



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

WILFRIDA ARNODAH ITOLONDOPETITIONER

VERSUS

BOARD OF TRUSTEES OF KENYATTA UNIVERSITY

STAFF RETIREMENT BENEFITS SCHEME RESPONDENT

RULING

1. The petitioner has brought this matter to challenge her exclusion from running as a trustee of the respondent in the elections scheduled for 2.00 O'clock this afternoon. In her Notice of Motion dated 14th August 2013, she seeks the following orders:
 1. *That the application be certified as urgent and heard ex parte and service thereof be dispensed with in the first instance.*
 2. *That a mandatory order be issued to compel the Respondent, to ensure that Applicant/Petitioner is allowed to vie for the position of Trustee of the Kenyatta University Staff Retirement Benefits Scheme at the forthcoming elections to be held on Thursday, 15th August 2013, **pending the hearing and determination of the Application/Petition herein inter partes.***
 3. *That in the alternative, an interim conservatory order be issued suspending the forthcoming elections of the Kenyatta University Staff Retirement Benefits Scheme to be held on Thursday, 15th August 2013 **until the Petition herein is heard and determined inter partes.***
 4. *That this Honourable Court be pleased to join other parties relevant to this petition as and when it deems fit.*
 5. *That the court do give any other or further orders that will favour the cause of justice*
 6. *That costs be in the cause.*
2. When the matter first came before me under certificate of Urgency on 14th August 2013, I directed that it be served for hearing inter partes this morning. Counsel for the respondent, Mr. Chacha Odera, indicated that he had been served late yesterday and had not been able to file a response as he had no full instructions on the matter, but would argue the application on points of law.
3. In his submissions, Mr. Nguning'a submitted that the petitioner was aggrieved by the respondent's rules which barred her from contesting in the elections. He contended that the rules are

unconstitutional, discriminatory against the petitioner and unreasonable and sought order No. 3 in the petitioner's application to stop the elections scheduled for today until the petition is heard and determined.

4. In reply, Mr. Odera opposed the application on the basis that there was no constitutional issue before the court. He argued that the nearest the matter could come to a constitutional issue was Article 47 under which the Constitution recognised citizens' right to fair administrative action. In his view, the petitioner had not exhausted the administrative process and procedure set out in Section 46 of the Retirement Benefits Authority Act (RBA Act) which gave her a right, if dissatisfied with a decision of a manager of a scheme, to ask for a review of the decision by the Chief Executive Officer of the RBA, and then, if still dissatisfied, to seek redress from the RBA Tribunal, which she had not done.
5. Having considered the application and the respective submissions of the parties, I take the following view of the matter. First, from the documents annexed to the petition, the petitioner was aware, as far back as 26th July 2013, that she had been barred from contesting the elections. I note this from annexure **G(ii)** which is a letter dated 26th July 2013 addressed to her by the Manager of the Scheme. She responded to the decision to bar her by her letter dated 1st August, 2013 (**F(ii)**). The petitioner therefore had more than 14 days within which she could have sought to stop the elections instead of waiting until the last minute to do so.
6. Further, and while appreciating that I do not have all the facts before me and that I am only dealing with this issue at the interlocutory stage, it appears from her documents (annexure **G(i)**) that contrary to the submissions by Mr. Nguring'a that the rules were made in August 2013, the rules she challenges as unconstitutional were formulated in December 2012, and the same document indicates that the rules had been forwarded to her. She had sufficient opportunity therefore to challenge the constitutionality of the rules long before the elections were due.
7. The respondent argues that the petitioner has not raised any constitutional issue in her application, and that she should have exhausted the grievance procedure established under section 46-48 of the RBA Act. Mr. Nguring'a takes two conflicting positions on this point. First, he argues that the petitioner has substantially complied with that procedure. He then argues that she has not, but that there is no requirement that she should, as the word 'may' in section 46 is not mandatory and does not oust the jurisdiction of the court.
8. In my view, the position taken by the respondent is supported by a whole line of decisions by our courts. Not every dispute is a constitutional issue, and where statute provides a mechanism for dealing with that grievance, that mechanism should be followed: see the case of **Speaker of the National Assembly -vs- Karume 92008) IKLR EP 425** in which the Court of Appeal observed as follows:

"In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."
9. See also the decisions in **Kones -vs. Republic and Another ex parte Kimani Wa Nyoike Civil Appeal No. 94 of 2005 and Ferdinand Ndungu Waititu -vs- The IEBC and 8 Others Election Petition No. 1 of 2013** all of which are agreed on in this point. There is therefore considerable merit in the respondent's argument that the issues raised in this matter should properly have been addressed through the procedure set out in the RBA Act, and there is therefore insufficient basis for me to interfere with the elections.
10. Which brings me to the question of the balance of convenience raised by the respondent. The elections are scheduled for this afternoon. As I have already found above, the petitioner had more than two weeks to raise the issues she now raises in a manner and within a time frame that would have allowed time for them to be properly addressed. As it is, the respondent has prepared to hold the elections this afternoon, and an order stopping the elections would adversely affect the rights

of others not now before me. In my view, the balance of convenience clearly lies against granting the orders sought. While it is true that the constitution does grant rights to individuals, it also requires that those rights should not be enjoyed in a manner that prejudices the rights of others.

11. In the circumstances, I find no merit in the petitioner's application and it is hereby dismissed. Costs shall await the determination of the petition.

Dated Delivered and Signed at Nairobi this 15th day of August 2013

MUMBI NGUGI

JUDGE

Mr. Nguring'a instructed by the firm of Ishmael & Co. Advocates for the petitioner

Mr. Chacha Odera and Ms. Oraro instructed by the firm of Oraro & Company Advocates for the respondent.