



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CIVIL SUIT NO. 4 OF 2015

SHERMAN INSTITUTION OF AFRICA LTD----- 1ST PLAINTIFF

PROF. DR. JOSEPH HERMAN MUKASA SSEMUJU-----2ND PLAINITFF

VERSUS

THE ATTORNEY GENERAL-----1ST DEFENDANT

COMMISION FOR UNIVERSITY EDUCATION-----2ND DEFENDANT

RULING

1. The Plaintiffs' suit, commenced herein on 2nd April 2015, has been met by a barrage of Preliminary Objections by the 2nd Defendant. This Court proposes to first deal with the Preliminary Objection in respect to the Jurisdiction of this Court to hear and determine this matter.

2. The 1st Plaintiff is a Limited Liability Company duly Incorporated in Kenya under the Companies' Act. From the Plaint, which is a prolix and does not make for easy reading, The Plaintiff, in the main, is aggrieved by the Decision of the 1st Defendant in failing to issue it with a Charter. The 1st Plaintiff avers that the Commission undertook to issue it with a written interim authority upon the 1st Plaintiff registering and paying curriculum for 50,000/- . That further the Commission promised to grant a Charter within 2 years. Acting on that representation, the 1st Plaintiff invested huge sums of money amounting to over Kshs. 397,000,000/- .

3. That to its disappointment, the Commission has not issued the 1st Plaintiff with a Charter and to the contrary has on numerous occasions published in newspapers that the 1st Plaintiff is bogus. In the end the 1st Plaintiff seeks for judgment against the Defendant for the following orders;

(1) That Sherman University of Africa be awarded a Charter.

(2) That an interim Order of a Charter and authorization of operation of Sherman University of African until the final hearing and final order or any other order of court.

(3) That the Commission to pay Special, general and exemplary damages such that it is deterred from further causing the said agony, misery, trauma and extremely untold suffering to newly established private universities and other institutions of Higher Learning.

(4) That all those people to have or deserve academic, professional and/or honourous qualifications and/or other achievements validated.

(5) That an interim or University Charter be issued in favour of Sherman University of Africa so as to enable it operate until the final or further orders of Honourable High Courts of Law.

(6) That a permanent order in lieu of the University Charter be issued in favour of Sherman University of Africa.

(7) That the commission for University Education be permanently restrained from interfering with the Administrative, academic, and Professional Programmes and activities of Sherman University of Africa and/or any other institution under it, its servants, agents and workmen until the final decision of the Honourable Court or other further orders of Court.

(8) That the Commission for Higher Education, its agents, servants, workmen or anybody acting for its behalf be permanently restrained from deregistration or unfair treatment of Sherman University of Africa.

(9) Any other or further relief the Honourable Court may deem fit or expedient.

4. The jurisdictional objections raised by the 2nd Defendant are threefold;

- a) That the Procedure provided for Regulation 85 of University Regulation has been skipped by the Plaintiffs
- b) That some orders sought in the plaint are in the realm of Judicial Review.
- c) That there are allegations of criminal offences which have been leveled against the 2nd Defendant.

5. Counsel for the 2nd Defendant submitted that matters raised in the Plaint should have been heard in the 1st instance by the Commission and thereafter the Cabinet Secretary for the time being responsible for matters related to University Education. Counsel cited the provisions of Section 85 of the University Regulations, 2014 which provides:

Any person or institution who or which is aggrieved by an act or decision of the Commission taken in accordance with any of the provisions of these Regulations, who desires to question that act or decision, or any part of it, may, within thirty days of the date of such act or decision, appeal in writing to:-

- a) The Commission which shall review and decide on the matter in question and respond within a period of three months; and**
- b) Thereafter to the Cabinet Secretary, if not satisfied with the decision of the Commission, and the Cabinet Secretary may give such orders or instructions as may be deemed necessary.**

Counsel drew this Court's attention to the Decisions in **The Speaker of the National Assembly vs Hon. James Njega Karume, KLR 22 (1992), Republic vs Director of Planning City Council Nairobi & 12 others and Kenya Planters Cooperative Union & 12 others vs the Minister for Cooperative Development Marketing** for the proposition that where a clear procedure for redress of a grievance is specified by the Constitution or Statute that procedure should be strictly followed.

