



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO 49 OF 2015

MICHAEL MUTINDA MUTEMI1ST PETITIONER

WILSON SHIVACHI MMAITSI.....2ND PETITIONER

VERSUS

CABINET SECRETARY MINISTRY OF EDUCATION.....1ST RESPONDENT

THE OFFICE OF THE DIRECTOR OF

SECONDARY SCHOOLS..... 2ND RESPONDENT

B. K. NGAHU – THE PRINCIPAL

DAGORETTI HIGH SCHOOL..... 3RD RESPONDENT

THE CHAIRPERSON – TEACHERS

SERVICE COMMISSION 4TH RESPONDENT

THE ATTORNEY GENERAL OF

THE REPUBLIC OF KENYA..... 5TH RESPONDENT

RULING

Introduction

1. The petitioners have filed the present petition alleging violation by the respondents of the provisions of Article 43 and 53 of the Constitution and the Basic Education Act, 2013. They had first approached the Court by way of a petition dated 11th February 2015 as well as an interlocutory application of the same date. They were instructed to serve the pleadings on the respondents for inter partes hearing on 18th February 2015.
2. On 26th February 2015, the petitioners applied for leave to amend the petition, which was granted. They then filed the amended petition dated 25th March 2015 in which they seek the following

single order:

a) That the court makes a finding and makes a declaration that: It is unconstitutional and illegal for any Public Primary and Public Secondary School administration in Kenya to send away from School any pupil or student as the case may be on account of unpaid school fees or any other charges whatsoever, and further declares that the 1st respondent (Cabinet Secretary Ministry of Education), Principal Secretary Ministry of Education, 2nd respondent (the office of the Director of Secondary Schools in Kenya), County & Sub- County Directors of Education of respective jurisdictions and the Heads of the public Primary & Public Secondary Schools shall be held individually & personally responsible for any breach of article 53(1)(b) of the Constitution of Kenya & Basic Education Act 2013.

3. In opposition to the amended petition, the respondents filed a six-point notice of preliminary objection dated 22nd May 2015 in the following terms:

1. That the issues raised herein are Res Judicata the same having been raised, canvassed and determined in Kenya national Association parents vs Cabinet Secretary Ministry of Education Science and Technology Jacob Kaimenyi & 4 Others [2015] eKLR. Hereto attached.

2. That the declarations sought are in the form of orders to restate the law, as is currently. That, accordingly the court cannot declare, at the behest of the petitioner, what already exists as statutory law, as law; and what the petitioner is obligated to take judicial notice of. It is a waste of the courts valuable time and therefore an abuse of the courts process.

3. That there is no nexus and/or connection between the pleaded facts and the prayers/orders being sought; and to that extent the petition herein lacks precise facts upon which a judicial decision can be made.

4. That the right to education, as espoused by Article 43 and 53 of the Constitution, is subject to Article 21(2) of the Constitution which recognizes that it will be achieved progressively.

5. That the state, acting in line with article 21(2) of the Constitution, has taken deliberate steps inter alia it has promulgated the relevant legislation and it has come up with the germane policies and standards, for purposes of actualizing the right to education.

6. That the petitioner has not demonstrated ow his rights have been violated by the respondents save for the deem indication from the language of petition that he has personal vendetta with respondents, particularly the 3rd and 5th respondents, whose origin, as can be deduced from 34 of the petition, are issues in question in petition No.133 of 2013. The petitioner is abusing this court's process by attempting to settle scores through it.

4. The parties filed written submissions, which they asked the Court to rely on in rendering its decision on the matter.

5. The respondents have raised many objections to the present petition, but the crux of their objection is that the issues it raises are *res judicata* having been raised and determined by this Court in **High Court Petition No. 10 of 2014 - Kenya National Association of Parents vs The Cabinet Secretary Ministry of Education Science And Technology Prof. Jacob Kaimenyi**. It is also their position that similar issues had been raised and determined in **High Court Petition No. 133**

of 2013 - Michael Mutinda Mutemi vs Attorney General and Others between the 1st petitioner and the respondents.

6. In determining whether or not the present petition is *res judicata*, it is useful to set out first what it is seeking. As noted above, the petitioners had first filed a petition dated 11th February 2015. They subsequently applied and were granted leave to amend their petition. The amended petition seeks the same order as was sought in the initial petition.

