



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO 354 OF 2018

JEFFERSON ERICK PELE.....PETITIONER

VERSUS

THE KENYA SCHOOL OF LAW.....1ST RESPONDENT

THE COUNCIL FOR LEGAL EDUCATION.....2ND RESPONDENT

JUDGMENT

1. *Jefferson Eric Pele*, the petitioner, is a student at the *Kenya School of Law*, (KSL), the 1st respondent herein whose mandate is to train persons who wish to be admitted as advocates of the High Court. He had successfully sat for and passed all subjects in the Bar examination except two. Although professional training programmes are offered by the 1st respondent, Bar examination is set and administered by Council of Legal Education, (CLE), the 2nd respondent herein, whose mandate is, among others, to ensure quality of the legal education in the country.

2. The petitioner decided to sit for the remaining subjects which he had not passed and therefore sought to register for the November 2018 cycle of the Bar examination in order to sit for the remaining two subjects. The petitioner states that he deposited Ksh20, 000 into the 2nd respondent's bank account and on 28th September 2018, which was the last day for registration, he presented the bank deposit slip to the 2nd respondent's offices for purposes of registration.

3. It is the petitioner's case that his details were confirmed including the bank deposit he had and he was issued with an official receipt and his registration form signed by the 2nd respondents' officer conforming payment and other details and he handed the registration form in duplicate to the registration officer. The petitioner pleads that one form was returned to him but he did not realize that it had not been stamped until he reached home.

4. The petitioner states that on realizing that his copy had not been stamped and being a Friday, he decided to return to the 2nd respondent's offices on the following Monday to have the form stamped. He contends that when he went to the respondent's offices that Monday, he was told that registration had closed and that he could not register for the November Bar Examination. He states that he was advised that since the registration period had closed, he would have to wait until the next cycle of Bar examination which is July 2019.

5. Aggrieved by the turn of events, and placing blame on the 2nd respondent, the petitioner, filed this petition claiming violation of his rights and fundamental freedoms and sought the following reliefs:

a) A declaration that the decision of the respondents to lock out the petitioner from re-sitting his failed bar examination papers is a violation of the constitution hence illegal, null and void.

b) Judicial Review order by way of an order of certiorari to remove into the court for purposes of quashing the decision of the Respondents, jointly and severally to lock out the petitioner from re-sitting his failed bar examination papers.

c) A declaration that the respondents' decision to unilaterally change the petitioner's results without any explanation or legal justification was unfair, illegal and unconstitutional.

d) An order directing the respondents to forthwith allow the petitioner to sit the failed Bar Examination papers.

e) Costs of and incidental to this petition; and

f) Any other order that this Honourable Court deems fit and just to grant in the circumstances.

Responses

6. Although the respondents were served and were represented, they did not file responses to the petition. The petition, however, proceeded by way of oral testimony with the petitioner testifying and the 2nd respondent calling one witness.

Evidence

7. The petitioner who testified as **PW1**, told the court that after he learnt that he still had failed two subjects, he decided to re-sit the two subjects in the November Bar examination administered by the 2nd respondent. He told the court that he deposited Kshs. 20,000 into the 2nd respondent's bank account and went to the 2nd respondent's offices on 28th September 2018 with a view to registering for the Bar examination.

8. He testified that at the 2nd respondent's offices, his registration form in duplicate was received together with the bank deposit slip and he was issued with an official receipt. He told the court that one copy of the form was stamped and retained by the 2nd respondent's officer and another copy was given to him. He testified that on reaching home, he realized that the copy of the form he was given had not been stamped; went back to the 2nd respondent's offices on the following Monday and asked them to stamp his form but he was told that it was too late and he not be registered. The petitioner told the court that he had given out two copies of the form one was retained and the other given to him but he was not registered though he had paid for the registration. He produced the documents as **PEX1**.

9. In cross examination by **Mr. Mwaniki**, counsel for the 1st respondent, the petitioner admitted that although he had sued **KSL** as the 1st respondent, it is not true that the school had locked him out from sitting the Bar examination. He also admitted that he had no complaint against the 1st respondent and had not sought any relief against it.

10. Cross examined by **Mr. Bwire** on behalf of the 2nd respondent, the petitioner admitted that he was still eligible to sit for the Bar examination in July 2019 and that he was aware of the procedure for registration for the Bar examination as contained in Student Guide. The petitioner told the court that he deposited Kshs20, 000 into the bank and took the banking slip to the 2nd respondent's offices where he was given an official receipt. He testified that he handed in the registration form in duplicate and the bank slip but that being the last day of registration, they were being served by one officer at the counter who completed the registration process. He told the court that the officer signed the forms and stamped them but that he noticed that his copy had not been stamped when he reached home.

