



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL PETITION NO 166 OF 2016

In the matter of alleged contravention of Articles 10 (2), (c), 47 (c) (b) of the Constitution of Kenya

And

In the matter of alleged contravention of section 4 (1), 5 (1) of the Fair Administrative Action Act, 2015

Between

Isaiah Ondiba Bitange.....Petitioner

And

Institute of Engineers of Kenya.....Respondent

CONSOLIDATED WITH

PETITION NO. 224 OF 2016

Stephen Nyakondo Nyangau & Hillary Nyaaga.....Petitioners

and

Eng. Jane Mutulili & Eng. John Kipchumba TanuiInterested Parties

and

PETITION NO. 182 OF 2016

BETWEEN

James Mwangi & Henry Ndugah.....Petitioners

And

Institute of Engineers of Kenya.....Respondent

JUDGEMENT

This judgement determines three consolidated petitions, namely petition numbers **166** of 2016, **224** of

2016 and **182** of 2016 which were consolidated on 28th June 2016.

After the consolidation, the parties were listed as **Isaiah Ondiba Biatange** (first Petitioner), **Stephen Nyakondo Nyangau** (second Petitioner), **Hillary Nyaaga** (Third Petitioner), **James Mwangi** (Fourth Petitioner) and **Henry Nduhah** (Fifth Petitioner) while the Respondents are listed as **Institution of Engineers of Kenya** (First Respondent), **Engineer Jane Mutulili** (Second Respondent) and **Engineer John Kipchumba Tanui** (Third Respondent).

For the sake of clarity, I propose to summarize the facts upon which each petition is premised, and the reliefs sought in each petition because they vary.

Isaiah Ondiba Nitange, the first petitioner averred that on 8th March 2016, the Cabinet Secretary for Transport and Infrastructure vide a Gazette Notice number **2702** appointed the persons listed in paragraph one of the said petition to serve as members of the Engineers Board of Kenya for three years and vide Gazette notice number **2701** the Cabinet Secretary appointed a one **Dionysius Maina Wanjau** to serve as the chairperson of the Engineers Board for three years and that the board performs a crucial function, hence any decision made as provided under Article 10 (2) (c) of the constitution ought to be made in a transparent and accountable and participatory manner, hence the nominations forwarded to the cabinet secretary were made arbitrarily, and without due regard to the law, procedure and contrary to article 10 cited above and article 47. The above averments clearly show the actions complained of are attributed to the Cabinet Secretary and the reliefs sought in the petition are against the cabinet secretary who is not a party to these proceedings. Clearly, petition number **166** of 2016 seeks orders against the cabinet secretary and not the Respondents. This raises a crucial question whether or not the petition discloses a case against the Respondents.

I am not persuaded that the petition discloses any constitutional issues against the Respondents to warrant the intervention of this court. Prayer (a) of the petition seeks a declaration that "the Respondents actions are unconstitutional." This prayer hangs in the air and there are no allegations against the Respondents in the petition. The same applies to prayers (d) in the petition. Does this petition disclose a reasonable cause of action against the Respondents?

A cause of action was defined by **Obi Okoye** — Essays on Civil Proceedings,[\[1\]](#) thus — "By a cause of action is meant any facts or series of facts which are complete in themselves to found a claim or relief."[\[2\]](#) In the case of *Drummond Jackson v. British Medical Associations & Ors.*,[\[3\]](#) Lord Pearson stated as follows:-

"..... the expression "reasonable cause of action"[\[4\]](#)No exact paraphrase can be given, but I think "reasonable cause of action" means a cause of action with some chance of success when..... only the allegations in the pleading are considered, if it is found that the alleged cause of action is to fail, the statement of claim should be struck out."

The Supreme Court of Nigeria in the case of *Oshoboja v. Amuda & Ors.*[\[5\]](#) held that a reasonable cause of action means a cause of action with some chances of success, when only the allegations in the Statement of Claim are considered. Our law is the law of the practitioner rather than the law of the philosopher. Decisions have to draw their inspiration and their strength from the very facts which framed the issues for decisions.

