



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION 332 OF 2015**  
**BETWEEN**  
**HIS HIGHNESS PRINCE AGA KHAN SHIA**  
**IMAMI ISMAILI NATIONAL CONCILIATION**  
**AND ARBITRATION BOARD FOR KENYA..... PETITIONER**  
**AND**  
**THE HON. ATTORNEY GENERAL.....RESPONDENT**  
**JUDGMENT**

***The Parties***

[1] The Petitioner is His Highness Prince Aga Khan Shia Imami Ismaili National Conciliation and Arbitration Board for Kenya. It is a body that is established in terms of **Article 13** of the **Constitution** of the **Shia Imami Muslims**. It brought the Petition on its own behalf and on behalf of members of the wider community of Ismaili Muslims in Kenya.

[2] The Respondent is the Hon. Attorney General of the Republic of Kenya.

***Factual background***

[3] On 5<sup>th</sup> June 2014, the High Court per Kimaru J delivered a Ruling on an Application made in **T.S.J vs S.H.S.R [2014]eKLR** to have an award made an order of court in terms of **Article 36** of the **Arbitration Act** and **Rule 4** of the **Arbitration Rules**. The award was made by the Petitioner in terms of **Article 13** of the **Ismaili Constitution** which provides as follows:

***“13.1 There shall be a National Conciliation and Arbitration Board for each of the territories specified in the Seventh Schedule to be known as ‘His Highness Prince Aga Khan Shia Imami Ismaili National Conciliation and Arbitration Board’ for the territory for which it is formed:***

***(a) to assist in the conciliation process between parties in differences or disputes arising from commercial, business and other civil liability matters, domestic and family matters, including those relating to matrimony, children of***

*a marriage, matrimonial property, and testate and intestate succession;*

*(b) to act as an arbitration and judicial body and accordingly to and adjudicate upon;*

*(i) commercial, business and other civil liability matters;*

*(ii) domestic and family matters including those relating to matrimony, children of a marriage, matrimonial property, and testate and intestate succession; and*

*(iii) disciplinary action to be taken under this Constitution and any Rules and Regulations.”*

[4] The Court dismissed the Application and expressed the view that the **Arbitration Act** envisages that only disputes of a commercial nature, and not personal nature should be resolved in an arbitration forum. In that regard, it found that the Petitioner lacked jurisdiction to deal with matrimonial and divorce matters because only ordinary courts or the Kadhi's courts have jurisdiction to deal with those matters. It further found that the Petitioner lacked jurisdiction to make orders of custody and maintenance because those matters fall within the exclusive jurisdiction of the Children's Court.

[5] The Petitioner was not party to those proceedings and aggrieved by the decision of that Court, it brought the present Petition.

#### ***The Petitioner's case***

[6] The Petitioner's case is essentially hinged on three premises. The first is that the Court's findings placed members of the Ismaili community at a disadvantaged position because they will not be able to effectively observe, manifest and practice their right to religion enshrined in **Article 32** of the **Kenyan Constitution** through adherence with their Constitution.

[7] The second is that the Ruling denied it and its members the right to protection and benefit of the law under **Article 27(1)** of the **Constitution** and benefit of using the **Arbitration Act** to resolve their disputes, contrary to both the spirit and letter of **Article 159(2)(c)** of the **Constitution**.

[8] The third argument is that the Court made adverse orders against it without being joined to the proceedings. In that regard, it complained that its rights to a fair hearing in terms of **Articles 25(c)** and **50(1)** of the **Constitution** have been violated.

