



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION 5 OF 2011

ERIC BARARE ORINA.....PETITIONER

V E R S U S

DIRECTOR OF INFORMATION AND 12 OTHERS.....RESPONDENTS

RULING

1. The petitioner in this case seeks various declarations and consequential orders against the respondents in his petition and chamber summons application dated 11th January 2011. The respondents oppose the application and filed a Notice of Preliminary Objection containing 7 grounds. Both parties had filed written submissions on the Preliminary Objection which they highlighted before me on the 29th of November 2011.
2. Mr. Asewe presented the respondents' position and relied on the written submissions dated the 15th of June 2011. He submitted that the petitioner has brought this suit as the Secretary General of the Kenya Union of Journalist (KUJ). However, according to documents filed with the Registrar of Trade Unions annexed to the affidavit of Dr. Levy Obonyo sworn on the 25th of February 2011, the petitioner is not the Secretary General of the KUJ. Annexure L01(a) and (b) which is an extract from the Registrar of Trade Unions and a press statement from KUJ confirm this. The petitioner therefore had no capacity to bring this petition on behalf of the KUJ. With regard to the petitioner's submission that he had brought the petition as a member of the Media Council, Mr. Asewe submitted that the Media Council is a body corporate capable of suing and being sued, and it is not a party to this suit. The petitioner therefore lacked capacity to bring this suit.
3. The respondents argue further that the petitioner has invoked Judicial review procedure yet failed to seek the specific orders and writs available to a petitioner in judicial review. He seeks 9 prayers none of which is mandamus, certiorari or prohibition. Rather, he is seeking an interpretation of his rights under Article 47 which deals with fair administrative action.
4. According to the respondents, the petitioner has raised the issue of fair administrative action. In his pleadings he states the 1st respondent failed to take into account the directives issued by the Chairman of a body known as the Media Owners Association of Kenya. Section 6 of the Media Act 2007 deals with the composition of the Media Council of Kenya. Section 6(b) states what the composition should be, including 3 members nominated by the Media Owners Association. The Media Owners Association of Kenya which is a totally different body registered under the Societies Act, is not mentioned anywhere in section 6(b). The respondents therefore contend that the 1st respondent was entitled to reject the list submitted by the Chairman of the so-called Media Association of Kenya.

5. Finally, the respondents submit that the orders that the petitioner seeks have been overtaken by events. At prayer 2 the petitioner seeks to stay the election of the 8th respondent as the Chairperson of the Media Council. The 8th respondent was elected as Chairman so the court cannot issue an injunction to that effect.
6. In addition, the petitioner seeks a prayer to stop the 4th respondent from vacating her position as the Executive Director of the 1st respondent. The 4th respondent tendered her resignation as the Executive Director voluntarily, and to issue the orders sought by the petitioner would be a gross violation of the 4th respondent's rights as such an order would prohibit her from vacating a position she has voluntarily relinquished.
7. Finally, it was the respondents' submission that all the orders sought by the petitioner in this suit have all been overtaken by events and there is nothing for this court to determine. They prayed for the petition to be dismissed with costs.
8. The petitioner, Mr. Orina, argued his case in opposition to the Notice of Preliminary Objection. He submitted that he filed this suit as a member of the Media Council of Kenya sworn in on 22nd December 2011 and had only used the term Secretary General of KUJ to further describe himself. He also argued that the registration of another person as the Secretary General of KUJ was done in breach of an existing court order.
9. He submitted that he had brought the matter under the relevant articles of the Constitution namely Article 22, 23 and 47(1). He argued that the court has on many occasions said it will not be bogged down by technicalities yet the respondents are insisting on technicalities that do not in any case apply to this case.
10. With regard to the respondents' reference to Section 6 of the Media Act, he submitted that the issue of who should have nominated members to the Media Council, whether it was the Media Owners Association or the Media Owners Association of Kenya, was one of the issues he had raised.
11. With regard to the issue of whether the matters at issue have been overtaken by events, Mr. Orina submitted that his understanding of a preliminary objection was that it raises points of law. He argued that the respondent should have filed an affidavit to enable him respond.
12. Finally, he submitted that Article 47 talks about the right to fair administrative action. The election of the Chairperson of the Media Council was not lawful or procedurally fair. He argued that the respondents had failed to prove that the Media Owners Association referred to in Section 6 of the Media Act is separate from the Media Owners Association of Kenya registered under the Societies Act in 1999. He submitted that the Media Owners Association of Kenya was in existence at the time the Media Act came into force and therefore the reference in section 6 was a reference to the Media Owners Association of Kenya.
13. I have considered the oral and written submissions of the parties in this matter with regard to the preliminary objection raised by the respondents. I have also looked at the objections against the orders sought by the petitioner. The petitioner in his petition dated 17th January, 2011 prays for the following orders:
 1. A declaration that the failure by the 1st Respondent to appoint the nominees of the Media Owners Association of Kenya to the Media Council of Kenya in accordance with Section 6(b) of the Media Act 2007 is a denial of the petitioner's right to administrative action in accordance with Article 47 of the Constitution.
 2. A declaration that the failure by the 1st, 2nd, 3rd, 4th, 5th, 8th, 9th, 10th, 11th, 12 and 13th Respondents to publish audited annual accounts for the years 2008, 2009 and 2010 as required by Section 22 of the Media Act 2007 is a violation of the petitioner's right to fair administrative action in accordance with Article

