



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PETITION NO 590 OF 2014

WACHIRA KARIUKI MUSAPETITIONER

VERSUS

THE HON ATTORNEY GENERAL.....1ST RESPONDENT

THE CHIEF EXECUTIVE OFFICER, THE INSTITUTE

OF CERTIFIED PUBLIC ACCOUNTS OF KENYA.....2ND RESPONDENT

JUDGMENT

Introduction

1. The petitioner, now known as Wachira Kariuki Musa pursuant to a deed poll for change of name (previously known as Fredrick Kariuki K. Wachira) is aggrieved by the decision of the 2nd respondent not to register him as a member of the Institute of Certified Public Accountants Kenya (ICPAK). He states that the basis of the refusal to register him is that he does not have adequate knowledge of local law and practice. His contention is that a former member of the Board of the 2nd respondent, who had qualifications similar to his, had been registered. He therefore alleges violation of his constitutional rights under Article 27 and seeks the following orders from the Court:

a) The court be pleased to issue a declaration that the respondent contravened the provisions of Article 27 of the constitution in as far as discrimination is concerned.

b) The Court be pleased to issue an order that the respondents do admit and recognize that the courses done by the petitioner and examination done and practice plus experience is sufficient and your petitioner is hereby admitted as a member of the institute subject to the payment of the requisite membership application fee.

c) Costs be borne by the respondent.

2. At the initial appearance of the parties before the Court, Ms. Irari for the Attorney General pointed out that this petition is not a public interest matter but is about the 2nd respondent's refusal to register the petitioner as a member of the Institute of Certified Public Accountants (ICPAK). She therefore prayed that the name of the AG be expunged from the proceedings as no relief was sought against his office. While initially arguing that the AG had been joined to the proceedings because he is the principal legal adviser of the state, the petitioner subsequently withdrew the claim against the office, which was removed

from the proceedings with no order as to costs. Reference in this judgment to the respondent shall be to the Institute of Certified Public Accounts of Kenya rather than to its Chief Executive Officer who is sued as the 2nd respondent. The petition was argued before me on 25th May 2015.

The Petitioner's Case

3. The petition is dated 25th November 2014 and is supported by an affidavit sworn by the petitioner on 25th November 2014. He has also sworn a further affidavit on 26th March 2015 in reply to the depositions by the respondent. The petitioner deposes that he is a qualified accountant having undertaken a course of study between September 1992 and November 1995. He then went through three years of practical experience and qualified as a member of Association of Certified Chartered Accountants (ACCA) in 2010.

4. It is also the petitioner's averment that prior to undertaking the ACCA course, he undertook a course of study at the then Mombasa Polytechnic and obtained Technical Diploma in Accountancy qualification, and that he undertook and passed a course in commercial law, company law and taxation, which one is required to have studied in order to be admitted to ICPAK.

5. The petitioner avers that he applied for exemption from sitting the **Kenya Accountants and Secretaries National Examination Board (KASNEB)** examinations since he had already passed in those subjects. He was however informed by the respondent that he needed to meet the threshold of sitting for local tax and commercial law, which he deems repetitive.

6. The petitioner avers that he is aware that one of the former members of the ICPAK Board held qualifications similar to his, that is the ACCA, but was admitted as a member. He relies on an article published in the ICPAK Journal of June-July 2014 titled "**Aboo's Extraordinary Journey**" regarding a Mr. Abdulwahid Aboo, who was, according to the article, a long-serving member of ICPAK.

7. He contends that he has been discriminated against, averring that the qualification he possesses satisfy the requirements of ICPAK, but that ICPAK has applied the law selectively.

8. In his written submissions which were highlighted by his Counsel, Mr. Mutai, the petitioner argues that he was discriminated against by the respondent by its failure to register him as an accountant as required under section 26(3)(a)(b) and (c) of the Accountants Act No 15 of 2008. He has the requisite knowledge, skill and expertise as required by the Act, and all that the respondent was required to do was look at his papers and register him.

9. The petitioner submits that the respondent has failed to perform its duty despite his having qualified and paid the requisite fees. He notes that a Mr. Aboo was admitted as a member of ICPAK, even though he possesses foreign qualifications, under the provisions of the repealed Accountants Act, Cap 531, which had provisions, at section 24 thereof, similar to section 26 of the Accountants Act 2008. The said section 24 of Cap 531 gave the respondent wide discretion in admitting accountants. It was his submission that the petitioner has better qualifications than the said Mr. Aboo, and the Court should find that the respondent had discriminated against the petitioner and order it to admit him to ICPAK.

