



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PETITION NO. 410 OF 2013

WILFRIDA ARNODAH ITOLONDO.....PETITIONER

VERSUS

BOARD OF TRUSTEES OF KENYATTA UNIVERSITY

STAFF RETIREMENT BENEFITS SCHEME.....RESPONDENT

JUDGMENT

Introduction

1. The petitioner, **Wilfrida Arnodah Itolondo**, is a lecturer at Kenyatta University and a member of the Kenyatta University Staff Retirement Benefits Scheme. She is also an official of the Universities Academic Staff Union. She has filed the present petition alleging violation of various rights under the Constitution by the respondent. The respondent is the Board of Trustees of the Kenyatta University Staff Retirement Benefits Scheme (hereinafter referred to as “**the Scheme**”) established under the provisions of the Retirement Benefits Authority Act, 2010. It is the manager and custodian of the retirement benefits of the staff of Kenyatta University.
2. The facts giving rise to this petition revolved around the elections of the trustees of the respondent which were scheduled for the 15th of August 2013. The petitioner wished to present herself for election, and to this end, among other interested members of the Scheme, she collected and returned Election Nomination Forms. She was one of two candidates who were not cleared by the respondent to contest elections. The reason given for her failure to qualify was that her candidature offended **Rule vii** of the respondent’s nomination rules which precludes elected council members and trade union officials from vying in the said elections, and **Rule vi** which barred candidates whom, in the view of the respondent were likely to injure the interests of the Scheme.
3. Aggrieved by the decision, the petitioner filed her petition dated 14th August 2013 claiming contravention of certain constitutional rights. In an application brought under certificate of urgency dated 14th August 2013 filed along with the petition, the petitioner sought orders to compel the respondent to ensure that she was allowed to vie for the position of a Trustee at the elections scheduled for 15th August 2013. In the alternative, she sought an order to suspend the elections pending the hearing of the petition. Upon hearing the application, the court took the view that the application was unmerited and directed the parties to proceed with the hearing of the petition.

4. The petitioner filed an amended petition on 30th January 2014 in which she sought the following orders:
 - a. *That a declaration be issued to declare that the Petitioner's enjoyment of rights and fundamental freedoms secured in the Bill of Rights cannot be limited by the rules and regulations of the Kenyatta University Staff Retirement Benefits Scheme.*
 - b. *That a mandatory order be issued compelling the respondent to allow the petitioner to vie for the position of Trustee in the Kenyatta University Staff Retirement Benefits Scheme at the scheme's elections.*
 - c. *That a declaratory order be issued that the Board of Trustee of Kenyatta University Staff Retirement Benefits Scheme unfairly discriminated against the petitioner by denying the petitioner eligibility to contest in the elections of the Kenyatta University Staff Retirement Benefits Scheme as a Trustee.*
 - d. *That a mandatory order be issued compelling the respondent to hold the elections for trustees of the Kenyatta University Staff Retirement Benefits Scheme within ONE month of the Honourable Court making the mandatory order in (b) above.*
 - e. *That an Order be issued nullifying the elections of the Kenyatta University Staff Retirement Benefits Scheme conducted on the 15th August 2013.*
 - f. *That a mandatory order be issued stopping the respondent frustrating the efforts of public spirited individuals who champion good governance at Kenyatta University.*
 - g. *That Rule VI and Rule VII of the Kenyatta University Staff Retirement Benefits Scheme be declared unreasonable and, therefore, unconstitutional, null and void.*
 - h. *That the Honourable Court does issues any other declarations and/or orders that serve the cause of justice.*
 - i. *That the costs of this Petition be borne by the respondent.*

