



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**CONSTITUTION PETITION NO. 8 OF 2015**

**JAMES MURAGE.....PETITIONER**

**V E R S U S**

**1. HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**2. COUNTY CO-OPERATIVE OFFICER KIRINYAGA COUNTY.....2<sup>ND</sup> RESPONDENT**

**RULING**

The petitioner James Murage filed this petition under **Articles 22(1), 23(1) & 3, 25(a), 27,28, 29(a)(d)(f), 35(1), 2, 36(1), 47 & 48 of the Constitution as read together with Section 28(4)(L), Co-operative Societies Amendment Act 2004** and all other enabling provisions of the law. The petition was filed against the Hon. Attorney General and the County Co-operative Officer, Kirinyaga County. However by a ruling of this court dated 14/12/2016, The Hon. Attorney General was struck out for being improperly joined as party.

**Petitioner's Case:**

It is the Petitioner's case that he is a citizen of this Country that is the Republic of Kenya who is entitled to enjoy all the rights and freedoms enshrined in the Constitution and in particulars the rights and freedoms enshrined under Chapter Four of the Constitution.

The petitioner contended that his fundamental right and freedom had been violated by the 2<sup>nd</sup> respondent. In 1993, the petitioner was elected committee member of Mugaya Coffee factory and later vice-chairman Mutira Coffee farmers Co-operative Society. He served as vice-chairman Mutira Coffee farmers Co-operative Society from 2006 up to 2008.

However, in 2008, the predecessor of the 2<sup>nd</sup> respondent then District Co-operative Officer Kirinyaga directed Mugaya Coffee factory and Mutira Coffee farmers Co-operative Society to unlawfully bar the petitioner from holding any elective position because of his previous conviction in **Baricho DM Criminal case No. 198 of 1987** whereby he was sentenced to eight months imprisonment and 2 strokes of the cane for assault which term he served.

That consequently he was barred by Mutira Coffee farmers Co-operative Society from assuming office and discharging the duties of vice-chairman and by Mugaya Coffee factory from assuming office and discharging duties of committee member. He claims the actions by the 2<sup>nd</sup> respondent was unconstitutional, wrongful unlawful and without any basis in law or fact thus null and void.

He sought the following reliefs;

1. Declaration that his rights and freedoms under the Constitution were grossly violated by the 2<sup>nd</sup> respondent's decision.
2. Declaration that the 2<sup>nd</sup> respondent's actions are null and void.
3. Declaration that he has a constitutional right and freedom to participate in, vote, be elected and assume any elective position in Mugaya Coffee factory and Mutira Coffee farmers Co-operative Society.
4. Declaration that he is entitled to payment of damages and compensation of gross and blatant violation and denial of his constitutional right and freedom.
5. General damages, exemplary damages and moral damages on aggravated scale under **Article 23(3) of the Constitution.**

**1<sup>st</sup> Respondent's Case:**

They were struck out from the petition on 14/12/2016 in view of the fact that they have been wrongly enjoined.

**The 2<sup>nd</sup> Respondent's Case:**

In response, he states that the petitioner does not satisfy the requirement of **Section 28 (4)(l) of the Co-operatives Societies (Amendment) Act, No. 2 of 2004** which stipulates the limiting conditions of a person to be a member of the committee.

**Section 28(4)(l) of the Co-operatives Societies (Amendment) Act** states:

*No person shall be a member of a committee if he - has been convicted of any offence involving dishonesty or is sentenced to imprisonment for a term exceeding three months;*

That the petitioner's annexure JMM 1 clearly indicates that he was convicted of a criminal offence of assault causing actual bodily harm in 1987. That judgment was delivered to Mutira Coffee farmers Co-operative Society in the year 2008 when the Society was conducting its elections and it is only then that they discovered that the petitioner was not eligible to become a committee member.

The petitioner on 24/03/2015 petitioned them to reinstate him but he was informed that he does not satisfy the requirements of **Section 28 (4) (l) of the Co-operatives Societies (Amendment) Act, No. 2 of 2004**.

Counsel for the petitioner submitted that it is not in dispute that the petitioner and his co-accused were convicted as stated in 1987 and sentenced to serve eight months imprisonment and two strokes of the cane. The petitioner and his co-accused did not appeal but served the full sentence.

He submits that the petitioner is before court because the 2<sup>nd</sup> respondent has arbitrarily used the conviction to bar the petitioner from holding any elective position in Magaya Coffee Factory and related Mutira Coffee Farmers Co-operative Society. That the conduct by the 2<sup>nd</sup> respondent is a gross and blatant violation of the petitioner's Constitutional rights and the same should be declared null and void.

He submits he has a constitutional right to participate and assume elective position in the Co-operative Society or any elective position in any Co-operative Society in Kenya or any other elective position. He relies on Article 23(3) of the Constitution which provides -

***“(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—***

***(a) a declaration of rights;***

***(b) an injunction;***

***(c) a conservatory order;***

***(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;***

***(e) an order for compensation; and***

***(f) an order of judicial review.”***

That the question is whether the 2<sup>nd</sup> respondent acted within the law or ultra vires.

For the 2<sup>nd</sup> respondent it is submitted that the petition is defective and is an abuse of court process and should be dismissed. That there is no office of the County Co-operative Officer. That **Article 23(3) of the Constitution** is on reliefs. That the petitioner is not seeking to declare Section 28(4)(L) as unconstitutional nor has it been declared as such.