11. At the close of the petitioner's case, the 2nd respondent called one witness, **Mary Mugune Mutugi, (DW1)**, the Acting director of quantity assurance at the 2nd respondent. **Ms. Mutugi** testified that the 2nd respondent has mechanisms for informing the procedure for applying and registering for the Bar examination which is in the student's Guide to the Bar examination and that students are asked to familiarize with it during orientation.

12. She told the court that a student has to deposit money in the bank for the subjects he/she is to sit for, present the bank deposit slip to the 2nd respondent's finance office where the amount is verified and an official receipt issued for the amount. According to **Ms. Mutugi**, the student then presents the receipt and the form in duplicate to the examination department where details are verified and after which the form is signed and stamped in duplicate. She told the court that the process is complete when the officer hands the signed and stamped form and the official receipt to the candidate.

13. The witness told the court, that the petitioner's registration form "JEP 7" did not go through all the stages and is not signed and stamped. That means the petitioner did not register for the November 2018 Bar examination and the deadline having passed, the petitioner could not be registered due to logistical challenges and she told the court that the petitioner was informed as much. She denied that the 2nd respondent violated the petitioner's fundamental rights and freedoms.

14. In cross examination, the witness admitted that she was not present on the last day of registration (28th September 2018) but denied that one desk could handle all the processes. She admitted though that the Finance department received and signed the form and issued an official receipt for payment but denied that the finance office could verify academic requirements or sign the form on behalf of the examination department. She maintained that the petitioner did not complete the registration process and that he was to blame for failure to register for the November 2018 Bar examination.

Determination

15. I have considered this petition and the evidence on record. The issue that presents itself from determination is whether the 2nd respondent violated the petitioner's rights and fundamental freedoms when it declined to register him for a re-sit of the November 2018 Bar examination. The petitioner has contended that he did all that was within his powers; paid the examination fee and handed in his registration forms but the 2nd respondent failed and or neglected to perform its obligation, namely; register him for the due Bar examination.

16. The petitioner contends that Articles 10 and 73 of the constitution obligate the 2nd respondent to observe the rule of law and that the 2nd respondent violated Article 47(1) of the constitution. Article 47(1) states that every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

17. The petitioner wanted to register for the November 2018 Bar examination and went to register on 28th September 2018, the last day of registration. He presented his documents to the finance department and was issued with an official receipt and the form was signed by that department. The petitioner contends that on that particular day due to the large number being the last day of registration, students were being served by one officer at each counter. He contends that he was given the form but only realized that it had not been signed and stamped when he reached home. He contacted the 2nd respondent on the following Monday but was told that registration had closed. The 2nd respondent has on its part argued that the petitioner did not fulfill his obligation of presenting the forms to the relevant department or section for registration.

18. Parties have only called one witness each, the petitioner and **Ms. Mutugi** each holding onto a different position regarding what happened, did not happen or was supposed to happen. That leaves the court with only one option to consider the evidence on record in order to decide this petition.

19. The petitioner was to present the registration form in duplicate together with the bank deposit slip which was to be verified at the finance department where it was to be signed and an official receipt issued to him for the amount paid. This, the petitioner did. According to the respondent, the form and the official receipt were then to be taken to the examination section where the petitioner's details were to be verified and the form signed and stamped. The form the petitioner relies on is neither signed nor stamped. This is clear from exhibit "JE P7" which shows that the form was only signed by the finance department. The petitioner contends that they were being served by one officer due to the large number of applicants and being the last day but the 2nd respondent argues that this could not happen because the finance department could not verify academic details of the applicants.

20. From the legal perspective, the petitioner contends that the 2nd respondent violated his right to fair administrative action. Article 47(1) of the constitution confers on everyone the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Anyone claiming that a respondent violated this constitutional right must prove that the respondent did not act expeditiously, that the action was not efficient, and that it was not lawful, reasonable or procedurally fair. These are matters of fact that must be brought out clearly in order to successfully impugn the decision.