6. Counsel further argued that the Judicial Review proceedings gives Courts authority to examine Executive or Legislative acts and to invalidate them if they are contrary to Constitutional Provisions. It was the view of Counsel that the suit seeks to have the Court review the supposed Administrative actions of the Defendants and for orders in Judicial Review. The argument was that the Plaintiffs should have

approached the Court, not by way of a suit, but through the procedure required by Section 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules.

7. The 2nd Defendant highlighted paragraph 37 of the Plaintiff in which allegations of fraud are made against the 2nd Defendant. Counsel argued that a Civil Court is not equipped to handle criminal complaints.

8. In response, Prof. Dr. Ssemuju for the Plaintiffs reiterated that the High Court enjoys not only original, and unlimited jurisdiction but also concurrent jurisdictions. Counsel cited various provisions of Article 165 of The Constitution and the Decision in **John Kenyaga & Others vs Jaydees Knitting Factory Nairobi High Court Civil Case No. 3417 of 1989** in which Justice Kuloba held that ;

“The High Court has unlimited original jurisdiction in civil and criminal matters and the creation of concurrent jurisdiction (e.g. by the Trade Disputes Act) does not dispossess the High Court of the same.”

This argument was reinforced by the proposition that the High Court has jurisdiction unless that jurisdiction is expressly ousted by Statute.

9. It was argued by the Plaintiffs that there is an apparent conflict between the provisions of Regulation 85 and the provisions Section 3 of the Government Proceedings Act and Section 42 of the Universities Act (Act No. 42 of 2012) which gives a right to the Plaintiff to sue the 1st and 2nd Defendants respectively. Counsel submitted that where there is a conflict between the subsidiary Legislation and Statute of Parliament, the Statute prevails.

10. In respect to criminal aspects of the proceedings, Counsel argued that the allegations were made merely as proof of the cause of action and no prayers were sought to enforce them.

Alternative Procedure Skipped

11. This is my view of the matter. As no Defence has been filed in answer to the Plaintiff, the averments of fact set out in the Plaintiff are not controverted. The case for the 1st Plaintiff is that on 2nd October 2007 it submitted its application to the Commission of Higher Education for Grant of a Charter and that to date the Commission (or its successor, The Commission for University Education) has failed to issue the Charter. That application must have been under the Universities Act (now repealed) and the Universities' (Establishment of Universities Chapter 2013) (Standardization, Accreditation and Supervision) Rules, 1989. The Act was repealed on 13th December 2012 by The Universities Act (Act No. 12 of 2012).

12. It must be taken that the 1st Plaintiff's Application was still pending at the time of the commencement of the current Statute on 13th December 2012 as the Commission, according to the undisputed pleadings, had not communicated its decision to the 1st Plaintiff. How then would that Application be treated after the commencement of the new Statute? Part X of the Statute is on Transitional Provisions. Section 81(1) provides:-

All acts, directions, orders, appointments, requirements, authorization or other things given, taken or done under, and all funds, assets, and other property acquired by virtue of the repealed Acts shall, so far as they are not consistent with this Act, be deemed to have been given, taken, done or acquired under this Act.

In my reading of these Transitional provisions, the Application would be treated as pending for consideration on accordance with the provisions of the current Statute.

