



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 2 OF 2017

IN THE MATTER OF AN APPLICATION UNDER ARTICLES 10, 19 & 22 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF THE CONTRAVENTION AND FURTHER THREATENED CONTRAVENTION OF ARTICLES 10, 35, 37 AND 47 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF THE CONTRAVENTION AND FURTHER THREATENED CONTRAVENTION OF ARTICLES 1, 35, 37, AND 47 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010, AND COMMISSION FOR UNIVERSITY EDUCATION ACT NUMBER 42 OF 2012 OF THE LAWS OF KENYA

SOLOMON CHEMJOR.....1ST PETITIONER

WILLIAM TENGECHA.....2ND PETITIONER

JACOB CHEMJOR.....3RD PETITIONER

CHEBON CHEBET.....4TH PETITIONER

JACOB MITEI.....5TH PETITIONER

KIPRUTO KIMOSOP.....6TH PETITIONER

JOSHUA CHEPKUTO.....7TH PETITIONER

SAMWEL BUNGEI.....8TH PETITIONER

VERSUS

THE COMMISSION FOR

UNIVERSITY EDUCATION.....RESPONDENT

AND

RICHARD KIPKEMBOI KIPKUNA.....1ST INTERESTED PARTY APPLICANT

WILSON KIBET ROTICH.....2ND INTERESTED PARTY APPLICANT

JULIUS KIPLAGAT CHELEGO.....3RD INTERESTED PARTY APPLICANT

JUDGMENT

The Petition

1. The Petitioners filed a petition dated 11th July 2016 at the High Court at Eldoret, which was subsequently on 7th February 2017 transferred to the High Court at Kabarnet where it was heard by way of submissions on 21st March 2017 and judgment was reserved. The petitioners complained that the respondent's decision to convert the Baringo Training Institute at Kamgoen area of Kapropita Ward in Baringo County into a University was made without public consultation in breach of the petitioner's right to fair administrative action. The Interested Parties who are residents of Baringo County who supported the respondent's decision were joined in the suit by an order of the Court with consent of the Parties made on 15th August 2016.

2. The petition is principally a claim on fair administrative action with consequential specific reliefs as follows:

“YOUR PETITIONERS THEREFORE HUMBLY PRAYS FOR

(a) A declaration that the actions of the respondent to acquire and/or convert Baringo technical College into a university is unlawful, arbitrary, unreasonable, contrary to good governance and without regard to the petitioners legitimate expectation for fair administrative action.

(b) A permanent injunction restraining the respondent by itself and its employees or servants howsoever from acquiring and/or converting Baringo Technical College into a university.

(c) A declaration that the acquisition and/or conversion of Baringo technical college into a university is unlawful, unreasonable and unconditional in so far as the same purports to convert the technical college set up for technical courses into a university.

(d) The honourable court do issue such other orders and give such further directions as it may deem fit to meet the ends of justice.

(e) The costs of the petition be awarded to the petitioners.”

3. The petitioners' case is set out in the facts set out in the Petition as follows:

“THE FACTS

(i) THAT the petitioners are Kenyans and residents of the County of Baringo.

(ii) THAT Baringo Technical College was established in 1985 by the petitioners and residents of Baringo County who donated land and other resources in kind for its construction for the benefit of their children who could not make it to university.

(iii) THAT after the construction of the college it did not start its operations immediately due to lack of funds to purchase equipment and/or learning materials.

(iv) THAT on or about September, 2012, the Government posted teachers to the college and the institution stated operating.

(v) THAT the college has since admitted students to undertake various Technical courses which are

beneficial to the community at large and at the moment it has 250 students.

(vi) *THAT the government has further invested heavily in the institution by donating equipment worth millions of shillings to enable the learners acquire technical skills.*

(vii) *THAT well wishers have also donated equipment and computers to the college for the benefit of the students and the community.*

(viii) *THAT after the establishment of the 47 counties it was seen fit by the central government that a university be established and/or set up in the counties without a university and Baringo County being one of the counties without a university benefited from the said directive.*

(ix) *THAT on/or about 24th July 2015, the respondent did inspect Baringo Technical College without the petitioners knowledge and made the decision to acquire and/or convert it into a university without giving them an opportunity to present their views.*

(x) *THAT the county education board, Baringo county assembly and the local leaders had deliberated on the site of setting up a county university and unanimously agreed that Chemeron was the right site of the university, however for unexplained reason the respondent is determined at acquiring and/or converting Baringo Technical into the county university.*

(xi) *THAT though the respondent was given the mandate to inspect the various sites and facilities proposed by the county, one of them being Baringo Technical College and consult the resident about its suitability and/or availability, the respondent has failed to consult and/or give reason for choosing Baringo technical College as the County University.*

(xii) *THAT there was a suitable site offered by the community for the establishment of the County university at Chemeron Baringo South with an area of 1100 acres the respondent appears fixated and/or determined to set up a county university at Baringo Technical College to the petitioner's detriment and in complete disregard to the County Assembly motion that identified Chameron as the location of the County University.*

(xiii) *THAT the respondent's decision and intended action will deprive the petitioners of a Technical college.*

(xiv) *THAT the respondent has refused and/or declined to accord the petitioners a right to a fair hearing and/or explain to them the reason for the conversion and/or acquisition of the college.*