47 of the Constitution.

3. A declaration that the failure by the 1st, 2nd, 3rd, 4th, 5th, 8th, 9th, 10th, 11th, 12th, and 13th Respondents to publish audited annual accounts for the years 2008, 2009 and 2010 as required by Section 22(3) of the Media Act 2007 is an offence in accordance with Section 45(2) of the Anti Corruption and Economic Crimes Act.

4. A declaration that the failure by the 1st Respondent to nullify the appointment of Ms Sarah Nkatha, the 2nd Respondent to the Media Council despite notification of the 2nd Respondent's lack of proper qualifications is a violation of the Petitioner's right to fair administrative action in accordance with Article 47 of the Constitution.

5. A declaration that the full council meeting of the Media Council held on 14th January, 2011 is in disregard of the requirements for such a meeting contained in the First Schedule of the Media Act 2007 and was null and void and was a violation of the petitioner's right to fair administrative action in accordance with Article 47 of the Constitution.

6. A consequential order quashing the appointments of Mr. Linus Gitahi, Ms Nelly Matheka, Mr. Kiprono Kittony and Ms Sarah Nkatha as members of the Media Council of Kenya.

8. A consequential order quashing the election of Mr. Levi Obonyo as chairperson of the Media Council of Kenya, subsequent to the meeting held on 14th January, 2011.

9. A consequential order requiring the 1st, 2nd, 3rd, 4th, 5th, 8th, 9th, 10th, 11th, 12th and 13th Respondents to publish the audited annual accounts for the years 2008, 2009 and 2010, before any handovers either by the chairperson or the Executive Director/Secretary to the council is effected.

10. A consequential order requiring the Kenya Anti-Corruption Commission to take appropriate action with regard to the failure by the 1st, 2nd, 3rd, 4th, 5th, 8th, 9th, 10th, 11th, 12th, and 13th Respondents to publish audited annual accounts for the years 2008, 2009 and 2010 as required by Section 22(3) of the Media Act.

11. A consequential order stopping the 5th, 6th and 7th Respondents from presenting themselves as officials of the Media Owners Association of Kenya, in accordance with Sections 17 and 24 of the Societies Act.

12. A consequential order requiring the 1st Respondent to appoint duly qualified nominees nominated by *bona fide* officials of the Media Owners Association of Kenya and the Kenya Union of Journalists and Allied Workers.

13. The costs hereof to be provided for.

14. Any other relief that the Honourable Court may deem fit to grant.

14. The respondents' Notice of Preliminary Objection to the Plaintiffs is on the following grounds:-

1. The entire petition as filed and the Chamber Summons applications are hopelessly and incurably defective and do not lie.

2. The applicant has purportedly instituted the suit as the Secretary-General of the Kenya Union of Journalists whilst he is not the Secretary General.

3. The Petitioner has purported to file a Representative Suit without first seeking the leave of this court and or without advertising.

4. The Petitioner purports to seek injunctive orders in an essentially Judicial Review matter and without invoking the relevant provisions of the Civil Procedure Rules, 2010.

5. The substance of the Petition before this Honourable Court does not raise any constitutional issues under Article 47 of the Constitution of the Republic of Kenya.

6. The Applications seek orders which aggregate to Interim Declarations which this Honourable Court lacks the jurisdiction to grant.

7. This court's Petitioner has not served the petition upon all the Respondents within seven (7) days of filing as required by Rule 15 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006.