13. On 12th June 2014, The Cabinet Secretary for Education, Science and Technology published the Universities Regulations 2014 pursuant to Powers conferred upon him by Section 70 of the Universities

Act. An objection by the 2nd Defendant is that Regulation 85 of the Regulation provides a dispute resolution mechanism which the Plaintiffs should have invoked in the first instance. Regulation 85 provides:-

Any person or institution who or which is aggrieved by an act or decision of the Commission taken in accordance with any of the provisions of these Regulations, who desires to question that act or decision, or any part of it, may, within thirty days of the date of such act or decision, appeal in writing to:-

a) The Commission which shall review and decide on the matter in question and respond within a period of three months; and

b) Thereafter to the Cabinet Secretary, if not satisfied with the decision of the Commission, and the Cabinet Secretary may give such orders or instructions as may be deemed necessary.

This Provision is not too dissimilar with Rule 23 of the Rules under the Repealed Statute which reads

(1) Any person or institution who or which is aggrieved by an act or decision of the Commission taken in accordance with any of the provisions of these Rules, who desires to question that act or decision, or any part of it may within thirty days of the date of such act or decision, appeal to the Minister who may give such orders or instructions as he may consider necessary.

14. The Complaint by the 1st Plaintiff is that the Commission has failed or omitted to act on its application. It is an allegation that the Commission has failed to carry out its Statutory obligation. My reading of Regulation 85 is that it gives a Right of Appeal against an Action or Decision of the Commission. The right is in respect to something done or a decision made by the Commission. It is not in respect to a failure to act as is the complaint by 1st Plaintiff. Where then would a person aggrieved by such failure turn to? In my view that is the very purpose and object of Judicial Review. That indeed leads the discussion to the second objection.

Matters for Judicial Review

15. The Plank of the Plaintiff's cause is that the Commission has failed in its Statutory Duty to process the 1st Plaintiff's Application for a Charter and also to issue it. It is a criticism about the manner in which a Public Body is discharging its Statutory obligations. That a substantial part of the issues raised are matters of public law is best demonstrated by the prayers sought in the Plaint. Let them be reproduced :-

(1) That Sherman University of Africa be awarded a Charter.

(2) That an interim Order of a Charter and authorization of operation of Sherman University of African until the final hearing and final order or any other order of court

(3) That the Commission to pay Special, general and exemplary damages such that it is deterred from further causing the said agony, misery, trauma and extremely untold suffering to newly established private universities and other institutions of Higher Learning.

(4) That all those people to have or deserve academic, professional and/or honourious qualifications and/or other achievements validated.

(5) That an interim or University Charter be issued in favour of Sherman University of Africa so as to enable it operate until the final or further orders of Honourable High Courts of Law.

(6) That a permanent order in lieu of the University Charter be issued in favour of Sherman

University of Africa

(7) That the commission for University Education be permanently restrained from interfering with the Administrative, academic, and Professional Programmes and activities of Sherman University of Africa and/or any other institution under it, its servants, agents and workmen until the final decision of the Honourable Court or other further orders of Court.

a. That the Commission for Higher Education, its agents, servants, workmen or anybody acting for its behalf be permanently restrained from deregistration or unfair treatment of Sherman University of Africa.

(8) Any other or further relief the Honourable Court may deem fit or expedient.

It seems to me that only one (i.e. prayer 2) is in the realm of private law. This Court agrees with the submissions of the 2nd Defendant that the other 7 (seven) remedies sought are in the nature of Judicial Review Remedies.

16. Without stating so expressly, the 1st Plaintiff, in part, relies on the Doctrine of legitimate Expectation. This is revealed in paragraph 27 of the Plaintiff which reads

That the Commission having persuaded the Plaintiffs to register Sherman University of Africa together with its programmes upon payment of Kshs. 50,000 plus several millions in expenses and having conducted itself as if it accepted and the Plaintiff having, basing on the said conduct, invested huge sums of money where even the defendants have benefited, they ought to be held responsible for those actions.

The Doctrine of legitimate expectation is a Doctrine in Public Law. What the 1st Plaintiff will have to clarify whether it shall be relying on this Doctrine to seek fulfillment of the Expectation or to seek Damages for Breach of Promise. If it were to choose the latter, then the 1st Plaintiff may well be charting new territory in this Country (see a short discussion of the possibility of payment of Damages for Breach of a Legitimate Expectation in the English case of F& I Services Ltd vs Customs & Excise [2001] EWCA Civ 762 (23 May 2001).