The Case for the Respondent

10. The respondent opposes the petition by way of an affidavit sworn by Dr. Patrick Ngumi on 23rd February 2015 and submissions dated 20th April 2015. Its position is that the petition does not raise any substantial issue of discrimination and that the petitioner must demonstrate first that he is fully qualified as required by the Accountants Act, and then the Court can examine whether, despite his qualifications, he was denied registration. It contends that the petitioner was not fully qualified as required under the Accountants Act 2008, and the respondent has therefore not committed any act of discrimination against him.

11. In his affidavit in opposition to the petition, Dr. Ngumi, the Executive Officer and Secretary of the Council of ICPAK, confirms that the respondent did receive the petitioner's application dated 23rd September 2013, which was an application for pre-registration under section 26 of the Act. He states that the respondent has formulated a form for pre-registration in respect of foreign qualifications, which form was to be completed by the petitioner in this case, and submitted to **KASNEB** in order for the petitioner to register and sit for the exams to satisfy the requirement for "adequate knowledge of local law and practice.". The petitioner was informed of this requirement by a letter dated 22nd September 2013, but Dr. Ngumi deposes that the petitioner has refused to submit himself to KASNEB, the only examination body recognized under the Accountants Act.

12. According to the respondent, applications for registration as accountants are governed by section 26(3)(a) of the Accountant's Act. An applicant for registration must satisfy the respondent, in a manner that the respondent directs, that he has full knowledge of local law and practice.

13. The respondent submits that in order to be satisfied that the petitioner was qualified, it remitted his application to KASNEB, and the petitioner was required to sit company and tax law to enable the respondent satisfy itself that he had knowledge of local law and practice. He refused to submit himself to examination of these subjects by KASNEB, his argument being, as in this case, that he had already done the subjects at the Kenya Polytechnics which examinations were offered by **Kenya National Examination Council (KNEC)**.

14. The respondent's position is that **KNEC** offers academic examinations but not professional qualifications, which are governed by KASNEB, a body established under section 17 of the Accountant's Act to offer professional examinations leading to registration as an accountant.

15. With regard to the petitioner's allegation that there has been violation of Article 27(5), which prohibits discrimination on any of the grounds set out at Article 27(4), its contention is that the petitioner has not cited any ground as the basis of discrimination.

16. As for the alleged registration of Mr. Aboo as illustrative of discrimination against the petitioner, the respondent points out that Mr. Aboo states in the article that he got his licence in 1979. While Mr. Aboo was registered under the provisions of the repealed Accountants Act, Cap 531, which provided at section 24 and the schedule for automatic registration, the Act that the petitioner was required to comply with was the Accountants Act, No. 15 of 2008. Section 26 of the current Accountants Act did not exist in the repealed Act, and all that was required under section 24 of Cap 531 was that one is a resident of Kenya and holds qualifications set out in the Schedule to the Act, one of which was ACCA, which Mr Aboo possessed.

17. As section 26 is a new requirement, Mr Aboo could not have been compelled at the time of his registration in 1979 to meet a requirement that was not then in the law. Further, as there was no other evidence of discrimination, such as a person with qualifications similar to the petitioner's who had been registered under the 2008 Accountants Act, the respondent submitted that the petition had no merit, and should be dismissed with costs.

Determination

18. In his submissions in reply to the respondent, Mr. Motari argued on behalf of the petitioner that the respondent was subjecting the provisions of section 26 of the Accountants Act, 2008, to too narrow a prism, and that to require the petitioner to do the same examinations from two different examination bodies would render the process repetitive and unnecessary.

19. This, I believe, lies at the core of the petitioner's claim. He states that he had done company and tax law under examinations given by the Kenya National Examination Council, that he has ACCA qualifications, has professional experience, and so he should not be required to do the KASNEB examinations. Put differently, as I understand his contentions, the provisions of section 26 of the Accountants Act 2008 should not be applied to him. If it is, then such application is discriminatory and a

violation of his rights under Article 27.

20. Article 27(4) and (5), which are relevant for present purposes, provide as follows:

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

21. In the case of **Peter K. Waweru vs Republic [2006]eKLR**, the Court defined discrimination as follows:

“...Discrimination means affording different treatment to different persons attributable wholly or mainly to their respective description by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions....to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description...discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex...a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”

22. In this case, the petitioner claims that there has been discrimination against him because a Mr. Aboo, who held the same qualifications as did the petitioner, was registered by ICPAK. The respondent concedes this in part. It notes, however, that the provisions of the law that Mr. Aboo was registered under in 1979 differed significantly from the requirements of the 2008 Act.