[9] In the end, it prayed for the following orders:

*“(a) A declaration that every Ismaili Muslim in Kenya has the right to freedom of religion and belief, including the right either individually or in community with one another, in public or in private, to manifest their religion or belief through practice and observance of the provisions of the Ismaili Constitution as promulgated by His Highness the Aga Khan.*

*(b) A declaration that the provisions of Article 13 of the Ismaili Constitution are in consonance with the provisions of Article 159(2)(c) of the Constitution, and that the Alternative Dispute Resolution mechanism provided for therein ought to be accordingly promoted by the Kenyan Courts.*

*(c) A declaration that National Conciliation and Arbitration Boards in Kenya*

*established under Article 13 of the Ismaili Constitution have the jurisdiction to hear and determine disputes between Ismaili Muslims in Kenya.*

*(d) Such other and/or further relief as this Honourable Court may deem fit and just to grant.*

*(e) The costs of and occasioned by this Petition be provided for.”*

[10] On 14<sup>th</sup> December 2014, the Petitioner filed written submission of even date and I must state that they are essentially a reiteration of the Petition. It submitted that **Article 159(2)** of the **Constitution** recognizes alternative forms of dispute resolution and that it would be a mockery of the said Article to refuse to give effect to such mechanisms. It urged that, in order to give effect to the purpose of **Article 159(2)**, this Court should seek guidance from the principle enunciated in the Ugandan case of **Besigye and Others vs. the Attorney General [2008] 1 EA 37** that constitutional provisions must be construed widely, holistically and harmoniously, with a view of achieving their purpose.

[11] In the above regard, it submitted that when **Articles 32** and **159(2)** are construed, a generous and purposive interpretation must be adopted in order to ensure the full realisation of the Petitioner's right to freedom of religion. Further that, to argue that an institution like the Petitioner is not recognised in Kenya would mean that Ismailis living in Kenya would be denied their right to religion.

[12] The Petitioner also submitted that the doctrine of party autonomy allows parties, in any kind of relationship, to choose a forum where they can have their disputes resolved. It is the Petitioner's argument in that regard that **Section 2** of the **Arbitration Act** places no limit on the types of dispute that can be referred to arbitration. It submitted further that the courts are in fact prevented from interfering with parties' arbitration agreements by dint of **Article 10** of the **Arbitration Act**.

[13] The Petitioner submitted further that, contrary to the Respondent's argument, it could not have gone to the Kadhi's Court because members of the Ismaili community do not submit to the jurisdiction of that Court. It sought reliance on **Fazleabbas Mohammed Chandoo vs. A.I Hussein - Kadhi, Kadhi's Court & 4 others [2015] eKLR** where this Court pointed out that in addition to complying with **Article 170(5)**, the parties appearing before the Kadhi's Court must, in advance, submit to the jurisdiction of the Kadhi's Court.

[14] It is the Petitioner's submission that Islam is diverse with many sects and should not therefore be dealt with "as one amorphous body". In that regard, the Petitioner submitted that the law as interpreted by the Kadhi's Court may not be consistently applicable to certain sects of the Islam religion. It relied on **Saifudean Mohamedalli Noorbhai vs. Shekinaz Abdehu Sein Adamji [2011] eKLR** to support the argument.

[15] The Petitioner submitted that there is nothing in the **Arbitration Act** which prescribes the nature of disputes that should be referred to arbitration and that **Section 3** of the **Act** recognises any form of arbitration. Further, that the definition of arbitration in the Act contemplates disputes arising in respect of a defined legal relationship, contractual or otherwise, including marriage relationships.

[16] The Petitioner submitted that the award should not have been quashed because it satisfied both constitutional and statutory requirements vide **Article 159(2)(c)** of the **Constitution** and **Section 3** of the **Arbitration Act**. With regards to the argument that its right to be heard was violated, it sought reliance on **Richard Ncharpi Leiyagu vs. Independent Electoral and Boundaries Commission and 2 Others, C.A 18 of 2013** and **Ahmed Issack Hassan vs. Auditor General [2015] eKLR, Wakahihia and Others vs. Thiongo (1986-[1989]EA 589**.

## **Respondent's case**

[17] The Respondent opposed the Petition vide its grounds of opposition filed on 24<sup>th</sup> November 2015. He argued that the Petitioner is non-suited since it was not party to the proceedings before Kimaru J. Further, that there is no evidence that the Petition is brought on behalf of the wider community of Ismaili Muslims in Kenya. He also argued that **Article 170(3)** of the **Constitution** requires that a body that deals with Muslim law should have both a constitutional and legislative foundation. In that regard, he maintained that the award was properly declared null and void because it lacked any legal and constitutional underpinnings.

