



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

PETITION NO. 25 OF 2018

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27, 28, 36 47(1), 50 AND 165 OF THE CONSTITUTION

HUSUS MUGIRI.....PETITIONER

VERSUS

MUSIC COPY RIGHT SOCIETY OF KENYA.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

RULING

1. The 1st respondent is a Company limited by guarantee and a non-profit making organization licenced by the Kenya Copy Right Board to collect royalties for authors, composers, arrangers, and publishers of musical works who are its members in respect of performances and broadcast to the public.
2. On 9th November, 2018, the 1st respondent placed a notice on the Daily Nation to the effect that its 28th Annual General Meeting will be held on Thursday 6th December, 2018 at **African Inland Church (AIC), Bondeni Nakuru** from 10am. In the said notice, the 1st respondent simultaneously notified its members that the regional elections will be held at various venues on 29th November, 2018. The venue for the Eastern Region was notified to be Machakos at the **Machakos University College**.
3. By a Petition dated 12th November, 2018, **HUSUS MUGIRI (hereinafter “the petitioner”)** alleged that; he and approximately 600 others are members of the 1st respondent from Lower Eastern and Upper North Eastern region of Kenya. That the publication of the aforesaid notice by the 1st respondent was in disregard of the centrality of the venue as other members hail from far off areas such as Laisamis, Marsabit, Wamba and Kaelo.
4. The petitioner therefore alleged that, a common central place such as Embu or other alternative centre more central in the North Eastern region of Kenya should be agreed upon. For the foregoing reasons, the petitioner prayed for a declaration that the aforesaid notice of elections raises triable issues and should be referred to arbitration.
5. Simultaneous with the petition, the petitioner took out a Motion on Notice under **Order 40 Rules 1, 2 & 3 of the Civil Procedure Rules and Section 7 of the Arbitration Act**, praying for conservatory orders. The orders sought were in the nature of a temporary injunction restraining the 1st respondent from carrying on with the aforesaid regional elections pending reference to arbitration and the hearing and determination of the petition.
6. The Motion was supported by the Affidavit of the petitioner sworn on 12th November, 2018. The petitioner reiterated the contents of his petition and further deposed that; for the reasons set out in the petition, the proposed elections would be irregular and against **Article 78 of the 1st respondent’s Memorandum and Articles of Association**. That he had written to the 1st respondent to seek arbitration on the matter but there had been no response. That the notice as published offends the provisions of the regulations. That he and his other colleague members from the upper Eastern Region will take close to 9 hours to go to the venue of the election. He therefore prayed that the orders sought be granted.
7. The application was opposed vide the replying affidavit of the acting Chief Executive Officer of the 1st respondent, Milka Kulati sworn on 19th November, 2018. He stated that the petition did not disclose any *prima facie* case nor did it comply with the Mutunga Rules. That the petitioner had not approached the 1st respondent with a request for referral to arbitration.

8. The 1st respondent further averred that; the rules of elections do not provide for venues for regional elections; that the previous elections were conducted in Embu and other members from far flung areas like Mito Andei still attended the Embu elections; that throughout the country, the election venues kept on changing. He concluded that the intention of the petitioner is to stall the elections and cause the Eastern Region not to present a candidate for directorship at the AGM.

9. At the hearing, Mr. Otieno for the petitioner submitted that in fixing the elections to be undertaken at Machakos, it was in contravention of **Articles 26, 27 and 47(1) of the Constituion of Kenya**. That the notice for the AGM was in contravention of the Memorandum and Articles of Association of the 1st respondent which require an 8 week notice; that the 1st respondent had not responded to the petitioner's allegations but had only made mere denials. That the elections should have been held at a central place. That due to the night travel ban, the petitioner and his colleagues may not attend the elections. Counsel urged that the application be allowed.

10. In response, Mr. Muchomba Learned Counsel for the 1st respondent submitted that the notice period for the AGM was 21 days contrary to Mr. Otieno's submissions; that this court is barred by dint of **section 10 of the Arbitration Act** from entertaining the present petition; that there was no night travel ban as submitted by Mr. Otieno. Counsel therefore urged the court to dismiss the application. The 2nd respondent never filed any response and never appeared at the hearing of the application.

11. I have considered the affidavits on record and the Counsel's submissions. This is basically an application for an interlocutory injunction. The principles applicable are well known. These were set in the case of **Giella vs. Cassman Brown [1969] EA 569**. These are that; the applicant must establish a prima facie case with a probability of success; he must show that if the injunction sought is not granted, he will suffer loss and damage that cannot be compensated by an award of damages; and that if the court is in doubt, it will decide the matter on a balance of convenience.

12. Before delving into the merits of the application, I should first examine the issue of jurisdiction raised by the 1st respondent. It was contended that since **Article 78 of the Memorandum and Articles of Association** of the 1st respondent provided that any dispute between a member and the 1st respondent or members intense be arbitrated upon, this court is barred by dint of **section 10 of the Arbitration Act** from entertaining this matter.

13. **Article 78 of the Memorandum and Articles of Association** of the 1st respondent is clear that where a dispute arises between a member and the 1st respondent, the same should be referred to a single arbitrator. **Section 10 of the Arbitration Act** provides: -

“10. Except as provided in this Act, no court shall intervene in matters governed by this Act”.