21. The claim of breach of the right to fair administration action implicates a fundamental right entrenched in our Bill of Rights and, therefore, a serious constitutional violation if it were to be proved. However, the petitioner bears the evidential burden and has to prove actual violation or threat to violate the right. He says that they were being served in one section as opposed to different sections which is disputed by the 2nd respondent who argues that there was no way the finance department where the petitioner went could sign for and on behalf of the examination department and, therefore, the decision not to register him is not actual violation of fundamental rights.

22. The 2nd respondent denies that any forms were submitted for verification signing and stamping at the examination department to complete the registration process. There is, therefore, no independent evidence on behalf of the petitioner that the form was presented for registration; that the registration process was completed or that the process was being done at one counter where verification, signings and stamping was taking place.

23. The petitioner was not alone on that day at least from his own evidence that there were many students being the last day of registration. He could easily have called independent evidence even from a colleague who registered on the same day and in the same manner as the petitioner, to collaborate his evidence. That having not been done it is difficult for this court to accept the petitioner's sole evidence given that the 2nd respondent's exhibit, namely; **Students Guide to the Bar examination, (DEX1)** shows an elaborate step by step process that is to be followed during registration for the Bar examination including the department responsible in every stage.

24. It is also important to bear in mind that the burden of proof is always on the person who alleges facts to be what he says they were and wants the court to believe them. In this regard, Section 107(1) of the Evidence Act (Cap 80) provides that **"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."**, section 108 states that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side, and section 109 of the same Act provides that **"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person"**

25. In support of the above provisions, the Court of Appeal stated in **Jenifer Nyambura Kamau v Humprey Mbaka Nandi [2012] eKLR**, reiterated the words of section 108 that under section 108 of the Evidence Act, the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. The court also emphasized in **Kirugi & Another v Kibaya & 3 Others [1987] KLR 347** that the burden of proof is always on the balance of probabilities. To that extent, the petitioner has not discharged the factual burden of proof in so far as registration for the Bar examination is concerned.

26. The petitioner has also alleged that the 2nd respondent violated his right to fair administrative action. For the petitioner to prove this, he has to show that the 2nd respondent's actions were contrary to law, or that the 2nd respondent failed to consider relevant factors, or irrelevant factors were considered; or the decision it took was one which no reasonable person could have taken. Put differently, the petitioner was bound to show that the 2nd respondent's decision was fraught with illegality, procedural irregularity and or irrationality. In considering such a claim, the court is also to apply the principle of proportionality test that is; check whether the means adopted by the respondent in exercising its power rationally fit the legislative purpose; whether the 2nd respondent could adopt means that could not injure the petitioner more than was necessary and that the injury caused to the individual by the 2nd respondent's exercise of the power should not be disproportional to the benefit which would accrue to the general public.

27. To my mind, the petitioner has not shown how the right to fair administrative action was violated. All the petitioner has done is plead violation of the constitution and the Bill of Rights but made no attempt to prove the violation. The law is now settled that he who alleges violation of constitutional rights must plead with precision and show the rights violated, the manner of infringement and the provisions alleged to have been breached. ((See **Anarita Karimi Njeru v Republic [1979] KLR 154**, **Meme v Republic [2004] eKLR**).

28. The Supreme Court also observed in *Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR, that there is the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and that the manifestation of contravention or infringement plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

29. The petitioner himself stated that he went to the 2nd respondent's offices and was told that he was already late for the registration. He has attached copies of emails exchanged and they show that he was properly informed that he was late; the process was closed and, therefore, he could not be registered. That being the case, I do not see how his rights were violated.

30. For my part, upon evaluated the evidence, considered the constitution and the law, I do not find any substance in the petitioner's allegations that the 2nd respondent violated the constitution or the law or that it violated the petitioner's fundamental rights and freedoms.

31. From the factual position, I am unable to find anything to support the petitioner's case. This was not the first time the petitioner was registering for the Bar examination. He definitely knew the procedure to follow because he had registered for the same examination before. The form which is supposed to aid his case was not signed and stamped. There is, therefore, nothing to show that he completed the registration process. If he was given an unstamped and unsigned form, he had a duty to confirm that the form had been properly signed and stamped for purposes of registration because that was why he went there in the first place. Had he completed the process to leave the matter at the discretion of the 2nd respondent, the court would probably have viewed this matter differently.

32. Having given due consideration to this petition, evidence and the law, I am not satisfied as to the merit of the petition. Consequently, the petition dated 16th October 2018 is declined and dismissed with no order as to costs.

Dated, Signed and Delivered at Nairobi this 14th Day of November 2018

E C MWITA

JUDGE