



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

PETITION NO. 3 OF 2016

IN THE MATTER OF PUBLIC OFFICERS ETHICS ACT AND IN THE

MATTER OF CAP 6 OF THE CONSTITUTION OF KENYA

H A O 1ST PETITIONER

C N 2ND PETITIONER

VERSUS

GEORGE ODUOR RESPONDENT

JUDGMENT

This is a Petition made under Articles 10, 81, 29, 175, 201, 232, 238 and 259 of the Constitution.

The Petitioners are the parents of E T A and S A who are students at [particulars withheld] Secondary School in Kisumu County while the Respondent is a Busar employed by the Board of Management of the school which they say is a Public Service Institution.

The grievance which makes them bring this Petition is that on diverse occasions they sent money (school fees) to the Respondent's phone by way of M-Pesa which was never credited to the accounts of their children or in the school account. They also allege that the Respondent adamantly refused to issue them with receipts culminating in them reporting the matter to the School Board of Management.

It is their case that failure to remit the money to the school account and the refusal to issue them with receipts amounts to dishonesty and just enrichment and hence a breach of Section 11 of the Public Officers Ethics Act as well as the Principles and Values of the Constitution. They therefore urge this Court to grant the following reliefs:-

“1. A declaration that the Respondent is an unfit candidate for the office of Bursar at [particulars withheld] Girls' Secondary School;

2. Costs of the Petition”.

In his replying affidavit sworn on 9th May 2016 deposes that in the year ending 2015 financial improprieties were perpetuated by the school principal and the same are being investigated by the Ethics and Anti-Corruption Commission; that Auditors from the Ministry of Education went to the school, inspected the books of Accounts and carried out an audit whereupon the school principal was transferred to another school. He deposes that the said school principal blamed him for her woes and that the alleged monies were sent to his M-Pesa account without notifying him who sent it and why. At paragraph 11 he

tracks the the movement of the monies and contends that the origin is from one phone number which belongs to one Stephen Omondi Agunda who is an employee of the school and personal assistant to the principal. He contends therefore that this is a frame up and that he has been suspended so as to frustrate investigations by the Ethics and Anti-Corruption Commission and the Education Audit Department. He further deposes that this Petition is intended to intimidate him so that he does not provide information to the investigators.

In their further affidavit the Petitioners deny that this is a frame-up and depose that they are not aware of the investigations and further that Stephen Omondi Agunda is a benefactor of both students and hence the reason he is the originator of the monies sent to the Respondent.

The Petition was canvassed by way of written submissions.

Mr. Amondi, Advocate for the Petitioner urges this Court to find the Respondent guilty of breaching Sections 8, 9 and 10 of the Public Officers Ethics Act as his failure to remit the monies to the school account amounted to unjust enrichment and is unethical. He also urges this Court to find the Respondent unfit to hold the office of the Bursar of [particulars withheld] Secondary School as he has brought the office to disrepute and has acted without integrity hence breaching the provisions of the Constitution.

Mr. Yogo, Advocate for the Respondent submits that there is an element of malice in the manner of sending the money to the Respondent's phone and wonders why Stephen Omondi, the originator of the same, who is a teacher at the school could not simply have walked to the Bursar's office and paid it in cash. He reiterated that this is a scheme to remove the Respondent from office so as to interfere with the investigations. He states that moreover the Respondent is not a public officer as defined in Article 260 of the Constitution as he is, firstly not an employee of the government but of the Board of Governors and secondly because his salary is not paid either from the Consolidated Fund or the money provided by parliament. He urges this Court to find there was no wrong doing on the part of the Respondent that would amount to a violation of the Public Officers Ethics Act. He has also submitted that the Petitioners have not demonstrated which of their rights were violated. He contends further that the issue herein ought to have been dealt with by the Respondents Petitioner in accordance with his contract of employment and that this Petition ought therefore to be dismissed with costs to the Respondent.

Article 258(1) of the Constitution gives a right to every person claiming that the Constitution has been contravened or is threatened with contravention to institute court proceedings. Although they have not expressly cited this Article the Petitioners' claim in this Petition is that the Constitution has been contravened. In that case all they are required to do is to demonstrate the articles contravened and how. This is unlike Article 22 where they would be required to demonstrate the particular right(s) denied, violated or infringed or threatened. The fact therefore that the Petitioners have not quoted the specific rights that have been infringed is not in itself a reason to throw out their petition.

