



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION
PETITION NO. 13 OF 2016
DR. SUSAN BOSIRE..... PETITIONER
VERSUS
SERAH WEKESA WELIME.....1ST RESPONDENT
DR. HUSSEIN A. MOHAMOUD 2ND RESPONDENT
TECHNICAL UNIVERSITY MOMBASA 3RD RESPONDENT

JUDGMENT

1. The petitioner Dr. Susan Bosire on 24th March, 2016 filed a constitutional petition under rules 4 and 11 of the Constitution of Kenya (protection of rights and fundamental freedoms) practice and procedure rules 2013 and Articles 2, 21, 23, 24, 25, 27, 32, 33, 35, 36, 37, 38, 47, 48 and 50 of the Constitution of Kenya.
2. She also filed a verifying affidavit with her petition. In her petition, she states that she was the Dean, School of Humanities and Social Sciences, Technical University, Mombasa and also the successful candidate for the same post, in elections concluded on 21st March, 2016. She contends that on 6th January, 2016 the 1st respondent issued a memo announcing the election of Deans of faculties/schools for elections that were to be held on 21st March, 2016. On the election date there were 35 eligible voters, which number was confirmed by the returning officer, the 1st respondent. The petitioner states that there were two candidates for the position of Dean, School of Humanities and Social Sciences. She states in paragraph 8 of the petition that she gained 18 votes of the total votes cast and was duly elected and issued with a certificate by the 1st respondent; which was to be sealed the following day, the 22nd March, 2016. In paragraph 10, the petitioner states that on the said date, the 1st respondent declared there was a tie and ordered a re-run of the election. She claimed that her rights were violated by the said fact.
3. It is the petitioner's contention that she filed a petition on 23rd March, 2016 with the 3rd respondent as required, which petition was to be determined within 7 days, after which elections were to take place 14 days after determination of the petition.
4. The petitioner asserts that the 1st respondent in blatant violation of regulations, the rules of natural justice and the Constitution, issued a fresh notice of election to be held on 1st April, 2016. In paragraph 13 of her petition, the petitioner states that the notice was illegal, unlawful and irregular as there was no

tie and the list of eligible votes (sic) was in her custody and proper election was conducted. According to the petitioner, there was no list of eligible votes (sic) but only faculty staff were eligible.

5. In the petitioner's view, the 1st respondent's action was arbitrary, discriminative and punitive in nature, which violates her constitutional rights as enshrined in Articles 2, 21, 37, 38 and 47 of the Constitution of Kenya, 2010.

The petitioner prays for the following orders:-

i. The Court to declare the petitioner the duly elected Dean School of Humanities and Social Sciences in the election held on 21st March, 2016 as any other election called by the 1st respondent is a gross violation of her constitutional rights;

ii. A declaration that the notice calling for re-election or re-run by the 1st respondent without cause or reason is unconstitutional and void; and

iii. An order compelling the 1st and 3rd respondents to install the petitioner as the Dean, School of Humanities and Social Sciences of the Technical University of Mombasa and/or any other suitable relief that the court deems fit to grant plus costs of the petition.

6. The 1st respondent filed a replying affidavit on 25th April, 2016. The 3rd respondent filed its replying affidavit on 26th April, 2016 and a further affidavit on 12th July, 2016. The 2nd respondent filed his replying affidavit on 12th July, 2016.

7. Counsel for the petitioner filed his written submissions on 12th August, 2016 while that for the 1st and 3rd respondents filed his on 17th August, 2016. Counsel for the 2nd respondent informed the court that he was wholly relying on the 2nd respondent's written submissions.

8. The petitioner attached no documents whatsoever to the petition. She called one witness, Joshua Amwayi, who testified that he worked with Robert Aswani in the same department. He was aware that Mr. Aswani was away on leave of absence when the voting was conducted. He stated that he could not confirm that a form he was shown in court was the one used for proxy voting, as he does not conduct elections.