(xv) *THAT the acquisition and/or conversion of the college into a university without the petitioners [participation is unlawful, unreasonable and unconstitutional in so far as the same purports to convert the technical college set up for technical courses into a university.*

(xvi) *THAT it will be in the interest of justice to grant the reliefs sought herein.*

GROUNDS FOR RELIEF

I *The intended acquisition and/or conversion of Baringo Technical College into a university contravenes the petitioner's right to a fair hearing as provided in the constitution.*

II *The intended or imminent acquisition of the college is contrary to public, policy arbitrary, unlawful and disregard to due process of the law.*

III *The petitioners' legitimate expectation to fair administrative action has been threatened by the respondent.*

IV *The petitioners are therefore apprehensive that unless the honourable court intervenes the*

petitioner's rights as enshrined in the constitution will be infringed.”

4. The facts were supported by affidavit of the 1st Petitioner as follows:

“SUPPLEMENTARY AFFIDAVIT OF SOLOMON CHEMJOR DATED 19TH SEPTEMBER, 2016

6. *THAT the residents of Baringo County were never consulted about the location of the County University, save that the County leaders had unanimously agreed that the County University ought to be at Chemeron. Annexed hereto and marked “SC3” is a copy of the county leadership meeting minutes of 24th August 2015 confirming Chemeron as the county university site.*

7. *THAT the stakeholders meeting purportedly held on 14th August 2015, was a locational development committee meeting hence it did not meet the threshold of a county consultative meeting. Further the invitation letter marked as annexure “R2” in the interested parties replying affidavit does not contain any agenda for the meeting and was meant for a chosen group.*

8. *THAT Baringo South Community offered 1100 acres for the establishment of a county University whose location the county leadership have unanimously agreed on contrary to the interested parties contention that they are not aware of the 1100 acres.*

9. *THAT the articles of the constitution we cited in our supporting affidavit are not quoted out of context as alleged by the respondent. As a matter of fact the respondent made the decision to acquire and/or convert the Technical college into a university, then they were duty bound to consult and/or allow us to present our views.*

10. *THAT there has never been any meeting organized by the respondent and/or the county Government in respect of the County University, the purported if any were locational meetings held to iron out issues affecting a specific location contrary to the respondent's contention that we participated in meetings where our views were considered.*

11. *THAT additionally the respondent has never put in motion any mechanism for public participation, consultation and/or taken into consideration views presented to it contrary to its allegations in paragraph 5 of the replying affidavit that mechanisms were put in place to receive public views.*

12. *THAT the respondent did not consult the residents, Leaders and/or the Board of Governors of Baringo Technical College contrary to its allegations in paragraph 9 of the replying affidavit the consultation was sought from the residents and leaders.*

13. *THAT I am reliably informed by the Board of Governors of Baringo Technical College which information I verily believe to be true that the Board and/or the management were never consulted and/or involved in the purported acquisition and/or conversion of the college.*

14 *THAT it is manifestly apparent that though the respondent admits that public participation and consultation is important and necessary they did not carry it out.*

15 *THAT the respondent has been manipulated by third parties believing that Baringo technical college is the preferred choice for setting up a county university and has sufficient land and infrastructure for a university yet from its annexure marked “PDS 5” it has only 7 hectares.*

16 *THAT further the purported resolutions marked “PDS 6” and 14” allegedly from the county leadership is a forgery and is not a true reflection of what transpired on 24th August 2015 on the county university.*

17 THAT no public participation has ever been carried out by the respondent contrary to its allegation in paragraph 22 of the replying affidavit that public participation was carried out.

18 THAT all the discussions if any alluded to by the respondent were discussions initiated by interested parties on the possibilities of setting up a University College in Baringo and more so Chemeron and not discussions initiated by the respondent hence it is wrong for the respondent to turn around and purport to own them.

19 THAT we come from various parts of Baringo County contrary to the respondent's contention that we come from two villages in Kapropita Ward.

20 THAT though the respondent has consistently maintained that public participation was carried out for one year, none was ever done. In fact what the respondent is calling public participation is actually procedural correspondence between itself and Egerton University."

The Responses

5. The respondent filed a replying Affidavit sworn by its Commission Secretary/CEO on 19th August 2016 in response to the Petition setting out its case as follows:

"REPLYING AFFIDAVIT OF PROF DAVID SOME

26. THAT in response to the facts alleged in paragraph (i) – (xvii) I wish to state as follows that public participation was done and all facts surrounding Baringo Technical College were taken into consideration, that is,

(a) The parent ministry being Ministry of Education, state Department of Technical and Vocational Training has given its approval on subjects to the concern, ideas mandate of Technical Training which the college was providing being taken into consideration.

(b) The commission has exclusive mandate to advise the Cabinet Secretary on elaboration of a college into a university college in terms of technical evaluation.

(c) Regarding the choice of Baringo Technical College as the University College all the stakeholders including the Petitioners were informed by relevant parties of the suitability and had hitherto participated.

(d) My readings of schedule IV of the constitution confirms that university education is a national function and as such it is not bound by the decision of the County Government at all.

(e) In any event we have not received an indication that the County Government of Baringo is opposed to the decision. To the contrary we received a presentation from the head of the County Government that is, the governor, which did not indicate that they have a different opinion.

