



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO.113 OF 2019**

**IN THE MATTER OF ARTICLES 10,22,23,38,47,50,81 AND 118 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 10, 38, 81,**

**AND 118 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS**

**AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF THE UNIVERSITIES ACT 2012 AS AMENDED BY ACT NO. 48 OF 2016**

**BETWEEN**

**MAGAWI MAXWELL ODHIAMBO.....1<sup>ST</sup> PETITIONER**

**ISAAC ROTICH.....2<sup>ND</sup> PETITIONER**

**MARTIN WANJAU NDIRANGU.....3<sup>RD</sup> PETITIONER**

**WANGECI MARY.....4<sup>TH</sup> PETITIONER**

**PHEDINARD ONGAYO.....5<sup>TH</sup> PETITIONER**

**ISAIAH ODHIAMBO.....6<sup>TH</sup> PETITIONER**

**ELIJAH LETIO.....7<sup>TH</sup> PETITIONER**

**MATHEW ODHIAMBO OTIENO.....8<sup>TH</sup> PETITIONER**

**KELVIN OTIENO AWUOR.....9<sup>TH</sup> PETITIONER**

**KEMBOI FELIX.....10<sup>TH</sup> PETITIONER**

**RONNY OTIENO ODIDA.....11<sup>TH</sup> PETITIONER**

**AND**

THE ATTORNEY GENERAL OF THE

REPUBLIC OF KENYA.....1<sup>ST</sup> RESPONDENT

THE UNIVERSITY OF NAIROBI.....2<sup>ND</sup> RESPONDENT

JUDGMENT

Petitioners Petition

1. The Petitioners herein, are students at University of Nairobi, within the Republic of Kenya, who filed this petition on 22/3/2019 claiming that by undated Notice issued sometimes in February 2019, the Deputy Vice Chancellor of University of Nairobi, in charge of students Affairs, informed all students that the senate had proposed the elections of the students' council to be held on the 5<sup>th</sup> of April 2019. The Notice invited applications for students who wished to serve in the electoral commission. That according to section 11(b) of the students constitution nomination papers are required to be picked from Electoral Commission 14 days prior to the date of Electoral college election; meaning the nomination papers were available from 18<sup>th</sup> March 2019.

2. The Petitioners intend to contest in the forthcoming elections for various positions and urge the electoral system contemplated under **section 41 of the Universities Act 2012** was to be in compliance with Article 81 of the Constitution of Kenya 2010 and that the requirement that students coalesce themselves into a team before they are eligible to contest in the elections violates the individual rights of the students to stand, and contest in the elections. The Petitioners submit that **section 11 of the Constitution of the University of Nairobi students' Association** is unconstitutional to the extent that it purports to control the rights of the students, who are unable or unwilling to be members of the team to contest in the students' election and that **section 11 goes away beyond the contemplation of section 41 of Universities Act**, by introducing unreasonable restrictions in the electoral contest.

Respondents Response

3. The 2<sup>nd</sup> Respondent filed grounds of opposition dated 28<sup>th</sup> March 2019 opposing the petition on the following grounds:-

1. THAT the application lacks legal or factual substratum and thus not maintainable;
2. THAT the Petitioners have complete misunderstanding and misapprehension of Article 81 of The Constitution.
3. THAT the 2<sup>nd</sup> Respondent is an autonomous Public University subject to the University Act, No. 42 of 2012;
4. THAT Chapter Seven of the Constitution is not applicable to the 2<sup>nd</sup> Respondent.
5. THAT the Petition and the Notice of Motion don't even attempt to demonstrate how their rights have been violated;
6. THAT the application and Petition filed Four days to the material elections is mischievous and extreme abuse of the court process;
7. THAT the Petition and the Notice of Motion are for dismissal.

