



St Patrick Senior School v Edexcel & another (Constitutional Petition E003 of 2022) [2024] KEHC 433 (KLR) (23 January 2024) (Judgment)

Neutral citation: [2024] KEHC 433 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CONSTITUTIONAL PETITION E003 OF 2022**

**SN MUTUKU, J
JANUARY 23, 2024**

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS PRACTICE AND PROCEDURE RULES 2023

AND

IN THE MATTER OF SECTION 7 OF THE CHILDREN’S ACT NO. 8 OF 2001 LAWS OF KENYA AND IN THE MATTER OF SECTION 4 OF THE CONSUMER PROTECTION ACT NO. 46 OF 2012 LAWS OF KENYA

BETWEEN

ST PATRICK SENIOR SCHOOL PETITIONER

AND

PEARSON EDEXCEL 1ST RESPONDENT

MARVIN OWITI 2ND RESPONDENT

JUDGMENT

Background

1. The Petitioner, a Limited Liability Company, manages a group of schools including a Secondary School and an International School-IGCSE offering an international curriculum and examinations to its students in Kajiado County. It has filed this Petition (undated) against the 1st Respondent, a registered Regional Office operating under the brand name Pearson Edexcel and authorized by its parent office Pearson Edexcel Curriculum and Examinations Office in the United Kingdom. The Regional Office is registered with the Ministry of Education of Kenya with offices in Karen, Nairobi County. The 2nd Respondent is the Regional Manager of the said Regional Office.
2. The Petitioner alleges violation of its constitutional rights and fundamental freedoms by the Respondents through Respondents’ arbitrary, unlawful, unreasonable, oppressive, and capricious



acts. The Petitioners alleged that on 15th February 2022 the Respondents capriciously and without notice cancelled the Petitioner's licence of approval to operate and/or manage the Pearson Edexcel International Education curriculum at its school rendering the students, parents/guardians, teachers, workers, and their families destitute and desolate. They alleged that no notice of any wrongdoing was issued to the Petitioners by the Respondents.

3. The Petitioners alleged violation of articles 25, 27, 47, and 50 of *the Constitution*; violation of the Fair Administrative Actions Act, the *Consumer Protection Act* and the Children's Act. The Petitioners are seeking the following reliefs:
 - a. A declaration that the Petitioner's constitutional rights have been infringed and/or are threatened with infringement by the Respondent through the arbitrary and/or unlawful actions or omissions.
 - b. A declaration that the act of the Respondent in cancelling the St. Patricks Senior School as a Pearson Edexcel centre for education and examination is in breach of the Petitioner's constitutional rights under Articles 10 (2) (b), 27 (1) (2), 28, 41, 47 and 50 of *the Constitution* and that the same is null and void for all intents and purposes.
 - c. A declaration that the said cancellation is in breach of St. Patricks Senior School students' constitutional rights as enshrined in Articles 10 (2), 27 (1) (2), 28, 41, 47 and 50 of *the Constitution*.
 - d. Pending the hearing and determination of the Petition, orders of stay do issue staying the cancellation of the St. Patricks Senior School as a Pearson Edexcel Education and Examination centre and orders do issue to the Respondents to proceed to register without any penalty or additional costs all eligible students in the Year 2022 and beyond in St. Patricks Senior School in the usual and customary manner in all prior years.
 - e. An order do issue to the Respondents directing the Respondents to re-instate St. Patricks Senior School as a Pearson Edexcel Education and Examination Centre.
 - f. An order of Judicial Review in the nature of Certiorari do issue to bring to this Honourable Court and quash the confirmatory letter by the Respondent revoking the cancellation of St. Patricks Senior School as a Pearson Edexcel Education and Examination Centre.
 - g. Any other order that this Honourable Court may deem fit, mete and just to grant.
 - h. Costs of the Petition be borne by the Respondents.
4. Contemporaneously with that Petition, the Petitioner filed a Notice of Motion. Both pleadings are filed under certificate of urgency. The Notice of Motion, brought under various provisions of the law under *the Constitution* and Children's Act, seeks the following orders:
 - i. That this application be certified as urgent and that this Honourable Court do dispense with service in the first instance.
 - ii. That pending the hearing and determination of this application, this Honourable court do issue an order of injunction restraining the Respondents, their officers, agents, servants or employees, from failing to register the petitioner's candidates to perform and/or seat their May/ June 2022 examinations or any other future examinations at their school.
 - iii. That pending the hearing and determination of this petition/suit, this Honourable court do issue an order of injunction restraining the Respondents, their officers, agents, servants or



employees, from failing to register the petitioner’s candidates to perform and/or seat their May/ June 2022 examinations or any other future examinations at their school.