(f) The decision remains with the Minister as the Commission has performed its function fully.

27. READING paragraph XII, I wish to state as follows:-

(a) That we received a letter dated 24/2/2014 from the government of Baringo County addressed to the ministry of education requiring the establishment of Baringo university at Chemeron Dry Land Research training and Ecotourism Centre.

(b) That after engaging public participation, the issue of Baringo technical College arose and both were put to public participation.

(c) After one year of public participation we received resolution of all the County leaders including

MPs and the governor establishments indicating their preference of the university at Baringo Technical College with views that the Chemeron Research and filed station to remain a satellite campus of Egerton University among other resolutions; **see annexure marked PDS 14.**

28. THAT knowing that Baringo County did not have any University and under Article 26 of the University it required to be prioritized we carried out technical evaluation and assessment in July 2015 and:-

(a) We established that:-

(i) That the consideration was given to Chemeron Dry Land had been proposed by the Governor, then.

(ii) The price of land at Chemaron Dry and Research Training and Exotourism Centre belonged to Egerton University was not willing to have the said land transferred to the proposed university.

(iii) There was need to seek concurrence of stake holders and thus we required the County to seek concurrence of Egerton University to have Baringo University as its Constituent college and Chemeron Dry Land Research Training and Ecotourism Centre Land transferred to the proposed university.

(iv) The Ministry together with Egerton University were to furnish an application and concurrence on above

(v) That we received the application from Egerton University without an indication that they were willing to transfer the said parcel of land to the proposed university.

(vi) That we received a letter dated 24/6/2015 from the university requesting that they establish a university in Baringo County together with Ksh. 810,000/- being inspection fees, **see annexed receipt marked as PDS 15.**

(b) THAT among the factors we considered were that:-

(i) presence of adequate resource and communication to be used by students and staff.

(ii) The ease of communication and transportation

(iii) The safety and comfort of the students staff and other personnel

(iv) The presence of the accommodation outside the institution

(v) The presence of support institutions including referral hospitals, hotels and others.

(vi) Compliance with the universities Act 2012, Universities Regulations 2014 and universities standards and guidelines.

(vii) The availability of land and ownership. There was no concurrence by Egerton University and willingness to surrender the land for the proposed university at Chemeron Dry Land.

(viii) All parameters considered Baringo technical College as the most suitable, and Chemeron Dry Land was unsuitable.

(ix) Views of the residents of Baringo County

(x) The viability of the university

(xi) *Competitive advantage of both sites*

(c) *Baringo Technical College was suitable for establishment of University College.*

29. *PURSUANT thereof the cabinet secretary was duly advised.*

30. *THAT consequently we carried out our duties under the act and made a decision that we are bound to make.*

31. *THAT reading the alleged facts in the petition it comes out clearly that:-*

(a) *Public participation was done*

(b) *The petitioners had a view that the university has to be in a place other than the decided location*

(c) *The petitioners have no disputes to competence, capacity and authority for commission to make the decision it has made.*

(d) *The constitution has taken a period of over 3 years and as such cannot be said to be arbitrary unfair unlawful and contrary to public unconstitutional the petitioners participated fully.*

(e) *THAT we considered all the views of all parties together with the technical evaluations which informed the decision we made.*

32. *THAT in response to xvi on the ground for relief I wish to state as follows-*

(a) *There is no single right which has been contravened*

(b) *The petitioners were not condemned unheard and the petitioners have no legitimate expectations on which the Respondent runs its affairs. Especially on technical issues.*

(c) *The residents of Baringo who were willing to be heard were heard and the right of public participation was not limited and petitioners*

(d) *There were no presentation on unsuitability of Baringo Technical College.*

33. *THAT what is deponed to herein is true and correct to the best of my knowledge, information and belief.”*

6. The Interested Parties filed a replying Affidavit sworn by the 1st Interested Party in opposition to the petition as follows:

“AFFIDAVIT IN ANSWER TO PETITION DATED 15TH DAY OF AUGUST 2016

12. *THAT in reply to paragraphs viii), ix) xi) and xii) of the petition, I wish to state as follows:-*

(a) *Baringo County deserved a public university.*

(b) *That petitioners do not have locus standi to allege that the respondent inspected Baringo Technical Training Institute on 24th July, 2015 because they are not in the management team of the said institution.*

(c) *Further to the foregoing, Baringo Technical Training Institute, which is an educational institution that is sought to be elevated to a higher capacity, is not a litigant in this petition.*

(d) *The petitioners admit that the respondent has a legal mandate to evaluate any public institution with the view to elevating its status.*

(e) *The petitioners also admit that the respondent, in exercise of the said mandate, proceeded to evaluate Baringo Technical Training Institute and Chemeron field station and made the recommendation that Baringo Technical Training Institute was suitable to be elevated to a public university status.*

(f) *Contrary to the petitioners' expectation, they could be consulted on the technical aspects of evaluating Baringo Technical Training Institute because none of the petitioners claims to be possessed of the relevant technical skills.*

(g) *The petitioners together with the County populace were sensitized and their views sought on diverse dates in various stakeholders for a conducted in various places including Nairobi, Marigat, Kabarnet and Baringo Technical Trainig Institute dining Hall.*