That Article 25(a) of the Constitution provides for violations and such particulars are not in the petition. Article 25(a) provides:-

***“Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—***

***(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;”***

It is further submitted that Article 35 of the constitution deals with access to information and the petition has not stated how he has been denied access to information. That it is a blanket application under Chapter 4 of the Constitution. That the petitioner does challenge Section 28(4)(L) of the Co-operative Societies Act but the actions of the officer who enforced them. That the court to dismiss the petitioner.

I have considered the petition, the reply and the submissions. The issues for determination are whether –

1) The 2<sup>nd</sup> respondent acted within the law or ultra vires.

2) Whether the Petitioner's rights and freedoms under the Constitution have been grossly violated.

3) Whether he has a constitutional right and freedom to be elected and assume any elective position in Magaya Coffee Factory and Mutira Coffee Farmers Co-operative Society.

The 2<sup>nd</sup> respondent has contended that he acted with the provisions of Section 28(4)(L) which I have cited **Supra**. The provision has two limbs. The 1<sup>st</sup> limb is that no person shall be a member of a committee if he has been convicted of any offence involving dishonesty. This is in my view would include offences such as stealing, fraud, obtaining money by false pretences to name but a few. It means that a person convicted of such offences would not be eligible in view of the section even if he was convicted and given a sentence of absolute or conditional discharge or other form of none custodial sentence.

The 2<sup>nd</sup> limb is where a person is sentenced to imprisonment for a term exceeding three months. This is why the provision states **Or**. The 1<sup>st</sup> limb does not apply to the petitioner. As for the 2<sup>nd</sup> limb of the provision, it is not in dispute that the petitioner was convicted and sentenced to serve eight months imprisonment and two strokes of the cane. This limb applies to the petitioner. Though he submits that he had served in the committee despite having been convicted and sentenced to serve eight months imprisonment and two strokes of the cane, most likely he did not disclose this when he vied for the post. This was an illegality which the court cannot uphold. The 2<sup>nd</sup> respondent has deponed that it was not until during the elections of the year 2008 that the Judgment in the matter where the petitioner was convicted was brought to them as a result of which the petitioner was barred from contesting. This is a fact which was not disputed by the petitioner. In 2015 the petitioner wanted to be reinstated as a committee member but he was informed that he was not eligible.

It is evident that when the respondent was elected as a committee member before 2008, the 2<sup>nd</sup> respondent was not aware of his conviction and sentence. He was in the office illegally. As submitted by counsel for the respondent, this court cannot uphold an illegality.

The petitioner is not before this court to seek a declaration that **Section 28(4)(L) of the Co-operative Societies Act (Amended) 2004** is unconstitutional. No court has declared the provision unconstitutional.

Article 19(3)(c) of the constitution states:

***“ The Rights and fundamental freedoms in the bill of rights –  
Are subject only to the limitations contemplated in this constitution.”***

Such limitations are provided under Article **24 of the Constitution**. It states:-

***“A right of 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 call relevant factors including –***

***a) The nature of the right and fundamental freedom.***

***b) The importance of the purpose of the limitation.***

***c) The nature and the extent of the limitation.***

***d) The need to ensure 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 limitations and its purpose and whether there are less restrictive means to achieve the purpose.”***

The petitioner has not alleged any violation under **Article 25 of the Constitution** which makes provision for rights and freedoms that may not be limited. The petitioner alleges violation which is based on a legal provision under the Act. The provision, that is, **Section 28(4)(L) of the Co-operative Societies Act** has not been declared unconstitutional. The constitution under **Article 24** contemplates that enjoyment of rights and fundamental freedoms may be legally limited under the provisions of the law. The **Section 28 (4)(L) of the Co-operative Societies Act** limits the rights of a person to be elected in a committee if he has been convicted for an offence involving dishonestly of imprisonment for more than three months. Petitioner falls squarely under this limb having been convicted and sentenced to imprisonment for eight months and two strokes of the canes which he has admitted that he served.

Section 28(4)(L) of the Co-operative Societies (Amendment) Act is couched in mandatory terms. It is meant to ensure that those who serve in the committees are persons of integrity. The petitioner has not alleged that section is unconstitutional. The 2<sup>nd</sup> respondent followed the law when it was brought to his attention that the petitioner was not eligible to be elected as a member of the committee by dint of the provision. The action by the 2<sup>nd</sup> respondent was therefore lawful. In answer to the first issue for determination I hold that the actions by the 2<sup>nd</sup> respondent were lawful as he acted within the law. The petitioner has not proved that the actions violated his rights or was ultra vires. The 2<sup>nd</sup> respondent did not violate the petitioner's rights and freedoms as he strictly enforced the law against the petitioner. The petitioner right's to be elected and to assume any elective position in Magaya Coffee Factory and Mutira Coffee Farmers Society are limited under the law as he does not meet the requirements set out under the law to exercise the rights.

**Conclusion:**

1. The petitioner has failed to prove that his Constitutional rights were violated or that the actions by the 2<sup>nd</sup> respondent were ultra vires null and void.
2. The petition is without merits and is dismissed.
3. Costs to the 2<sup>nd</sup> respondent.

**Dated at Kerugoya this 11<sup>th</sup> day of October 2018.**

**L. W. GITARI**

**JUDGE**