



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 491 OF 2016

DR. JAPHETH ODODA ORIGA.....PETITIONER

VERSUS

THE VICE CHANCELLOR, UNIVERSITY OF NAIROBI.....1ST RESPONDENT

THE ACADEMIC REGISTRAR, UNIVERSITY OF NAIROBI.....2ND RESPONDENT

B.M WAWERU (the returning officer).....3RD RESPONDENT

JUDGMENT

1. This is a Petition dated 24th November 2016 and filed on the same day together with a motion that is now spent. The Petition begins with the narrative on the constitutional principles in the Bill of Rights as a guide on the interpretation of rights based claims. The petition refers to Article 20 of the Constitution as binding courts to interpret the constitution in a manner that favours application of human rights; that the spirit of the constitution more than the letter should guide the Court to concur that the rights of the petitioner have been gravely violated; that Article 21 requires every state organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights; and that Articles 22 of the constitution gives every person the right to institute Court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or denied.

2. The petition goes further to recite Article 23 of the Constitution which states that the High Court has jurisdiction in accordance with Article 165 to hear and determine applications for redress of denial, violation or infringement of or threat to a right or fundamental freedom in the Bill of Rights; that Article 47 decrees that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedural fair.; and that Article 50(1) states that every person has the right to a fair hearing and trial before a Court or if appropriate, another independent and impartial tribunal.

3. After enumerating the Articles of the constitution as above, the Petition says no more but prays for the following reliefs;

a. A declaration that the elections of the dean school of education at the University of Nairobi scheduled for 25th November, 2016 is illegal, null and void, undemocratic, bias and unconstitutional.

b. A declaration that the petitioner's right to fair competition is violated by the respondents in disqualifying him on flimsy grounds.

c. A declaration that the petitioner is qualified to vie for the position of Dean School of Education at the University of Nairobi.

d. In the alternative the university of Nairobi statute law be declared illegal, discriminatory and unconstitutional as it the same denies more experienced and qualified persons from vying for a position they deserve.

e. A declaration that the respondents are biased by their conducts, precedent and actions from barring the petitioner from vying for the position of Dean School of education at the University of Nairobi as advertised.

f. This honourable courts do order the respondents to re-advertise the position of the Dean School of Education at the University of Nairobi and the petitioner be allowed to contest accordingly.

4. Together with the petition and motion, the petitioner swore a supporting affidavit of the same day. According to the affidavit, the petitioner deposes that he had been a Lecturer since 1993, rising to the position of senior Lecturer and that in the process, had served as an Associate Dean for two terms of 3 years each. He deposes that he applied for the position of Dean of school of Education but by letter dated 22nd November 2016, he was informed that he was not qualified to stand for the position. He states that there were only two candidates who had offered themselves for election and if he was disqualified, the other candidate would simply sail through unopposed. He contends that a lecturer with similar qualifications had previously been allowed to run for similar election hence he should not be prevented from standing for the impending election.

5. The respondent filed a replying affidavit by **Prof. Mutoro Henry Wangutusi**, sworn on 12th May 2017. Opposing the petition. **Prof. Wangutusi** deposed that the position of Dean of School of Education is a creature of statute; that the position is elective in accordance with statute X1X 6(1) in every school based on qualifications and that the Dean is the academic leader who should be qualified to lead based on experience. He denied that the petitioner was qualified to stand for election.

6. During the hearing, **Ms. Nyang**, learned counsel for the petitioner, submitted that the petitioner is a senior lecturer who has acted as associate Dean, while the requirements are that one must have been a chairman of a Department for at least 2 years. Learned counsel contended that the petitioner had acted as Associate Dean and, therefore, considers himself qualified to stand for the election. It was **Ms. Nyang's** contention that one **Dr. Genevieve Wanjala Kasiera** was once elected for the same position when she was a senior lecturer and had been acting chairman for one and a half years which was not a substantive appointment but had been Associate Dean for only one term of 3 years. Further contention was that the statute relied on is illegal and discriminative.

7. The respondents did not attend during the hearing, but filed written submissions dated 9th May 2018. The respondents contended that the petitioner had failed to establish that the petition raises constitutional issues and that his rights had been violated. It was also submitted that the petition does not meet the threshold of a constitutional petition. Reliance was placed on the cases of **Anarita Karimi Njeru v Attorney General (No.1)** [1979]KLR 154 and **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others** [2013] eKLR, arguing that the petition did not plead with adequate particularity.

8. The respondents also relied on the case of **Thorp v Holdsworth** [1876]3 Ch. D 637 for the proposition that the whole object of pleadings is to bring the parties to an issue, and the meaning of the rule was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was, and that the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.

9. The respondents also relied on the case **Kiambu County Tenants Welfare Association v Attorney General and another** [2017]eKLR for the submission that a constitutional question is an issue whose resolution requires the interpretation of the Constitution rather than that of a statute. They submitted that the petitioner had not shown that there was a violation of constitutional rights; that there was discrimination and that the reliefs sought were deserved.

Determination

10. I have considered this petition, the response thereto; submissions on behalf of the parties and the authorities relied on. As I stated at the beginning of this judgment, this petition is not only poorly drafted but is also devoid of direction. The petition has no background information, no facts, or the basis upon which it is grounded. Put differently, the petition has no legs upon which the prayers sought hinge.