- iv. That pending the hearing and determination of this suit, this Honourable Court does issue an injunction restraining the Respondents, their officers, agents, servants or employees from interfering with the affairs and or operating of the Petitioner.
 - v. That this Honourable Court do grant any other or further relief that it may deem fit to grant.
 - vi. That the costs of this application be borne by the Respondents.
5. Pending the hearing and determination of the Application, the Petitioner, through its counsel sought conservatory orders. This court declined to issue conservatory orders and directed the parties to agree on the issues for determination in the Application and prepare to argue the application orally. The matter was fixed for mention to confirm compliance with court’s directions on 6th July 2022.
 6. On 6th July 2022, Mr. Kang’ethe for the Petitioner informed the court that there were positive developments in the matter to the effect that the Petitioner had been vindicated and acquitted of any wrong doing vide a communication from the Respondent dated 25th June 2022; that the effect of that communication was that the Respondents had acknowledged the error of their actions and reinstated the cancelled licence of the Petitioner. Mr. Kang’ethe asked the court to allow the Petitioner to file written submissions on the pending issues being that the Petitioner’s rights had been infringed and that they are seeking restitution. He also asked for directions in respect of the Notice of Motion dated 15th June 2022.
 7. Mr. Angwenyi for the Respondents responded that the Petition was filed prematurely because there was a pending appeal between the parties; that the Appeal was determined, and the decision arrived at that the Petitioner could administer examinations. Counsel told the court that the prayers sought in the Petition have been overtaken by events and the application for review is of no consequence and that the Petitioner cannot seek for restitution because it is not in its pleadings and that the prayers sought in the Petition are now an academic exercise. Counsel reiterated that the Petitioner had not exhausted the doctrine of exhaustion.
 8. This court directed that parties file brief submissions on the main Petition to enable this court to decide on it.

Petitioner’s Submissions

9. The Petitioner filed submissions dated 25th July 2022, filed on 26th July 2022. It has submitted that it is distinct from Mr. Kairu and that the concerns communicated and contained in the letter dated 3rd November 2021 was addressed specifically to Mr. Kairu and not the Petitioner and therefore it is misleading for the Respondent to assume that the Petitioner was served with any notice.
10. While citing Kenya Human Rights Commission & another v NGO Co-ordination Board & another [2018] eKLR on the right of a party firmly to be heard before taking an action against him, the Petitioner submitted that the Respondent has abused the Petitioner’s right of a notice and reasons for it before imposition of the cruel and draconian sanctions. The Petitioner relied on the Kenya Human Rights Commission case cited above where the court stated that “....it is no longer even a mere legal requirement but a constitutional one that a person is entitled to be heard and that the action to be taken should meet the constitutional test.”
11. It was submitted that the rights of the Petitioner under Article 47 of *the constitution* was violated by the Respondents; that the Petition was not anchored on the success or failure of its teachers but on the



gross violation of its constitutional rights under Article 47 on fair administrative action and Articles 10 (2) (b) (c) and 22 of *the Constitution*; that the violations have already taken place by closing the school which rendered the students, parents, teachers and workers destitute.

12. It was submitted that by reason of the gross violation of its rights, the Petitioner has suffered loss of revenue when the school was closed from 15th February to 24th June 2022, an aggregate of two terms with loss estimated at Kshs 5,500,000, loss of students, parents/guardians and loss of reputation and psychological torture, trauma and stress.
13. It was submitted that the decision to reinstate the Petitioner's licence not only vindicates the Petitioner but also establishes a firm basis for restitution. The Petitioner relied on the Supreme Court of Kenya case Attorney General v Zinj Limited (Petition No. 1A of 2020) [2021] KESCA 23A (KLR) where the Court stated that:

“Any injury or loss suffered by a person either through a tortious act, omission or breach of contract, attracted redress in a court of law. The redress included an award of damages to the extent possible as may be determined by the court. The quantum of damages to be awarded depended on the nature of the right that was proven to have been violated, the extent of the violation and the gravity of the injury caused. In case of general damages, a court of law exercises discretion guided by the circumstances of each case.”