7. In the affidavit in support of their amended petition, the petitioners depose:

1.

2. *That the 1st petitioner has investigated the behavior of various institutions of free and compulsory basic Education in Kenya and found that neither the Basic Education Act 2013 nor the constitution of the Republic of Kenya 2010 is being followed or cared by either the heads of the institutions, management boards, district education officers, county education officers nor the national education officers and so the poor Kenyan families are left on the mercy of the school managers, as the government officers deliberately refuse to intervene....*

3. *That the 2nd petitioner's son – one SHIVACHI NILVEN LLUYALI has been denied admission to Friends School Senende at Vihiga county by the 1st respondent's servant – the school principal for what the principal claimed as not attaining certain marks.*

4. *That the respondents are jointly and severally to blame as each of the mentioned respond has specific role in ensuring good governance and to see to it the constitution and the laws of the country are respected, but they seem to have opted to form what seems to be a conspiracy of silence.”*

8. As noted above, on 17th of February 2015, the 1st petitioner had filed an application under certificate of urgency dated 17th February 2015 in which he sought the following orders:

1. That the Honourable Court be and is hereby pleased to certify this application urgent and the same to proceed ex parte in the first instance.

2. That the Honourable Court be and is hereby pleased to order the 1st respondent (Cabinet Secretary Ministry of Education) and Mr B.K Ngahu (the Principal Dagoretti High School) to admit – one MUTINDA HUDSON KRAPF in form 1, 2015 at Dagoretti High school forthwith, and that there be no discrimination against him (Mutinda Hudson Krapf) whatsoever.

3. That the Honourable Court be and is hereby pleased to find with costs to the 1st petitioner that Mr B.K Ngahu - the Principal Dagoretti High School

a. Guilty of insubordination against his boss – the 1st respondent (Cabinet Secretary Ministry of Education) with all consequences.

b. In Contravention of section 38(2) of the Basic Education Act 2013 with all consequences.

9. The application was based on the following grounds:

1. That the applicant is the 1st petitioner and the father of one MUTINDA HUDSON KRAPF who has been called for admission at Dagorretti High School.

2. That the 1st petitioner/applicant presented his son for admission to the said School on 12th February 2015 in accordance with section 31(1) of the Basic Education Act 2013.

3. That in sheer disregard of sections 29(1), (2)b, 34(2),(5) & 38(2) of the Basic Education Act – 2013, the Principal Dagoretti High School denied admission the 1st petitioner/applicant's son – one Mutinda Hudson Krapf on the account of not possessing the entire school fees, and not even the intervention of DEO Dagoretti Mr Benjamin Muthengi nor the Nairobi County director of education Mr. Abdillahi cold move Mr BK Ngahu – Principal Dagoretti High School into admitting the minor.

4. That the 1st petitioner maintains that laws are not made in vain and must be obeyed.

5. That the 1st petitioner/applicant maintains it is unconstitutional, illegal and malicious for MR B.K NGAHU or any other person to deny his son admission to Dagoretti High School on the grounds of non-payments of any form of money, and further the 1st petitioner avers that admission to an institution of Free & Compulsory Education, or continuation in the same DOESN'T DEPEND ON ANY PAYMENT, and any claim to the contrary is unconstitutional, illegal and malicious.

6. That the Principal Dagoretti High School in his correspondences for School admission has completely disregarded DIRECTIVES from his boss the 1st RESPONDENT the Cabinet Secretary, Ministry of Education Prof. JACOB KAIMENYI (dated 18th December 2014 Ref: MOE/DSTE/GE/VOL IV) of "maximum allowable PTA levy Kshs2,000/- &... not affect new students being admitted in 2015.." AND so insubordinates his boss.

7. That on 12th February 2015 during the hearing of this petition, the Honourable Court by implication enjoined MR. B.K NGAHU – Principal Dagoretti High School, MR KUGO IBRAHIM BWAMU – Principal Friends School Senende & MR MUTHENGI – DEO DAGORETTI DISTRICT as respondents I.E by directing the three be served with copy of the petition to appear in court during the hearing of the petition on 18th February 2015.