15. I must state that the petition before this court is somewhat convoluted and it is unclear precisely what the petitioner is aggrieved by. Not only does he seek orders pertaining to the election of members of the Media Council but also seeks orders to compel the Media Council to publish audited accounts and orders directing the Kenya Anti Corruption Commission to 'take appropriate action' with regard to the failure by the respondents to publish audited annual accounts for several years. In the Chamber Summons application filed with the petition, the petitioner seeks orders staying the termination of the contract of the 4th respondent as Executive Officer of the 1st respondent and also staying her handing over to another officer.

16. The petitioner submits, correctly, that a preliminary objection raises points of law. He also submits, again correctly, that this court is not to be bound by technicalities. Indeed, this is a constitutional requirement. However, some basic rules must be followed in order for the courts to properly and expeditiously dispense justice. As a petitioner in a constitutional court, the petitioner must be clear about what he is seeking from the court. It has long been established that a party who seeks to invoke the court's intervention in the protection or enforcement of fundamental rights and freedoms must specifically set out his complaint, the provisions of the Constitution which he alleges have been infringed and demonstrate the manner in which they have been infringed in relation to him. See *Anarita K. Njeru v R (No. 1) (1979) KLR 154* and *Matiba v The Attorney General Nairobi Misc. Appl. 666 of 1989 (Unreported)*.

17. The petition is expressed to be brought under Articles 22, 23(1) and (3), 47(1) and 165(3) (b) of the Constitution. Article 22 contains the general right for any party to bring a matter before the court where a right has been denied, infringed violated or threatened. Article 23 and 165 relate to the jurisdiction of the court to enforce the Bill of Rights and to interpret the constitution respectively. Article 47 relates to the right to fair administrative action and provides that:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

18. From a perusal of the petition before this court and the affidavit filed in support, there does not appear to be any denial, violation or infringement of any right of the petitioner by the respondents. The petitioner does seem to have a wide range of complaints about the composition of the Media Council, about its running of its affairs, recruitment of its officers and generally with its failure to '***observe the law in making appointments to the council, rendering it captive to vested interests***'. The result has been, in the petitioner's view, a failure by the media in Kenya, to '***live up to its role as an independent and impartial watchdog for the public interest...***'

19. The concerns of the petitioner with regard to the role of the media are commendable. However, there is nothing in the petition before me that shows a violation or threatened violation of the rights of the petitioner under Article 47, and I would agree with the respondents that the substance of the petition before this Honourable Court does not raise any constitutional issues under Article 47 of the Constitution.

20. The petitioner states in the petition that he has sued in his own interest and in the interests of the Kenya Union of Journalists and Allied Workers and the Media Owners Association of Kenya. In his submissions, he contended that he was suing as a member of the Media Council of Kenya. The respondents submit, correctly in my view, that the petitioner has no capacity to file a petition on behalf of the Kenya Union of Journalists or the Media Council or the Media Owners Association of Kenya which are bodies capable of suing and being sued in their own names or in the names of their officials in the case of societies.

21. The petitioner seeks what he refers to as '*consequential orders*.' He wants such an order to quash the appointments of Mr. Linus Gitahi, Ms Nelly Matheka, Mr. Kiprono Kittony and Ms Sarah Nkatha as members of Media Council of Kenya, another quashing the election of Mr. Levi Obonyo as chairperson of the Media Council of Kenya. He also seeks '*consequential orders*' requiring the respondents to publish the audited annual accounts for the years 2008-2010 before any hand over either by the chairperson or the Executive Director/Secretary to the Council is effected. He also seeks a '*consequential order requiring the Kenya Anti-Corruption Commission to take appropriate action*' with regard to the failure by the respondents to publish the audited accounts.

22. It is not clear, either from the petition itself or the petitioner's written submissions, under what provisions of the law the petitioner seeks the '*consequential orders*'. The Civil Procedure Rules contain at Order 53 very clear provisions on the invocation of the jurisdiction of the court to review administrative actions. There is nothing before the court to show that some administrative action or decision has been taken by any body exercising quasi judicial powers that has been in breach of the rules of natural justice on the basis of which the court would be entitled to intervene.

23. Finally, it is clear from the facts and evidence presented to this court that for the court to issue any of the orders sought by the petitioner in this matter would be vain. The events complained of took place more than a year ago, and so the petition has been overtaken by events. The court can also not issue orders compelling an individual, even were that individual still in office, to remain in office as the petitioner was asking of this court with regard to the 4th respondent. That would be an infringement of her rights under Article 30 of the constitution.

24. In the circumstances, I find that the preliminary objections by the respondents have merit and dismiss this petition with costs.

Dated and Delivered at Nairobi this 3rd day of February, 2012

Mumbi Ngugi
Judge