17. Whichever way, the 1st Plaintiff will have to demonstrate that its case meets the requirements for Legitimate Expectation which have been stated by the Supreme Court in **Communications Commission of Kenya & 5 others vs Royal Media Services Limited & 5 others** [2014] eKLR to be:-

- a) There must be an express, clear and unambiguous promise given by a public authority;**
- b) The expectation itself must be reasonable;**
- c) The representation must be one which it was competent and lawful for the decision-maker to make; and**
- d) There cannot be a legitimate expectation against clear provisions of the law or the Constitution.**

18. Judicial Review Remedies are only obtained in proceedings commenced under Order 53 of the Civil Procedure Act or a Petition brought under Articles 22 of The Constitution 2010 for enforcement of the Bill of Rights. As no amount of amendment can successfully metamorphosize a Civil Suit into a Judicial Review Application or Constitution Petition, this Court has no option but to strike out prayers (1), (3), (4), (5), (6), (7), and (8) of the Plaintiff.

19. Perhaps I need to add this. Even if this Court had Jurisdiction to consider the just struck down prayers, I very much doubt that they are grantable as sought. The Universities Act gives the Commission the

prerogative of recommending to the Cabinet Secretary for the time being in charge of University Education the Issuance of a Letter of Interim Authority or the Grant of a Charter. While the Court can direct the Commission to consider or process an application in accordance with the law, it cannot direct the outcome of the Application. It cannot direct the Commission to either recommend or not to recommend. And, certainly, the Court cannot make that decision on behalf or in place of the Public Body that has the Statutory mandate of making the Decision

Matter Criminal ?

20. In paragraph 37 and 38 of the Plaint, the Plaintiffs aver:-

37. That it is with due respect fraud for Commission (sic) for University Education to have received money from the Plaintiff and to have lied to the plaintiff up to October last year when the Plaintiff learnt that the Commission for University Education was committing the said fraud.

38) Particulars of the Fraud.

1) Lying to the Plaintiff, students and the University community as stated above.

2) Obtaining money by falsely making the plaintiff belief that they were going to issue a charter in 2 calendar years whereasnot

The 2nd Defendant's objection to this is that this Court is not equipped to handle criminal complaints and that an inquiry into fraud can only be pursued through established criminal Procedure mechanisms. The 1st Plaintiff's answer is that the criminal offences are only stated to demonstrate its case. I think that the 1st Plaintiff is right. Nowhere in the Plaint is the intervention of the Court's Criminal Jurisdiction sought. The Plaint does not seek the grant of Penal Sanctions or orders. This objection fails.

Unqualified Advocate?

21. There is no agreement as to whether or not the 2nd Plaintiff is an Advocate qualified and or admitted to Practice in Kenya. That is therefore not an issue for disposal as a Preliminary Objection. Yet there would be a real difficulty about the inclusion of the 2nd Plaintiff as a party to this suit. Paragraph 2 of the Plaint reads:-

The 2nd Plaintiff is a male adult of sound mind, a Professor and Doctor of Laws, the Managing Director of the 1st Plaintiff, Vice Chancellor of Sherman University of Africa, Director Sherman Teachers' Training College and Law Consultant with International Law Institute whose address of Count (sic) process and for the purpose of this suit is Sherman University of Africa, Sherman Teachers' Training College and ILI Building situated at Emaseno Mundika P.O. Box 317-50400, Busia Kenya and duly authorized to also defend this case on behalf of the 1st Plaintiff. The letter of authority and support documents from Sherman University of Africa Sherman Teachers' Training College and ILI are attached hereto and marked "B", "C" and "D".

