



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL PETITION NO. 65 OF 2015

IN THE MATTER OF: ARTICLE 22, 185, 207(3) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL ARIGHTS AND FREEDOMS UNDER ARTICLES 19, 20, 35, 36, 40, 46, 47 OF THE CONSTITUTION OF KENYA ALL OTHER ENABLING PROVISIONS OF THE CONSTITUTION

BETWEEN

1. MAIMUNA IBRAHIM

2. SAID EDWARD NZARO

3. KISUSE HASSAN (suing on behalf of UKUNDA YOUTH

POLYTECHNIC).....PETITIONERS

VERSUS

1. COUNTY GOVERNMENT OF KWALE

2. KENYA COMMERCIAL BANK LIMITED

3. EQUITY BANK LIMITED

4. HON. ATTORNEY-GENERAL.....RESPONDENTS

JUDGMENT

INTRODUCTION

1. The Petitioners herein Maimuna Ibrahim, Said Edward Nzaro and Kisuse Hassan, the Chairperson, Vice-Chairperson and Treasurer respectively of Ukunda Youth Polytechnic have brought the Petition herein against the following Respondents –

(1) the Government of the County of Kwale;

(2) the Kenya Commercial Bank (Ukunda Branch);

(3) Equity Bank Limited;

(4) the Attorney-General.

2. The Petitioners seek the following orders –

(a) a declaration that the Petitioners as a Cultural and Welfare Organization registered as Self-Help Group is an autonomous community organization not to be subjected to the authority, direction and control of the First Respondent in exercise of the mandate under Article 185 and 186 of the Constitution;

(b) an order of certiorari to bring to this court for the purposes of being quashed the First Respondent's letters dated 9th September, 2015 and 19th November, 2015 respectively;

(c) an order of prohibition to prohibit the First Respondent by themselves, servants, agents or whosoever from interfering with the management of the Petitioners' organization whatsoever;

(d) damages for breach of consumer rights as against the Second and third Respondents; and

(e) costs of and incidental to these proceedings.

3. The Petition was supported by the Affidavit of Maimuna Ibrahim sworn and filed on 30th November, 2015, the grounds on the face of the Petition, the Supplemental Affidavit of the said Maimuna Ibrahim sworn and filed on 2nd December, 2015, the undated Supplementary Affidavit of Maimuna Ibrahim filed on 19th May, 2015, and the written submissions of S. Jumbale, learned counsel for the Petitioners dated and filed on 30th May, 2015, the Petitioners' counsels' Response to the First Respondent's submissions dated and filed on 20th June, 2016.

4. The Petition was opposed by the First Respondent through **firstly**, the Replying Affidavit of Harrison M. Gachuru, the Director, Youth Training, County of Kwale, and prior to that, the Officer-in-Charge of all Youth Polytechnics in Kinango, Msambweni and Kwale, sworn on 13th April, 2015 and filed on 18th April, 2015. **Secondly**, the Petition was also opposed by the Third Respondent's Grounds of Opposition dated and filed on 28th April, 2016, and **thirdly** the First Respondent's counsel's submissions dated 24th May, 2016 and filed on 30th May, 2016.

THE PETITIONERS' CASE

5. The Petitioners' case is set out in paragraphs 6-9 of the Petition. In brief the Petitioners plead that this Polytechnic was formed in 1969, as **Ukunda Boys Association** and in 1972-1974 it was selected as an Approved Pre-Vocational Training Centre under the then Ministry of Cooperatives and Social Services, and that between 1981-1983, it was again Approved Pre-Vocational Youth Training Centre under then Ministry of Housing and Social Services, and that from 1985 it was approved as Approved Pre-Vocational Training Centre, as an Examination Centre offering part-time and full-time tuition to students within Ukunda region.

6. The Petitioners claim that since its inception the Polytechnic has never been financed and/or funded from public finances by either the Government of Kenya or the defunct County Council of Kwale and it has remained as autonomous Community Organization, culminating in its registration as a Self-Help Group. The Petitioners' claim that the Polytechnic is guided by its Constitution drawn in 2002, and drew its membership from the then Diani Location of the former Kwale District, and now Ukunda Ward in the present County of Kwale, and is managed by a Board of management drawn from delegates from the villages in Diani Location in accordance with its Constitution.

7. The Petitioners are consequently opposed to the direction of the Government of the County of Kwale, whether under Article 185 or 186 of the Constitution and the Fourth Schedule of the Constitution of

Kenya 2010. The Petitioners are also opposed to the appointment by the Government of the County of Kwale, of any Board of Management, or any signatories for the Polytechnic's account with the Kenya Commercial Bank and Equity Bank Limited, both at Ukunda Branches, whereas signatories to the accounts in the said banks have always been Board Members of the Polytechnic's Board of Management.