The Case for the Petitioner

5. The petitioner's case is set out in her Amended Petition dated 30th January 2014 which is supported by a Supplementary Affidavit sworn on the same date; her further affidavit dated 17th April 2014, and her submissions dated 29th April 2014. It was presented by her Learned Counsel, Mr Onyony.
6. The petitioner contends that she has been barred several times from vying for the position of Trustee in the Kenyatta University Staff Retirement Benefits Scheme, in complete disregard and infringement of her fundamental rights and freedoms under **Articles 22, 27 (2) and 41** of the Constitution. She states that such violation arises as a result of the decision to deny her participation in the election of the Scheme to which she is a member because of her membership in a trade union and for filing a case in the High Court. She has presented in evidence minutes of a Special Board of Trustees meeting held on 26th July 2013 which state, under Minute 4.0 on **"Nomination Forms Noted"** that the reason for not clearing the Petitioner was that she **'Has a pending Court case with the Sponsor of the Scheme and is a Union Delegate. Rule (vi) and (Vii) renders her application ineligible.'**
7. The Petitioner avers that it is unreasonable and, therefore, unconstitutional, null and void for the Board of Trustees of the Scheme to victimise and intimidate her for being an exemplary citizen who exercises her constitutional rights to approach the Courts of law and other constitutional bodies seeking to protect the rule of law, the principles of natural justice, constitutionalism, and

- the public interest. She contends that the allegation that she cannot vie for the position of trustee because she is an elected official of the **University Academic Staff Union (UASU)** cannot stand as she is a co-opted official of UASU; and that in any event, even if she was an elected official of UASU, that would not take away her rights to vie for the position.
8. The petitioner submits that the Constitution secures her right to be a member of a trade union; that this cannot be used against her or to limit the rights of other leaders of trade unions from vying to be trustees of their pension schemes; and that such a move would also be discriminatory and unreasonable, and, therefore, unconstitutional, null and void.
 9. It is the petitioner's case that she is entitled to all benefits enjoyed by other members of the Scheme and so the respondent violated the Constitution when it barred and continues to bar her from vying for the position of Trustee; and that her enjoyment of rights and fundamental freedoms secured in the Bill of Rights cannot be limited by rules and regulations of the Scheme.
 10. The petitioner further submits that to allege that she is ineligible from vying because she had filed **Judicial Review Case No. 232 of 2012** against various parties including the Kenyatta University Council and the Vice-Chancellor of the University, is to infringe her constitutional right to institute court proceedings to seek redress; that to have a court case against the Vice-Chancellor or the University, who are legally independent entities from the Scheme is not and can never be an action that is likely to injure the interest's of the Scheme; that the sponsor of the Scheme, Kenyatta University, is a separate legal entity from the Scheme and as such the filing and maintenance of **Judicial Review Case No 232 of 2012** and subsequent appeal is a matter that should not have any bearing on her eligibility to vie for the Scheme's elections or to participate in the running and management of the affairs of the Scheme.
 11. The petitioner submits further that to bar her from contesting as a Trustee because of trade union membership is to unfairly discriminate against her on grounds of trade union membership; that membership to a trade union is a fundamental universal right under the Universal Declaration of Human Rights and **Article 41(2) (c)** of the **Constitution**; and that such membership and participation in the activities and programmes of a trade union should not be a bar to eligibility to elections as a trustee of the Scheme.
 12. The petitioner contends that the power contained in the respondent's trust deed to make rules for nomination of persons for election as Trustees does not translate to making unconstitutional rules to infringe on her rights. It is her contention that it is a travesty and abuse of human rights to refuse her to contest as a Trustee for having filed a Court case against the Kenyatta University Vice-Chancellor; and that the filing of such a case does not by any stretch of the imagination amount to injuring the interests of the Scheme.
 13. The petitioner also raises objections with regard to the affidavit filed in reply to the petition on behalf of the respondent. It is her contention that the affidavit by, one **J.M. Sawaya** is fatally defective as it uses initials instead of the full name of the deponent and that John Sawaya, the administrator of the Scheme, is at law incapacitated to swear an affidavit against a member of the Scheme. It is also her case that the said John Sawaya as the administrator of the Scheme in a fiduciary capacity has violated the rules of the Scheme by failing to competently advise the respondent against defending the petition, thereby upholding and perpetuating the illegality raised in the petition. It is her contention that the deponent has demonstrated impunity, bias, and conflict of interest and violated the Retirement Benefits (Occupational Retirement Benefits Scheme) Rules 2000.
 14. With regard to whether this is the appropriate forum for this matter, the petitioner submits that the Retirement Benefits Appeals Tribunal and the Retirement Benefits Authority operate under the provisions of the Retirement Benefits Act Cap 197 of the Laws of Kenya; that the legislation does not provide for original and inherent reference of appeals to the Tribunal nor is it a mandatory provision that a party such as the petitioner who is dissatisfied with any decision of the respondent

must move the Retirement Benefits Authority.