[18] He argued that the Constitution of Kenya does not recognise any other body, other than the Kadhi Court, that deals with Muslim law. He stated further that only the High Court, Magistrate Courts and the Kadhi Court have jurisdiction to deal with matters of personal law under Muslim law. In the above regard, the Respondent lauded the findings of Kimaru J.

[19] It is the Respondent argument that since the Petitioner was not party to the proceedings before Kimaru J, it cannot claim that its rights have been violated and that only those who were party to those proceedings have the right to claim violation of their rights.

[20] The Respondent's other argument is that the Petitioner is an adjudicative body and cannot therefore possess constitutional rights including the right to freedom of religion and conscience. He further argued that the Constitution does not distinguish between any sects of Muslim faith and that all sects of Muslim faith, including Ismailis, are subjected to the **Kadhi Courts Act** and should be dealt with by the Kadhi Courts. In that regard, he argued that all questions surrounding personal law in Muslim faith should be dealt with by the Kadhi Courts and that to do otherwise as will divest them of their powers donated by the Constitution.

[21] In the end, he argued that it is not in the public interests to hold that bodies like the Petitioner have the power to determine matters of Islamic personal law and that doing so would open floodgates of similar claims.

[22] On 7 January 2015, the Respondent filed his written submissions. The Submissions basically fleshed out the Grounds of Opposition set out above. He framed the following issues for determination:

- a. Whether the Board is recognised in Kenyan law.
- b. Whether a Petition can arise out of the determination of a legally constituted and established Court.
- c. Whether the Board can competently allege any violation of the rights / does the board have any rights that can be violated.

[23] On the first issue, the Respondent submitted that the Petitioner has not demonstrated that it is registered under the **Societies Act** or exempted from complying with the provisions of the said Act. He submitted further that **Article 159(2)** of the **Constitution** envisages and encourages ADR processes only in cases that are handled in a legally established Court or Tribunal. The upshot of the argument is that parties cannot agree to have their disputes resolved in an institution or body that is not constitutionally or statutorily founded.

[24] Regarding the second issue, the Respondent submitted that it is not tenable for the Petitioner to claim that its rights were violated by a judgment of a court and it relied on **Fatuma Mohamed Sharif vs. The Principal Magistrate Court Kajjado & 2 Others [2014] eKLR**. In that case, this Court stated that where a party is dissatisfied with a judgment of a court, the proper avenue is to have the decision reviewed or to file an appeal in the Higher Court.

[25] In respect of the third issue, the Respondent emphasized that the Petitioner is an adjudicative body and therefore cannot possess any rights that may have been violated such as the right to religion and

conscience. Further, that in any event the Petitioner was not party to the proceedings which gave birth to this Petition and may not therefore claim that its right to freedom of religion and conscience have been violated. In the end, the Respondent submitted that in any event, the Petitioner has not demonstrated that its rights under **Articles 25, 27, and 32** have been violated.

## **Determination**

### *Issues*

[26] I have read the Parties' Affidavits and the rival submissions and it appears to me that the fundamental issues in contention are the following:

- a. Whether the Petitioner has locus standi to bring the Petition in this Court.
- b. Whether the Petition is properly before this Court.
- c. Whether the Petitioner had the competence to make an award.
- d. If all of the above are in the affirmative, whether the judgment of Kimaru J violated the Petitioner's rights as alleged.

I will deal with these issues seriatim.

### ***Whether the Petitioner has locus standi to bring the Petition in this Court***

[27] The Respondent argued that the Petitioner is non-suited to bring this Petition and that since it was not party to the proceedings before Kimaru J, it cannot now challenge the orders of that court. He also argued that there was no evidence that the Petition is brought on behalf of the broader Muslim community in Kenya. Lastly, he argued that the Petitioner is not registered with the **Societies Act** nor is it exempted from complying with the provisions of the said Act.

[28] It is necessary for me to address this issue because, if it has meritorious, then the Petition should be jettisoned instantly.

