



College of Human Resource Management v Institute of Human Resource Management (Petition E448 of 2021) [2024] KEHC 5153 (KLR) (Constitutional and Human Rights) (16 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5153 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E448 OF 2021

LN MUGAMBI, J

MAY 16, 2024

BETWEEN

COLLEGE OF HUMAN RESOURCE MANAGEMENT PETITIONER

AND

INSTITUTE OF HUMAN RESOURCE MANAGEMENT RESPONDENT

JUDGMENT

Introduction

1. The Petition is dated 25th October 2021 and is supported by the Petitioner's affidavit sworn on even date. The Petitioner seeks the following reliefs against the respondent:
 - a. A declaration that the Respondent's act of actively conducting of Continuous Professional Development (CPD) events as trainers or other activities as contemplated under the Human Resource Management Professionals (HRMP-CPD) Regulations 2017 amounts to usurpation of the Petitioner's role and creates a conflict of interest with sponsoring agencies licensed by the Respondent herein.
 - b. An order of permanent injunction be issued restraining the Respondent from conducting CPD events as trainers or other activities as contemplated under the HRMP (CPD) Regulations, 2017.
 - c. A declaration that the Respondents act of organizing a CPD earning event at the same venue as the Petitioner on even dates, denies the Petitioner its right to equal protection and benefit of the law as guaranteed by Article 27 of the Constitution and is unconstitutional.



- d. An order of injunction be issued restraining the Respondents from holding a CPD event at the same venue as the one communicated by the Petitioner.
- e. A declaration that the Respondent's main role is merely regulatory in nature as the Petitioner is an independent legal entity in law, separate and distinct from the Respondent enjoying attendant rights and it is not owned by the Respondent.
- f. A declaration be issued that the removal of the Petitioner's three Board member namely: Mr. Bashir Mburu, Mr. Samson K. Osero and Mr. Elijah Sitimah by the Respondent from membership of the Human Resource Professional body was un-procedural, malicious, unlawful and in violation of Articles 10, 27, 47, 50(1) and (2) of the Constitution thus null and void ab initio.
- g. A declaration that the Respondent's act of denying the petitioners CPD points for a conforming Annual Talent Summit CPD event and giving it to others is discriminatory and unconstitutional as it is inconsistent with Article 27 of the Constitution.
- h. An order of judicial review in the nature of a mandamus be issued compelling the Respondent to approve the Petitioner's application and allocate CPD points for the Annual Talent Summit CPD event.
- i. Any other order the Court deems fit and just to grant in favour of the Petitioner in the circumstances.
- j. Costs be awarded to the Petitioner.

Petitioner's Case

2. The Petitioner's principal, Margaret M. W. K. Kinyanjui swore that the petitioner was established on 19th September 2008 under the Companies Act Cap 486. Its founding members at the time as reflected in the Articles of Association then (AOA) were: The Institute of Human Resources Management, George Hapisu, Paul Kasimu, Adrian Muteshi, Selina Makokha, Bashir Mburu, Susan Kiama, Elijah Sitimah and Samson Osero.
3. Following the enactment of the Human Resource Management Professionals Act in 2012, the Respondent was established under Section 3. The Respondent's mandate under Section 4 provides for the regulation and setting of standards in the Human Resource field.
4. She depones that as a result of the Respondent's change of status, the Petitioner amended its AOA. Previously, the Respondent under Section 48(a) of its AOA was authorized to appoint its Chairman. However, in the amended Memorandum and AOA dated 24th February 2021, the Respondent's prerogative power to appoint a Chairman was revoked under Article 34A. In its place the Respondent's scope of involvement in its management affairs was limited to the extent that: 'As a founding member of the college, the Institute of Human Resource Management shall reserve the right and power to elect one person to the Board of Directors which person shall be chosen from persons who are already registered members of the College'. Therefore, she asserts that the Respondent cannot claim ownership over the Petitioner.
5. She asserts that the Respondent vide a statement dated 16th September 2021 proclaimed that there was uncertainty in the Petitioner's ownership. She argues that this is in spite of the clear provisions in the petitioner's Memorandum and Article of Association (AOA). The Petitioner swiftly rebutted these allegations in their communication dated 17th September 2021.