The following passage from the *Halsbury's Laws of England*[\[6\]](#) at paragraph 73 is relevant:-

"In judging the sufficiency of a pleading for this purpose, the court will assume all the allegations in it to be true and to have been admitted by the other party. If the statement of claim then shows on the face of it that the action is not maintainable or that the absolute defence exists, the court will strike it out. Its pleading will not however be struck out if it is merely demurrable, it must be so bad that no legitimate amendment could cure the defect. The jurisdiction to strike out a pleading ought to be exercised with extreme caution and only in obvious cases...."

Useful guidance can be obtained from *Bullen and Leake*^[7] on nature of pleadings where the learned authors state as follows:-

"the system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which the parties can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two fold purposes of informing the court what are the issues between the parties which will govern the interlocutory proceedings before he trial and which the court will have to determine at the trial."(Emphasis added).

The purpose of pleadings is to enable the defendant to know the case he had to meet so that he could properly plead his defence with the result that the issues would be sufficiently defined to facilitate the appropriate questions for decision to be resolved. This purpose cannot be achieved unless the words are pleaded with sufficient particularity. Pleadings do not only define the issues between the parties for the final decision of the court at the trial; they manifest and exert their importance throughout the whole process of the litigation. They contain the particulars or the allegations of which further and better particulars may be requested or ordered, which help still further to narrow the issues or reveal more clearly what case each party is making. They act as a measure for comparing the evidence of a party with which he has pleaded. They determine the range of admissible evidence which the parties should be prepared to adduce at the trial.

The pith and marrow of it is that where on a consideration of only the allegations in the pleading the court concludes that a cause of action with some chance of success is shown then that pleading discloses a reasonable cause of action. Person, J in *Drummond Jackson v British Medical Association*,^[8] the definition of a cause of action was determined as **an act on the part of the Defendant which gives the Plaintiff his cause of complaint.**

The question that begs for an answer is, does the first petitioners petition disclose a *prima face* case as against the Respondents? The complaints raised are against actions attributed to the Cabinet Secretary. The Reliefs sought likewise are directed against the Cabinet Secretary. The two reliefs against the Respondents are not supported by the averments in the petition. Worse still, No amendment was brought even after the first Respondent raised this issue in their response and addressed it in their submissions. I'm left with no choice but to dismiss petition number **166** of 2016 for not disclosing any cause of action against the Respondents.

I am aware that courts are enjoined under article 159 (d) of the constitution to administer justice without undue regard to procedural technicalities. However, before me is a petition which raises complaints against the cabinet secretary, and even seeks reliefs against the cabinet secretary who is not a party to the case. The petition makes no allegations against the Respondents nor are any reliefs sought against them. Precise formulation of the applicant's rights in the initiating document is of central importance. This is because the pleading is the source from which many other consequences flow in the life of the litigation from filing at first instance through to final resolution by the Court. The pleading is used as the reference point, the calling of evidence, the relevance and admissibility of evidence, the closing arguments, the reasons for judgments and the availability of arguments on appeal. At all of these points, the following questions arise: "Was this issue pleaded?" and "How was this issue pleaded?" The question is **not** the loose one whether the argument could possibly be raised on the evidence at the conclusion of a hearing but whether the issue has been pleaded. I reiterate the centrality of proper pleading to identify the real issues in dispute.

The general rule is that relief granted is confined to those issues available on the pleadings. This rule exists for a variety of reasons. *First*, a properly drafted pleading ensures the basic requirement of procedural fairness, namely, that ambush at trial is avoided and a party should have the opportunity of knowing the case against him or her and being able to take steps to meet it, in a timely manner.^[9]

Secondly, it defines and identifies the issues for decision. That process enables the relevance and admissibility of evidence to be determined at the trial. Disputes over evidence, particularly as to

relevance, are determined by the pleadings. It is necessary to ensure that the evidence relates to the pleadings. Final submissions for the parties are determined by the pleadings as originally framed or as finally formulated after amendment at trial. Usually, counsel will not be allowed to address on a matter which has not been pleaded and the Court will ignore such submissions in many circumstances because there is a potential for unfairness. The Court will usually assume that pleadings are formulated on instructions from the party.