Submissions

4. Mr. Omondi, learned Advocate for the Petitioners filed written submissions dated 22<sup>nd</sup> March 2019 and which submissions he adopted during the highlighting of the same. He urged that the Election scheduled for 5<sup>th</sup> April 2019 and by which, by virtue of section 11 of the students constitution requires the students to form teams for the purpose of election to the Council of Students Association is unconstitutional as section 41 of the Universities Act do not introduce such provision requiring the students to form teams before they contest election, and that it controls students right to contest election. He urged the principles under section 41 are that electoral system must comply with Article 81 of the Constitution of Kenya 2010, which invokes Article 38 of the Constitution of Kenya 2010, providing for rights to fair political choices, which includes right to participate in political party. He urged Article 38(2) of the constitution talks of the right of free, fair elections based on universal suffrage. He therefore submitted section 41 of the Universities Act having incorporated section 81 and 38 into elections process, that it makes it mandatory for University to establish an electoral system that complies with the principles set out in the constitution.

5. Mr. Omondi, learned Advocate, further urged the petition is supported by the supporting affidavit of the Petitioners who are amongst a few of aspiring candidates. That an attempt to obtain nomination papers from Electoral Commission of University of Nairobi, has failed and as such they did not submit their nomination papers hence they have been disenfranchised from the election process. That the Petitioners attempt to be heard as averred through a letter "MM-2" and "MM-3" has not been granted.

6. Miss Muchama, learned Advocate, did not file any written submissions but submitted orally. She relied on the grounds of opposition raising two points being; whether, first, the petition meets the constitutional threshold and secondly the matter is Res Judicata by virtue of **Hc Pet.C. No.17 of 2017 Were Samuel & 14 others vs The Attorney General & 2 others**. She urged that the petition is premised on Article 81 of the Constitution of Kenya which relates to the National Election as the interpretation on the same is misguided.

7. Mr. Omondi, learned Advocate, in a quick rejoinder submitted that the Hc Pet.C. No.17 of 2017 is not relevant as it dealt with public

participation before introduction of section 41 of the Universities Act.

### **Analysis and Determination**

8. I have very carefully considered the petition, grounds of opposition thereto and counsel rival submissions. I have considered the relevant section of the law and the constitution referred to in the petition, introducing amendments to section 41 of the Universities Act 2012; which is on students elections at the Universities and University colleges.

9. The Petitioners petition is mainly seeking to have a declaration, that compelling the petitioners or any other student to constitute themselves into a team before they can be allowed to contest in the elections of the students council is unconstitutional and an order do issue to compel the electoral commission established by the 2<sup>nd</sup> Respondent to receive individual nomination papers from the Petitioners and any other student, who wishes to contest in the forthcoming elections and to maintain provisions for their participation in the elections as independent candidates.

10. **Section 41 of the Universities Act**, provides any University shall have a student's Association comprising all students in the University. What comprises of students' council is well spelled out section 41 (1A); (1B) ; (1C); (ID); (1E); (1F); (1G); (1H) and it is specially stated under (1C) and (1D) as follows:-

**"(1C). For purposes of conducting the election of the members of student council referred to in subsection (1A), the students' association shall constitute itself into electoral colleges based on academic departments, schools or faculties, as may be appropriate.**

**(1D). The students of each electoral college constituted under subsection (AC) shall elect three representatives."**

11. From the provisions of section 41(II) of the Universities Act, it is clear that any election that has to be conducted has to be in strict compliance with the general principles of the Constitution of Kenya as set out under Article 81 of the Constitution of Kenya.

12. It has also to be noted that the right to contest in an elections is not absolute, as it is not a matter of walk in walk out, at the leisure of the intended candidate. The right has to be in accordance with the provisions of the law governing the elections process. Article 24 (1) (a) – (e) of the Constitution of Kenya provides:-

**"24. (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including;**

**(a) The nature of the right or fundamental freedom;**

**(b) The importance of the purpose of the limitation;**

**(c) The nature and extent of the limitation;**

**(d) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and**

**(e) The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose."**

13. The right and freedom to contest in the election of students council in the University is a function of Article 38 and 81 of the Constitution but such right cannot be urged is not subject to limitations which may be imposed by the law. Section 11 of the Constitution of University of Nairobi Students Association provides:-

a) .....

b) .....