14. From the foregoing, it is clear that, unless permitted by the Act itself, no court is permitted to entertain matters arbitral. **Section 7 of the Act** provides: -

“7. (1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure”.

15. The cumulative effect of the foregoing is that, while courts have no jurisdiction to entertain matters arbitral, the High Court has jurisdiction to entertain an application for interim measure of protection pending arbitral proceedings.

16. In the present case, there is an arbitral agreement under **Article 78 of the Act**. The main prayer in the petition is to declare that there is a dispute as to the proposed election and the matter be referred to arbitration. The application before me is for an interim measure of protection pending reference to arbitration. In my view, the objection by the 1st respondent is spurious and has no basis. This court has the perfect jurisdiction under **section 7 of the Act** to entertain the present application.

17. Now to the main application. On the first principle of **Giella v. Cassman Brown**, the petitioner's contention is that his fundamental rights have been infringed. That he and 600 other members of the 1st respondent from the upper Eastern Region will be disfranchised as a result of the elections being held in Machakos; that the distance to the venue of the election is so far.

18. In order for a petition to qualify to be a constitutional petition that seeks to enforce or protect fundamental rights and freedoms under the bill of rights, it must meet the test set in **Anarita Karimi Njeru vs. Republic [1979] eKLR**. That is, the applicant must specify which specific provisions of the Constitution that declare the rights, the specific rights and freedoms that have been or are threatened to be infringed or violated and the manner in which the respondent has infringed the subject rights. This position has been reiterated time and again.

19. In **Meme v Republic [2004] eKLR**, the court restated the position in the **Anarita Karimi Case (supra)** as follows:-

“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 reasonable degree of precision that of which he complains, the provisions said to have been infringed and the manner in which they are alleged to have been infringed and that the applicant's instant application had not fully complied with the basic test of constitutional references, as it was founded on generalized complaints without any focus on fact, law or Constitution, hence it had nothing to do with the constitutional rights of the appellants”.

20. In **Robert Amos Oketch vs. Andrew Hamilton & 8 Others [2017] eKLR**, the court held:-

“First, this being a constitutional petition, the petitioner is required to show with precision that it meets the test set in the case of

Anarita Karimi Njeru v. Republic (supra). In that case, the court stated that ... a party who wishes the court to find in his favour must plead with a reasonable degree of precision the rights he claims to have been violated the constitutional provisions allegedly violated and the jurisdictional basis for it.

....

Applying the above principles to this case, I have considered the petitioner's pleadings, the evidence as well as submission by his counsel and in my respectful view this is not a proper constitutional petition challenging violation of fundamental freedoms. I say so because, although the petitioner had pleaded provisions of the constitution, he has not demonstrated to the required standard how his rights and fundamental freedoms have been violated infringed or are threatened to come within the ambit of Article 23(1) of the constitution for redress".

21. I will reiterate the foregoing on the present petition. Although the petitioner cited on the heading of the petition **Articles 27, 28, 36, 47(1), 50 and 165 of the Constitution**, he did not specifically state, in anyway whatsoever, in the body of the petition what of and how his rights and freedoms had been violated or threatened to be infringed and the legal basis for the same.

22. In my view, other than submitting as counsel for the petitioner did, that holding the elections at Machakos was an infringement of **Articles 27, 26 and 47 (1) of the Constitution**, it was incumbent upon the petitioner to state with precision how the holding of the said elections as aforesaid infringed upon the right to equality, freedom from discrimination, right to life and fair administrative action of the petitioner. It was imperative for the petitioner to plead these matters in the petition and offer evidence through or by way of his verifying affidavit. This he did not.

23. In so far as the petition fell short of the test in the **Anarita Karimi's Case**, it is doubtful if the first test of **Giella v. Cassman Brown** can be met.

24. On the other grounds, I have considered the **Memorandum and Articles of Association of the 1st respondent**. It has not specified any specific place where the regional elections are to be held, leave alone the AGM. That being the case, it was upon the petitioner to demonstrate with certainty and precision, that the holding of the elections as had been set by the 1st respondent in its notice, would amount to a violation of his rights and freedoms under the Constitution. This he did not.

25. On the second principle, it was not demonstrated that if the elections are not stopped, the petitioner or the 'over 600 other' members, whose identities were not disclosed, would suffer irreparable loss and damage. Although the petitioner complained of the distance between Meru and Machakos, he never demonstrated that that was against the **Memorandum and Articles of Association** of the 1st respondent or would violate any of his rights under the Constitution. The petitioner also fails on the second principle.

26. As regards convenience, the balance of convenience tilts in favour of allowing the elections to go since the court has not been told the total number of members in the Eastern Region *vis a vis* the "over 600" members whose identities was not disclosed, the view this court takes is that, the majority of the members need to exercise their right to vote in those elections and choose those who are to represent them at the AGM. This is so considering that no constitutional right of anyone has been demonstrated to be likely to be infringed by the holding of those elections as set.

27. Accordingly, I find that the application dated 12th November, 2018 to be without merit and the same is hereby dismissed with costs.

DATED and DELIVERED at Meru this 27th day of November, 2018.

A. MABEYA

JUDGE