9. The witness stated that he had no direct concern with the elections but he was to confirm whether Mr. Aswani was an employee of the University and he confirmed so. When referred to the further affidavit of the 3rd respondent sworn by Stanley Mwajefwa Chwai, the witness confirmed that the instructions on the letter of 15th October, 2014 (sic) was that the salary be stopped and he be removed from the system.

10. On being cross-examined by Mr. Muyala the witness confirmed that Mr. Aswani's name was not on the list of eligible voters attached to the affidavit of Dr. Hussein Mohammed.

11. On re-examination, the witness said that he was not sure if there was a register of voters for the purpose of University elections. He was called by Sarah Wekesa Welime to confirm whether Mr. Aswani was still a member of staff and he confirmed so. The witness reiterated that Mr. Aswani sought leave of absence for 2 years from May, 2015.

PETITIONER'S SUBMISSIONS

12. Ms. Oyier, Learned Counsel for the petitioner submitted that she was relying on the Constitution of Kenya and the Fair Administrative Act to argue the petition. It was her contention that the petitioner won the elections by 18 votes against the 2nd respondent's 17 votes. She contended that the 1st respondent presented the petitioner with a certificate that was not sealed by the 3rd respondent. She stated that the said certificate was attached as exhibit 4 to the petitioner's affidavit. The petitioner was however

informed the following day that there would be a re-run as one of the voters, Robert Aswani, was not supposed to vote. Ms. Oyier cited regulation 4.2.2 of the election regulations that provides that an Assistant Lecturer does qualify to vote. She also referred to regulation 4.2.3 that lays down who can vote by proxy. Ms. Oyier submitted that the voter (Mr. Aswani) was on study leave which she equated to leave of absence. She referred to the letter marked **DRA1** attached to the 3rd respondent's further affidavit which states that Mr. Aswani was on leave of absence.

13. With regard to the issue of violation of the petitioner's rights, Counsel argued that there is an internal mechanism which was not followed. On 23rd March, 2016, the petitioner appealed against the decision that a re-run be conducted but the 1st and 3rd respondents did not give her an opportunity to appear before a panel to hear her grievances and she was not told why they were not addressed. Ms. Oyier prayed for the petition to be allowed.

1ST AND 3RD RESPONDENT'S SUBMISSIONS.

14. Mr. Oluga, Learned Counsel for the 1st and 3rd respondents submitted that Mr. Aswani was not an eligible voter for he was on leave of absence which he had been given vide a letter marked **DRA1** attached to the 3rd respondent's further affidavit. The notations on the letter were to the effect that Mr. Aswani was to be removed from the system and his salary stopped. Counsel stated that Mr. Aswani got a job at Pricewaterhouse Coopers Ltd. It was further submitted that Mr. Aswani's name was not on the register of voters, thus he was not eligible to vote. Mr. Oluga referred the court to paragraph 5 of the form for proxy voting which shows that the only persons allowed to vote by proxy are employees on sabbatical leave, study leave and sick leave. The petitioner's rights were therefore not infringed.

15. Counsel referred to rule 13 of the campaign rules which provides that if a candidate is dissatisfied with the elections he/she should appeal within 48 hours. On 23rd March, 2016, the petitioner appealed but rushed to court prematurely before a re-run could be held.

16. The Court's attention was drawn to the case of **Anarita Njeri Karimi vs The AG** [1979] KLR 154 where it was held that in a constitutional petition, specific violations must be pleaded. Counsel submitted that in the present petition, the pleading has been done generally. He added that the allegations by the petitioner on the award of a certificate have been rebutted in paragraph 16 of the 1st respondent's replying affidavit. He prayed for the petition to be dismissed.

2ND RESPONDENT'S SUBMISSIONS

17. Mr. Muyala, Counsel for the 2nd respondent supported the submissions of the 1st and 3rd respondents. He also relied on his client's replying affidavit. It was his contention that the 2nd respondent did not infringe the petitioner's constitutional rights. He stated that due process should have been followed and as such the petition is premature since all avenues available have not been exhausted.