[29] I must state immediately that the Petitioner indicated that it brings this Petition on behalf of members of the Ismaili community and on its own behalf. In that regard, it has clearly brought itself within the purview of **Article 22** of the **Constitution** which provides as follows:

***“1. Every person has 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 is threatened.***

***2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by?***

***(a) a person acting on behalf of another person who cannot act in their own name;***

***(b) a person acting as a member of, or in the interest of a group or class of persons;***

***(c) a person acting in the public interest; or***

***(d) as association acting in the interest of one or more of its members.”***  
( Emphasis added)

[30] The Petitioner stated that it has been established in terms of **Article 13** of the **Ismaili Constitution** to adjudicate on certain matters between members of the Ismailis community in various regions. I am therefore not doubtful that it has a vested interest on issues surrounding its

powers and functions in relation to members of the Ismaili community. In any event, even if I were to find that it lacks an interest in the Petition, it would be clearly suited to bring the Petition under **Article 22(2)(b)** of the **Constitution**.

[31] The Respondent's argument that there is no evidence that it is also acting on behalf of the Muslim community is therefore misplaced. Further, it matters not that the Petitioner was not a Party to the proceedings before Kimaru J, the ambit of **Article 22** is wide and flexible enough to accommodate an interpretation that allows the Petitioner to bring a Petition on behalf of its members who were involved in those proceedings.

[32] I also heard the Respondent's to be arguing that the Petitioner cannot bring the Petition because it is not registered with the **Societies Act**. I must state immediately that I am not persuaded that it cannot. It has been held repeatedly that for an organisation or association to bring a Petition under **Article 22(2)(c)**, it need not be registered. I associate myself with the dictum in **Northern Nomadic Disabled Person's Organization (Nondo) vs. Governor County Government of Garissa & another [2013] eKLR** where the Court stated thus:

*“Even if the Petitioner was not a registered association, by dint of Articles 22 and 258 of the Constitution they would still have the legal legs to stand on.” (sic)*

[33] The same view was expressed in **Robwa C. Kimkung & 4 Others vs. Redeemed Gospel Church INC. & 15 others [2015] eKLR** where the Court rendered itself as follows:

*“Article 22 grants standing to ‘a person acting as a member of, or in the interest of, a group or class of persons’. There is no requirement under Article 22 that the group of persons on whose behalf the petition is brought be registered under the Society’s Act or other legislation or rules.”*

[34] I am duly guided by the above expositions of the law and I see no merit in the Respondent's argument that the Petitioner should have been registered in order to bring the present Petition.

[35] Additionally, the definition of the word “persons” under Article 259 of the Constitution seems to encompass unregistered associations as well. Article 259, as read together with Articles 258 and 22 of the Constitution, marked a clear departure from the jurisprudence of the old that unincorporated societies or associations could not bring a suit or be sued in their names but only through its registered officials. I say no more in this regard.

### ***Whether the Petition is properly before this Court***

[36] The Respondent argued that the Petition is improperly before this Court because it seeks to impugn a competently rendered judgment on the basis that it allegedly violated the Petitioner's rights. In that regard, he submitted that the matter should have been taken on review or appeal. The Petitioner on the other hand indicated that the impugned judgment violated its constitutional rights in **Articles 25, 27 and 32** and in that regard, it is entitled to approach this Court to vindicate its rights.

[37] While it is true that **Article 22** entitles a party to approach this Court where he/ she alleges that his/her constitutional rights have been violated or threatened, it is equally important that an appropriate procedure be followed. It may as well be true that the Petitioner's rights and that of its members have been violated or threatened, but is this the appropriate forum and method to vindicate those rights? The answer has to be in the negative. I say so because this is a case of a party who, dissatisfied with a decision of a court, seeks to challenge it in a court of equal status. That, in my view, is unprocedural.