11. I understood the petitioner to state through his affidavit, that there were elections he intended to stand for but was locked out on the basis that he was not qualified. He also deposed in his affidavit that a lecturer had earlier been allowed to run for similar elections without the qualifications demanded and had similar or less qualifications than those of the petitioner, which action he termed discriminatory.

12. From the petitioner's submissions, **Ms. Nyang**, learned counsel for the petitioner appeared to suggest that the statute relied on by the respondents to lock out the petitioner from standing for the election for the position of Dean of the School of Education, is unconstitutional and discriminative. The respondents, on their part, argued that the petition does not meet the threshold of a constitutional petition in terms of pleading; that it has not identified the constitutional rights said to have been infringed or the constitutional provisions breached.

13. It is a principle in constitutional litigation that a party seeking reliefs through a constitutional petition on the basis of violation of the constitution, constitutional rights and fundamental freedoms, the petitioner must plead with a higher degree of precision; show constitutional or fundamental freedoms violated, the manner of violation, the Constitutional provision in question or violated and the jurisdictional basis for the litigation. (see **Anarita Karimi Njeru v Attorney General** -*supra*).

14. In **Meme v Republic** [2004] eKLR, the Court reiterated that "*where a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed*".

15. Precision in pleading is vital in Constitutional petitions because it enables the opposite party to fully understand the case they face and be in a position to adequately respond to it. It also enables the Court to decipher the issues brought before it for adjudication. It helps in avoiding surprises and ambiguities in the litigation but more importantly it shows the link between the aggrieved party, the constitutional provisions at play and the possible infringement. This was well stated by the **Supreme Court** in the case of **Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others** [2014] eKLR thus:-

"[349] Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court

decision in *Annarita Karimi Njeru v. Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement...

16. In *Mumo Matemu v Trusted Society for Human Rights Alliance & 5 others* (supra), the appellant argued that apart from citing omnibus provisions of the Constitution, the petition provided neither particulars of the alleged complaints, the manner of alleged infringements or the jurisdictional basis of the action before the court. He maintained that the failure to draft the petition with precision had prejudiced the appellant and the other respondents. Responding to this submission, the Court of Appeal stated;

“[41] We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point”

17. The Court then went on to state;

“In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under section 1A and 1B of the Civil Procedure Act (Cap 21) and section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.

18. The Court reaffirmed the principle of precision in constitutional petitions observing that the petition before the High Court referred to Articles of the Constitution in the title but provided little or no particulars as to the allegations and the manner of the alleged infringements without enumerating any particulars. And in *Kiambu County Tenants Welfare Association v Attorney General* (supra), the Court observed that a constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.

19. It flows clearly from the above decisions that particularity and preciseness of pleading in Constitutional petitions plays a pivotal role in enabling the Court do justice of the case and to the parties. Looking at the present petition, it not only fails to plead the Articles of the constitution violated, the right the petitioner’s claims has been infringed but also the manner of the infringement if any. That is, the petition does not state what rights, if any, have been violated, how they have been infringed, and the Constitutional provisions undermined by the respondent’s actions.

20. Where a petitioner approaches the court through a constitutional petition pleading that his constitutional rights and fundamental freedoms have been violated or denied, pleading with precision and clarity, pointing out with particularity the Articles of the Constitution concerned, enables the Court understand the issues it is called upon to resolve. This is because a claim of violation of constitutional rights and fundamental freedoms call on the court to interpret the constitution and its provisions as they relate to the rights and fundamental freedoms said to have been infringed, thus determine whether the petitioner’s claim of infringement of rights has any basis. That is however, not what I find in this petition. There are neither facts, particulars of violation of rights or Constitutional provisions breached. The Court is left to search for the nature and extent of violation the petitioner complains of without any particularity and to what extent they have been violated or infringed. To that extent, this is not a proper Constitutional petition.

21. I must also point out that it is not every disapproval of actions or decisions of public bodies that should lead to filing constitutional petitions alleging violation of fundamental rights and freedoms. There must be a real infringement, denial of rights or threat to violation that calls for interpretation of the constitution vis vis the rights infringed or threatened. It is not every disagreement that must find its way to the constitutional court.

22. In this regard, I agree with the observation by **Lord Diplock** in the case of *Harrikissoon V Attorney General of Trinidad and Tobago* [1980]AC 265 where he decried the tendency of people rushing to institute constitutional petitions alleging violation of fundamental freedoms where there was none, stating;

“The notion that wherever there is a failure by an organ of government or a public officer to comply with the law this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed for individuals by...the constitution is fallacious. The right to apply to the High Court... for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action... the mere allegation that a human right of the applicant has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the Court...if it is apparent that the allegation is frivolous, vexatious or abuse of the process of Court as being made solely for the purpose of avoiding the necessity of applying the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.” (emphasis)

23. In *Benard Murage v Fine Serve Africa Limited & 3 others* [2015] eKLR the Court stated that **“Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first;”**

24. In the circumstances of this petition, I agree with the respondents that the petition fails the threshold of a Constitutional petition and is a candidate for dismissal. Consequently, the petition dated 24th November 2016 is dismissed with costs.

Dated, Signed and Delivered at Nairobi this 30th Day of July 2018.

E C MWITA

JUDGE