14. It was submitted that Article 23 (1) & (3) of *the Constitution* empowers this court to grant appropriate reliefs in any proceedings seeking to enforce fundamental rights and freedoms such as this one. The Petitioner relied on Minister of Health & others v Treatment Action Campaign & others (2002) 5 LRC 216 where “appropriate relief” was defined as follows:

“... appropriate relief will in essence be relief that is required to protect and enforce *the Constitution*. The court may even have to fashion new remedies to secure the protection and enforcement of these all-important rights and are obliged to “forge new tools” and shape innovative remedies, if need be to achieve this goal.”

15. The Petitioner urges this court to invoke its inherent jurisdiction and award the Petitioner compensation and any other relief this court can grant.

1st Respondent's Submissions

16. The 1st Respondent submitted that the only relief remaining is “Any other order that this court may deem fit, mete and just to grant” because the other reliefs are spent. It was submitted that the Petitioners have not pleaded for damages or prove any damages suffered. It is submitted that by the time the Petition was filed, the Petitioner had already activated the 1st Respondent's internal dispute resolution mechanism and that the Petitioner failed to inform the court of this.
17. The 1st Respondent has identified the following as the issues arising for determination:
 - a. Whether the Honourable Court has the jurisdiction to award damages.
 - b. Whether the Petition was presented prematurely before exhaustion of alternative administrative remedies.
 - c. Whether the Petitioner's Head of Centre was duly authorized under the terms of the Centre Agreement dated 14th October 2016 to receive correspondence on behalf of the Petitioner.



- d. Whether the Petitioner has specifically pleaded and proved the damages they claim to have sustained.
18. On the first issue, it is submitted that this dispute arises from, and relates to, the contractual agreement between the Petitioners and the 1st Respondent; that Clause 5(i) and (ii) of the Agreement provided that all aspects of the relationship between the Petitioner and the 1st Respondent are to be governed by English Law and that any disputes with respect to the agreement will be subject to the exclusive jurisdiction of the English Courts. It was submitted that the dispute concerning the revocation of the Petitioner's licence falls within the exclusive jurisdiction of the English Courts. The 1st Respondent relied on *National Bank of Kenya Ltd v Pipelastik Samkolit (K) Ltd & another* [2001] eKLR to emphasize the point that contractual terms, lawfully and freely entered by parties, deserve the respect of the courts and that courts cannot re-write them.
19. It was submitted that departure from the jurisdiction clause must be justified by exceptional circumstances which the Petitioner has not demonstrated and that the dispute between the parties raises contractual and not constitutional issues.
20. On the second issue, it was submitted that Article 159(2) of *the Constitution* enjoins courts to embrace alternative dispute resolution and therefore where parties enter into an agreement which has an alternative dispute resolution clause, the jurisdiction of the court is, in the first instance, ousted by that agreement and that this position is buttressed under Section 9(2) of the *Fair Administrative Action Act*, 2015 which provides that:
- The High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
21. The 1st Respondent cited *Ndiara Enterprises Ltd v. Nairobi City County Government* [2018] eKLR where the court stated that:
- “Though the High Court can exempt a party from following such clear laid down procedures of grievances before approaching it in the noble interest of justice, the learned Judge rightly found that the appellant had failed to prove there were exceptional circumstances in its case to warrant such exemption. Indeed, there are no apparent exceptional circumstances to justify such exception and which exception was also not sought. The High Court's power to exercise its jurisdiction under Article 165 of *the Constitution* was therefore limited or restricted by statute in this instance as found by the Judge.”
22. The 1st Respondent submitted that the above finding by the court was based on the provisions of Section 9(1) (2) (3) and (4) of the *Fair Administrative Action Act* 2015 which Act implements Article 47 of *the Constitution* on the right to fair administrative action and which clearly stipulates that an applicant must first exhaust the available internal dispute resolution mechanisms before resorting to court.
23. The 1st Respondent relied on *William Odhiambo Ramogi & 3 others v Attorney General & 4 others: Muslims for Human Rights & 2 others (Interested Parties)* (2020) eKLR where the court (bench of 5 judges) observed that:
- “52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by the agency's action, seeks redress from a Court of law on an action without pursuing



available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensue that a party is, first of all, diligent in the protection of his own interest within the mechanism in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of *the Constitution* and was aptly elucidated by the High Court in *R. v. Independent Electoral and Boundaries Commission (I. E. B. C) Ex Parte National Super Alliance (NASA) Kenya and 6 others* [2017] eKLR.

