



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
PETITION NO. 8 OF 2016

CHARLES NDUNGU NGUMI.....1ST PETITIONER

WILSON KARANJA WAMBUGU.....2ND PETITIONER

VERSUS

PAUL GITONGA WANJAU.....1ST RESPONDENT

J.M. THUO.....2ND RESPONDENT

JUDGMENT

On 30th March, 2016, elections were held to elect a director to represent Gathuti tea factory of Mahiga electoral area at the Kenya Tea Development Authority during the year 2015/2016. In those elections, the petitioners and the first respondent vied for this particular position while the second respondent presided over the elections as the returning officer. After the electoral process, the first respondent emerged with the most votes and was therefore declared the winner for the contested position.

The petitioners were not satisfied with the results and so by a constitutional petition dated 3rd June, 2016 and which they filed in court on 14th June 2016, they disputed the election of the first respondent. It is this petition that is the subject of this judgment.

In their petition, the petitioners cited **articles 3, 10, 12(1), 20(2), 22(1) and 48** of the **Constitution** as having been contravened. Apart from these constitutional provisions, the petitioners also alleged that the elections were conducted in flagrant disregard of regulation nos. 5(a) and (h) and 18 (a) of the Tea (Elections) Regulations 2000 to the extent that the first respondent was allowed to vie for the position of the director despite the fact that he was not eligible for election for such a position; that the first respondent's election was also in breach of regulation no.4(15) of the same regulations in that the returning officer did not announce the number of votes cast for each candidate; and that regulation no. 4(17) was also breached because strangers were allowed to vote.

Although only two respondents are named in the petition, the petitioners alleged in the body of the petition that *“the second, third and fourth respondents purported to declare the first respondent as the duly elected director of the Kenya Tea Development Authority”*. It is not clear who the third and fourth respondents are. They further alleged that these anonymous people together with the second respondent did not announce the votes cast for each candidate and that they also manipulated the voter register to include unregistered persons to vote.

In the premises, the petitioners asked for three main prayers; first, they sought for a declaration that the first respondent was unlawfully declared as the duly elected director to the Kenya Tea Development

Authority and that his election was null and void for all intents and purposes; second, they sought for an order of judicial review to remove into this court and quash the decision of the “2nd, 3rd and 4th respondents” in declaring the first respondent the duly elected director. Finally, the respondents sought for an order of judicial review of prohibition to prohibit the first respondent from carrying on the functions of a director until such time that fresh elections are held.

The petition was supported by the affidavit of the first petitioner who swore that he holds 108 shares at Gatururu tea buying center while his co-petitioner is a shareholder at Munyange tea buying centre and that they were eligible to contest for the position of a director within the particular electoral area in which the elections for this position were held. The first respondent on the other hand only held 78 shares at Gathuthi tea factory but was not registered as a proprietor of any land within the electoral area. Consequently, he was not eligible to contest for the post of director within that area.

The petitioners also deposed that the first respondent does not produce green tea of at least 2000 kg per year.

Although the first respondent was not eligible to vie for the post of director, he was allowed to contest but even then, the second respondent did not announce the votes cast for each of the contestants and therefore infringed the petitioners’ constitutional right to information and due process. According to them, the elections were also rigged because widows were allowed to vote on behalf of their deceased husbands.

The second respondent filed a replying affidavit opposing the petition and admitted that indeed he presided over the elections for the position of a director for Gathuthi Tea Factory in Mahiga electoral area which were held on 30th March, 2016. He swore that the entire electoral process was regular and in any event the petitioners’ agents who represented them at all the polling stations and witnessed the tallying of votes never raised any concern on the electoral process on the day of the voting. The officer denied having manipulated the voters’ register and neither was he aware that any widow had voted on behalf her deceased husband. To the best of his knowledge, the election in which the petitioners participated was open, free and fair.

As I considered the submissions by the learned counsel for the petitioners and the respondents, one thing I noted on the face of the petition and which is too glaring to be ignored, is that although several provisions of the Constitution are cited and alleged to have been violated or contravened, the petitioners never went further than reiterating what those provisions entail. It is apparent all they have done is to reproduce those provisions seriatim in the first seven paragraphs of their petition and alleged in the last paragraph thereof that the provisions cited have been infringed without any indication of how they have been infringed as alleged.

The affidavit in support of the petition is not useful either as all it represents are allegations that the first respondent was ineligible to contest for the position in dispute for the reason that he was not a land owner within the electoral area in question and that in any event, the votes cast for him and his competitors were not announced. Further his election was irregular for the reason that strangers were allowed to participate in the elections.