The issues for determination then are:-

- (a) Whether the Respondent is a public officer as defined in the Constitution and whether he is bound by the provisions of the Public Officers Ethics Act;***
- (b) Whether the orders sought are available to the Petitioners;***
- (c) Who bears the costs of the Petition.***

Article 260 of the Constitution defines a public officer as any state officer or any other person who holds a public office either in the National Government or County Government and whose salary is paid directly from the Consolidated Fund or directly out of money provided by parliament. The Public Officers Ethics Act, has expanded that definition to:-

“Public Officer” means any officer, employee or member, including an unpaid, part-time or temporary officer, employee or member, of any of the following -

- (a) *the Government or any department, service or undertaking of the government;*
- (b) *the National Assembly or the Parliamentary service;*
- (c) *a local authority;*
- (d) *any Corporation, Council board, committee or other body which has power to act under and for the purposes of any written law relating to local government, public health or undertakings of public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law;*
- (e)
- (f)
- (g)”

Boards of Governors such as the one Respondent asserts is his employer are established under the Education Act for schools which receive financial assistance from the Ministry or the Teachers Service Commission. Section 10(2) of the Education Act provides that the Minister may, by order declare a board of Governors to be a body Corporate with perpetual succession and capable of suing or being sued. We do not know whether this is the case for the Board of Governors of [particulars withheld] Secondary School. Be that as it may, the school being a public school it is my finding that its Board of Governors, being an entity that is tasked with the Management of a school that receives funds from the Ministry hence the Government, is a public entity. Its employees are therefore public officers within the meaning of the Public Officers Ethics Act and more particularly under Section 2(d). The Respondent is therefore a public officer and not only is he bound by the Public Officers Ethics Act but also the Anti-Corruption & Ethics Act, the values and principles of the Constitution and Article 10 thereof.

That stated the question then is whether the relief sought is available to the Petitioners.

It is now settled that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament that procedure should be strictly followed. In **International Center for Policy and Conflict & Others V. Hon. Uhuru Muigai Kenyatta & Others Petition 552 of 2012** a five Judge bench of this Court stated:-

“All parties in this Petition acknowledge the High Court's unlimited jurisdiction under Article 165(3)(a) of the Constitution. This unlimited original jurisdiction, however, cannot be invoked where parliament has specifically and expressly prescribed procedures for handling grievances raised by the Petitioners. See Speaker of National Assembly Vs. Njenga Karume [200] 1 KLR 425, which held that:

“In our view there is considerable merit that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of the Parliament that procedure should be strictly followed”.

This was also the finding of Majanja J in **Michael Wachira Nderitu & 3 Others V. Mary Wambui Munene Aka Mary Wambui & 4 Others [2013] eKLR** and in **Benson Riitho Mureithi V. J W Wakhungu & 2 Others [2014] eKLR**. Mumbi Ngugi J acknowledged that principle. On my part I see no reason to depart from it. It has been shown here that already there is a report to the Ethics and Anti-Corruption Commission. This is also a grievance that can be handled by the police. We have not been told whether the same has been reported as apart from being unethical in which case the same can be dealt with under the Public Officers Ethics Act which at Part V has a procedure for enforcement of the Code of Ethics and Conduct, the acts complained of if true are criminal. We have also not been told whether the grievance was referred to the school's Board of Governors and if so what was the outcome. Moreover to grant the relief sought would be tantamount to removing the Respondent from office without due

process. That would go against Article 236 of the Constitution which states:-

“236. A public Officer shall not be -

(a)

(b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law”.

It behoves the Petitioners therefore to follow the mechanisms and procedures provided under the law for dealing with their grievance so that the due process of the law is observed. Consequently this Petition is dismissed with costs to the Respondent.

Signed, dated and delivered at Kisumu this 29th day of September 2016

E. N. MAINA

JUDGE

In the presence of:-

N/A for the Petitioners

Mr. Yogo for the Respondents

CC: Moses Okumu