Thirdly, by narrowing the dispute to definite issues, a properly drafted and appropriately succinct pleading will diminish the expense and delay involved in court proceedings.

Finally, a properly drafted pleading informs the Court of the issues involved in the case and dictates the issues that the Court may consider in both its original and appellate jurisdictions. When the Court comes to give judgment, the starting point for approaching and defining the issues is the pleadings. The pleadings can permeate the whole course of a piece of litigation. When an application is sought for leave to appeal or when an appeal is filed, the Court may take the view that, where an issue has not been pleaded in the hearing below, it therefore cannot be raised on appeal, even though it may have had some merit had it been properly pleaded. This refusal is often made on the ground of the basic unfairness caused because the other side may well have failed to adduce relevant and critical evidence which bears on the proposed new matter or may have refrained from pursuing a line of attack in cross-examination.

The pleadings represent the essential structure of the litigation to which reference by both the Court and the parties is made. Therefore, the need for clear, direct and unambiguous allegations and defences, and the identification of the real issues requiring resolution cannot be over stressed.

The second and third petitioners, **Stephen Nyakondo Nyangau** and **Hillary Nyaaga** (petitioners in number **224** of 2016) aver that the Respondent denied them a chance to be heard, that during the 2016 elections they were denied the chance to defend themselves and to hold duly elected positions, that they were accused of voting twice, that the first Respondent through their scrutineers committee proceeded to select the second and third Respondents in the said petition as duly elected officials, that the first petitioner in the said petition lost his position to the second Respondent in the said petition who allegedly scored only 180 votes against his 323 while the second petitioner in the said petition scored 333 but lost to the second petitioner who garnered 218 votes.

They sought *inter alia* orders that the Respondents be compelled to produce ballot papers and scrutineers reports and any documents relating to the elections, that the declaration of the above named persons as official be declared illegal, that their rights under Article 47 of the constitution were violated, an injunction stopping the Gazettement of the said persons as duly elected officials, a declaration that section 5 of the constitution of Engineers of Kenya (IEK) amendments 2015 pertaining to elections and transfer of members is unconstitutional for being "inconsistent with the spirit of the constitution." article 47 & 50 of the constitution and an order for compensation.

On record in response to the above allegations is a further affidavit of **Michael Okonji**, the president of the Respondent filed on 7th June 2016 attaching the scrutineers report dated 20th April 2016, an election register and a further replying affidavit in Pet no. **224** of 2016 attaching *inter alia* a notice advertising the said annual general meeting, circular to all the members dated 21st January 2016 and confirmation of postage of ballot papers to members. In the said further affidavit, Michael Okonji stated that **Hillary Nyaanga** (the 3rd Petitioner) offered himself for elections as vice president but the scrutineers determined that he voted twice vide original ballot paper number **204047** and a photocopy of the same ballot paper and that **Stephen Nyakondo Nyangau** the second petitioner offered himself as a member of the council but also voted twice on ballot paper number **204674** and both were disqualified. Also on record is a Replying affidavit by Okonji filed in Pet No **166** of 2016 insisting that the conduct of the elections complied with its articles.

In my view, the assertion that the two petitioners were disqualified for double voting, a serious electoral malpractice were not rebutted. The disqualification on such serious allegations has not been shown to be unreasonable or illegal. The ballot numbers have been provided. Clearly, such serious allegations ought to

have been sufficiently rebutted. All ballot papers were serialized. The two petitioners did not demonstrate that the said ballot papers were not the ones issued to them. The alleged violation of constitutional rights have not in my view been proved at all nor have the two petitioners adduced sufficient evidence to warrant the court to grant the reliefs sought. I find that the second and third petitioners were properly disqualified on account of double voting and on this ground alone I decline their petition.