8. For all those reasons the Petitioners pray for the declarations, and orders first above described.

THE FIRST RESPONDENT'S CASE

9. The First Respondent's case is set out in the Replying Affidavit of Harrison M. Gachuru. According to this deponent all Youth Polytechnics in Kenya were established and registered with the then Ministry of Technical Training and Applied Technology and the functions were ceded to the relevant Ministry after re-organization of the Government Ministries among them, the Ministry of Housing and Social Services, Ministry of Culture and Social Services, Ministry of Cooperatives and Social Affairs, Ministry of State for Youth Affairs, among them.

10. This deponent further avers in paragraph 4 of the Replying Affidavit, *"that like all other **community** and/or **youth polytechnics**, the Polytechnic has never been a private institutions but have always been public institution, and that the claim that the Polytechnic is community based does not make the Polytechnic a private institution outside the direction and control of the relevant public oversight bodies as by law mandated to oversee the administration of all public and/or community youth polytechnics."*

11. This deponent also avers that the First Respondent appointed, but dissolved the Board in which the Petitioners served. The Petitioners did not object to their appointment after consultation with the stakeholders when they were appointed by the First Respondent. The Petitioners brought this Petition when the Board in which they served was dissolved for misconduct.

12. The First Respondent also argues that following the enactment of the Constitution of Kenya, 2010, and devolving of the Youth Polytechnics to County Governments, the First Respondent took over like others, the management of Ukunda Youth Polytechnic. The deponent concluded that the Petition herein has no basis, and ought to be dismissed.

THE SECOND RESPONDENT'S CASE

13. The Second Respondent case was **firstly** set out in the Replying Affidavit of Munira Salim, sworn on 23rd June, 2016, and filed on 24th June, 2016 and **secondly** in the written submissions of counsel for the Second Respondent dated 29th June, 2016, and filed on 30th June, 2016.

14. This Respondent's case is that it has never dishonoured any of the Petitioners' cheques or breached Articles 45 and 47 of the Constitution and presented no evidence of such violation. This Respondent also contends that the Petition herein is an abuse of the process of court.

15. I agree with the submission by counsel for this Respondent that the Petition herein should be struck out principally on two grounds, **firstly** because the constitutional process is being used as a substitute for ordinary civil litigation or civil dispute resolution, and **secondly**, the matter is purely a private law matter – **MAGGIE MWAUKI MTALAKI VS. HOUSING FINANCE COMPANY OF KENYA LIMITED [2015]eKLR.**

THE THIRD RESPONDENT'S CASE

16. The Third Respondent, Equity Bank Limited, filed Grounds of Opposition and submitted that the Petition is misconceived, incompetent and bad in law as it does not disclose any violation of the Petitioner's rights nor any cause of action against this Respondent, and that the dispute (if any) between the Petitioners and the Third Respondent is a contractual relationship between the parties, and can be remedied by way of an ordinary suit and that the Third Respondent has under its contract with the customer, power to freeze the operation of an account if there is any suspicion that fraud, illegality or

criminal offence has been committed.

ANALYSIS

17. In addition to the Supporting and Replying Affidavits the Petitioners' and the First Respondent's counsel filed written submissions together with authorities referred and attached to the submissions. I have perused and considered the respective submissions. The issue in terms of the Petition is whether, the First Respondent has breached any constitutional rights of the Petitioners in terms of Articles 19, 20, 35, 36, 40 and 47 of the Constitution to warrant the grant of any of the orders sought in the Petition.

18. This being a Petition alleging violation of constitutional rights, it is incumbent upon the Petitioners, in order to succeed to demonstrate, with a reasonable degree of precision, the provisions of the Constitution which have been violated with regard to the Petitioners. And the manner of such violation. That is threshold laid down in the case of **ANARITA KARIMI NJERU [1976-80], 1KLR1272**, and **TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE VS. ATTORNEY-GENERAL & OTHERS, [2013] eKLR** and **NAIROBI LAW MONTHLY COMPANY LIMITED VS. KENYA ELECTRICITY GENERATING COMPANY LIMITED & 2 OTHERS [2013] eKLR**.

19. In **TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE VS. AG & 2 OTHERS [2012] eKLR**, the Judges said –

“...the proper test under the new Constitution is whether a Petition as stated raises issues which are too insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional Petitions. Neither does it require talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondent about the nature of the claims being made so that they can adequately prepare their case.”

20. The Petition herein is grounded upon Articles 19, 20, 35 ad 47 of the Constitution. Article 19 (1) declares that the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. And Article 19(3) declares that the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the State. Article 22(1) grants every person the right to institute court proceedings claiming that a right or fundamental freedom has been denied, violated or infringed or threatened.