ANALYSIS AND DETERMINATION

The issues for consideration and determination are:-

- i. Whether the present petition is incompetent; and
- ii. If the petitioner exhausted all the administrative remedies available before filing this petition in court.

COMPETENCY OF THE PETITION.

18. The Constitution of Kenya (protection of rights and fundamental freedoms) practice and procedure rules, 2013 commonly known as the Mutunga rules provide as follows in rule 11:-

“1. The petition filed under these rules may be supported by an affidavit.

2. If a party wishes to rely on any document, the document shall be annexed to the supporting affidavit or the petition where there is no supporting affidavit.” (emphasis added).

19. In the instant petition, the petitioner did not file an affidavit to support the petition other than a verifying affidavit. She did not attach any documents to her petition. This renders her petition to be an empty shell that is bereft of life. When submitting before this court, the petitioner’s Counsel referred to some documents which were attached to an affidavit that had been filed in support of the petitioner’s Notice of Motion dated 24th March, 2016. Those documents were filed in support of the said application in which she sought injunctive and conservatory orders against the respondents. That affidavit was not filed in support of the petition. The petition therefore lacks affidavit evidence or documents to support the allegations put forth by the petitioner in her petition dated 24th March, 2016.

20. In the case of **Jackson Maina Ngamau vs Ethics & Anti-Corruption Commission & 3 Others** [2015] eKLR, Muriithi J. stated thus:-

“I would concede that there will be cases where the dispute in the petition may be determined on the basis of submissions on law where the facts are not in dispute or where the facts in issue are matters of public notoriety as to attract judicial notice without proof. In such situations there would be no need for an affidavit in support of a petition. However, in cases such as the present where serious charges of unprofessional conduct and fraudulent accounting are made such allegations must consistently with the fair hearing principles be supported by an affidavit so that the defendant knows the case he has to meet.” (emphasis added).

21. It is thus my finding that failure by the petitioner to attach any documents to her petition or to file a supporting affidavit alongside her petition to attach any documents she wished to rely on, rendered her petition incompetent. The respondents did not raise a preliminary objection on the said issue. They based their arguments on the documents attached to the affidavit in support of the Notice of Motion dated 24th March, 2016. I would have struck out the petition at this point but I deem it necessary to consider the other issue that needs to be determined.

ADMINISTRATIVE REMEDIES

22. It was the petitioner’s argument that she filed a petition with the 3rd respondent on 23rd March, 2016 after the 1st respondent who was a returning officer announced that there was a tie in the elections of 21st March, 2016. Although she contends that she won the elections and was announced the winner after which she was given an unsealed certificate on 21st March, 2016 to confirm this, the said certificate was not attached to her petition. Her assertion that she was declared the winner cannot be proved by an averment in her petition without being supported by evidence.

23. Rules 12, 13 and 14 of the campaign rules of the 3rd respondent, Technical University of Mombasa (TUM), provide as follows:-

“12. All appeals of irregularity during voting shall be in writing to the chairman TUMEC within forty eight (48) hours from the time election results are officially declared.

13. The chairman TUMEC shall then constitute a panel that shall investigate all issues raised and recommend to the vice chancellor whether to uphold the results or call for fresh elections within forty eight (48) hours after receiving the official complaint.

14. Fresh elections shall be called within two (2) weeks after the election results are officially declared.”

A copy of the 3rd respondent’s campaign rules was attached and marked as exhibit SWW5 to the 1st

respondent's affidavit. It shows that the petitioner signed the said document and committed to faithfully abide by the rules and regulations.

24. The exhibit marked as **SWW6** attached to the 1st respondent's affidavit is the petitioner's vote score form showing that she garnered 17 votes. The exhibit marked **SWW6b** is the 2nd respondent's vote score form showing that he also garnered 17 votes. The ballot paper reconciliation form marked as **SWW7** to the 1st respondent's replying affidavit shows that 35 ballot papers were received and that they were all cast. There was one spoilt ballot paper.

