



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

PETITION NO. 8 OF 2016

JULIANA YEGON.....PETITIONER

VERSUS

JUSTUS KIGEN.....1ST RESPONDENT

FELIX KIPRONO MATAGEL.....2ND RESPONDENT

GEDION KETER.....3RD RESPONDENT

RADIO AFRICA GROUP.....4TH RESPONDENT

NICHOLAS LANGAT.....5TH RESPONDENT

RULLING

This petition dated the 28th day of September 2016 seeks the following orders

- a) A declaration that the actions of the 1st 2nd 3rd 4th and 5th Respondents are illegal, defamatory, unfair and in violation of the petitioners rights, specifically her right to dignity, right not to be subjected to torture in any manner, right to the correction or deletion of untrue or misleading information that affects the person, right to life and freedom of movement.
- b) An order directing the 2nd Respondent to correct or delete the untrue or misleading information given to Teachers Service Commission.
- c) An order directing the 3rd 4th and 5th Respondents to apologize and correct or delete the misleading information that was published by the 4th Respondent and was edited by the 3rd Respondent on 13th June 2016 as misled by the 5th Respondent in the Star Newspaper.
- d) Mandatory injunction restraining the Respondents jointly and severally from calling, texting publishing any information that is defamatory, malicious, threatening or in any way interfering or infringing the rights and freedoms of the Petitioner.
- e) Exemplary and punitive damages for defamation.

Two preliminary objections were raised in this petition which in the main question the Jurisdiction of this court in entertaining and determining the same.

The issues raised in the preliminary objections are

- 1) Whether this court has the Jurisdiction to interfere with a matter already seized and pending before competent and constitutional bodies.
- 2) Whether the claim by the petitioner is justifiable.
- 3) Whether fundamental rights and freedoms set out in the bill of rights can be enforced by a private individual by way of a constitutional petition.
- 4) The petitioners claim if any is a claim in the tort of defamation and the same can only be remedied in a civil suit and not through a constitutional petition as sought by the petitioner.
- 5) That the notice of motion application and petition all dated 28.9.2016 is pre-mature and an abuse of court process.
- 6) The substratum and the collary of the application and petition cannot be determined as its convoluted.

Brief facts

On the 6th day of June 2016 the 2nd Respondent filed a petition in the National Assembly alleging that the petitioner aided and abetted in examination irregularities in the year 2015 and hence she was not fit to be a teacher or hold any public office.

On or about the 6th day of June 2016 the 2nd Respondent wrote a complaint to the Teachers Service Commission with a view to having the petitioner interdicted and suspended with threats of legal consequences in default.

On or about the 13th day of June 2016 the 4th Respondent caused to be published in the Star Newspaper allegations that a Resident of Bomet County wanted the petitioner to be declared unfit to be a teacher or hold any public office.

Subsequently, the petitioner filed the present petition which has raised the preliminary objections herein.

The 1st and 5th Respondents preliminary objections are to the jurisdiction of this court on the basis of the same matter being seized before other constitutional bodies – The Teachers Service Commission and the National Assembly.

It is also their contention that this petition is pre-mature and have relied on the case of THE SPEAKER of NATONAL ASSEMBLY VS KARUME (2008) IKLR 426.

It is further submitted that this petition is incompetent and fatally defective for failure to cite with precision the relevant provisions of the constitution alleged to have been violated and the manner in which the 1st and 5th Respondents have violated the same. Reliance is placed on the case of Annarita Karimi Njeru – VS AG (1979) KLR 154.

The second Respondents preliminary objections are as regards the jurisdiction of the court whether the petition should have been instituted in Nairobi where the alleged violation took place or where the petitioner resides which is Bomet. That the Respondents reside and work in Nairobi.

It is submitted that the Teachers Service Commission is one of the independent constitutional commission and offices under article 248 of the constitution. Reliance is placed on the decision in the case of INTERNATIONAL CENTRE FOR POLICY AND CONFLICT AND 5 OTHERS – VS THE AG PETITION NO 552 of 2013 where it was held:- “An important tenet of the concept of the rule of law is

that this court before exercising its jurisdiction under article 165 of the constitution in general, must exercise restraint. It must first give an opportunity with relevant constitutional bodies or state organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act. For instance, in the case of IEBC, the court would end up usurping IEBC's powers. This would be contrary to the institutional independence of IEBC guaranteed by article 249 of the constitution."

The 3rd and 4th Respondents preliminary objections are in the main similar to those raised by the other Respondents. Further it's their contention that the claim brought against them is that of the tort of defamation and the remedies sought lie in private law.

The petitioners contention is that the court has jurisdiction to entertain and determine this petition by dint of the powers conferred to it under article 165 (3) of the constitution and the constitution of Kenya (Protection of rights and fundamental freedoms) practice and procedure rules.

It is submitted that under article 22 (1) and article 258 (1) of the constitution any person has the right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been denied, violated, infringed or is threatened.

On the issue as to whether the claim is based on the tort of defamation it is contended that the court has unlimited jurisdiction both in criminal and civil matters and even if the form was to be held wrong, the constitution requires that the court do substantive justice without regard to technicalities – article 159 (2) of the constitution.