**c) A non-refundable amount of Kshs. 3000 (Students' Council) and Kshs. 2000 (Electoral College) or such other sums as may be prescribed by the Electoral Commission, shall be paid as nomination fee;**

d) .....

**e) Nomination papers for members shall be signed by the aspiring team, a proposer and at least seven hundred (700) seconders for each aspirant for the Students' Council, and three hundred (300) for each aspirant at the Electoral College;**

f) .....

**g) The seconders for the aspirant for the Students' Council shall be proportionately distributed from at least seven electoral colleges;**

**h) Aspiring teams shall submit duly signed nomination papers to the Electoral commission nine (9) days prior to the election date between 8 am and 5.00 pm;**

**i) The nomination papers shall be returned in designated places in the contestants' respective campuses;**

**j) The Electoral Commission shall announce within two (2) days and cause to be prominently published immediately thereafter successfully nominated aspiring teams.**

**14. Section 11 of the Constitution** of University Association, which is couched in a mandatory form, deals with preliminary stages as regards nomination of the aspiring teams. This is the mode of nomination which the students agreed to be bound by. The process of nomination has its purpose and reasons and its intention amongst others is to ensure justice and equality but not to allow each and every student to seek election at the same time as that would be difficulty for the University to manage the situation and it allowed it would be a source of chaos. I find the limitation imposed under section 11 of the Constitution of University of Nairobi Student's Association is not unreasonable nor does it offend Article 24 of the Constitution of Kenya. The limitation is justifiable in an open and democratic society as without setting out a process of elimination of would be candidates no election would be ever be conducted. I find no constitution violation of the petitioner's rights have been demonstrated as Article 24(2) of the Constitution requires an enactment that limits a right or fundamental freedom and that notwithstanding I find the petitioners have failed to demonstrate the limitation set by the University is unreasonable and offends principles set out under Article 24. I further find as the University has set out the powers governing nomination of aspiring team to cater for all students; or represent the interest of respective students, the petitioners and every other aspiring students who are unable or unwilling to be members of a team cannot be said they stand to be disenfranchised from electoral process. I find Articles 38 and 81 are relevant in principle during election; for parties who have undergone successful nomination process but cannot be used to overlook or jump a duly set up nomination process and especially where set process is mandatory as is the case herein.

**15.** The Respondent urged that the Petition is *Res Judicata* by virtue of Hc.P.C No.17 of 2017 Were Samuel & 14 others vs Attorney General & others. The above case was dealing with a petition challenging amendments introduced to the University Act and in particular section 18(1C) (ID) and (IE), which introduced changes to the manner of election of student leaders in Universities. Section 18 amended section 41 of the University Act 2012 introducing (1A), (1B), (1C), (ID), (IE) (IG) and (II) to section 41 of the Act. The petition was dismissed for lack of merit and as such upheld the electoral process under section 41 of the University Act, 2012. I do not agree with the petitioners submissions that the issue was purely limited to the public participation in that petition. I agree with the 2<sup>nd</sup> Respondent that matter as it challenges the electoral process set under section 41 of the Universities Act, 2012 and was determined, the present petition challenging the same section is *Res Judicata*.

**16.** The Petitioners herein did not comply with the laid down nomination process and within the time lines set and as such, I find that they have failed to comply with the electoral process set by the 2<sup>nd</sup> Respondent.

**17.** The upshot is that I find no merit in this petition. I proceed to declare as follows:-

a) That compelling the petitioners or any other student to constitute themselves into team before they can be allowed to contest in the elections of student's council is not unconstitutional.

b) Each party to bear its own costs.

**Dated, signed and delivered at Nairobi this 3<sup>rd</sup> day of April, 2019.**

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**J .A. MAKAU**

**JUDGE**