The third and fourth petitioners **James Mwangi** and **Henry Ndugah** are the Petitioners number **182** of 2016. They aver that there were complaints of persons who did not receive ballot papers in time so as to participate in the elections. To me, this is a generalized allegation. In my view, it would have been prudent to name the persons in question. They also allege that after several members raised the concern "*it became apparent that may be not all eligible voters might have timely received the ballot paper to cast their votes.*" Again the use of the words "*it became apparent may be not all eligible voters might have timely received the ballot paper to cast their votes*" is in my view too speculative. It would have been prudent to disclose the person(s) alleged not to have received the ballot papers. Even one or two could have sufficed. Allegations of electoral malpractices must be pleaded with sufficient clarity and proved to the required standard.

It is also alleged that the ballot papers were only sent to 900 members out of a membership of 2000. Again this is too speculative. It would have been prudent to give the number of eligible voters who did not receive their ballot papers rather than issue blanket averment. Alternatively, it was necessary to demonstrate that the 2000 were eligible voters but did not receive their ballots or specify the ones who did not receive their ballots. Being a member and being eligible to vote are two different things.

The petitioners stated that the elections were flawed, not free and fair, and that the Respondent violated Articles 10 and 47 of the Constitution. It was necessary to provide evidence to prove the unfairness and also demonstrate how articles 47 applies in election disputes. Similarly, article 10 was also invoked. I have examined the elections in question and the declaration of the results and the entire process and I cannot see how article 10 applies. It is trite law that allegations of violation of constitutional rights must be specifically pleaded and proved. This requirement has not been achieved in the present case.

On record in file numbers **182** of 2016 and No. **166** of 2016 is the Replying affidavit of **Michael Okonji** who averred that the Respondent was truly faithful to the constitution of the Respondent and the bylaws, that it published a list of the vacancies, requested for nominations and sent out 999 ballot papers to eligible members with a returnable date. That ballot papers were sent by registered post and published in a local daily and availed duplicate papers to members who specifically stated that they did not receive the originals and also appointed independent scrutineers and that persons elected assumed office and that the Respondent never received any written complaints. He also avers that the matters raised are not justiciable nor does article 47 (3) (b) apply nor relevant, that the petitioners allegations are not specific and that the petition before the court is incompetent. I find nothing in the petitioners evidence to rebut the above averments.

In an affidavit filed on 13th June 2016, the fourth and fifth petitioners aver that upon scrutinizing ballot papers, it was "*apparent*" that ballots that were cast had actually not been sent by post mail, and that as for the votes which were cancelled on allegations that the voters voted twice, the original ballot paper that was never received by the voter voted for a different candidate compared to the duplicate, that some graduate members did actually vote, that some voters who reside out of the country actually voted, that some voters had not provided postal codes, yet they received ballot papers, that some ballot papers were sent as late as 3rd March 2016, that there was no evidence that 999 ballots were sent as alleged. Again, the above are generalized statements. The use of the word "*apparent*" in my view does not help the petitioners case but destroys it. Pleadings and evidence cannot sustain a case if they are premised on mere speculation. The court is interested in reasonable possibilities and sufficient proof of the facts complained of having occurred not possibility of having occurred.

Its trite law that an election can only be declared invalid if irregularities in the conduct of the elections have been such that it could not be said that the election had been so conducted as to be substantially in accordance with the law or if the irregularities had affected the results. The petitioners have not

demonstrated that the results could have been otherwise had the alleged irregularities not been there. [10] Accordingly, where breaches of the election rules, although trivial, affect the result, that by itself is enough to compel the court to declare the election void even though it had been conducted substantially in accordance with the law as to elections. Conversely, if the election had been conducted so badly that it was not substantially in accordance with the election law it was vitiated irrespective of whether or not the result of the election has been affected.