24. It was submitted that the Petitioner was not keen on exhausting alternative dispute resolution mechanisms before coming to court for the reasons that on 15th February 2022, the Petitioner and its Head of Centre were informed that they had two weeks to submit an appeal but they did not do so within the time given but did so on 5th April 2022 with no explanation for the delay and failed to inform the court that they had activated the appeal mechanism; that on 11th April 2022 the 1st Respondent requested the Petitioner and its Head of Centre to indicate dates in April or May 2022 when they would be available to argue their respective appeals but they did not respond to the request and instead commenced these proceedings and that the Petitioner still denies that he lodged an appeal.
25. It was submitted that the Petitioner is not deserving of any damages for having delayed in activating the alternative dispute resolution mechanisms and failed to inform the court the existence and activation of that mechanism; that the Petitioner has not met the conditions under section 9(4) of the *Fair Administrative Action Act* and therefore the Petitioner cannot claim exceptions to the doctrine of exhaustion.
26. On the 3rd issue, the 1st Respondent has submitted that under Clause 7 of the Centre's Agreement, the Head of Centre is responsible for transacting and receiving communications for and on behalf of the Centre; that under Clause 1 of the suspected Malpractices Policies and Procedures, it is the Head of Centre who is accountable to the awarding bodies for the integrity of the examinations on behalf of the Centre and that under Clause 13.1, decisions on Malpractices Policies and Procedures, decisions on malpractices are communicated to the Head of Centre. It was submitted that all the communication in regard to the concerns of the Test Inspector as well as an email dated 9th November 2021 seeking clarification from the Petitioner were communicated to the Petitioner through the Head of Centre.
27. On whether the Petitioner has specifically pleaded and proved the damages it claims to have suffered, it was submitted that it did not do so. While citing *Gitobu Imanyara & 2 Others v. Attorney General* [2016] eKLR, the 1st Respondent submitted that it is trite that loss of revenue are damages in the nature of special damages which must be pleaded and specifically proved; that the issue of loss of revenue has been mentioned for the first time in the Petitioner's submissions, which are not pleadings or evidence. The 1st Respondent cited *Daniel Toroitich Arap Moi v. Mwangi Stephen Muriithi & Another* [2014] eKLR where it was held that:

“Submissions cannot take the place of evidence. The 1st respondent failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' 'marketing language', each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”

28. It was submitted that the damages alleged by the Petitioner's submissions are therefore unmerited for the reason that they were neither pleaded specifically nor proved. It was submitted that this court lacks requisite jurisdiction to entertain the Petition and that the Petition has since been overtaken by events



and that the prayers sought in it have all been spent. The 1st Respondent urged that the Petition be dismissed with costs.

Analysis and Determination

29. The Petitioner has not identified issues for determination. My understanding of this Petition reveals the following as the issues for determination:

- i. Jurisdiction of this court to award damages.
- ii. Whether the Petition was filed prematurely before exhaustion of alternative administrative remedies.
- iii. Whether the Petitioner's Head of Centre was duly authorized under the Centre Agreement to receive correspondence on behalf of the Petitioner.
- iv. Whether the Petitioner has specifically pleaded and proved damages claimed.

30. On the issue of jurisdiction, I have noted that the dispute between the parties that has given rise to this Petition arises from an agreement called Centre Agreement entered between the parties dated 14th October 2016. I have read that agreement. Clause 5 of the agreement is about disputes. Under Clause 5(i) and 5(ii), the agreement states as follows:

5(i) I agree that this application, any subsequent centre approval and qualification approval, and all aspects of the relationship between the applicant and Pearson (together with the "Agreement") are governed by and shall be construed in accordance with English Law.