6. She further depones that the respondent on 5th October 2021 informed it that it had removed 3 of its Board Members from its Register. She stated that this was done arbitrarily and without granting them an opportunity to be heard on pretext that the said Members had contravened some provisions of the *Human Resource Management Professional Act*.
7. Additionally, she avers that the Petitioner is a licensed Sponsoring Agency for the purpose of providing Continuous Professional Development (CPD) accredited activities. In this regard, she states that the Petitioner issued its application to the Respondent for allocation of CPD points in view of an activity dubbed ‘the Annual Talent Summit’ that was scheduled to take place at Sarova White sands, Mombasa from 2nd to 5th November 2021. The event was organized in conjunction with the College of Human Resource Management Alumni Association has always been held every year for the last 4 years.
8. After the application was lodged, the Respondent requested for additional documentation which the petitioner supplied on 24th September 2021. The petitioner is aggrieved that the Respondent failed to acknowledge receipt of their documents. The Petitioner follow up correspondence on 6th and 7th October 2021 and a complaint dated 19th August 2021 bore no fruits. She stated that as at the time of filing the Petition, the event was only seven days away yet the Respondent had not given any approval which is a contrast with the past events where approval would be granted promptly.
9. It is alleged that in its quest to sabotage their event, the Respondent in a notice on social media indicated that it would be holding a leadership summit between 3rd to 5th October 2021 at the same venue which would result in allocation of 6 CPD points.
10. The Petitioner is aggrieved that: The Respondent has unreasonably delayed to allocate the CPD points for its activity despite being compliant with the regulatory requirements. It has failed to respond to its concerns and issue reasons for its inaction. That the Respondent has discriminated against it since other agencies’ similar applications received prompt approval.
11. The petitioner for these reasons brings this petition against the respondent for the alleged violation of its rights under Articles 10, 27, 47, 50(1) and (2) of the *Constitution*.

Respondent’s Case

12. The Respondent, in the replying affidavit sworn by CHRP Quresha Abdullahi on 1st November 2021 avers that one of its mandate under the Human Resources Management Professionals Act, 2012, is development of its members through CPD Programmes. These programmes are regulated under the *Human Resources Management Professionals (Registration and Training) Regulations, 2015*.
13. Furthermore, through its Council, it is required to conduct education programmes that are relevant to its members.
14. She states that under the Registration and Training Regulations, 2015, the Respondent is authorized to license other institutions known as Sponsoring Agencies for the purposes of carrying out these education programmes. Principally, the Respondent under Rule 13(2) of the *Registration and Training Regulations, 2015* is required to be guided by the principles therein to reject or approve applications seeking allocation of CPD points.
15. She stated that the mere fact an institution is a licensed Sponsoring Agency, does not automatically mean that its education programmes will be awarded CPD points by the Respondent. She states that an examination of the petitioner’s event showed that the ‘Annual Talent Summit’ did not satisfy the requirements of the Regulations. Further that the Petitioner is not a licensed Sponsoring Agency for the purpose of providing CPD accredited education programmes.



16. She notes that the Respondent's Council on 16th September 2021 resolved to stop granting the Petitioner preferential treatment. In effect, the Petitioner who had been informed of the same, was required to comply with the legal requirements for registration as a Sponsoring Agency but the Petitioner instead chose to institute this petition to side-step the Respondent's decision.
17. She further deponed that the Petitioner was registered by the Respondent as a company limited by guarantee and merely invited its former council members as initial subscribers only for the purposes of incorporation. As such, they were set to retire at the 1st Annual General meeting. However, the initial subscribers refused to vacate office for selfish and unlawful reasons. Accordingly, the purported amendment of Article 48 of the petitioner's AOA has no legal basis. Equally, it was done in bad faith on the part of the Petitioner's Board Members.
18. Moreover, she contended that the Petitioner has failed to exhaust the available dispute resolution mechanism under Article 73 of its Articles of Association which provides for disputes to be referred to arbitration. Considering this, she states that this Court is not the proper forum to deal with this matter. The Respondent thus contended that the Petition is an abuse of the court process and ought to be dismissed with costs.

Petitioner's Submissions

19. Through the submissions dated 2nd March 2022, Omanga Nyabwengi and Company Advocates for the petitioner submitted that the issues for discussion are: whether the Petition raises constitutional questions, whether the Petitioner's legitimate expectation as a Sponsoring Agency was violated and the ownership of the petitioner.
20. On the first issue, Counsel submitted that the petition raises issues on the constitutionality of the respondent's acts, which violated the petitioner's constitutional rights. Counsel asserted that the Respondent acted in a manner that does not align with constitutional principles and values. Reliance was placed in *Evans Latema Muswabili v Vihiga County Public Service Board and 2 Others: Marley Ezekiel Ayiego(Interested Party)* (2021) eKLR where it was held that:

“If a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important that he should set out with reasonable degree of precision that which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.”
21. Additional dependence was placed in *Coast Water Services Board v Alome Achayo and 5 others* (2015) eKLR and *Attorney General v Kituo cha Sberia and 7 others* (2017) eKLR.
22. On the second issue, Counsel submitted that the legitimate expectation is anchored on the fact that the Petitioner is a licensed Sponsoring Agency. This expectation was further solidified by the fact that the Respondent had for the last four years prior to this, allocated the Petitioner CPD points for its event without fail. Equally that the application lodged with the Respondent was compliant in view of the legal requirements. Accordingly, on the basis of this subsisting practice and representation, a legitimate expectation that a similar approval would be granted in the future crystallized.
23. Reliance was placed in *Communications Commission of Kenya and 5 others v Royal Media Services and 5 others* (2014) eKLR where it was held that:

“Legitimate expectation would arise when a body by representation or by past practice, has aroused an expectation that is within its power to fulfill. Therefore, for an expectation to



be legitimate, it must be founded upon a promise or practice by a public authority that is expected to fulfil the expectation.”

24. Like dependence was placed in *Public v Principle Secretary, Ministry of Transport, Housing and Durban Development Ex parte Soweto Residents Forum CBO* (2019) eKLR.
25. On the third issue, Counsel noted that the Petitioner is a duly registered Company under the Companies Act hence separate and distinct entity from its members as established in *Salomon v A Salomon and Company Limited* (1897) AC 22. Further that this principle has equally been affirmed by our Courts such as in *Kolaba Enterprises Limited v Shamsbudin Hussein Varvani and another* (2014) eKLR where it was held that:

“It should be appreciated that the separate corporate personality is the best legal innovation ever in company law...that a company is a different person altogether from its subscribers and directors.”
26. For this reason, Counsel argued that the Respondent is only a member of the Petitioner and the AOA does not state that the other 8 subscribers were mere trustees at the onset. Additionally, it is noted that Section 22 of the *Companies Act*, No.17 of 2015 permits amendment to a company’s AOA by way of special resolution. It is noted nonetheless that the Respondent did not challenge the amendment of the AOA with the Registrar of Companies or on any other forum.
27. Counsel further argued that the Respondent’s mandate as per Section 6 of the *Act* does not expressly give the Respondent the mandate to conduct CPD activities. That provision of the same by the Respondent creates a conflict of interest in the human resource profession. Additionally, removal of the 3 Board Members from its membership was done maliciously and in bad faith. Counsel thus urged the Court to allow the petition.

Respondent’s Submissions

28. On 28th March 2022, Kamotho Njomo and Company Advocates filed submissions for the Respondent. On the first issue, Counsel stressed that the respondent’s mandate is broad as stipulated under Section 6 of the *Human Resource Management Professionals Act*, 2012 hence it is incorrect to argue that the respondent cannot conduct CPD programmes.
29. Furthermore, it was submitted that under Rule 9(1) of the *Human Resource Management Professionals (Registration and Training) Regulations*, 2015, the Respondent is charged with the responsibility of conducting education programmes. Consequently, it was manifest both in the law and the regulations that the Respondent had the necessary legal mandate to offer training and educational programmes either on its own or through the Sponsoring Agencies.
30. On whether the Petitioner is a licensed Sponsoring Agency, Counsel was emphatic that it is not and relied on the averments in the Respondent’s replying affidavit. He argued that the Petitioner was duty bound to rebut the allegation by the Respondent by production of a license issued to it to that effect which the Petitioner had even failed show even in its supplementary affidavit. Counsel submitted that the absence of requisite license was even evidenced by the Petitioner’s own exhibit marked as ‘MMK – 11B’ dated 24th February 2021 where the Petitioner’s principal sought to be recognized by the Respondent as a training institution. For this reason, Counsel argued that prayers (d) and (e) of the Petition are not merited as the Petitioner cannot prove that it is a licensed Sponsoring Agency.
31. In respect of Prayers (c), (d), (g) and (h) in the Petition, Counsel argued that they had been overtaken by events since the event took place as scheduled on 2nd to 5th November 2021. Concerning the Petitioner’s



- allegation that the Respondent intended to run a similar event, Counsel termed the allegation as false since the Respondent had not planned such an event. In any case, no evidence was actually adduced to support this assertion by the Petitioner.
32. On whether this matter raises constitutional issues, Counsel submitted that the dispute does not raise Constitutional issues and as it does not directly raise an issue that requires the Interpretation of the Constitution. Relying on a case cited by the Petitioner, *Coast Water Services Board (supra)* Counsel stressed that the Court made it clear that a constitutional issue is that which directly arises from a court's interpretation of the Constitution. Like dependence was placed in *Jennifer Shamalla v Law Society of Kenya & 15 Others* (2017) eKLR and *Godfrey Paul Okutoyi & others v Habil Olaka & Another* (2018) eKLR.
 33. Counsel further submitted that the Petitioner had not demonstrated how it had been treated differently from other institutions in respect of the application for allocation of CPD points. In any event, it was stressed that the right to be allocated CPD points for its activities was not a constitutional right.
 34. On legitimate expectation, the Respondent argued that it could not arise if it was based non-compliance with the law on the Petitioner's part hence the petition is unsustainable and an abuse of the court process.
 35. On dispute over the ownership of the Petitioner, Counsel submitted that this was not a constitutional issue. Reiterating the history of its establishment as captured in the Respondent's rely, Counsel submitted that the Respondent with the enactment of the *Human Resource Management Professionals Act, 2012* under Section 45 (7), the Governing Council of the Institute of Human Resource Management professionals transitioned and assumed the responsibilities imposed on the Council under the new Act. Similarly, the assets/properties/staff owned or employed by the former institute became the assets and staff of the Respondent. This position was maintained until 24th February 2021 when the Board Members purportedly sought to unjustifiably and unlawfully amend Article 48 of the Petitioner's AOA so as to exclude the Respondent from its governance framework.
 36. Counsel also noted that the Petitioner had not supplied the complete Amended Memorandum and AOA with the execution pages showing the persons who signed on behalf of the Respondent. Accordingly, it was argued that this Court could not rely on the incomplete annexure "MMK-4" as it did not contain the signatures or certification and stamp by the Registrar of Companies. Likewise, that the Petitioner had not supplied the CR12 Form from the Registrar to show the current Petitioner's trustees.
 37. Lastly, on removal of the Board members, Counsel submitted on a preliminary note that the Petitioner had not adduced its authorization to sue on their behalf. Additionally, that the Act which provides for instances of removal, sets out the criteria for an aggrieved party to appeal the decision. It was noted that this application had not been exhibited and neither had the petitioner exhausted the prescribed internal mechanism before filing this suit as required under the Article 73 of the Petitioner's AOA and Section 9 (2) of the *Fair Administrative Actions Act*.

Analysis and Determination

38. It is my considered view that the issues that arise for determination are:
 - i. Whether the instant petition raises a constitutional question.
 - ii. Resolution of the dispute on the Petitioner's ownership.



- iii. Whether the Respondent violated the Petitioner's constitutional rights and legitimate expectation.

Whether the instant Petition raises Constitutional Questions

39. This being a Constitutional Petition, the Court must satisfy itself that the Petition before it raises Constitutional questions. This means that the matters in question can only be determined through reference to the Constitution, as matter that can be settled legislation should be settled within requisite legislation. The constitution should only be invoked if a fundamental freedom or a key constitutional principle is threatened with violation or has been violated.

40. Courts have rendered themselves on this point in several decisions. In *Hakizimana Abdoul Abdulkarim v Arrow Motors (EA) Ltd & another* (2017) eKLR the Court reasoned thus:

“37. A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute... When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful.

39. The question is whether the argument forces the court to consider Constitutional rights or values. The issues stated above fall mostly in the realm of negligence, contract, breach of implied terms or conditions only to mention but some.

40. The question of what constitutes a constitutional question was ably illuminated in the South African case of *Fredericks & Others v MEC for Education and Training, Eastern Cape & Others* in which Justice O'Regan recalling the Constitutional Court's observations in *S v. Boesak* notes that:-

“The Constitution provides no definition of “constitutional matter.” What is a constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions ofthe Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State..., the interpretation, application and upholding of the Constitution are also constitutional matters. So too, ... is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.”

41. Put simply, the following are examples of constituting constitutional issues; the constitutionality of provisions within an Act of Parliament; the interpretation of legislation, and the application of legislation. At the heart of



the cases within each type or classification is an analysis of the same thing – the constitutionally entrenched fundamental rights. Therefore, the classifications are not discreet and there are inevitably overlaps, but the classifications are nonetheless useful theoretical tools to organize an analysis of the nature of constitutional matters arising from the cases before the Court.

42. The Petition before me does not raise any constitutional questions at all. This court abhors the practice of parties converting every issue in to a constitutional question and filing suits disguised as constitutional Petitions when in fact they do not fall anywhere close to violation to constitutional Rights.”
41. Correspondingly, in *Munene v Director of Public Prosecutions & 3 others* (Constitutional Petition 5 of 2022) [2023] KEHC 25900 (KLR) (30 November 2023) (Judgment), the Court held as follows:
- “27. The jurisdiction of the High Court in dealing with Constitutional Petitions is properly invoked once a Petition that complies with the constitutional and legal requirements is lodged. The Court must, therefore, decline any invitation by a Petitioner to deal with an alleged Petition which falls short of the laid down parameters on Constitutional Petitions.”
42. The Court, sitting as a Constitutional Court, has a duty to weed out disputes that do not raise constitutional issues and which may therefore be conveniently be resolved through other legal avenues. This is has come to be known as “doctrine of constitutional avoidance”. This position was reaffirmed by the Supreme Court in the case of *Commission of Kenya and 5 others v Royal Media Services Ltd and 5 others* (2014) eKLR in which the Court stated:
- “(256) The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v. Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:
- “I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”
- (257) Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (*Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936)).”
43. Turning to the present Petition, one of the key issues raised by the Petitioner is a dispute pertaining to the ownership of the Petitioner, (a registered Company).
44. With due respect, my humble view is that this cannot by any stretch of imagination be a constitutional issue. The resolution of the ownership of a Company lies in the *Companies Act*. The attempt to invoke the Constitution to resolve this dispute is thus misplaced. Company disputes are resolved through the application of Company Law, not by recourse to the *Constitution*. This was affirmed by the Supreme



Court in *Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others* (Petition 18 (E020) of 2022) [2023] KESC 106 (KLR) (28 December 2023) (Judgment) where the Court held:

“91. The *Companies Act*, No 17 of 2015, makes provision to govern all types of companies. Section 20 of the *Act* provides for the articles of association as the Constitution of the company. Pursuant to section 26 of the *Act*, for existing companies before the commencement of the Act, such as the companies in the instant suit, the memorandum of association is treated as provisions of the articles. Companies therefore have a free hand in managing their own affairs through these constitutive documents. As provided under section 30(1) of the *Act*, the company’s constitution binds the company and its members to the same extent as if the company and its members had covenanted, agreed with each other to observe the constitution. Further, within our jurisdiction and outside, it has been held that a court cannot interfere with the internal affairs of a company except for limited circumstances ... We would agree that while it is not the business of the High Court or this court to involve itself in the day to day running of institutions such as the church, colleges, clubs and so on, yet where it is shown that such an organization is conducting its affairs in a manner contrary to its constitution and to the detriment of its members, then the High Court and this court would not only be entitled to but under a duty to compel it, either, by injunction or otherwise, to obey its constitution.”

45. Further still, it was the Petitioner’s case that the Respondent does not have authority to offer Continuous Professional Development Courses (CPD). This again does not raise a Constitutional question as it does not require one to invoke any Constitutional provisions to resolve. It is purely a matter that can be resolved by having regard to the *Human Resource Management Professionals Act*, 2012 as read with the *Human Resource Management Professionals (Registration and Training) Regulations*, 2015. The Petitioner has not complained that either the *Act* or these *Regulations* are in in any way in conflict with the Constitution. The Act and the Regulations can sufficiently address his concerns.

Whether the Respondent violated the Petitioner’s Constitutional rights violation and legitimate Expectation

46. A key complaint by the Petitioner against the Respondent is that the Petitioner is a licensed Sponsoring Agency for purposes awarding of CPD points yet the Respondent has unreasonably delayed and withheld approval to allocate CPD points for the Petitioner’s activity dubbed “Annual Talent Summit” that had been scheduled to take place between 2nd -5th November, 2021 at Sarova Whitesands, Mombasa.

47. According to the Petitioner, it had legitimate expectation that the Respondent’s CPD Committee will grant approval for the Petitioner’s application expeditiously because previously, it had approved similar activities within a week or two.

48. The Respondent responded that the fact that an Institution is licensed as a Sponsoring Agency is not a guarantee that any programme it conducts for its members must be awarded CPD points by the Council. That the programmes have to be assessed by the Council to confirm the importance and relevance of the education programme to HRM members. Consequently sponsoring Agency have to apply to the Council for accreditation under Rule 13 (2) of the *Regulation and Training Regulations*, 2015.



49. The Respondent was emphatic that the Applicant has never been licensed as a sponsoring agency for purposes of offering CPD accredited education programme and cannot thus award CPD points under the *Registration and Training Regulations*, 2015.
50. As already observed, the dispute between the Petitioner is basically revolving around the interpretation of the relevant regulations. The legitimate expectation is by the petitioner is pegged on the implementation of the relevant regulations by the Respondent. The question as to whether or not the Petitioner possess CPD accreditation license can be determined without invoking the constitution.
51. Concerning the allegation by the Petitioner that the Respondent is discriminating against the Petitioner because it has allowed other sponsoring agencies to award CPD points while denying similar treatment to the Petitioner; the Petitioner had a duty to marshal evidence to prove that allegation. Section 107 of the *Evidence Act* requires that person who asserts the existence of a fact to prove that the fact exists. The Petitioner only stopped at making the allegation. He did not provide evidence to substantiate the fact of discrimination. It was thus unsustainable allegation as against the Respondent.
52. The upshot is that this Petition lacks merit. It is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF MAY, 2024.

L N MUGAMBI

JUDGE