8. That it is in the interest of justice the orders sought be granted.

10. By an order issued on 18th February 2015, the Court (Korir J), while observing that he was not making any comments on the petition, directed the Principal, Dagoretti High School, to admit the 1st petitioner's son, Mutinda Hudson Krapf, upon payment of Kshs20,000/- as school fees. He noted that the payment of the balance of the fees was to be determined by the outcome of the petition or upon further orders of the Court.

11. It is noteworthy that while the application for interim orders related to the admission and payment of school fees for the 1st petitioner's son, the order sought in the petition is general in nature and seeks a declaration that it is unconstitutional for any school administration to send away a pupil or student from school on account of unpaid school fees or any other charges whatsoever. It also seeks an order that the respondents shall be held individually and personally responsible for any breach of **Article 53(1)(b)** of the Constitution and the **Basic Education Act 2013**.

12. According to the respondents, the issues that this petition raises have been addressed by the Court in other matters, namely **Kenya National Association of Parents vs The Cabinet Secretary**

Ministry of Education Science & Another and Michael Mutinda Mutemi vs Attorney General and Others (supra).

13. The petitioner denies that the matters raised in this petition are *res judicata* and sets out what he sees as the distinctions between the petition and the previous matters.

14. I have considered the law with regard to the *res judicata* rule. Section 7 of the Civil Procedure Act, Cap 21 of the Laws of Kenya, sets out the law in the following terms:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

15. The Civil Procedure Act then gives explanations with respect to the application of the rule as follows:

Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. (2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

16. Black's Law Dictionary (9th Edition) at page 1425 defines *res judicata* as follows:

“Latin 'a thing adjudicated' 1. An issue that has been definitively settled by judicial decision. 2. An affirmative defence barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit. The three essential elements are 1. an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties.....”

17. In *Nicholas Njeru vs Attorney General & 8 Others (2013) eKLR*, the Court of Appeal expressed itself as follows:

“This doctrine has been applied in a number of cases including; Reference No. 1 of 2007 EACJ, James Katabazi & 21 Others vs The Attorney General of the Republic of Uganda where the court stated that for the doctrine to apply;

-The matter must be directly and substantially in issue in the two suits.

-The parties must be the same or parties under whom any of their claim, litigating under the same title; and

-The matter must have been finally decided in the previous suit (see Uhuru Highway Development Limited -vs- Central Bank & 2 Others – Civil Appeal No. 3 of 1996.”

18. See also **Job Kipkemei Kilach vs Director of Public Prosecutions and 2 Others (2014) eKLR; Charo Kazungu Matsere and 273 Others vs Kencent Holdings Limited and Another (2012) eKLR;** and **Karia and Another vs the Attorney General and Others (2005) 1EA 83.**
19. The petitioners have set out in their petition various provisions of the Constitution and the Basic Education Act, and accuse the respondents generally, in not very civil terms, of, inter alia, extreme ignorance and naiveté with respect to the provisions of the Basic Education Act and the Constitution.
20. Two matters stand out from the present petition. The first is that it raises issues related to the provisions of Article 53 of the Constitution and the Basic Education Act as they apply to the payment of fees and other charges by parents to schools. These issues were the subject of litigation in the case of **Kenya National Association of Parents vs The Cabinet Secretary Ministry of Education Science & Another** (supra). The petition had been lodged by an association that states that it acts on behalf of and draws its membership from parents of children in schools in Kenya.
21. At paragraph 47- 49 of my decision in that case, I considered the issues that arose in the petition as follows:

[47.] The right to education has been expressly provided for in the Constitution of Kenya at Article 43 (1)(f). With respect to children, the right to education is captured in Article 53 (1)(b), which provides that “Every child has the right to free and compulsory basic education.”

[48.] Article 43 contains the constitutional guarantee to social and economic rights, including the right to education, which, in accordance with Article 21(2), are to be realised progressively:

(2) The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.”

[49.] It is the right to education guaranteed under Article 43(1)(f) and 53(1)(b) specifically in respect of children that the petitioner alleges violation of by the respondents. It also alleges violation of Article 27 which guarantees to all non-discrimination and equality before the law. The petitioner has also alleged a violation by the respondents of the provisions of the Basic Education Act, 2013. Its grievance appears, from its pleadings and submissions, to arise from a dissatisfaction with the manner in which the provisions of the Act have been implemented, in particular the steps or actions taken by the government with regard to implementation of the Act.”

