REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CONSTITUTIONAL PETITION NO. E002 OF 2020

IN THE MATTER OF ARTICLES 1, 2 (1), 3(1), 10, 22, 23, 27, 35, 47,

159(2), 165(3)(d) AND 259 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTIONS 3, 6. 7, 18 AND 19 OF THE ENGINEERS ACT NO. 43 OF 2011

BETWEEN

FERDINAND CHIRURE NYONGESA.....PETITIONER

AND

ENGINEERS BOARD OF KENYA.....RESPONDENT

RULING

By his petition dated 23rd October, 2020, the petitioner seeks;

> ***a. A declaration that the failure by the respondent to register the petitioner as a graduate engineer is unconstitutional and in violation of the petitioner's legitimate expectation for registration as graduate engineer after meeting the requirements of law.***
>
> ***b. An order that the respondent be compelled to register the petitioner herein as a graduate engineer having acquired his academic certificate properly, procedurally and in conformity with the law and with the requirements of the Engineers Board of Kenya.***
>
> ***c. Costs of the petition.***

The petitioner states that he has pursued matters of registration as a graduate engineer with the respondent for the past 37 years after graduating with a Bachelor of Science Degree in physics in 1983 and employed as an Assistant Engineer (Electronics) in the Ministry of Transport and Communications.

That in the year 1987, he sought registration as a graduate engineer with the respondent's predecessor; Engineers Registration Board (ERB) wherein he was informed that he did meet the requirements for registration in the absence of any other qualification in the engineering academics.

Pursuant to the recommendations by the Board, he proceeded on a government scholarship to the University of Bradford and studied for a Graduate Diploma in Electronic and Communication Engineering and a Master of Science in Communication Engineering. When he submitted his application again in 1990, the respondent refused again on grounds that it did not recognize postgraduate qualifications. The petitioner feels the respondent is shifting goal posts to his disadvantage.

The petitioner then left to teach at at the Masinde Muliro University where he was awarded a scholarship in 2011 to study for PhD. When he resumed duties in 2017, he was denied to teach engineering related courses on the respondent's advise. He was advised to engage the respondent directly on matters registration.

The petitioner in 2019 submitted his certificates for equation and later re-submitted his application for registration in 2020 which has elicited no response from the respondent thus the instant petition.

Despite the respondents being served, it never entered appearance or filed a response hence the petitioner's averments above remain factually uncontroverted.

The petitioner also filed his written submissions which have been duly read and considered. The issue arising in the petition is whether the petitioner is entitled to the orders sought.

The respondent is a statutory body created by the Engineers Registration Act, 2011. Its core duties are set out under Section 11 while the petitioner is a scholar aggrieved by the respondent's action of not registering him as an Engineer.

The petitioner's journey to registration as an engineer began in February 1987 when he sought to be registered as an engineer. The respondent's predecessor by letter dated 19th February, 1987, advised;

> ***Your degree as submitted with your letter under reference, appears to be in science and not engineering. It is regrettable that in the absence of any other qualifications in engineering academics you are not registrable at all with the Board.***

Upon receipt of the letter, it is not in dispute the petitioner attained further qualifications in order to comply. He went ahead to equate his foreign-attained certificates with the Kenya National Qualifications Authority which certificate have been annexed to his petition.

He relaunched his bid to the respondent on 2nd January, 2020 by submitting his application for registration enclosing the certificate and the equation certificates. By letter dated 23rd September, 2020, the petitioner having not received a response on the status of his application sought to follow up. The letter was responded to by the respondent on the same date informing that his application was under review. Another letter dated 1st October, 2020 by the respondent confirmed that the application was still pending review.

The court is quite alive to the fact that the respondent is a statutory body and caution has to be taken not to usurp its powers and roles.

Section 54 of the Engineers Act, 2011 sates;

> ***A person aggrieved by a decision of the Board under this Act may, within thirty days from the date of the Board's decision, appeal to the High Court and in any appeal the High court may annul or vary the decision as it may consider necessary***

In the circumstances and on the evidence on record, the respondent has not formally communicated its decision on the status of the petitioner's registration for the petitioner to invoke the powers of this court. The Act allows one to move the High Court upon receipt of the board's decision.

There is importance in following set-down legal procedures and steps to avert a situation where parties invoke judicial action and side stepping the statutory mechanism of conflict resolution. In legal terms, the principle is known as exhaustion of remedies. In ***William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR,*** the court held;

> ***The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an 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 ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of the Constitution.***

The evidence only shows that the respondent is still reviewing the petitioner's application and this cannot amount to violation of his rights.

The petitioner also complains that the respondent's action infringes on his right to fair administrative action under Article 47 of the Constitution which provides that every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

The ***Fair Administrative Action Act*** No. 4 of 2015 was enacted to operationalize Article **47** of the Constitution. Section **4(3)** of the Act provides the broad parameters which bodies undertaking administrative action have to adhere to.

In ***Judicial Service Commission Vs. Mbalu Mutava & Another*** **(2015) eKLR,** the Court of Appeal held:-

> ***"Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed."***

Section **7 (2)** of the Fair Administrative Action Act, 2015 provides for grounds of review which include bias, procedural impropriety, ulterior motive, failure to take into account relevant matters, abuse or discretion, unreasonableness, violation of legitimate expectation or abuse of power.

When the constitutionality or legality of a decision made by a public body in the exercise of its statutory mandate is questioned, the duty of the court is to determine whether the impugned decision is capable of being read in a manner that is constitutionally compliant or as in the present case whether it can be read in a manner that conforms to the relevant statute. Every act of the state or public bodies must pass the constitutional test.

In the circumstances of this case, this action must fail for the reason that the respondent has not formally communicated its decision on the petitioner's application and secondly, there is no evidence that the respondent has not adhered to the constitutional mandate under Article 47 of the Constitution. Each party to bear his own costs.

Orders accordingly.

DATED AT BUNGOMA THIS 5TH DAY OF NOVEMBER, 2021

S. N. RIECHI

JUDGE.