15. It is her further contention that in the determination of disputes, the Retirement Benefits Authority can only exercise the power of a subordinate court of the first class, which invariably means a Magistrate's Court rather than the High Court; and that the grievance procedure under the Retirement Benefits Authority deals with routine scheme rules and does not provide for determination of violation of the Bill of Rights. It is therefore her case that the petition is properly before the court.
16. It is also the petitioner's submission that Article 165 of the **Constitution** donates sufficient capacity and jurisdiction to the court to adequately hear and determine issues of a constitutional nature such as are raised in her petition. She relies in support on the decisions in **Re The Matter of the Interim Independent Electoral Commission [2011] eKLR, Constitutional Application No. 2 of 2011, Samuel Kamau Macharia v. Kenya Commercial Bank and 2 Others** and **Petronella Chirwa v. Transnet & 2 Others Case CCT 78/06 [2007] ZACC 23**, in support of her argument pertaining to the question of jurisdiction.

The Case for the Respondent

17. In response to the petition, the respondent filed an affidavit sworn by Mr. J. M Sawaya, the Principal Pensions Officer of the Scheme, on 4th April 2014. The respondent has also filed submissions dated 13th May 2014.
18. The position taken by the respondent is that the Retirement Benefits Act has provided a grievance procedure for the resolution of grievances of members of Retirement Benefits Schemes. It contends that the procedure requires that an aggrieved member forwards the grievance to the Chief Executive Officer of the Retirement Benefits Authority; and that the decision of the Chief Executive Officer on such a complaint is subject to appeal before the Retirement Benefits Tribunal.
19. The respondent contends that the petitioner has not lodged any complaint against it to the Retirement Benefits Authority; that she has not been denied the right to have her grievance addressed by the Retirement Benefits Authority; and that the present petition therefore lacks merit.
20. According to the respondent, the procedure for resolving any dispute that arises from the **Retirement Benefits Act** is governed by **Section 46** and **Section 48** of the said Act; and that the petitioner should have lodged a request for review of the respondent's decision with the Chief Executive Officer of The Retirement Benefits Authority. It relies on the decisions in **Speaker of The National Assembly v Njenga Karume [2008] 1 KLR 425** and **Francis Gitau v National Alliance Party & 4 Others (2012) eKLR** and **Benjamin Munywoki Musau v Daniel Mutua & 2 Others (2013) eKLR** in support of its submission that this dispute should have been heard under the procedure provided under the Retirements Benefit Authority.
21. The respondent submits further that under Section 7 of The Retirements Benefit Act's Regulations, 2000, every Retirement Benefits Scheme is mandated to have its own rules governing its day to day operations, including elections; that it was operating within the law when it subjected all potential candidates for the position of trustee to the Scheme's Nomination Rules; that the Nomination Rules apply to all members of the Scheme; and the petitioner's claim of discrimination on the basis of being a union member is unfounded.
22. To the petitioner's contention that she was a co-opted rather than an elected official of UASU, it was the respondent's case that both elected and co-opted officials are considered officials of a trade union; and that Rule vii precludes officials of trade unions from vying for the position of trustee. It was also its case that **Rule vi** of the Scheme rules is a reflection of **Section 26(2) (d)** of the **Retirement Benefits Act** and should therefore be upheld.