The upshot of the petitioners’ petition is that they have simply randomly cited several provisions of the Constitution without specifying how those provisions have been violated to the detriment of their constitutional rights. Courts have consistently frowned upon this approach of invoking their jurisdiction in determination of constitutional issues and the leading case in this respect **Anarita Karimi Njeru versus The Republic (No.1) (1976-1980) KLR 154** where the High Court, faced with a similar situation, dismissed the petitioner’s petition for, among other reasons, lack of correlation between the petitioner’s complaints and the provisions of the Constitution alleged to have been infringed and the manner in which they are alleged to be violated. The court stated as follows:

We would however again stress that if a person is seeking redress from the High Court on a matter which involves the Constitution, it is important (if only to ensure that justice is done to his case) 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. (see paragraph (H) at page 156).

Courts have taken cue since then and followed this line of thinking in many other cases where this question of the need to state with precision a petitioner's grievances and how those grievances arise from the violation or a threat to violation of the Constitution has arisen; for example, in **Meme versus Republic (2004) 1KLR**, a three-judge bench of the High Court quoted this statement with approval and adopted it as the principle upon which allegations of violation of the constitutional rights must be founded. In dismissing that the petition before it, the court stated at page 688 that:

We must state in our judgment that the application before us has not fully complied with that basic test...the main thrust of the applicant's case is founded on generalized complaints without any focus on fact, law or the constitution which is being invoked as the umbrella.

This is exactly what the petitioners have done here; as much as their complaints may appear apparent, they are not precise as to those provisions in the constitution that have been infringed and the manner in which they have been infringed.

In a more recent decision in **Mumo Matemu versus Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR**, (paragraphs 41-44) the Court of Appeal followed that decision to emphasise that a dispute before court must be properly defined. In upholding the decision of the High Court dismissing the petition, the Court held that the petition fell below the threshold set by the **Anarita Karimi Njeru** case.

Besides the petitioners' failure to raise any constitutional question worthy of determination as such, there is a related question of whether the petition should have been instituted as an ordinary suit rather than as a constitutional petition. The dispute between the parties, as noted, is basically about an election and more particularly, whether the election regulations pertaining to that election were adhered to. The petitioners' case is that those regulations were not complied with and in the face of such breach, the petitioners have not shied away from seeking for judicial review orders specifically. In these circumstances, there is no plausible reason why the petitioners opted to file a constitutional petition rather than a judicial review application or any suit through which they could ventilate their grievances.

I am aware that in determination of a constitutional petition a court can grant judicial review orders but even then, a judicial review application cannot be substituted for a constitutional petition. It does not necessarily follow that since judicial review orders may be made in a constitutional petition, then a party thereby has a carte blanche to file a constitutional petition for judicial review orders when circumstances demand that he ought to have filed a judicial review application instead. In my humble view, it smacks of an abuse of the process of court if, for instance, in a bid to avoid the stringent requirements for an application for judicial review orders, the applicant lodges the same application but camouflages it as a constitutional petition.

This question was aptly captured by the judicial committee of the Privy Council in **Kemrajh Harrikioson Versus Attorney General of Trinidad & Tobago (1979) 3WLR 62**. In that case the teaching service commission of Trinidad and Tobago, acting under regulation 135(1) of the public service commission regulations 1966(as adopted and amended by the commission in 1968), made an order transferring the appellant teacher to another school, without giving him the three months' notice that was required unless the exigencies of the teaching service did not so permit. The appellant considered that the transfer was intended as a punishment for allegations he had made of improprieties at the first school and that the exigencies of the teaching service did not justify his transfer on less than three months' notice. Instead of availing himself of the review procedure provided by regulation 135, he applied to the High Court under section 6 of the Constitution of 1962 for a declaration that the human rights and fundamental freedoms granted to him by section 1 of the Constitution had been violated. The High Court rejected the appellant's claim. He appealed to the Court of Appeal of Trinidad and Tobago, which dismissed his appeal. When the matter went to the Privy Council, it held as follows:

The notion that wherever there is a failure by an organ of the Government or a public authority

or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter I of the Constitution is fallacious. The right to apply to the High Court under Section 6 of the Constitution 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 normal proceedings for invoking judicial control of administrative action. In an originating application to the High Court under Section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedoms.

This statement is self-explanatory and I need not belabour the point that the procedure the petitioners adopted to ventilate their grievances is not the right one. In the final analysis I am convinced that the petitioner's petition is not only misconceived and an abuse of the process of the court but I have also not found any merit in it; I hereby dismiss it with costs.

Signed, dated and delivered this 24th day of March, 2017

Ngaah Jairus

JUDGE