(h) *As for the meeting held at Baringo Technical Training Institute, the area Member of Parliament Hon. Sammy Mwaita, Area Chief, Kapropita Location (where the Baringo Technical Training Institute is situated) and LOCAL DEVELOPMENT COMMITTEE issued invitation cards to all stakeholders across the county notifying the public that there would be a consultative forum on the 14th AUGUST, 2015 at BARINGO TECHNICAL TRAINING INSTITUTE Dinning Hall. **(Annexed hereto are copies of some of the invitation cards marked RK2 a, b & c)***

(i) *Over 1500 members of the community attended the said meeting in which the status of Baringo Technical Training Institute and establishment of the proposed university was discussed **(annexed hereto is a copy of the minutes of the said meeting marked RK3)**.*

(j) *One of the ideas floated in the said meeting was that should the technical training institute herein be upgraded into a university, then the courses currently offered in the said institution could still be offered as degree programs are introduced for eligible students.*

(k) *In view of the foregoing, the perception that middle cadre courses currently offered by the said institution would be phased out upon its elevation to a university is untrue.*

(l) *The interested parties herein are not aware of a 1100 acre parcel of land in Chemeron area that was offered by the public for the establishment of a public university as alleged by the petitioners.*

(m) *But the interested parties are aware of a field station owned by Egerton University whose suitability for elevation to a university was said to have been evaluated together with Baringo Technical Training Institute.*

13. *THAT in view of the assertions stated in paragraph 12(a) to (m) above, I wish to state that the every stake holder including the petitioners herein had a fair hearing during the process leading to the proposed conversion of Baringo Technical Training Institute into a public university.*

14. *THAT further, I wish to state that the process was not arbitrary, unreasonable, unconstitutional or contrary to public policy If anything, the elevation of the said technical institute to a public university would immensely impact on the community socially and economically in a positive manner.*

15. *THAT I therefore pray that the court finds that the petitioners have not laid a sound basis upon which the court can issue the declaratory order that the proposed conversion of Baringo Technical Training Institute to a public university is arbitrary, unreasonable, contrary to good governance and without regard to the petitioners legitimate expectation to fair administrative action.*

16. *THAT I also pray that this Honourable court does find that there is no merit in the prayer for*

issue of an order for permanent injunction restraining the respondent from exercising its mandate to establish a public university in Baringo County as per the procedure provided for by law.

17. THAT in any event, the petitioner is incompetent for want of Verifying Affidavit in support of the Petition.

18. THAT therefore prays that this petition be dismissed with costs.”

Submissions by the Parties

7. Counsel for the parties filed written submissions and made respective supplementary oral submissions. For the Petitioners, it was urged in their written submissions that-

“PETITIONERS WRITTEN SUBMISSIONS DATED 16TH MARCH, 2017

It is apparent from the summary of evidence and/or averments of the respondent and the interested parties that no proper consultation and/or public participation was carried out by the respondent. In fact in its report prepared by professor RIOBERT OKWARO the respondent recommended that the residents must initiate the necessary consultation and negotiations to resolve the seat of the proposed County University.

This recommendation is a clear admission that consultation must be carried out. The respondent has expressly stated that the need for consultation of public participation was not necessary as the institute is a public institution and can be acquired without an u reference to the petitioners.

Further the respondent has stated that the petitioners do not have the Technical knowledge and/or know how on acquisition hence their participation is unnecessary.

The respondent has latched on to meetings held and/or organized by some of the petitioners herein and/or third parties and treated them as meetings organized by itself.

*We submit that the two meetings held by some of the petitioners, interested parties and/or third parties did not amount to consultation and/or public participation as **it lacked the technical input of the respondent.***

Had the respondent carried out consultation and or public participation as alleged it would have realized that there was no sufficient land to host a university at the Institute.”

8. The respondent maintained that it had complied with all constitutional and statutory requirements of procedural fairness setting out its case in paragraphs 8-10 of its written submissions dated 20th March 2017 as follows:

“RESPONDENTS CASE

8. *The Respondent’s case is that the said land was not donated but was exchanged with some other parcels in Kipkabus division for establishment of Baringo Technical College. It is the Respondent’s case the Egerton University applied for a constituent college and the Respondent carried out public participation and two sites were identified, that is, Chemeron Dry land Training and Eco Tourism Centre and Baringo Technical College. The Petitioners formed Chemeron Lobby Group to lobby the Respondent to establish a University in Chemeron Dry Lands Research Training and Ecotourism Centre while other leaders preferred Baringo Training College.*

9. *After wide consultations and listening to views of stakeholders and technical evaluation was carried out where Baringo Training College was found to be suitable and Chemeron Dry land Research Training and Ecotourism Centre was found to be unsuitable where Egerton University which was the applying university was given the report to make a decision.*

10. All stakeholders were involved in the deliberations. Egerton University made a decision that they preferred Baringo Technical College and were not willing to cede Chemeron land to the university college. Once the decision was made, what is now remaining is the establishment of the university.”

9. The Interested Parties supported the respondent’s case pointing out that the petition was fatally defective for want of verifying affidavit; that there was public participation in the process leading to the decision of converting the Baringo Technical Training Institute into a public university; and that there was, therefore, no breach of the petitioners’ constitutional rights.