22. I then considered at length the provisions of the Basic Education Act, and the question of fees and whether orders should issue restraining the charging of fees in schools. In declining to issue the said order, I expressed the following view:

[64.] The petitioner has sought an order restraining the charging of school fees, on the basis that it is in violation of Section 29 (1), (2)(B) and (c) of the Basic Education Act....

[65.] It must, I think be conceded that the cost of funding education to ensure that each child accesses quality education is a challenge within Kenya. While the ideal is a situation in which all children access basic education, it is recognised that this can only be done by the state“ to the maximum of its available resources.”

23. The petitioners in this case are asking the Court to consider the same issues that it considered in the above matter, and to declare the charging of fees, and therefore the issue whether a school should send students home for non-payment of fees, unconstitutional. While they were not directly parties to the petition, the National Association of Parents held itself out as acting on behalf of all parents. This Court cannot therefore revisit the same issues at the invitation of individual parents when it has already considered and determined the issue related to the payment of fees in a previous petition. At any rate, as observed by the respondents, the question of sending pupils home for non-payment of fees has already been addressed directly in the Basic Education Act, and I need therefore not make declarations with matters already dealt with and provided for by law.
24. The second notable point is that while this petition is clothed in such a way as to appear to be concerned with the interests of children generally, at the core of the petition is the concern of the 1st petitioner that his son does not pay school fees. He applied and obtained orders on 18th February 2015 for the admission of his son to Dagoretti High School upon payment of Kshs20,000. The Court observed that the issue with respect to the payment of the balance of fees would be considered at the determination of the petition. The 1st petitioner has not, however, litigated the question of the payment of his son's fees. Indeed, while his amended petition makes a range of accusations against the respondents, there is nothing pertaining to his son that emerges from his pleadings.
25. It is noteworthy that the petitioner had litigated the payment of fees by one of his sons, Mutinda Belteshazzar Mumo, in **Michael Mutinda Mutemi vs Attorney General and Others** (supra). In that petition, which was heard and determined by Lenaola J, the petitioner was allowed to pay a first installment of Kshs.20,000 to the school by 11th March, 2013 and a subsequent amount of Kshs.10,000 by 11th April, 2013, after which directions would be taken with regard to other fee payments. It is not clear from the judgment whether the 1st petitioner complied with the said orders.
26. Of relevance to the matter before me, however, is the nature of the claim that the 1st petitioner had placed before the Court in that petition. In his judgment in the matter, the Court (Lenaola J) captured the petitioner's grievance as follows:

[6.] The Petitioner also complains that the Respondents are determined to deny his son his right to education as provided for in Article 43(1) and Article 53 (1) (b) of the Constitution and he believes that the Respondents have no interest in his socio-economic situation and contends that his son has a right to seek bursary from the Respondents because under the Constitution and the Basic Education Act, the Respondents are tasked with the responsibility of providing free and compulsory education as well as cushioning vulnerable families like his."

27. Having read the judgment of the Court in that matter against the pleadings in the present matter, I am satisfied that the respondents are correct that the petitioner is again raising issues in this case that he raised in the previous matter, or that he should have raised in Petition No. 113 of 2013 when he alleged violation of his son's right to education under Article 53, or which have been heard and determined in the **National Association of Parents** case. As was observed in the cases set out above, parties cannot be permitted to give a cosmetic change to their grievances and litigate them over and over, or raise one issue on the same subject matter in one case, and another in subsequent cases. As was observed in the English case of **Henderson vs Henderson (1843-60)** **ALL E.R.378**:

"...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject

in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

28. The petitioner might argue that the first petition related to one of his children, while he is concerned with the right to education of a different son here. However, the issues raised relate to the right to education under Article 43 and 53 of the constitution. They have been dealt with by a court of competent jurisdiction. They cannot be raised in respect of all the 1st petitioner's children individually.

29. In the circumstances, I find that the issues raised in the present petition are *res judicata*. I therefore strike out the petition, but with no order as to costs.

Dated, Delivered and Signed at Nairobi this 13th day of November 2015.

MUMBI NGUGI

JUDGE

Mr. Mutinda and Mr. Shivachi, petitioners in person.

Mr. Moimbo instructed by the State Law Office for the 1st, 2nd and 5th respondents.

Mr. Rambo instructed by the firm of Allan M. Sitima & Co. Advocate for the 3rd respondent.

No appearance for the 4th respondent.