REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NAKURU

Petition 12 of 2011

STEPHEN KURIA MUIRURI & 12 OTHERS…….....PETITIONERS

VERSUS

THE MINISTER FOR YOUTH AFFAIRS AND SPORTS & 2 OTHERS…… RESPONDENTS

JUDGMENT

The petition dated 13/5/2011, is filed by thirteen (13) petitioners, against the Minister of Youth Affairs and Sports, The Minister for State for Provincial Administration and Internal Security and the Attorney General (1st to 3rd respondents). The petitioners seek several declarations and orders as follows:-

(a) A declaration that the provisions of section 5(1) (g) and (h) of the National Youth Council Act, 2009 and the guidelines on the elections of youth representatives to the National Youth Council of 2011 have infringed on the petitioners fundamental rights and freedoms;

(b) A declaration that the provisions of section 5(i)(g) and (h) and section 23 and 24 of the National Youth Council Act of 2009 are unconstitutional, null and void;

(c) A declaration that the guidelines on the elections of youth representatives to the National Youth council gazetted on the 4th February, 2011 by the Minister are unconstitutional null and void;

(d) An order of prohibition to prohibit the Minister of Youth Affairs and Sports or any of the respondents from conducting, carrying on or in anyway organizing and or preparing for elections of any manner in the name of electing the representatives to or of the National Youth Council;

(e) A declaration that the National Youth council elections is to be conducted in line with the devolved system of Government enshrined in the constitution of the Republic of Kenya at Chapter eleven (11) violates the petitioners constitutional rights guaranteed for affair remuneration at Article 41 of the Constitution. Article 55 on protection from harmful cultured practices and exploitation.

The petition is predicated on an affidavit sworn by Stephen Kuria Muiruri and grounds found in the body of the petition. The deponent deponed that he is one of the youths aspiring to take part in the elections geared towards making the National Youth Council which were scheduled on 16th May 2011. The petitioners have taken issue with the endless on guidelines of youth registration to the National Youth

Council because the provisions are oppressive, harsh, primitive and infringe on their Constitutional rights; that in March 2011, the Ministry started registration of youth who intended to participate in the elections for the National Youth Council. After registration, the youths called to a meeting by the Advisory and Election Board on 11/5/2011, where they were told they were only electing National Youth Council representatives. It was deponed that the guidelines were premised on the Provincial Administration which is in violation of Chapter 11 of the Constitution. They were informed that the said exercise was in accordance with provisions of **Sections 5(g) and (h), 23** and **24** of the **Act,** which decentralized all the youth affairs placing them in the hands of the Council to be elected by the majority and the Minster. It is the petitioner's contention that the **Section** is unconstitutional; That the effect of guidelines 3 and 4 violate their rights guaranteed under **Articles 55** and **41** of the **Constitution**; That two months had not lapsed since registration was closed on 8/4/2011, and that they should have been held as from 1/7/2011, and that was prejudicial to the petitioners.

The petition was opposed. David Kebati, Acting Head of Youth Empowerment & Participation, is also employed as a civil servant in the Ministry of Youth Affairs, filed an affidavit dated 1/7/2011. He deponed that **Section 5(1)(g)** and **(h)** of the **Youth Act, 2009** provides for the composition of the Council and the minister has discretional powers to appoint the representatives; that the guidelines as published are impartial and ensure equity; that the petitioners have not demonstrated how they were discriminated against. In regard to involvement of the Provincial administration, it was urged that the involvement by the Provincial Administration is transitional to await the General Elections and the rolling out of devolution; that the power had no mandate to pay remunerations; that the process of appointing youth representatives ensures equitable representation and affirmative action; that the election process is consultative with various stakeholders involved and that extensive civil education was carried out as evidenced by the advert (DK1). That many youth attended as per the exhibited lists. It was also denied that **Article 41** was not complied with. According to the respondent the petitioners have misinterpreted **Section 5, 23** and **24** of the **Act.**

I have now considered the affidavits and the submissions of counsel. The first issue I will consider is whether this petition is res judicata. What is res judicata. **Section 7** of the **Civil Procedure Act** provides as follows:-

"S.7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit…

Res Judicata derives from the rule in **Henderson v Henderson [1843] 3 Hare 100** where Sir James Wingram vc said**:**

'Where a given matter becomes the subject of litigation is, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence inadvertence, or even accident, omitted part of their case.'

The narrow rule was expanded in **Yat Tung Investment Company Limited [1975] AC 581** to include matters which could have been raised in previous proceedings;

'There is a wider sense in which the doctrine may be appealed, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.'

This expanded rule was explained in **Barrow v Bankside Sgency Limited [1996] 1 WLR 257** to the effect;

'It requires the parties when a matter becomes the subject of litigation between them in a court of competent jurisdiction to bring their whole case before the court so that all aspects of it may be finally decided (subject of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decisions on the first occasion but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on desirability, in the general interest as well as that of the parties themselves that litigation should not drag on for ever and that a defendant should not be oppressed by successive suits when one would do. That this is the abuse at which the rule is direct."