Issue for Determination

10. The sole issue for determination is whether the petitioners as stakeholders were consistently with fair administrative action consulted or afforded opportunity to make representations on the issue of acquisition or conversion of Baringo Technical Institute into a University.

11. As regards the formal validity of the petition for want of verifying affidavit, this Court has previously held that a petition is not defeated by want of an affidavit to support the Petition as the applicable rules contemplate a valid petition without an affidavit in support. See NAIROBI HC PETITION NO. 284 OF 2016, **Bryson Mangla v. Attorney General & Others**, where the Court considered Rule 10 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 and held as follows:

12. *The Court’s discretion in this regard must be the conciliating factor with the Constitutional dictate in Article 22 (3) (b) and (d) that the Chief Justice shall make Rules of Court for enforcement of the Bill of Rights, which shall satisfy the criteria that—*

“(b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;

(d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities.”

13. **The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedures Rules, 2013** do not require that a petition must be supported by an affidavit, see Rule 11 thereof in these terms:

“11. Documents to be annexed to affidavit or petition

(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.”

14. **It is conceivable that a petition which challenge for example constitutionality of a particular legislative text may not require an affidavit.** Where however, a petition relies on matters of evidential fact, this must be proved by affidavit or oral testimony as the court may direct.”

12. No issue arises as to alleged donation of land by the Petitioners for the Baringo Technical Training Institute for, even if that were the case, the land remains a public land for use by a public body, and once donated for public use the private donor loses any proprietary rights over the property as well as any say as to the user of the land. Moreover, the The Permanent secretary to the Treasury as Trustee for Baringo Technical College is shown as the absolute proprietor of the land Baringo/Kapropita/ 616 with all the rights of an absolute proprietor under the law. If any issue of compensation for the donors of the land arose, as emerging from the Stakeholders forum of 14th August 2015, such should be the subject of a

separate suit in that behalf.

13. There was a glaring case of non-joinder with respect to the Cabinet secretary for Education to whom, as pointed out by the Respondent, the mandate for creation of universities is given under section 20 (3) of the Universities Act as follows:

“The Cabinet Secretary may, in consultation with the Commission, by an order published in the Gazette, establish or declare an Institution to be a constituent college of a university.”

14. The Egerton University which seeks to have a University campus established in Baringo Technical Training Institute was similar not joined as a party. In addition, the allegations by the Petitioners that the Management of the Baringo Technical Training Institute was not consulted could only be proved by joinder of the Institute as a co-petitioner.

Determination

15. Article 10 of the Constitution provides for people participation in governance. Article 47 of the Constitution entrenches the right to fair administrative action. These constitutional provisions support a stakeholders right to consultation when a public body is considering any administrative or quasi-judicial action in the exercise of its mandate under the constitution and the law. The right to fair administrative action is also statutorily underpinned by the Fair Administrative Action Act of 2015 which came into force on 17th June 2015. However, apart from citing the right to fair administrative action, the petitioners do not indicate the manner in which they considered that the right had been violated in relation to them or give evidence of such violation.

16. It is the duty of an applicant who comes to law to enforce his constitutional rights, such as the applicant herein in the matter the right to information (Article 35), right of Assembly (Article 37), right to fair hearing (Article 50), right to fair administration action (Article 47) and the principle of people participation (Article 10), to demonstrate by evidence how such a right has been violated. See ***Anerita Karimi Njeru v. Republic (No. 1)*** (1979) KLR 154.

17. In ***Bryson Mangla***, supra, this Court discussed the requirements of ***Anerita Karimi Njeru*** as follows:

“Particularity of pleading constitutional cases

9. *The requirement of setting out with specificity the particulars of the petitioner’s complaint under the Bill of Rights and other constitutional litigation (and indeed any pleading before the court) is a requirement of common sense that a claimant’s case should be clear and elaborate to enable the respondent know the case it has to meet and the court the question it will be asked to determine. Pleadings should not leave the*

10. *Court guessing the case before it, as the court in ***Anerita Karimi Njeru***, supra, did or the respondent the case he has to answer.*

11. *The context of the oft-cited holding of the High Court (Travelyan J. and Hancox, JJ.) in ***Anerita Karimi Njeru v. Republic (No. 1)*** (1979) KLR 154, 156 gives the background and motivation of the directions for precision in pleading constitutional infringement cases, which is applicable to all litigation:*

“On the morning of the commencement of the hearing before this Court Mr Muttu representing the Republic raised a preliminary objection. After hearing it, we then invited Mr Mwirichia to give us further and better particulars of precisely that which he is alleging under the second head of his complaint, that is to say that the applicant was not given facilities to procure the attendance of witnesses other than Mr Mase. In the event he did not do so; and in our opinion he could not validly do so, for he is on record as having said to the magistrate, after he had returned to conduct the applicant’s defence, that the only evidence the defence wished to call was that of Mr Mase.