23. It is also the respondent's submission that this petition raises no constitutional issues for determination by this court. In this regard, it is its submission that there has been no discrimination against the petitioner as alleged; that the fact that the Constitution is cited or its provisions are invoked is not sufficient to qualify a matter as a constitutional matter thereby conferring on the High Court the licence to inquire or deal with an issue that can be dealt with under the dispute resolution process provided by statute, a principle that the respondent submitted had been upheld in many decisions of the court. The respondent prayed that the petition be dismissed with costs.

Determination

24. I have noted the issues proposed as falling for determination by the parties in this matter. However, having read and considered the pleadings of the parties and their respective submissions, written and oral, I take the view that the following issues arise for determination in this matter:

- i. ***Whether this court has the jurisdiction to hear the matter.***
- ii. ***Whether Nomination Rules, Rule vi and Rule vii of the Kenyatta University Staff Retirement Benefits Scheme are unreasonable and, therefore, unconstitutional, null and void.***
- iii. ***Whether there has been a violation of the petitioner's rights under Articles 27 (2) and 41 (2) (c) of the Constitution.***

The Applicable Law

25. In determining the issues raised in this matter, I am guided by the provisions of the Constitution contained at Article 22, under which this petition is brought before the court. Article 22(1) gives the right to everyone to file a petition alleging violation of a fundamental right or freedom. It provides as follows:

22. (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

26. At Article 22(3)(d), the Constitution enjoins the court, in dealing with matters brought under the Bill of rights, in the following terms:

(d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; “

27. A similar injunction with respect to the exercise of judicial authority provision is contained in Article 159(2)(d):

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c)...

(d) justice shall be administered without undue regard to procedural technicalities; and

28. Article 23(3) gives the court the jurisdiction, in a petition brought under Article 22, to grant appropriate relief, including a declaration of rights, an injunction, a conservatory order, a

declaration of invalidity of any law, an order for compensation and an order of judicial review.

29. With regard to the applicable statutory provisions, it is, I believe common ground that the Retirement Benefits Act, under whose provisions the respondent is established, provides the legislative framework for the issues in dispute.

Preliminary Matters

30. I observe that the petitioner has challenged the replying affidavit sworn on behalf of the respondent on the basis that it does not include the full name of the deponent, but contains initials. No authority has been cited for this submission, but in my view, it would qualify as a technicality that causes no prejudice to the petitioner.

31. The petitioner has also placed reliance in her submissions on the Civil Procedure Rules. However, with respect to constitutional petitions, I believe the applicable rules are **The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** (the “**Mutunga Rules**”).

32. I now turn to consider the three issues identified as falling for determination in this matter.

Jurisdiction

33. The important place that the question of jurisdiction has in the exercise of judicial authority was succinctly captured in the landmark case of **Owners of the Motor Vessel “Lilian S” vs. Caltex Oil (Kenya) Limited [1989] KLR 1**. In that case, Nyarangi JA observed as follows:

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. 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”.

34. Article 165 of The Constitution, so far as is relevant for the purposes of this petition, vests jurisdiction in the High Court in the following terms:

3. *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. ...

d. *Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of this Constitution including the determination of –*

(i) The question whether any law is inconsistent with or in contravention of this Constitution.”

35. In this case, the petitioner alleges violation of her rights under **Article 22, 27 (2) and 41(2) (c)** of the Constitution. The basis of her case is that she was denied an opportunity to vie for the position of a Trustee in the respondent Scheme.

36. On its part, the respondent contends that the petitioner’s grievance falls for determination by the Retirement Benefits Authority under the provisions of the Retirement Benefits Act. Such a grievance is required to be forwarded to the Chief Executive Officer of the Retirement Benefits Authority for resolution, while a party aggrieved by his decision can appeal to the Retirement Benefits Tribunal.

37. Section 46 (1) of the Act provides as follows:

“Any member of a scheme who is dissatisfied with a decision of the manager, administrator, custodian or trustees of the scheme may request, in writing, that such decision be reviewed by the Chief Executive Officer with a view to ensuring that such decision is made in accordance with the provisions of the relevant scheme rules or the Act under which the scheme is established.”

(2)...