25. The 1st respondent in paragraphs 10 and 11 of her affidavit deposes that the petitioner's argument is that she got 18 votes due to the proxy vote that was cast in her favour. According to the 1st respondent, she considered the vote cast by proxy as a spoilt vote because the person who cast the said vote in the petitioner's favour was not eligible to vote. He was not in the register of voters marked as **SWW2** and attached to the 1st respondent's replying affidavit.

26. The 3rd respondent in its further affidavit sworn by Stanley Majefwa Chwai and filed in court on 12th July, 2016 deposes in paragraphs 6 through to 11 that the person who cast the proxy vote, Daniel Robert Aswani was on leave of absence, consequently, his name was removed from the 3rd respondent's Human Resource system. The deponent further states that although Mr. Aswani sought leave of absence to pursue his Phd studies, it turned out that he gained employment at Pricewaterhouse Coopers Ltd. Upon investigations being launched by the 3rd respondent on how he got employed elsewhere while still an employee of the 3rd respondent, he resigned.

27. It is however evident from the email of 7th April, 2016 by Elizabeth Ng'ayu of Pricewaterhouse Coopers Ltd., that Mr. Aswani joined the said company on 1st April, 2016 as a full time employee. His employment in the said company occurred after the elections of 21st March, 2016. I therefore find the information about his employment elsewhere when he was on leave of absence of no relevance to the present petition. The issue that is of relevance is if an employee on leave of absence is entitled to vote as Mr. Aswani did.

28. The 2nd respondent basically reiterated most of what was contained in the 1st respondent's affidavit that there was a tie between him and the petitioner during the elections of 21st March, 2016 and that Robert Aswani's name was not on the voter's register.

29. The document marked as **SWW4** attached to the 1st respondent's affidavit giving guidelines on how the elections were to be conducted provides in clause 4.2.3 that those on **study leave** can vote by proxy. Can study leave be interpreted to be the same as leave of absence? This court is of the view that these are some of the questions that would have been answered by a panel that would have been constituted by the Chairman of the 3rd respondent to hear the petitioner's petition which she filed on 23rd March, 2016. The petitioner however overshot the laid down administrative process by filing this petition on 24th March, 2016. I am in agreement with the submissions of Counsel for the 1st, 2nd and 3rd respondents in that regard. This court will not step into the shoes of the 3rd respondent by deliberating and making a determination on whether leave of absence equates to study leave, or if Mr. Aswani had the right to vote by proxy while on leave of absence. This court is of the view that due administrative process should be exhausted first.

30. In the case of **Geoffrey Muthinja & Another vs Samuel Muguna Henry & 1756 Others** [2015] eKLR, the Court of Appeal had this to say:-

“..... It is imperative that where a dispute resolution mechanism exists outside the courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be there for a last resort and not the first port of call the moment a storm brews within churches as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that

there is 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 mechanism in place for resolution outside of courts. This accords with article 159 of the Constitution which commands courts to encourage alternative means of dispute resolution.” (emphasis added).

31. Following the analysis in this judgment, it is my finding that this petition is premature. The petitioner's petition with the 3rd respondent needs to go through an incubation process before she can move the court on the validity or otherwise of the election held on 21st of March, 2016.

32. The end result is that the petitioner has not satisfied this court that she is entitled to the orders sought. Furthermore, as submitted by Counsel for the 1st and 3rd respondents, the petitioner failed to specify how the constitutional provisions she cited were violated. Her petition lacks precision as required in constitutional petitions. Refer to **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others** [2013] eKLR.

33. The upshot of the foregoing is that the petition dated 24th March, 2016 is hereby struck out with costs to the 1st, 2nd and 3rd respondents.

DELIVERED, DATED and SIGNED at MOMBASA on this 9th day of February, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms. Oyier for the petitioner

Mr. Oluga for the 1st and 3rd respondents and holding brief for Mr. Muyala for the 2nd respondent

Oliver Musundi - Court Assistant