Accordingly, in our view, the only complaint that can lie of an alleged refusal to afford the defence such facilities (and we accept that this means “reasonable facilities” under section 77(2) (e) of the Constitution) is as respects Mr Mase. We mention that we also sought to be enlightened as to which of the paragraphs of section 77 of the Constitution were thereby alleged to have been infringed, and Mr Mwirichia referred to his list of authorities (filed on to the day preceding the hearing) which mentioned both paragraphs (c) and (e) of subsection (2) of that section. This was a rather curious manner of bringing a statutory provision to the notice of a court of law, but, at all events, we were prepared to permit Mr Mwirichia to develop his arguments under both paragraphs. In the event, on the second day of the hearing before us, Mr Mwirichia abandoned the position he had previously taken up under paragraph (c). We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

12. Save for the right to public consultation under the principle of people participation of Article 10 of the Constitution, the Petition did not set out with any specificity the alleged other breaches of the petitioners’ constitutional rights or adduce evidence in proof thereof. The Evidence Act places and legal and evidentiary burden of proof requirement of the party who would lose in the proceedings if no evidence was taken. See sections 107 and 108 of the Evidence Act.

13. On the merits of the application, it is not the law that consultation must lead to acceptance of the position taken by the person consulted. The law requires stakeholder participation and therefore consultation but not approval for an administrative action to be taken by the mandated organ. What is necessary is an opportunity for the members of the Public who wish to make any representations on a matter the subject of consultation be granted. The public participation requirement is one for reasonable facilitation of public involvement or participation, which depends on the circumstances of each case. See Nairobi Employment and Labour Court Pet. No. 52 of 2015 **Union of Kenya Civil Servants v. Salaries and Remuneration Commission and Anor.**; Nairobi HC Constitutional Petition No. 486 of 2013 **Nairobi Metropolitan PSV Saccos Union Limited & 2 Ors. v. County of Nairobi and 3 Ors.** (2013) eKLR; **Robert N. Gakuru & Ors. v. The Governor of Kiambu and 3 Ors.** (2014) eKLR; **In the matter of the MUI Coal Basin Local Community** (2015) eKLR and **Patrick Musimba v. National land Commission and 4 Ors.** (2016) eKLR.

14. In MOMBASA HC CONSTITUTIONAL PETITION NO. 76 OF 2012 (Formerly Nairobi Petition 291 of 2011) **SDV Transami Kenya Limited and 19 Others v. The Attorney General & 3 Others**, this Court considered the issue of consultation and held as follows:

103. *Consultation need not result in views of the person consulted carrying the day.* Musinga, J. (as he then was) in **Centre For Rights Education and Awareness (Creaw) & 7 others v Attorney General** [2011] eKLR interpreted ‘consultation’ in the context of Article 10 as follows:

“The second issue relating to the constitutionality of the nomination to the office of the Chief Justice is whether it was done after **consultation** between the President and the Prime Minister in accordance with the National Accord and Reconciliation Act. The Constitution does not define the word “**consultation**”. Other than media reports that were annexed to the petitioners’ affidavit, there is no other evidence relating to the consultations. What does the word “consultation” therefore mean? The Shorter Oxford English Dictionary defines “consult” as, *inter alia*, “take counsel together, deliberate, confer. “**Consultation**” is said to mean, *inter alia*, “the action of consulting or taking counsel together, deliberation, conference.” Websters New Universal Unabridged Dictionary suggests that it means “consulting, a meeting of persons to discuss, decide, or plan something”, while ‘consult’, in the relevant context means “to ask advice of, to seek the opinion of as a guide to one’s judgment”. In the Readers Digest Universal Dictionary, ‘consult’ is rendered in such context as “to exchange views, confer, and ‘consultation’ as “the act or procedure of consulting, a conference at which advice is given or views are exchanged.”

In the South African case of *MAQOMA vs. SEBE & ANOTHER* 1987 (1) SA 483 the meaning of consultation was considered in the context of the Administrative Authorities Act 37 of 1984, which like our Constitution, does not define ‘consultation’. Pickard J observed:

“It seems that ‘consultation’ in its normal sense without reference to the context in which it is used, denotes a deliberate getting together of more than one person or party in a situation of conferring with each other where minds are applied to weigh and consider together the pros and cons of a matter by discussion or debate. The word “consultation” in itself does not presuppose or suggest a particular forum, procedure or duration for such discussion or debate. Nor does it imply that any particular formalities should be complied with. Nor does it draw any distinction between communications conveyed orally or in writing. What it does suggest is a communication of ideas on a reciprocal basis.”

In *AGRICULTURAL, HORTICULTURAL AND FOREST INDUSTRY TRAINING BOARD vs. AYLESBURY MUSHROOMS LTD* [1972] 1 All ER 280 at 284 it was held that:

“The essence of consultation is the communication of a genuine invitation, extended with a receptive mind, to give advice. If the invitation is once received, it matters not that it is not accepted and no advice is proffered. Were it otherwise organizations with a right to be consulted could, in effect, veto the making of any order by simply failing to respond to the invitation. But without communication and the consequent opportunity of responding there can be no consultation.”

From the definitions of the word ‘consultation’ as hereinabove stated and from the authorities cited and from the annexures to the petitioner’s affidavit, it appears to me that there was some consultation between the President and the Prime Minister. However, there was no consensus or agreement between the two principals, which I must state, is not a requirement under the provisions of Section 24(2) of Schedule Six of the Constitution. That notwithstanding, the values and principles stated under Article 10 and the spirit of the National Accord and Reconciliation Act ought to have been borne in mind in making the nominations.”

