



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO 26'A' OF 2012

BETWEEN

PATRICK KAMAU GATWECHI.....PETITIONER

AND

BOARD OF TRUSTEES (KENYA METHODIST UNIVERSITY)

REV. STEPHEN KANYARU AND OTHERS..... RESPONDENT

RULING

Introduction

1. This ruling is in respect of a Preliminary Objection dated 18th April 2013. The Respondents, the **Board of Trustees (Kenya Methodist University)** have filed the Preliminary objection stating that the Respondent is not an entity known in law capable of being sued and that the Petition is therefore frivolous, vexatious and an abuse of the Court process and ought to be struck off. Parties addressed that issue by filing submissions as below.

Respondent's Submissions

2. The Respondent submitted that the Respondent as sued is not a proper and competent party to a suit and is not a person known in law, capable of being sued for or on behalf of the Kenya Methodist University. They claim that the Kenya Methodist University is a Private University established by Charter under Legal Notice No. 130 of 2006, a Subsidiary Legislation to the University Act. That **Article 3(3)** of the **Charter** has established the university as a body corporate which by its corporate name can sue and be sued. Further, that the putative Respondent is only a constituent of the Kenya Methodist University with their roles set out in **Article 12** of the **University Charter** and does not constitute the corporate personality of Kenya Methodist University. They thus contend that the Petition is materially incompetent.
3. On the second ground, the Respondent contest the forum where the Petitioner has sought redress. They state that the Constitutional and Human Rights Division of the High Court is an inconvenient forum for disputes between private parties. They claim that disputes between private individuals

whether or not they involve infringement of fundamental rights and freedoms fall under the province of private law and should be addressed as such. They relied on the case of **C.O.M v Standard Group Ltd and Another, Petition No. 192 of 2011** where this Court recognised the many decisions of the High Court on the position that private individuals cannot maintain an action against a private individual for violation of fundamental rights and freedoms.

4. They thus urged me to uphold the preliminary objection and dismiss the Petition.

Petitioners' case.

5. The Petitioner on the first issue submitted that his action should not be defeated merely on account of misjoinder of the Respondents. He claimed that **Article 159(2)(c) and (d)** enjoins this Court to do justice to the parties before it without giving regard to procedural technicalities. And that this Court ought to facilitate the hearing and determination of the cases before it with a view of granting substantive justice to the parties. They therefore contended that this Court has powers to grant him leave to amend his Petition so as to sue the right party and that an amendment of the Petition in his view will not prejudice the Respondent in any way.
6. On the issue of filing the suit in the wrong forum, the Petitioner contends that the rights he alleges to have been violated are not private in nature and that the civil Courts cannot enforce his rights under **Article 31** of the **Constitution**. He stated that the case of **C.O.M v Standard Group Ltd and Another (supra)** was distinguishable as it was a clear case of defamation and this Court's sentiments that the same could have been ventilated in a civil Court was a correct exposition of the law.
7. He thus urged me to dismiss the Respondent's preliminary objection as it was misplaced in law since the Constitution does not anticipate that the proceedings seeking enforcement of the Bill of Rights should be dismissed summarily.

Findings

8. Having set out the parties' submissions as above, I am of the view that the two issues raised by the Parties are the proper ones for me to determine, namely; firstly whether the Respondents are the right parties in this Petition and secondly, whether the Petitioner has filed his Petition in the right forum.

Misjoinder of parties

9. It is clear to me that **Article 3(3)** of the **Charter** establishing the Kenya Methodist University has established the University as a body corporate which by its corporate name can sue and be sued. According to the Respondent, the Board of Trustees of the Kenya Methodist University is a constituent of the University whose roles are set out under **Article 12** of the **University Charter** and is therefore not the right party to be sued.
10. I agree with the Respondents that the University is the right party to be sued in this petition. However, I also agree with the Petitioner that a misjoinder of a party cannot be the basis upon which this Court can dismiss the Petition. I am aware of the fact that the Respondent has admitted some of the facts contained in the Petition and as I see it, the objection it has raised is meant to frustrate the Petitioner in his bid to enforce his fundamental rights if any, that have been violated. **Article 159(2)(c) and (d)** of the **Constitution** has also enjoined this court to do justice to the parties without giving due regard to procedural technicalities. An issue of joinder or misjoinder of parties may not *per se* be a procedural technicality but I do not see how it affects or prejudices the Respondent once the Petition is given life by an amendment.
11. I am also alive to the provisions of **Rule 5** of The **Constitution** of Kenya (**Protection of Rights and Fundamental Freedoms**) **Practice and Procedure Rules, 2013** commonly known as the

“Mutunga Rules” which has allowed joinder, addition, substitution and striking out of parties. This rule states as follows;

“The following procedure shall apply with respect to addition, joinder, substitution and striking out of parties-

a) where the Petitioner is in doubt as to the persons from whom redress should be sought, the Petitioner may join two or more Respondents in order that the question as to which of the Respondent is liable, and to what extent, may be determined as between all parties.

b) A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.

c) Where proceedings have been instituted in the name of the wrong person as Petitioner, or where it is doubtful whether it has been instituted in the name of the right Petitioner, the Court may at any stage of the proceedings, if satisfied that the proceedings have been instituted through a mistake made in good faith and that it is necessary for the determination of the matter in dispute, order any other person to be substituted or added as Petitioner upon terms as it thinks fit.

d) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just-

i) order that the name of any party improperly joined, be struck out; and

ii) that the name of any person who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court adjudicate upon and settle the matter, be added.

e) Where a respondent is added or substituted, the petition shall unless the Court otherwise directs, be amended in such a manner as may be necessary, and amended copies of the Petition shall be served on the new respondent and, if the Court thinks, fit on the original Respondents”.