[38] This Court dealt with this anomaly in **Fatuma Mohamed Sharif vs. Principal Magistrate Court Kajiado & 2 Others [2014] eKLR** and Ngugi J warned:

***“It is, I believe, trite law that where a party is dissatisfied with a decision of a lower court, the remedy lies in an appeal or an application for review of that decision. It does not lie in a constitutional reference alleging violation of constitutional rights.”***

[39] The same position was reiterated in **Brookside Dairy Limited vs. Attorney General & 2 Others [2015]eKLR**. I stand guided by the exposition of the law in this regard and I concur with the Respondent that the correct procedure would have been to take the matter on review or appeal. However, the Petitioner indicated that it cannot take the matter on review or appeal because it was not party to the proceedings before Kimaru J and cannot therefore have a right to review or appeal. I do not think that is a reason enough to depart from the settled legal position set out above. I hasten to state that the impugned judgment was rendered by a court of equal status. How then can this Court question the correctness or otherwise of that judgment? I see no way that this Court can come to the Petitioner’s aid without doing violence to the above procedural principles.

[40] In my view, the reasoning well generated by the Court of Appeal in the case of **Peter Nganga Muiruri vs. Credit Bank Limited, Court of Appeal Civil Appeal No 203 of 2006**, that a judge seated in the Constitutional & Judicial Review of the High Court, has no power or jurisdiction to supervise, superintend, correct or guide another judge of the High Court ( and now courts of equal status) would apply with equal measure to this case. It indeed matters very little that the Petitioner was not a party to the proceedings before Hon Kimaru J. the point being made by the Petitioner to put it so bluntly is that Hon Kimaru J was wrong. Whether he was right or wrong , this court is not the one to get an answer to the Petitioner’s disquiet. An appeal against Kimaru J’s decision or review of the same should have been lodged.

[41] It perhaps would have been different if a question similar to the one that was before Kimaru J was also the same one before this court and either party asked me not to follow precedent.

[42] In view of the above findings, this should mark the end of the Petition’s road in this Court.

[43] However, before I down my judicial tools and at the risk of violating the principles set out above, I wish to state my humble view on a few things. It seems to me that where an Act does not expressly limit or specify the kind of things excluded, it would be wrong to assume that the Legislature intended to do so where such a conclusion would result in the limitation of fundamental rights. A sound principle of constitutional interpretation would dictate that where there is more than one interpretation, one that protects and promotes fundamental rights and achieves the purpose of the legislative provision should be preferred.

[44] I do not think that a restrictive interpretation of the Arbitration Act would be in consonant with the spirit and letter of **Article 159(2)** of the **Constitution**. In the same way, it does not appear to me that it could have been the framers’ intention that only constitutionally or statutorily founded forums should have the competence to deal with certain matters. Such a construction would be a restrictive one. Alternative dispute resolution is now universally embraced. The court’s jurisdiction to promote the same does not only get ignited when there is a matter before the court, rather the court is always alert to ensure that suits which should be dispatched to the alternative resolution forums are truly dispatched.

[45] In my mind, the following dictum by Madan JA in **Nurani vs. Nurani (1981) KLR 87** still rings true to this day:

***“I am not aware of any statutory provision which prohibits a set within the general society from setting up their own tribunal for the settlement of matrimonial or other permitted disputes between its own members; a tribunal thus constituted has a duty to act fairly and justly. If it fails to do so there are ample safeguards and remedial actions available.***

...

*It is laudable if such a non-statutory tribunal functions impartially and as an independent forum as the High Court in the exercise of its jurisdiction. There is nothing derogatory in that to the powers of prestige of the High Court.”*

[46] I must say that I see no reason why either **Article 159(2)** of the **Constitution** or the **Arbitration Act** should be interpreted to discourage instead of encouraging the use of forums that are established to give effect to other forms of Alternative Dispute Resolution.

[47] However, in the circumstances of this case, it is not for this Court to make definitive findings on the other issues. That is for the appropriate forum to decide. In that regard, I will therefore not make any determination on issues (c) and (d) earlier isolated.

### **Conclusion**

[48] The Petition is dismissed for the above reasons. Let each Party bear its own costs.

**Dated, signed and delivered at Nairobi this 31<sup>st</sup> day of May 2016**

***J.L.ONGUTO***

**JUDGE**