104. However, there was no evidence of presentation of the Regulation on Maritime Service Providers in Draft for consideration and comment by the stakeholders as an ingredient of the consultation principle of **‘communication and the consequent opportunity of responding’** Because of the specific character of law, consultation in matters of law-making must involve seeing the proposed law and having an opportunity to respond to the proposals in the law rather than a general communication on the matter. Although the petitioners’ complaint appeared to be that their views were not reflected in the final Regulations, I find that there was no sufficient consultation as the draft of the proposed Regulations was not put to them, and there was, therefore, a breach of the Article 47 right to fair administrative action. The entire Regulations are therefore unconstitutional for want of consultation in terms of the right to fair administrative action under Article 47 of Constitution.”

15. In this case, the petitioners have not demonstrated that they were not consulted over the issue of acquisition or conversion of the Baringo Technical Institute into a university. Indeed, the principal complaint by the petitioners appeared to be misrepresentation of the outcome or what transpired at consultative meetings and the accuracy of the minutes of the meeting which recommended the conversion of Institute into a college.

16. There was the stakeholders’ meeting of 14th August 2015 held at the Technical Institute with a single agenda as discussing the issue of upgrading the Baringo Technical College into a University with the 1st petitioner among others in the forum said to be more than 1500 people. In addition, the petitioners’ own letter of 15th January 2016 to the Cabinet Secretary with a copy to the Respondent and signed by the 2nd Petitioner on behalf of **Baringo County University Lobby Group - Chemeron** confirms public consultation as follows:

“Baringo County University

Lobby Group – Chemeron

P O Box 92 -20403

MARIGAT

15TH January, 2016

Dr Fred O Matiang’i EGH

The Cabinet Secretary

Ministry of Education, Science and Technology

P O Box 30040-00100

NAIROBI – KENYA

JOGOO HOUSE B.

Dear Sir/Madam

RE: BARINGO COUNTY UNIVERSITY

As it refers to the above subject, we would like to comment the commitment of Jubilee Government Policy to nurture a university in every county.

As Baringo people we welcome the establishment of the university in our county.

In 24th August, 2013, the Baringo County Leadership held a county consultative meeting in Chemeron (Baringo South) which was chaired by his Excellency Benjamin Cheboi the Governor Baringo to agree on the location to establish the university. The meeting unanimously agreed that the existing Egerton university research centre (Chemoron) was the suitable place.

As a follow up on this decision on 24th July, 2015 the Commission of University Education (CUE) conducted an assessment and its recommendation was in favour of Chemeron centre. The Baringo County Assembly also endorsed Chemeron as the ideal place in a motion passed on 13th August, 2015. Furthermore, the Governor, senator and all members of parliament from Baringo County met on 24th August, 2015 in Nairobi and agreed to fast track the implementation of the decision as earlier agreed.

In order to compliment the efforts made by the county leaders and stakeholders, lobby group in support of this decision was formed called BARINGO COUNTY UNIVERSITY – CHEMERON to work closely with the leaders and relevant institutions mandated with the implementation process of the proposed county university.

It is for this reason that, the committee and member of the said lobby (attached list) in a resolution made on 3rd January, 2016 at Marigat High School acknowledged the constitutional mandate your office has in the implementation of the above reported decision.

We therefore look forward for your positive response and actions on this matter.

..... Samuel Bungei

William Tengeche Secretary BCU – Chemeron Lobby

Chairman BCU – Chemeron Lobby TEL 0722960261

Tel: 0717-146177

Cc

1. Governor Baringo County

2. Members of parliament Baringo

3. Chairman Commission of University Education”

17. There was also a meeting of County Leadership of the 8th April 2015 held at the Intercontinental Hotel Nairobi whose Resolutions were attached to the Replying Affidavit of the Respondent sworn by Prof. Some of 19th August 2016. The resolutions of the meeting signed by the County Governor and area Members of Parliament under the County Government letterhead were, significantly and so far as relevant, that-

“1. A Public University to be established in Baringo County Technical Training College to be named Baringo University under mentorship of Egerton University.

2. Chemeron Research and Field station to remain as Egerton Satellite Campus but will play host to the main Campus if Baringo Teachers Training College will be constrained in the matter.”

18. The petitioners attached to the supplementary affidavit sworn by the 1st petitioner on 19th September 2016 Resolutions of Leaders Meeting on Establishment of Baringo University also on County Government letterhead and setting out resolutions of a meeting of 24th August 2015 at the Intercontinental Hotel Nairobi, in material parts as follows:

“1. The Establishment of Baringo University

The meeting deliberated at length and agreed to establish a Baringo University under a collegiate system funded by the National Government. The main campus was agreed to be located at Chemeron.

That a Second university funded by the County Government shall be established in the larger former Koibatek district (Eldama Ravine and Mogotio sub-Counties) at a location to be agreed by the leadership by the leadership of the two sub-counties....”

19. While not disputing the holding of the County Leadership Meeting of 8th April 2015, the Petitioners alleged without proof that then minutes of the resolutions were doctored or fake and not the true reflection of the resolutions at the meeting. The petitioners did not adduce evidence by any of the same leaders shown to have signed the two sets of Resolutions denying the resolutions of the meeting 8th April 2015 or their accuracy, or indeed, that the correct position of the matter was as set out in the petitioners’ own attachment of Resolutions of Leaders Meeting on Establishment of Baringo University of 24th August 2015 at the same venue as the meeting of 8th April 2015.