5(ii) My Organization submits to the exclusive jurisdiction of the English courts for all purposes relating to and in connection with the Agreement or its subject matter (including its formation, enforceability, validity and interpretation).

31. It is my view in this matter that the parties entered into an agreement freely and bound themselves to resolve any disputes as shown above in Clause 5(i) and 5(ii). I am guided by the decision in *Areva T & D India Limited v Priority Electrical Engineers & Another* [2012] eKLR where the court held that:

"I fully agree that the rule that the parties should be held to their bargain should only be departed from in a special and exceptional case. Here, in the case before us, as I have pointed out, no such special and exceptional circumstances have been established to depart from the contract that the parties had freely and voluntarily agreed upon."

32. I also refer to *United India Insurance Co. Ltd, Kenindia Insurance Co. Ltd & Oriental Fir & General Insurance Co. Ltd v. East African Underwriters (Kenya) Ltd* (1985] eKLR where the court stated that:

"...The exclusive jurisdiction clause however should normally be respected because the parties themselves freely fixed the forums for the settlement of their disputes; the court should carry out the intention of the parties and enforce the agreement made by them in accordance with the principle that a contractual undertaking should be honoured unless there is strong reason for not keeping them bound by the agreement."

"Everybody accepts that the general rule is that the jurisdiction clause must be obeyed. There must be something exceptional to justify departure from it and the exceptional circumstances must be such as to afford strong reasons for such departure."



33. The Petitioner has not demonstrated any exceptional circumstances to persuade this court to depart from the jurisdiction clause. My reading and understanding of the Petition and the supporting affidavit as well as the submissions of the parties is that the Petitioner did not reveal to this court that its relationship with the 1st Respondents is contractual. In its pleadings, the Petitioner has not disclosed that there was an agreement between the parties and that the agreement provided for an internal dispute resolution mechanism. Further, the Petitioner has not demonstrated any exceptional circumstances to persuade this court to depart from the exclusive jurisdiction provided in the agreement between the parties.
34. It is my finding therefore, and I so hold, that this court lacks jurisdiction to determine this matter for the reason that the parties herein entered into the agreement freely and intended any disputes between them in respect of that agreement should be governed by English Law and any submitted to the exclusive jurisdiction of English Courts.
35. This court ought to lay down its tools once it has arrived at the above conclusion that it lacks jurisdiction to determine this matter. But even if I were to proceed to determine the remaining issues, it is my finding that the Petitioner filed this matter prematurely before exhausting the internal dispute resolution mechanism that is in place. The Petitioner claims that the Respondent failed to abide by the *Fair Administrative Action Act*. Section 9 (2) of that Act provides that:
- (2) The High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted (emphasis added)
36. The Petitioner concealed that there was in existence an internal dispute mechanism and that it was ongoing as at the time it filed this Petition. From the information availed to court by both parties, it is clear to this court that it is indeed the internal dispute resolution mechanism contained in the agreement between the parties that finally resolved the issues between the parties. For the above reasons, I agree with the 1st Respondent that the Petitioner prematurely filed this matter in court.
37. On whether the Petitioner's Head of Centre was duly authorized under the Centre Agreement to receive correspondence on behalf of the Petitioner, I have noted that under Clause 7 of the Centre Agreement, it is worded as follows:
- I represent and warrant that I am the Head, Principal or Chief Executive of the Organization and/or am duly authorized by my Organization to execute and deliver this Agreement on behalf of the Organization and I represent and warrant that this Agreement is binding upon my Organization in accordance with its terms.
38. It is my understanding that the Head of the Centre or the Chief Executive of the Petitioner is responsible for, among others, communication to and from the Centre.
39. Finally, the Petitioner has not specifically pleaded damages in its pleadings. It cannot purport to do so in the submissions.
40. Consequently, it is the finding of this court and I so hold, this matter is not a dispute that raises constitutional issues. It is a contractual dispute whose exclusive jurisdiction is provided for in the agreement binding both parties. That exclusive jurisdiction has ousted the jurisdiction of this court to determine the matter before it. For that reason alone, this Petition fails. It is consequently dismissed with costs to the 1st Respondent.



41. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 23RD JANUARY 2024.

S. N. MUTUKU

JUDGE