In this case, the respondent urged that the Youth representatives of Molo, Elburgon and Nakuru applied to be enjoined in **Nairobi No.76/2011, Abdul Azziz Abubakar v AG,** as Interested Parties through their representative, Benson Murimi Mwai, and they were allowed and took part in the petition. In Petition 76/2011, the applicants sought two prayers; a declaration that the publication and implementation of **National Youth Council Act of 2009, Section 5** as read with guidelines on elections, **Legal Notice No.7** of 4/2/2011, is discriminatory, unconstitutional and that it is in breach of **Articles 35** and **55, Article 10(1)(2)** and **73(1)** and **(2)** of the Constitution. Secondly, the applicants sought orders of injunction to restrain the 2nd respondent from carrying out further elections. These prayers are similar to what the petitioners seek at prayer a, b, c, d and e as they challenge the constitutionality of **Section 5(1)(g)** and **(h), Section 23** and **24 and Section 55** of the **National Youth Council Act**, and **Articles 22, 23, 41** and **55** the guidelines and wanted the elections be stopped till the devolved Government came into being. In that case, the court formed the opinion that the issues for determination were whether there had been a violation of **Articles 27, 35** and **55**. The court considered **Article 27** which prohibits discrimination. The petitioners had complained that some of the positions for the Youth in the National Youth Council are not remunerative. The same issue has been raised in the instant appliciton. The court held that the petitioners had failed to prove the allegation. The court also considered whether **Article 55** of the **Contitution** was breached. The Act provides that:-

"The State shall take measures, including affirmative action programmes, to ensure that the youth –

(a) access relevant education and training;

(b) have opportunities to associate, be represented and participate in political, social, economic and other spheres of life;

(c) access to employment; and

(d) are protected from harmful cultural practices and exploitation."

The court found that the National Youth Council elections organized by the 2nd respondent and various activities such as workshops and seminars were organized, meaning that the State met its constitutional mandate. The court found that there was no evidence of contravention of **Article 55**. The court dismissed the petition for failure by the petitioners to prove that the petitioners' rights had been violated. In conclusion, I find that the Nakuru Youths were represented in the petition No. 76/2011 Nakuru. All the issues raised herein were considered and determined in the said petition. Even if the applicants have other issues, they should have been raised then in Petition 76/2011 because the parties cannot be coming to court piecemeal. The petitioners cannot have a second bite at their cherry. Litigation must come to an end. I find that the issues raised herein have been considered and determined in HC 76/2011, and this petition is therefore res judicata.

Even if the petition was not res judicata, the question is whether the applicants have demonstrated that their rights have been violated. I have read the affidavit of Stephen Kuria Muiruri and I find that he depones generally on how their rights have been infringed without being specific. At paragraphs 9, 13, 17, 18, 19 and 23, the applicant generally alluded to violation of the petitioners' rights. I will set out the

said paragraphs:-

9. That though we had no problem with the Government coming up with a youth policy and the empowerment of the youth in the country, we have found that some of the provisions of the Act and guidelines to be oppressive, harsh, primitive and infringes or are likely to infringe on our constitutional rights.

13. That it was then that it dawned on us that the structures and guidelines gazetted by the Minister clearly infringed our constitutional rights and was expressly in violation of the Constitution.

17. That the provisions of section 23 of the Act granting power to the Council to establish such branches or organs as it may deem necessary and Rule 2 of the guidelines that the election of youth representatives of the of the sub-location in the provincial level shall not be continued as establishment of the branches of the National Youth Council in themselves is unconstitutional and aimed at centralizing of youth affairs as opposed to the devolution per chapter eleven of the Constitution.

18. That in effect guidelines 3 and 4 by the Minister expressly violates the rights enshrined in Article 55 and 41 of the Constitution.

19. That in essence the Act and the guidelines are an impediment to our right to improve our lives and enjoy the fruits of our able Constitution.

23. That in light of the foregoing I pray that the various provsions of the Act herein stated as well as the guidelines be declared unconstitutional, null and void

In an application such as this, the petitioners have to demonstrate in their pleadings, and affidavits that their rights have been violated. The courts have over the years insisted that such pleadings must be specific and precise as to the nature of the breach, the section allegedly breached and how it was violated. It is not enough for the petitioners just to allege that their rights are violated and leave it at that. In petition 26/2011, J. Ngugi relied on the case of **Anita Karimi Njeru v Rep [1979] KLR 154** where Kneller and Hancox JJ had this to say at page 156:-

"We would however again stress that if a person is seeking redress from the High Court or an order which involves a reference to the Constitution, it is important (if only to ensure that justice is done in his case) that he should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed."

Again the court in **Matiba v AG HCMISC. AP. 666/1990,** had this to say:-

"An applicant in an application under Section 84(1) of the Constitution is obliged to state his complaint, the provision of the Constitution he considers has been infringed in relation to him, and the manner in which he believes they have been infringed. These allegations are the ones which if pleaded with particularity invoke the jurisdiction of the court under the section. It is not enough to allege infringement without particularizing the details and the manner of infringement."

See also **Cyprian Kubai v Stanley Kanyonga NRB HMISC. 612/02**.

In the instant case, apart from alleging that their rights under **Article 21, 22, 41** and **55** of the **Constitution** have been infringed, they did not demonstrate how they were infringed and their pleadings remained mere allegations.

In the end, I find that apart from this petition being res judicata, the petitioners failed to prove that any of their fundamental rights had been breached as alleged. I therefore find no merit in the petition, it is hereby dismissed with no order as to costs.

DATED and DELIVERED this 1st day of August, 2012.

R.P.V. WENDOH

JUDGE
PRESENT:
Mr. Wambegi for the petitioners
Mr. Njuguna for the respondent
Kennedy – Court Clerk