20. The Resolutions on the Establishment of Baringo University presented to the respondent Commission intimating the agreement as to the establishment and location of the University was drawn on the County Government letterhead and acknowledged by a receipt date stamp of the Respondent on 3rd June 2015. There is no evidence that this document is not genuine. It is the document that the County Government presented to the Respondent. The petitioners do not explain the circumstances leading to the writing of the document under the same title on County Government letterhead but for meeting shown to have been

held on the subsequent date of 24th August 2015.

21. Moreover, although the views of the County Government and Members of Parliament, are not *per se* views of the entire public for purposes of public consultation they are a significant aspect of public participation as representatives of their respective constituencies in accordance with representative democracy of the modern State.

22. Again, in a technical matter as establishment of a University, it is understandable if invitation to a stakeholder's forum is issued to persons knowledgeable in matters of education and socio economic development, and it cannot be a valid objection that the general public were not consulted. Indeed, in this case, the minutes of the meeting of the stakeholder forum at the Baringo Technical Training Institute indicate an attendance of 1500 people including the petitioners who among other speakers freely made representations on their positions both in support and opposition to the revival of the Technical Training College and its upgrade to a University.

23. I do not find that the notice of the stakeholders' meeting of 14th August 2015 was fatally defective in terms of calling for public participation on the matter for failing to give the agenda specifically on its face, in view of the general reference in the invitation card to the meeting as "a stakeholders forum at Baringo Technical College" and the chief guest being shown as Dr. Joseph Kandie PhD, Director Kisii University, Eldama Ravine and Kabarnet Campuses. Indeed, the 1st Petitioner is recorded in the minutes of the meeting giving introductory remarks as follows:

"Bolei welcomed the area member of County Assembly Hon. Solomon Chemjor who termed the forum as historic. The MCA said the main aim is to get the views of the residents on the issue of upgrading the technical institute to a fully fledged University."

24. In addition, in a technical matter such as the establishment of a constituent college of a University, the respondent must, in addition to taking views of the public on the matter, give consideration to technical evaluations of suitability of the locations suggested. In this regard, the respondent commissioned a study of the two proposed locations with respect to technical suitability and found *"the Baringo Technical Training Institute to be suitable and the Chemeron Dry Research Training and Ecotourism Centre to be unsuitable for a location of a university college."* The petitioners apparently conceded the importance of the technical evaluation by the respondent when it asserts in its submissions of 16th march 2017 they *"submit that the two meetings held by some of the petitioners, interested parties and/or third parties did not amount to consultation and/or public participation as **it lacked the technical input of the respondent.**"*

25. It was obvious to the Court that the Petitioners as members of a lobby for the siting of the University at Chemeron rather than, as proposed by the respondent, Baringo Technical Training Institute, were unhappy with the outcome of the consultation and not with the lack of it. Moreover, I would agree with the Respondent that public participation and consultation does not require that the view of each and every member of the public in the area be obtained. I respectfully agree with Lenaola, J (as he then was) in ***Nairobi Metropolitan PSV Saccos Limited***, supra, *"that the fact that views given by attendee at a public forum are all not taken into consideration does not vitiate the fact that there has been compliance with the requirements for public participation."* In asserting incorrect or fake minutes of consultative meetings, the Petitioners concede that there was consultation on the matter. The respondent has given a detailed account as to how consultation was carried out and, on a balance of probabilities in view of its uninterested status as a Commission for Higher Education unlike the petitioners and Interested Parties who have an interest in the location of the University, the Court accepts that there was such consultation consistent with the Constitution and the law.

Conclusion

26. The petitioners have not demonstrated by evidence as required by sections 107 and 108 of the Evidence Act, that the respondent did not consult the public over the issue of acquisition or conversion of the Baringo Technical Institute into a university, and that therefore their right legitimate right to fair

administrative action under Article 47 of the Constitution has been violated. Consultation does not mean approval, and therefore a duty to consult does not require that the person consulted must approve or agree with the proposals or recommendations which are the outcome of the consultative process. Consultation affords people participation in governance but subjective views of the individual consulted persons must give way to such objective assessment of the matter following upon receipt of all stakeholder views and other relevant considerations. It was not shown that the respondent took into account any irrelevant considerations or that their decision was plainly wrong for the Court to feel justified to interfere with the decision, in exercise of its supervisory jurisdiction under Article 165(6) of the Constitution. Moreover, it is not for the Court to interfere and substitute its own view of the matter over which the public body has legal mandate. Indeed, evidence presented by the respondent and conceded by the petitioners indicates that there was consultation but the petitioners were not happy with the recommendations made upon such consultation and even suggested that the record of the minutes of such consultative meetings were doctored. So, there was indeed consultation, and on balance of probabilities, the court accepts the position of the respondent who is *uninterested* party.

Orders

27. Accordingly, for reasons set out above, the Petition dated 11th July 2016 is dismissed with costs.

DATED AND DELIVERED THIS 16th DAY OF MAY 2017.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S M. K. Chebii & Co. Advocates for the Petitioners

M/S Magare Musundi & Co. Advocates for the Respondent

M/S Nyekwei & Co. Advocates for the Interested Parties.