nd January, 2019, which makes the Hospital a state corporation. Once the Legal Notice is quashed, it is immaterial as to the legal reasoning used to find it unlawful. The Petitioner, if successful in the E & LR Court petition will not have to prosecute this petition to kill the Legal Notice one more time.

33. The argument by the Petitioner that this petition is different from E& L R Court Petition No. 66 of 2019 therefore finds no footing. The E& L R Court petition cannot be determined without a finding being made as to the legality of the Legal Notice that made the Hospital a parastatal. The splitting of the suit was thus not necessary – see the Court of Appeal decision in **Daniel N, Mugendi v Kenyatta University & 3 others [2013] eKLR**.

34. Indeed in the ruling delivered on 12th April, 2019 in **Okiya Omtatah Okoiti v National Executive of the Republic of Kenya & 8 others [2019] eKLR; Petition No. 66 of 2019**, Byram Ongaya, J was alive to the fact that the issue of the ownership of the Hospital had to be addressed when he commented that:-

“Parties made detailed submissions on [the] issue of the Kenyatta University owning the Hospital as established in the order and the government’s financial stakes in the Hospital but such are matters best delved into after close of pleadings and a full hearing.”

35. In another ruling delivered on 31st July, 2019 Byram Ongaya, J again revisited the issue of the ownership of the Hospital and held that:-

“The Court has revisited the petition as amended. The Court returns that the petition should not be dismembered or severed but should be heard and determined by the Court with focus on the predominant dispute which clearly falls within the Court’s jurisdiction. The Court considers that prayers 60 (k) (l) and (o) and some of the paragraphs in the petition raise issues about the ownership of the hospital. To the extent that such background information is necessary for effectual determination of the real or predominant issues in dispute in the present petition, they would not be liable to being struck out in so far as they relate to a relevant background about ownership and property in the Kenyatta University Teaching, Referral and Research Hospital and related property rights. Within jurisdictional concerns, the Court considers that they would remain vestigial and therefore parties and the Court would treat them as useful only as relevant background information and the predominant dispute in the petition falling for determination will be heard and determined accordingly. While making that finding the Court has also considered that the petitioner has indicated that he will file another related petition for matters outside the jurisdiction of this Court. The Court has also considered that the Hospital and the University are public and the land they stand on are also public and to that extent, in the circumstances of the case, the real and predominant dispute in the petition is not about ownership or property rights but the appointments of the Hospital’s Board Members and Chief Executive Officer in issue and the applicable law. Thus, the Court considers that the ownership issues are remote to the real issues in dispute and the predominant issues of appointment of the Hospital’s Board Members and the Chief Executive Officer and applicable law clearly fall within the jurisdiction of the Court and fall for determination by the Court accordingly.

The Court has further considered the applicants’ case that the petition relates to the interpretation of the Constitution and therefore the Court lacks jurisdiction. The Court returns that in matters predominantly within its jurisdiction like in the instant case, the Court has jurisdiction to interpret the Constitution. Thus Article 10(1) (a) of the Constitution provides that the national values and principles of governance in the Article bind all State Organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution. By that provision it is clear that the interpretation of the Constitution is impliedly taken away to every person and for the Court, for matters within its jurisdiction and like for the predominant matters in the present petition, the Court has the necessary jurisdiction. The Court considers that no further emphasis beyond the liberal Article 10 of the Constitution is necessary to confirm the Court’s jurisdiction to interpret the constitution whenever it is considering disputes within its jurisdiction.”

36. With the pleadings and the holdings of Ongaya, J in E & L R C Petition No. 66 of 2019, I wonder whether one can say that the Petitioner has an arguable case. I will leave it at that.

37. How about the allegation by the opposing parties that the petition has been filed after inordinate delay? By July 2019, the Petitioner had already indicated that he intended to file another suit on issues that the E& L R Court had no jurisdiction to deal with. He never did so. The email that talked of the launch of the Hospital is dated 1st October, 2019. It is presumed that the Petitioner knew about it on that day. He

waited until the eleventh hour on 11th October, 2019, a Friday before moving for orders. In my view, there was inordinate delay in the circumstances of this case.

38. The Petitioner never demonstrated any imminent violation of rights. If any rights were violated by the issuance of Legal Notice No. 4 of 22nd January, 2019, then those rights were violated way back in January, 2019. He had lived with the violations, for nine months before moving the court. It will do no more harm if he waits for the conclusion of the petition, which will finally determine if indeed any rights have been violated.

39. The Petitioner did not establish the prejudice he would suffer if conservatory orders were not issued. As correctly pointed out by the opponents of the application, if Legal Notice No. 4 of 22nd January, 2019 will eventually be quashed, the Hospital can easily be put under the management of Kenyatta University.

40. In any case, the Petitioner approached the court too late in the day because the Hospital had taken advanced steps towards operationalization by recruiting employees and entering into agreements with service providers. These are some of the reasons upon which he based his application for conservatory orders.

41. Where does the public interest lie? The interest of the public lies in allowing the Hospital to start operations. The bigger picture in this case is to allow Kenyans access medical services from a brand new facility. That will reduce the strain on other medical facilities in the country. The public interest therefore frowns upon the Petitioner's application.

42. The reasons in this ruling sufficiently explains the dismissal of the Petitioner's Notice of Motion dated 11th October, 2019. The costs for the application shall abide the outcome of the petition.

Dated, signed and delivered at Nairobi this 31st day of October, 2019

W. Korir,

Judge of the High Court