12.As it can be seen from Rule 5 above, this Court may at any stage of the proceedings order any other person to be substituted or added, or order the name of any party improperly enjoined to be struck out and the name of the person who ought to have been joined, added.

13.That provision is clear to my mind. And in the instant case, I am certain that the Petitioner sued the Respondent in good faith and cannot be penalized for that error. I do not therefore see any prejudice the Respondents will suffer by making such an order.

Whether the Petition is in the right forum

14.The Respondents further submitted that the Petition as filed is in the wrong forum and ought to have been filed in a civil Court. That a private individual cannot enforce his rights as against other private individuals. Before I address this issue, I would like to distinguish the case of **C.O.M v Standard Group Ltd and Another (supra)** relied on by the Respondents with the present case. In that case, the cause of action leading to violation of fundamental rights and freedoms arose out of a civil claim; that of defamation. As such to my mind, the right forum to have all issues canvassed was the civil Court.

15.Looking at the instant Petition, on the other hand, the Petitioner has alleged a violation of his fundamental rights and freedoms. I do not see any direct civil claim that may justify the proposition that the matter should be filed in a civil Court. I am alive to the fact that this Court has previously held that claims under the Constitution are to be determined under the Constitution alone - See **Dominic Arony v Attorney General, Misc. Application No.494 of 2003.**

16. On the issue whether private citizens can enforce their rights as against other private citizens, I reiterate the reasoning of this Court in Satrose Ayuma & 11 Others v Registered Trustees of the Kenya Railways Staff Retirement Benefit Scheme, Petition No. 65 of 2010 where the Court rendered itself as follows;

“Looking at the provisions of Articles 2(1), 19(3) and 20(1), I am certain that the Bill of Rights can be enforced as against a private citizen, a public or a government entity such as the 1st and 2nd Respondents. I say so deliberately and with firmness because previous decisions of this Court on the subject have been completely misunderstood and misread by more persons than the misguided journalist masquerading as a scholar of Constitutional interpretation. The Bill of Rights is therefore not necessarily limited to a State Organ as argued by the 1st and 2nd Respondents and in saying so, I am alive to the provisions of Article 2(1) of the Constitution which provides that 'this Constitution is the Supreme Law of the Republic and binds all persons and all state organs at both levels of the Government.' Article 19(3) provides that;

“the rights and fundamental freedoms in the Bill of Rights;

(a) belong to each individual and are not granted by the state;

(b) ...

(c) are subject to the limitations contemplated in this Constitution”

Further, Article 20(1) provides that “the Bill of Rights applies to all law and binds all state organs and all persons”. The definition of a State Organ is found at Article 260 which states that, a State Organ is; “a commission, office, agency or other body established under this Constitution” and “person” includes “a company, association or other body of persons whether incorporated or unincorporated”.

And further stated further that;

“Clearly, to interpret the Constitution in a manner to even suggest that the 1st and 2nd Respondents do not have an obligation to promote and protect the Petitioners' rights and freedoms does not only fly right out of the window, but would also defeat the very essence and spirit of Article 20(3). It is thus clear to my mind that it would not have been the intention of the drafters of the Constitution and the Kenyan people who overwhelmingly passed the Constitution that the Bill of Rights would only bind State Organs. A purposive interpretation as can be seen above would imply that the Bill of Rights binds all State Organs and all persons, whether they are public bodies or juristic persons. It also seems clear to me therefore that from a wide definition of the term “person” as contained in Article 260, the intention of the framers of the Constitution was to have both a vertical and a horizontal application of the Bill of Rights. I therefore find that the Petitioners are entitled to file a claim under Article 22 before this Court alleging a violation of the Petitioners rights by any of the Respondents, and the Court can properly grant an appropriate relief as envisaged by Article 23 of the Constitution. I hope this settles the issue once and for all in as far as the views of this Court are concerned. ”

The above holding squarely answers the second issue in contest.

Conclusion

17. The above is the law as I understand it. To find otherwise would be improper. In stating so, am alive to the provision of the law that striking out any pleading is a drastic measure which must be exercised sparingly and only in instances where the case is most hopeless and cannot be saved

even by an amendment. In *D.T Dobie & Co. (Kenya) Limited versus Muchina [1982] KLR 19* it was stated that;

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows some semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for court of justice ought not to act in darkness without the full facts of a case before it.”

18. As stated elsewhere in this ruling, a perusal of the Petition herein discloses some reasonable cause of action and cannot be dismissed as a hopeless case and I so find. The Petitioner is entitled to his day in Court no matter his hopeless case so long as some life can be injected into it by an amendment. And I have already found that the amendment is not of substance but of form. Let the Petitioner give life to his Petition by an amendment. I do not see how the Respondent will be affected by such an amendment as they will have an opportunity to respond on the amendment.

The objection is overruled with the further order that the Petitioner shall amend his Petition within 14 days. I shall make no order as to costs.

19. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 18TH DAY OF DECEMBER, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Mr. Musyoka holding brief for Mr. Muchoki for Petitioner

Mr. Wanyeki for Petitioner

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE