



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

PETITION NO. E007 OF 2021

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOM UNDER ARTICLES 24, 27 (5), 36 (1), 37, 43 (1) (f), 47 (1), 47 (2), 50 (1), 50 (2), 50 (3), 50 (4), 50 (5) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ARTICLES 2 (1), 2 (4), 3 (1), 10, 19, 20 (2), 22 (1), 22 (3), 27 (1), 28, 48, 165 (3) (b), 165 (6), 258 (1), 259 (1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 4 (1), 4 (2), 4 (3) (e), 4 (3) (f), 4 (3) (g), 4 (4) (a), 4 (4) (c), 6 (1), 6 (3), 7 (2) (a), 7 (2) (b) OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES 2013

BETWEEN

PETER GLEN ONYNAGO.....PETITIONER

VERSUS

KENYA METHODIST UNIVERSITY.....RESPONDENT

RULING

1. The Petitioner is a student and is said to be the President of Kenya Methodist University who was expelled from the University following a disciplinary hearing conducted by the Social Disciplinary Committee. Being aggrieved by this decision, he filed the instant Petition and contemporaneously filed an application under certificate of urgency dated 12th April 2021.

2. In his Petition, he is primarily challenging the procedure followed in reaching the decision to expel him from the University. In his application, the Petitioner claims that he was arbitrarily and unlawfully expelled from the University and that following the expulsion, the Respondent acted *ultra vires* by ordering him not to be seen within KeMU and its environs, in a direct act of discrimination towards the Petitioner's ethnic origin as he was ordered to go back to Kisumu where he belongs. He further claims that the Respondent used the Administration Police and Area Chief to harass him and force him into moving out of Meru. He further avers that the disciplinary process was done in violation of Article 47 of the Constitution and that the mandatory and material procedure prescribed for under the KeMU student's handbook was not complied with. He avers that following the unlawful expulsion, he wrote to the Respondent requesting for a chance to appeal the said decision but the same has not elicited any response forcing the Petitioner to seek redress from this Honourable Court. He further claims that his right to education as envisaged under Article 43 (1) (f) of the Constitution was infringed upon as classes were ongoing when the acts complained of were committed by the Respondent and the said classes will resume at any moment.

3. The Petitioner seeks a temporary order of stay of the decision made on 1st February 2021 (decision to expel him) by the Respondent pending hearing and determination of the Petition as well as an interim conservatory order maintaining the status of the Petitioner prior to the impugned decision to expel him from the institution and in particular that he be deemed as a *bona fide* student pending the hearing and determination of the Petition.

Preliminary Objection

4. Before filing a response to either the Petition or the Application, the Respondent filed a Notice of Preliminary Objection dated 16th April 2021 raising the following points of objections: -

i) The Petitioner has not properly invoked and/or exhausted the Disciplinary Appeals Procedures provided for and available to him under Clause 12 of the Kenya Methodist University Guidelines, Policies, Procedures and Student Code of Conduct (Academic Handbook).

ii) The Petition does not meet the threshold of a Constitutional Petition since it does not particularize what right or fundamental freedom under the Bill of Rights has been denied, violated or infringed as constitutionally required.

iii) The Petition is fatally defective since the Petitioner's pleadings do not disclose adequate particulars as relates the alleged cause of action or claim as necessary to enable this Honourable Court to legally process the Petition or grant reliefs sought.

iv) The Petition gravely offends the principles laid down in various decisions by Kenyan Courts and principally, in the matter Anarita Karimi Njeru v Republic (1979) eKLR as affirmed by the Court of Appeal in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR.

v) No Petition currently lies since the substantive dispute in the Petition herein, has been remitted by the Petitioner by way of appeal to the Respondent and is pending adjudication before the Respondent's Disciplinary Appeal Committee, currently in abeyance, in view of the COVID 19 pandemic containment measures decreed by His Excellency the President on 12th and 26th March 2021.

vi) The Petition and attendant application are premature and collateral in nature, and shall occasion merit based comments on issues yet to be adjudicated by the Respondent's Disciplinary Appeal Committee.

vii) The Petition militates against the time honoured doctrine of ex turpi causa non oritur action asserted by the Court of Appeal in the matter of Kenya Ports Authority v Fadhil Juma Kisuwa (2017) eKLR.

viii) This Honourable Court lacks jurisdiction to entertain the instant Petition and Application.

5. The Preliminary Objection was canvassed by way of written submissions.

Petitioner's Submissions

6. The Petitioner filed submissions dated 14th May 2021. He submits that the Respondent's Preliminary Objection lacks merit. He submits that the first point of the preliminary objection does not raise a point of law, as the circumstances that culminated in the Petitioner filing the instant Petition is an issue of fact which will require parties to tender evidence. He submits that the mere fact that the KeMU Student's Handbook is part of the Respondent's list of authorities/documents and the fact that the Court has been invited to analyze and decipher the same is a clear indication that there are issues of fact that can only be ascertained during trial or by tabling evidence. He submits that a preliminary objection cannot be supported by evidentiary documents and further, that the Respondent has erroneously pleaded facts in the preliminary objection. He submits that all other grounds in the Respondent's preliminary objection do not reveal any points of law. He urges that the preliminary objection should be dismissed with costs.

Respondent's Submissions

7. The Respondent filed submissions dated 5th May 2021. It is submitted that the Respondent is a Chartered private university within the scope of Section 73 of the Universities Act, 2012 and that the Universities Act (Cap 210B) cited by the Petitioner stands repealed under Section 71 of the Universities Act, 2012 and is therefore nonexistent.

8. Giving a factual background, he states that between 4th January and 20th January 2021, unprecedented chaos, riots, mass indiscipline and violence erupted within the student fraternity of the Respondent and that in the ensuing melee, injuries were sustained, and property was destroyed and the public within the surrounding gravely affected by the upheaval. That business along the Meru Nairobi Road was persistently disrupted during the material period and that for the first time in the history of the Respondent, learning and other operations were grounded and that it was by good chance that the public and security agencies stepped in to help avert more damage.

9. That once dust had settled, the Respondent convened disciplinary hearings and the suspects were accorded an opportunity to be heard and after the hearings, the verdicts were communicated to the respective students. That upon such notification of the verdict, the Petitioner alongside other aggrieved students preferred appeals against the respective decisions and that through a letter dated 18th February 2021, the Petitioner wrote to the Respondent seeking to be furnished with various documents and was accordingly supplied with the same, to aid in the preparation of his appeal.

10. That taking into account the COVID 19 pandemic and the various containment measures decreed by the President, the Respondent convened a Disciplinary Appeals Committee and settled on 11th May 2021 as the hearing date, which date was communicated including the procedures applicable to all the appellants. That come 11th May 2021 however, the Petitioner had already filed the instant Petition and this forced the Respondent to hold its horses in deference to the Honourable Court. It is submitted that the Petition has been lodged *mala fides* and is untenable in law, hence ought to be struck out and/or dismissed *in limine* for offending among others the doctrine of exhaustion, want of jurisdiction, for being incompetent and devoid of merit. It is submitted that the Petitioner's invocation of the Court's jurisdiction at this stage is extremely premature as has failed to exhaust the appellate mechanism and that it is vexatious and exasperating for the Petitioner to

mount proceedings in multiple parallel forums simultaneously. The Respondent relies on the cases of *Geoffrey Muthinja & Another v Samuel Muguna Henry & 1756 Others (2015) eKLR* and *Nelson Andayi Havi v Law Society of Kenya & 3 Others (2018) eKLR* and *County Government of Turkana v National Land Commission, Attorney General & Jackson Ekaru Nakusa & 32 Others (2020) eKLR*.

11. It is submitted that the Petition does not meet the basic threshold of a constitutional petition since at the very least, it fails to particularize what right or fundamental freedom under the Bill of Rights has been denied, violated or infringed as is required going by the findings in the cases of *Anarita Karimi Njeru v Republic (1979) eKLR* and *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR* and *Stephen Njuguna & Others v Hon Lewis Nguyai & Others Petition No. 118 of 2011 (UR)*. It is submitted that multiple facets, the Petitioner's pleadings do not disclose adequate particulars as relates to the alleged cause of action/claim as would be necessary to enable this Honourable Court to legally process the Petition or grant the reliefs sought.

12. It is further submitted that on multiple facets, the Petitioner's allegations are self-contradicting and misdirected one instance being that whereas the Petitioner purports to have been harassed by the provincial administration, there is no explanation as to why the said persons have not been enjoined to this Petition. That the disciplinary mechanisms falling within the ambit of the Respondent do not in any manner oust the intervention of other state actors or persons from proceeding lawfully against any student on justifiable grounds.

13. It is further submitted that the Petition militates against the time honoured doctrine of *ex turpi causa non oritur* action as in his pleadings, the Petitioner does not deny that he played a prime role in the events that shaped the ugly turn of events prevailing at the Respondent and that conversely, the Petitioner is mainly heard to be saying that he is at liberty to do as he wishes as long as he does it outside the precincts of the Respondent, consequences notwithstanding. Relying on the case of *Kenya Ports Authority v Fadhil Juma Kisuwa (2017) eKLR* the Respondent urges that no legal remedy or benefit can flow from unlawful acts.

Issues for Determination

14. The main issues raised in the Preliminary Objection all touch on the question of whether this Court has jurisdiction to entertain the instant Petition and Application. The sub issues which this Court will each address are as follows: -

i) Whether the Applicant failed to exhaust the internal Appeal procedure before bringing his Petition and whether this issue, if determined in the affirmative bars the Court from assuming jurisdiction over the matter.

ii) Whether the Petition meets the threshold of a Constitutional Petition.

iii) Whether the Petition militates against the time honoured doctrine of *ex turpi causa non oritur* action.

Determination

15. In determining the issues above, this Court will first of all examine whether the said issues identify with what is legally recognized as a preliminary point of law within the ambit of a preliminary objection. What properly constitutes a preliminary objection has been defined times over including in the *locus classicus* case of *Mukisa Biscuit Company v Westend Distributor Limited (1969) EA 696* as follows: -

'A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.'

16. A preliminary objection should therefore only be raised where there are no disputations on matters of facts by parties. Should this Court find that there are any disputations of fact which will require it to look at evidence adduced and interrogate factual issues, the Court will not have jurisdiction to entertain the preliminary objection.

17. In the *locus classicus* of *Owner of the Motor Vessel "Lilian S" Vs Caltex Oil (Kenya) Limited*, Nyarangi J sitting in the Court of Appeal held as follows: -

"...Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter the moment it holds the opinion that it is without jurisdiction...."

18. Against this backdrop, the Court will now consider each of the issues as raised by the Respondent herein.

Whether the Applicant failed to exhaust the internal Appeal procedure before bringing his Petition and whether this issue, if determined in the affirmative bars the Court from assuming jurisdiction over the matter.

19. The Respondent argues that the Petition and application accompanying it are both premature in light of a pending appeal lodged by the Petitioner with the Respondent's Disciplinary Appeal Committee, challenging the decision to expel the Petitioner. The Respondent claims that the hearing of the Appeal has been affected by the ongoing COVID 19 pandemic and therefore the Petitioner is yet to exhaust the Disciplinary Appeals Procedures available to him.

20. The Petitioner argues in his submissions that this is not a pure point of law since it will require the Court to examine matters of evidence to wit, Clause 12 of the Kenya Methodist University Guidelines, Policies, Procedures and Student Code of Conduct (Academic Handbook). However from his application, he has indicated that he wrote to the Respondent requesting for a chance to appeal the said decision but the

same has not elicited any response forcing the Petitioner to seek redress from this Honourable Court.

21. It appears from the parties' dispositions that the issue of whether or not the Appeal was filed and whether or not there is reason good enough as to why the Appeal is yet to be heard is a factual one requiring this Court to take evidence. While the Petitioner argues that no steps were taken in hearing his Appeal, the Respondent argues that the delays in hearing the Appeal were caused by the effects of the COVID 19 pandemic. All in all, the facts being relied on to urge this point of the Preliminary Objection are disputed. For a proper determination of this matter, this Court would have to interrogate, by way of analyzing evidence whether: -

i) *Whether any Appeal has been filed.*

ii) *How far the appeal process has gone and what steps, if any, have been taken in hearing the Appeal.*

iii) *Whether the apparent delay in hearing the Petitioner's Appeal, if any, was out of deliberate nonchalance on the part of the Respondent or whether it was due to the effects of the COVID 19 pandemic as alleged by the Respondent.*

Although a positive finding to the effect that the Petitioner is yet to exhaust the internal appeal procedures will be persuasive in the question of whether to stay and/or dismiss his application (*in line with the principles espoused under the doctrine of exhaustion of remedies. See Speaker of National Assembly vs Njenga Karume Civil Application No. NAI 92 of 1992 eKLR and Geoffrey Muthinja Kabiru & 2 Others Samuel Munga Henry & 176 Others*) that matter can only be determined upon examination of key evidence.

22. This Court does not therefore find this to be a proper point to raise by way of a preliminary objection. This is a matter to be determined after parties have filed their affidavits over the same. Since this is a matter to be determined after analysis of evidence, the Court will not make a finding on whether the Petitioner was yet to exhaust the internal Appeal mechanisms.

23. In the premises, points number i) v) and vi) of the Respondent's preliminary objection fail.

Whether the Petition meets the threshold of a Constitutional Petition.

24. Citing the case of *Anarita Karimi Njeru v Republic (1979) eKLR* and the other case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR* the Respondent urges that the Petitioner's Petition does not meet the threshold of Constitutional Petitions for failure to adequately particularize the rights and fundamental freedoms that are alleged to have been infringed. The Petitioner in his submissions has not adequately addressed this issue.

25. To begin with, this Court finds that this issue is indeed a preliminary point of law not dependent on any determination of fact unlike the previous one. For a determination of this issue, all that the Court needs to do is to look at the pleadings filed and/or the contents of the Petition.

26. In the case of *Anarita Karimi Njeru v The Republic (No.1) (1979) eKLR*, Trevelyan & Hancoxx JJ held as follows: -

'If a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a 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.'

27. In the latter case of *Trusted Society of Human Rights Alliance vs. Attorney General and 2 Others [2012] eKLR*, the Court re-affirmed the holding in the *Anarita Karimi Njeru* case and stated that:

"We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication; a person claiming constitutional infringement must give sufficient notice of the violations to allow her adversary to adequately prepare her case and to save the court from embarrassment on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are too insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged."

The test does not demand mathematical precision in drawing constitutional Petitions. Neither does it require talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case."

28. The above authority clarified the position that in such Constitutional Petitions under the new Constitution, what matters is whether the Court can fashion an appropriate remedy from the issues raised in the Petition. In the present case, the Court has had a chance to peruse the Petition. There various constitutional provisions which have been cited therein and alleged to have been infringed and/or violated. Indeed at Part D of the Petition, the Petitioner has identified the rights he claims to have been infringed and he has outlined the ways in which the purported infringement has occurred. This is in addition to outlining the facts in support of the Petition as outlined at Part C of the Petition.

29. This Court is able to fashion an appropriate remedy. The Petitioner is aggrieved by the purported limitation of his right to legal representation and picketing in supposed violation of Article 24 of the Constitution, purported violation of his freedom from discrimination based on his ethnicity and religion enshrined under Article 27 (5) of the Constitution, purported violation of his freedom of association by limiting his right to participate in the Respondent's activities contrary to Article 36 (1) of the Constitution, purported violation of his right to

assembly, demonstration and picketing contrary to Article 37 of the Constitution, purported violation of his right to education as enshrined in Article 43 (1) (f) of the Constitution, purported violation of his right to fair administrative action as enshrined under Article 47 (1) and (2) of the Constitution, purported violation of his right to a fair and public hearing as enshrined in Article 50 (1) and (2) of the Constitution. The facts which support the Petition have been clearly outlined at Part C of the Petition, alongside the Petitioner's supporting affidavit.

30. This Court does not therefore find that the Petition has failed to meet the threshold of a Constitutional Petition. As such, grounds **ii), iii) and iv)** of the Respondent's preliminary objection similarly fail.

Whether the Petition militates against the time honoured doctrine of ex turpi causa non oritur action.

31. The Respondent urges that the Petitioner does not deny playing a role in the events that shaped the ugly turn of events at the material time and has instead been justifying his actions and that by dint of this, the Petition militates against the doctrine of *ex turpi causa non oritur action*. To this Court's mind, what the Respondent is urging is that the Petitioner is somehow estopped from benefiting from the Court wing on account of his purported wrongdoings of instigating the demonstrations and chaos.

32. The doctrine of *ex turpi causa non oritur action* is ordinarily invoked in the law of contract where a contract is especially illegal or contrary to public policy. According to Broome's Legal Maxims 10th Edition by R. H. Kersley, at page 499: -

'It is moreover a general proposition that an agreement to do an unlawful act cannot be supported at law (g) that no right of action can spring out of an illegal contract (h) and this rule, which applies not only where the contract is especially illegal, but whenever it is opposed to public policy (h) or founded on an immoral consideration (i) is expressed by the well-known maxim ex turpi causa non oritur action...'

33. In the same text, at page 181, referring to the said maxim it is established: -

'And on a criminal charge of assault consent affords no defense if the assault is likely or intended to do bodily harm (y). It has, indeed, been said that even in an action for an assault it is no defense to allege that the parties fought by consent, if the fight was unlawful (z); but it does not follow that either of the consenting parties to an unlawful fight can recover damages; for even if their consent being illegal, be a nullity, it may well be that the action would be dismissed by reason of the maxim ex turpi causa non oritur action (a).'

34. It appears that for the maxim to apply, the parties to a case must first of all have gotten into some form of agreement, and it being established that such agreement was illegal and/or contrary to public policy, then the Court or a third party can invoke this maxim that would override either parties' purported interests ensuing from such agreement. In the present case, the Petitioner and Respondent did not enter into any contract and/or agreement. What is in issue is the unilateral acts of the Petitioner, for which the Respondent was aggrieved by and decided to take disciplinary action against him. It would therefore appear that the invocation of this doctrine in the present circumstance is misplaced.

35. Nevertheless, this Court finds that this is also not a pure point of law as a determination of the nature and extent of damage caused by the actions of the Petitioner, if any would require the Court to interrogate matters of fact, to wit, the culpability of the Petitioner in the alleged chaos. Further, what is before the Court concerns the disciplinary process that led to the expulsion of the Petitioner and not the lawfulness and/or unlawfulness of the 'chaotic' events on the material day of the demonstrations. In the premises, ground number **vii)** of the Petition similarly fails.

Conclusion

36. In conclusion, this Court finds that the factual matters touching on the question of exhaustion of internal appeal procedures is one that is contested and this is therefore not a proper point to raise as a preliminary objection. Concerning the threshold of a Constitutional Petition, this Court finds that the same has indeed been met. Finally on the doctrine of *ex turpi causa non oritur action*, this Court finds that the same is not applicable in the instant case, and even then, it would require an analysis of evidence, thereby removing it from the ambit of a preliminary objection. In the end, this Court makes the following orders: -

i) The Notice of Preliminary Objection dated 16th April 2021 is hereby dismissed.

ii) The Respondent is at liberty to file a response to the Petitioner's Application dated 12th April 2021 within seven (7) days from the date of this order.

iii) As the matter involves the petitioner's right to education, under Articles 43 (f) and 55 (a) of the Constitution of Kenya, the Court orders for an expeditious hearing of the matter, and for that purpose the matter shall be mentioned on 18th June 2021 for directions as to hearing.

Order accordingly.

DATED AND DELIVERED ON THIS 10TH DAY OF JUNE, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Robi Kerato Partners, Advocates for the Petitioner

M/S Adrian Kamotho Njenga & Co. Advocates for the Respondent.