38. Section 47 (1) provides for the establishment of the Retirements Benefits Appeals Tribunal and its composition, while section 48 (1) provides for appeals to the Tribunal in the following terms:

“Any person aggrieved by a decision of the Authority or of the Chief Executive Officer under the provisions of this Act or any regulations made thereunder may appeal to the Tribunal within thirty days of the receipt of the decision.”

39. Section 49(1) of the Act gives the Tribunal, on the hearing of an appeal, *“all the powers of a subordinate court of the first class to summon witnesses, to take evidence upon oath or affirmation and to call for the production of books and other documents.”* The section also gives the Tribunal power to receive evidence by way of affidavit and administer interrogatories.

40. As correctly argued by the respondent, the petitioner was aggrieved by its decision finding her ineligible to vie for the position of a trustee of the Scheme. Given the above provisions of the Act, the petitioner’s grievance was one which fell within the ambit of the Retirement Benefits Act. She should, therefore, have placed her grievance before the Chief Executive Officer of the Retirements Benefits Authority, and if dissatisfied with such decision as he would have arrived at, appealed to the Tribunal.

41. The respondents have contended, in reliance on the decisions in **Speaker of The National Assembly –vs- Njenga Karume, Francis Gitau –vs- National Alliance Party & 4 Others** and **Benjamin Munywoki Musau –vs- Daniel Mutua & 2 Others** (supra) that where there is a clear procedure provided by law for the redress of any particular grievance, that procedure should be strictly followed. I agree fully with the respondent on this point.

42. However, the petition has sought to bring herself outside the jurisdiction of the Retirement Benefits Authority by alleging two things. First, it is her contention that the acts of the respondent in denying her the right to vie as a trustee because she had filed a case against the Chancellor and Council of the Sponsor, and the fact that she was an official of a trade union, subjected her to discrimination in violation of Article 27 of the Constitution and her right to join a trade union guaranteed under Article 41.

43. It is also her contention that the Scheme rules, specifically **rules vi** and **vii** of the Nomination Rules, are unconstitutional for violating the said rights.

44. It is my view that the mechanism provided under the Retirement Benefits Act is not intended to deal with questions regarding the constitutionality or otherwise of regulations or rules, or to determine whether a right or fundamental freedom in the Bill of Rights has been infringed or threatened with infringement. Such jurisdiction, in my view, is vested in the High Court by Article 165(3) set out above. I therefore find in favour of the petitioner with respect to the question of jurisdiction, and now turn to consider the other two issues raised in this petition.

Constitutionality of Rules vi and vii of the Respondent’s Nomination Rules

45. The court notes the impugned rules which are set out in the minutes of the Special Board of Trustees meeting held on 7th August 2013. The rules prohibit the nomination of, among others,

any person who has been sentenced to six months' imprisonment or more, is of unsound mind, has been declared bankrupt, or was involved in the management of a scheme that was deregistered for any failure of the management. Rule vi prohibits the nomination of, and allows the rejection of, the nomination of ***“Any person who in the view of the Board of Trustees is likely to injure the interests of the Scheme.”***

46. Rule vii prohibits the nomination of, and allows the Scheme to reject the nomination of, ***“Elected Council Members and Trade Union Officials of the Sponsor”***.

47. The petitioner contends that **Rule vii** is unconstitutional as it renders a person who is a member of a trade union ineligible for elections as a trustee of the respondent. She contends that membership to a trade union and participation in its activities and programmes should not be a bar to eligibility to the said elections. It is her contention that the rule violates her rights under Article 41(2)(c). This Article guarantees to workers the right to join trade union as follows:

“Every worker has the right—

(a) to fair remuneration;

(b) to reasonable working conditions;

(c) to form, join or participate in the activities and programmes of a trade union; ***“*** (Emphasis added)

48. A plain reading of rule vii shows that the rule does not bar **members** of trade unions from being elected as trustees of the respondent. Rather, the limitation is of officials of trade unions, without a distinction being made between an elected official or, as the petitioner alleges she is, a co-opted official.