If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected, or not. If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls – provided that it did not affect the result of the election. There is no material before me to demonstrate that the results could have been different. In *John Fitch v. Tom Stephenson & 3 Others*, [11] the court upholding the will of the people when it was held:-

“The decided cases, including those which Lord Denning considered in Morgan –vs- Simpson, established that the courts will strive to preserve an election as being in accordance with the law, even where there have been significant breaches of official duties and election rules, providing the results of the election was unaffected by those breaches. This is because where possible, the courts seek to give effect to the will of the people...”

I reiterate that the burden of Proof lies with the petitioners and I am afraid the obviously speculative evidence tendered does not discharge this burden. As observed above, only generalized allegations were made which are too speculative and the court cannot attach any weight to such speculations.

In my view the petitioners failed to discharge the burden of prove to the required standard. All cases are decided on the legal burden of proof being discharged (or not). **Lord Brandon** in *Rhesa Shipping Co SA vs Edmunds* [12] remarked:-

“No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take.”

Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by **Rajah JA** in *Britstone Pte Ltd vs Smith & Associates Far East Ltd* [13] :-

“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”

The starting point is that *whoever desires* any court to give *judgement* as to any legal right or liability, dependant on the existence of fact which he asserts, *must prove* that those facts exist. 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 burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of probabilities. In the case of *Miller vs Minister of Pensions*, [14] **Lord Denning** said the following about the standard of proof in civil cases:-

‘The ...{standard of proof}...is well settled. It must carry a reasonable degree of probability....if the evidence is such that the tribunal can say: ‘We think it more probable than not’ the burden is discharged, but, if the probabilities are equal, it is not.’

In my view the reason for this standard is that in some cases, the question of the probability or improbability of an action occurring is an important consideration to be taken into account in deciding whether that particular event had actually taken place or not. It is a fundamental principle of law that a

litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. The standard of proof, in essence can loosely be defined as the quantum of evidence that must be presented before a court before a fact can be said to exist or not exist.

In my view, absence of express provisions in the first Respondents constitution or the Engineers Act providing for a mechanism of challenging election does not make the said constitution or the above act unconstitutional. What is relevant is the law under which the first Respondent is registered. The parties did not specify whether it is registered under the Societies Act or not. In any event an aggrieved parties has a right to move to court.

In conclusion, as pointed earlier, this is a constitutional petition and the petitioners have to discharged the burden of proof. In view of my analysis of the facts of this case and the law as shown above, I find that the petitioners have failed to prove their case against all the Respondents to the required standard. The up short is that this petition is dismissed the costs to the Respondents.

Orders accordingly. Right of appeal 30 days.

Dated at Nairobi this 2nd day of **March**, 2017

John M. Mativo

Judge

[1] Page 224 Art 110

[2] *Dyson v. Attorney General* (1911) 1 K.B. 410 @ 419 - per Multon, L.J. and Bullen & Leak & Jacobs Precedents of Pleadings 12th Edition page 142

[3] {1970} 1 WLR 668 @ 696 C.A.

[4] To which Lindley, M.R. called attention in *Hubbeck & Sons Ltd. v. Wilkenson, Hey wood & Clark Ltd.* (1899) 1 Q. B. 86 pp. 90-91.

[5] {1992} 7 SCNJ. (Pt. II) 317 @ 336,

[6] **4th Edition, Volume 36**

[7] 12th Edition, page 3

[8] **{1970} 2 WLR 688** at p. 676

[9] See, for example, *Dare v Pulham* (1982) 148 CLR 658 at 664 per the Court; *Banque Commerciale SA en liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279 at 286-287 per Mason CJ and Gaudron J; *McKellar v ContainerTerminal Management Services Pty Ltd* (1999) 165 ALR 409 at 417 per Weinberg J.

[10] *Morgan v. Simpson* (1974) 3 ALL ER 722

[11] QBD (2008) EWHC 501

[12]{1955} 1 WLR 948 at 955

[13]{2007} 4 SLR (R) 855 at 59