It is further submitted that the evidence of other bodies specifically the Teachers Service Commission and the national Assembly do not oust the jurisdiction of the High court where violation of fundamental rights and freedoms are alleged. Reliance is placed in the case of Jane Njeri Onyango VS Erick Ochieng & 2 others where it was held, "that the existence of the media council does not oust the jurisdiction of the court."

Determination

Jurisdiction

In the case of "the owners of Motor Vessel "Lillian S" – VS Caltex oil Kenya Ltd (1989) KLR, the court held:- "Jurisdiction is everything, without it, a court has no power to make one step.

Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction."

Article 165 (3) of the constitution provides:- "Subject to clause (5) the High court shall have

- (a) Unlimited original Jurisdiction in criminal and civil matters
- (b) Jurisdiction to determine the question whether a right or fundamental freedom in the bill of rights has been denied, violated, infringed or threatened.
- (c) Jurisdiction to hear an appeal from a decision of a tribunal appointed under this constitution to consider the removal of a person from office, other than a tribunal appointed under article 144.
- (d) Jurisdiction to hear any question respecting the interpretation of this constitution including the determination of –
 - (i) The question whether any law is inconsistent with or in contravention of this constitution.

(ii) The question whether anything said to be done under the authority of this constitution or any law is inconsistent with or in contravention of this constitution.

(iii)

(iv) ...”

Article 23 (1) of the constitution clothes the High court with enforcement powers thus:-

“The High court has jurisdiction in accordance with article 165 to hear and determine applications for redress of a denial violation or infringement of or threat to a right or fundamental freedom in the bill of rights.”

Para 1 clause 17 of the petition states that the petitioners constitutional rights specifically article 20 (1) (2) (3) (b) (4) (a) (b), 26 (1) article 39 (1) have been threatened and article 27 (1) and 2, 28, 29 (d), 33 (2), (d) (1) and 3, 34 (1) (1) 35 (2) of the constitution have been violated.

Para 18. The reputation of the petitioner has also been damaged in the minds of the right thinking members of the society due to publishing of defamatory information by the Respondents.”

Whereas the petition sets out the articles of the constitution that have been violated or threatened to be infringed, there are no particulars set out, and there is no explanation as to in what manner or by whom the infringement has been occasioned.

In the case of Annarita Karimi Njeru – VS Attorney General 1979, it was held, “where a person is alleging a contravention of a constitutional right, he must set out the right infringed and the particulars of such infringement or threat.”

This reasoning found favour in the court of appeal case of Mumo Matemu Kalimu VS Trusted Society of Human right Athanie & others 2013 EKLK where it was held, “we wish to re affirm the principle holding on this question in Annarita Karimi Njeru case. In view of this we find that the petition before the court did not meet the threshold established in that case.

At the very least the petitioner should have seen the need to amend the petition so as to provide sufficient particulars to which the Respondents could reply, viewed thus, the petition fell short of the very substantive test to which the High court made reference to.”

The issues in the petition are not precise and dear. It has not been sufficiently shown the manner in or as to how they have been violated and by which particular respondent.

The petition has not met the threshold required.

In the present petition it is not in dispute that the matters complained of are presently before the Teachers Service Commission and the National Assembly. The prayers in the petition and in particular prayer (b) is for an order directing the 2nd Respondent to correct or delete the untrue or misleading information given to the Teachers Service Commission.

Teachers Service Commission and the National Assembly have their own constitutional mandates.

I am of the considered view that this court should not intervene or tamper with processes that are being undertaken before other constitutional bodies unless it is shown that these processes are unconstitutional.

In the case of International Centre for policy and conflict and 5 others VS AG, it was held “An important tenet of the concept of the rule of law is that this court before exercising its Jurisdiction under article 165 of the constitution in general must exercise restraint. It must first give an opportunity to the relevant constitutional bodies or state organs to deal with the dispute under the relevant provision of the relevant

statute.”

In the case of speaker of the National Assembly - V Karume Supra, it was held:- Where an institution or a statute has established a dispute resolution procedure then that process must be strictly followed or applied as of universal application. The mere fact that the constitution is cited or invoked is not sufficient to qualify the matter and confirm licence to High court to inquire and investigate arbitrate surcharge or in any manner deal with issues which can be dealt with through the dispute resolution procedure provided by constitution or a statute.”

I find it would be prudent for the petitioner to await the outcome of the investigations before the two bodies and revert back to challenge them by way of Judicial review.

Lastly, a perusal of the prayers sought and in particular prayer (D) is for a mandatory injunction restraining the Respondents jointly and severally from calling, texting, publishing any information that is defamatory, malicious, threatening or in any way infringing the rights and freedoms of the petitioner.

This prayer clearly lies in the realm of defamation. This is a tort founded under common law and therefore it is not a constitutional issue. The remedies sought can be addressed and ventilated through a suit for defamation.

The upshot is that, I am satisfied that the preliminary objections have merit.

The petition is pre-mature before this court and both the application and petition dated 28.9.2016 are dismissed.

Each party will bear its own costs.

Ruling delivered dated and signed in open court this 9th day of December 2016 in the presence of Mrs Kirui holding brief Caleb Koech

M. MUYA

JUDGE

9.12.2016