49. I observe, further, that the rule also bars ***“Elected Council Members of the Sponsor.”*** While the respondent was somewhat reticent on this issue and the basis for barring Council members and trade union officials from being trustees of the Scheme, a reasonable supposition is that such members may result in a conflict interest. At any rate, I can find no discrimination or other violation of the petitioner's constitutional rights by this rule.

50. With regard to **Rule vi**, the petitioner contends that the filing of a court case to seek redress does not constitute a threat of injury to the interest of the Scheme. The rule states that ***“Any person who in the view of the Board of Trustees is likely to injure the interests of the Scheme”*** shall not be eligible to vie for the position of a trustee.

51. The respondent argues that this rule is a reflection of section 26(2)(d) of the Retirement Benefits Act. This section, which is titled ***“Requirements with regard to trustees”*** provides as follows:

(1) Every scheme, other than a scheme established by a written law shall be established under an irrevocable trust.

(2) No person shall be a trustee of any scheme fund if such person—

(a) has been sentenced to imprisonment by a court of competent jurisdiction for a period of six months or more;

(b) is adjudged bankrupt;

(c) was previously involved in the management or administration of a scheme which was deregistered for any failure on the part of the management or the administration thereof;

(d) is disqualified under any other written law, or his holding office as such is deemed by the Authority as being, in any way, detrimental

to the scheme.” (Emphasis added)

52. While it is correct that the impugned rule vi reflects to a large extent the provision in section 26(2) (d) of the Retirement Benefits Act, it does have one important distinction with the provision in the Act. The Retirement Benefits Act provides that it is the **Retirement Benefits Authority** established under section 3 of the Act which is vested with the power to determine whether a particular person’s membership of the Board of Trustees is likely to be detrimental to the Scheme. However, the respondent has arrogated to itself this power and made a decision that the petitioner’s membership is likely to injure the interests of the Scheme.
53. Another concern is that the rule, as framed and applied, seems to me to be very wide and open to abuse, even had power been vested in the respondent by section 26(2)(d). It does not provide the criteria on which the Authority or the respondent can determine what is likely to injure the interests of the Scheme, what such interests are, and how such injury is to be measured. Further, in this case, in determining that the election of the petitioner was likely to injure the interests of the Scheme, the respondent did not afford the petitioner an opportunity to be heard before it reached the decision that her candidature was likely to injure its interests. Without affording her such an opportunity, the respondent was, in my view, in breach of her rights both under Article 47 and 50 of the Constitution which guarantees fair administrative action and a fair hearing. As was observed by the Court of Appeal in **Onyango Oloo vs. Attorney General [1986-1989] EA 456**:

“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard... There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice... To “consider” is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion... “Consider” implies looking at the whole matter before reaching a conclusion... A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...” (Emphasis added)

54. It was incumbent on the respondent to give an opportunity to the petitioner to be heard before barring her from contesting the elections for trustee on the basis that she had filed a case against the Scheme Sponsor. On the face of it, and without any reasons being advanced by the respondent, it appears unreasonable for it to conclude, without more, that the filing of a case against the Sponsor was likely to injure the interests of the respondent. Thus, while rule vi of the respondent’s nomination rules may echo in some respects the provisions of section 26(2) (d) of the Act, the respondent has arrogated to itself powers that it does not have under the Act; and further, its exercise of such powers, and the application of the rule in exercise of such powers is, in this case, in violation of the statute and unreasonable.
55. Had this rule been the only basis for barring the petitioner from running for the office of trustee in the respondent, there would have been a basis for interfering with the elections. However, having found that the petitioner was properly barred under **rule vii** and that there is therefore no violation of her rights under Article 27 and 41, I am constrained to dismiss the petition.

56. Each party shall bear its own costs of the petition.

Dated, Delivered and Signed at Nairobi this 26th day of November 2014

MUMBI NGUGI

JUDGE

Mr Onyony instructed by the firm of Onyony & Co. Advocate for the petitioner

Mr Okoth instructed by the firm of Oraro & Co. Advocates for the respondent