As I understand it, the 2nd Plaintiff is the Managing Director of the 1st Plaintiff, and participates in these proceedings under the Authority of the 1st Plaintiff. Just as a natural person is permitted to represent himself in Court, so is an Officer of a Limited Liability Company duly authorized to do so in accordance with the Memorandum and Articles of the Company permitted to represent the Company in legal proceedings. However, from the pleadings, the cause of action belongs to the 1st Plaintiff and not the 2nd Plaintiff. The two do not share it. The inclusion of the 2nd Plaintiff is therefore unnecessary and undesirable. I shall, pursuant to Order 1 Rule 10 (2) of the Civil Procedure Rules, make an order that the name of the 2nd Plaintiff be struck out.

Claims founded on breach of Contract time barred?

22. In the Plaintiff, the Plaintiffs repeatedly state that 2nd Defendant is in breach of Contract. In its written submissions the plaintiffs say more about the nature of the Contract. It submits

“The Applicants entered into a valid partly oral and written contract with the 2nd Defendant that emanated into registration of Sherman University of Africa together with its six (6) Curriculums.”

The 2nd Defendant is however of the view that the cause of action founded on contract would be time barred as the Cause of Action rose on 2nd October 2007.

23. That date, from the Pleadings, is the date when the 1st Plaintiff submitted its Application for a Charter to the Predecessor of the 2nd Defendant. The Plaintiff, however, is unclear as to when breach of Contract is said to have occurred. The 2nd Defendant may request (Order 2 Rule 10 of the Civil Procedure Rules) that 1st Plaintiff particularizes when the Breach occurred, but before then this Court is unable to strike out that Cause of Action on the ground that it is time barred.

Is the Suit Frivolous, Vexatious, scandalous and an abuse of Process?

24. It is submitted for the 2nd Defendant that the 1st Plaintiff's claim is not only beyond the jurisdiction of the Court but also lacks a basis in law. This Court has already agreed with the 2nd Defendant that the issues raised by this suit which belong to the realm of Public Law must be struck out.

25. What has survived the striking out orders is the Plaintiff's Cause of Action in Contract. Yet even on this, the path of the 1st Plaintiff may not be plain sailing. It would be interesting to see how the 1st Plaintiff can prove that the 2nd Defendant breached a contractual obligation and not a Public Duty or that the non-fulfillment of a Public Duty has given rise to a parallel cause of action in Private Law. Whichever way the 1st Plaintiff will have to revamp its pleadings by amendment. But as this Court is for sustaining rather than terminating a suit (unless of course it is shown to be hopeless beyond redemption – see D.T. Dobie & Co. (K) Ltd vs Muchina (1982) KLR 1), those issues are left for determination on another day after they have been canvassed more extensively.

Defective verifying Affidavit?

26. This Court considers the objection taken on verifying Affidavit sworn by the 2nd Plaintiff to be insubstantial. The objection to the Affidavit is that it fails to state the place where it was sworn and thereby breaches section 5 of the Oaths and Statutory Declaration Act...

Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.

It being argued that the failure is significant because Busia is a Border town. This Court is however commanded by the Constitution (Article 159 (2)(d)) not to give undue regard to procedural technicalities when dealing with matters before it. The question to be asked is what prejudice, if any, does the omission cause to the Defendants? The Name and Address of the Advocate who attested to the Affidavit is on the Stamp affixed thereon. It would be easy to clarify from the attesting Advocate where the oath was taken. Nothing much can turn on this objection.

ORDERS

27. These now are my orders:

a) The Preliminary objection of 7th May 2015 succeeds only to the extent that prayers (1) (2), (4), (5), (6), (7) and (8) of the Plaint are hereby struck out.

b) The name of the 2nd Plaintiff is hereby struck out.

c) Costs of The Preliminary Objection to the 2nd Defendant.

d) The Costs which are consequent to the Orders shall be paid to the 2nd Defendant in any event but will await the final outcome of the suit.

Dated, signed and delivered at Busia this 15th day of December 2015.

F. TUIYOTT

J U D G E

In the presence of :-

Oile - C/Assistant

N/A - for Plaintiffs

Ochieng h/b for Kabatta - for Defendant