23. Section 24 of the Accountants Act, Cap 531, which was in force in 1979, provided as follows:

24(1) Subject to this section, a person is qualified to be registered if-

a) He has been awarded by the Examinations Board a certificate designated the Final Accountancy Certificate;

b) He holds a qualification approved under subsection (2) by the Registration Board;

c) He is, at the commencement of this Act, both ordinarily resident in Kenya and a member of any professional body specified in the schedule to the Accountants (Designation) Act (now repealed), as in force immediately before the commencement of this Act; or

d) He is a person who, before the 27th November, 1976, was authorized by the Registrar of Companies under the provisions of section 161 (1)(b) of the Companies Act to hold the appointment of auditor of a company, and was so authorized at that commencement.

(2) The Registration Board may, from time to time, by notice in the Gazette, approve qualifications which it considers sufficient to allow a person to be registered, and may, in the same manner, withdraw that approval.

(3) Notwithstanding subsection (1) or (2), the Registration Board may require a person making application for registration to satisfy the Registration Board (in such manner as it directs) that his knowledge of local law and practice is, and that his professional conduct and general character have been, such as in the opinion of the Registration Board make him a fit and proper person to be registered, and unless the person so satisfied the Registration Board he shall not be treated as being qualified to be registered.

24. Section 26 of the 2008 Act titled “**Qualifications for registration**” states as follows:

(1) Subject to this section, a person is qualified to be registered if the person—

(a) has been awarded by the Examinations Board a certificate designated the Final Accountancy Certificate; or

(b) holds a qualification approved under subsection (2) by the Council.

(2) The Council may in consultation with the Examinations Board and with the approval of the Minister, from time to time, by notice in the Gazette, approve qualifications which it considers sufficient to allow a person to be registered, and may, in like manner, withdraw any such approval.

(3) Notwithstanding subsection (1) or (2), the Council may require a person making an application for registration to satisfy the Registration Committee, in such manner as it may direct, that the person has—

(a) adequate knowledge of local law and practice;

(b) adequate experience in accounting; and

(c) acceptable professional conduct and general character which, in the opinion of the Committee, make such person a fit and proper person to be registered, and unless the person so satisfies the Registration Committee, he shall not be treated as being qualified to be registered.”

25. The “Examination Board” referred to in section 26 above is defined at section 2 of the Act as follows:

“Examinations Board” means the Kenya Accountants and Secretaries National Examinations Board established under [section 14](#).”

26. Section 14 then sets up KASNEB. In my view, these provisions give the ICPAK Council, in consultation with KASNEB, the mandate to determine the qualifications that those wishing to be registered as accountants must have, and to refuse to register them if they do not meet such qualifications.

27. In the case of the petitioner, he was required by the respondent to sit examinations that would demonstrate his knowledge of local law and practice. He declined, on the basis that he had passed ACCA and KNEC examinations. He wishes the Court, in effect, to compel the respondent to register him, on the basis that the acts of the respondent are discriminatory in that one other person had been registered with the same qualifications as the petitioner.

28. I have considered the article cited by the petitioner as evidence of discrimination. The subject of the article, Mr. Aboo, was registered in 1979. The provisions of the law then in force, as noted above, were vastly different from the position today. The requirements under the Accountants Act 2008, as well as the Board established to deal with professional examinations for accountants, were not then in place.

29. Is it discriminatory for the respondent to subject the petitioner to the current provisions of the law, as opposed to the provisions under which Mr. Aboo was registered 36 years ago? Had the petitioner been able to place before the Court evidence of registration of a person with the same qualifications as his, who had applied and been registered under the 2008 Act, there would have been a basis for complaint.

30. As matters stand, the respondent has only asked the petitioner to abide by the law as it currently stands. The mandate under the law is vested in the respondent with regard to registration of accountants, and unless clear evidence of violation is presented, the Court has no basis for interfering. The petitioner has the obligation to abide with the law with regard to registration, and to demand that he be exempted is

to demand preferential treatment which the Court cannot sanction.

31. In the circumstances, I find no merit in this petition. It is therefore dismissed with costs to the respondents.

Dated Delivered and Signed at Nairobi this 17th day of September 2015

MUMBI NGUGI

JUDGE

Mr. Mutai instructed by the firm of Kandie Mutai Mudeizi & Co. Advocates for the petitioner.

Mr. Ogembo instructed by the firm of Okoth & Kiplagat & Co. Advocates for the 2nd respondent.