21. The Petitioners' claim that their rights under Articles 35 (access to information), 36 (freedom of association), 40 (the right to property), 46 (the right to goods and services) and 47 (the right to fair administrative action) have been violated.

22. The Petitioners have however not demonstrated at all how their rights to information, the freedom of association, the right to property, or their consumer rights to goods and services or the right to fair administrative action has been violated.

23. The Petitioners complaint essentially is that they were removed from the membership of the Board of Management of Ukunda Youth Polytechnic. The Petitioners have not, even in the undated Supplementary Affidavits of Maimuna Ibrahim filed on 19th May, 2016, or in the Petitioners' Response to the First Respondent's submissions dated and filed on 20th June, 2016, nor have the Petitioners answered the factual historical establishment of Ukunda Polytechnic.

24. The uncontroverted facts regarding the establishment of Ukunda Polytechnic date back 1967 when it was known as Ukunda Boys Association (UBA) and converted to a training centre under the County Council of Kwale, and was managed by a Board of Governors also known as Management Committee, on behalf of the responsible Minister/Ministry. This mode of management changed upon implementation of

the Constitution of Kenya, 2010, which devolved under the Fourth Schedule (Section 9) to County Government's functions relating to pre-primary education, village polytechnics, home craft centres and childcare facilities. These functions were further explained by the **Transition Authority** in a document entitled – **UNBUNDLED FUNCTIONS (National and County Governments)** dated 24th July, 2014, which placed management of Technical Training Institutes, including Youth Polytechnics, and placed the development and implementation of policies and polity guidelines, rules and regulations in Youth Polytechnics, as well as management of Youth Polytechnics to County Governments, hence the right of appointment of Management Committees or Boards of Management. The right to appoint includes the right to change even pre-maturely of a board upon good grounds.

25. The Petitioners were members of the Board of Management and until dissolution of the Board by letter dated 19th November, 2015, attended meetings of the Polytechnic's Board of Management. They neither objected to, nor declined appointments to the Board of Management made by the First Respondent. Having been so appointed and having accepted the meetings of the Board as aforesaid, the Petitioners cannot be heard to contend that **they** and some unknown members of the Ukunda Community own the Polytechnic. The Petitioners are in law, estopped, in fact barred and prohibited from approbating and reprobating, blowing hot and cold. In **FARIDA MOHAMMED & PURITY MUHORIA VS. EUNICE NJERI KANYARATI [2004]eKLR**, the court said –

“The Appellants cannot approbate and reprobate. They cannot on the one hand say that they needed time to vacate the said premises and on the other hand seek to remain indefinitely in the said premises. The Appellant have clearly shown that they have no regard whatsoever for fair play when it comes to litigation. They would now want this court to endorse their flagrant abuse of the process of the court by granting them stay of execution to stay indefinitely in the said premises. I will not grant them their wish.”

26. The Petitioners' sole contention is the averment that Ukunda Polytechnic is not **“a public”** institution but rather a **community based** institution registered as a **“Self-Help Group”** under the Ministry of Gender, Children and Social Services on 14th November, 2012, and that it should be managed **“independent of the County and National Government”**, and the Petitioners' be at liberty to source funds from donors, collect fees from students, inherit all the assets of the defunct County Council of Kwale, the County Government of Kwale and the National Government, and **privately manage the Polytechnic** and its resources.

27. I have already held that the Petitioners have not demonstrated any grounds for denial, violation, or infringement or threat to their rights. The registration of the Polytechnic as a Self-help Group/Project, or Approved Youth Project Polytechnic for training Projects of the Draft Ukunda Youth Polytechnic (Katiba ya Chuo Cha Vijana Cha Ufundi) nor donor funding do not constitute it into a private institution.

DETERMINATION

28. The Petitioners' relied on the decision of Majanja J in **COUNTY OF MIGORI VS. BISHOP PHILLIP ANYOLO, CATHOLIC DIOCESE OF HOMABAY & REV. FATHER RICHARD ODHIAMBO**, where the learned judge found that –

“the provisions of Part 2 of the Fourth Schedule to the Constitution relied upon by the County only vest the County Government with the regulatory authority for village polytechnics, public or private. Under Section 26 of the Act, the County Government may provide funds required for the development of the necessary infrastructure for institutions of basic education and training. It may, through the County Education Board, license institutions and ensure compliance with standards enacted for that purpose. It may also own and run youth polytechnics. I do not read that power to encompass taking over what are otherwise private institutions and make them public. A private institution can only become public at the option of the owner or proprietor. In any other case there are in place due processes of law for acquisition of private property for a public purpose.”

29. The facts in that above case are clearly distinguishable from the facts in this Petition. In the Migori County case, the land upon which the Polytechnic was build was owned by the Diocese of Homa Bay. The Polytechnic had been developed by the Diocese. Even though the County of Migori had offered assistance to the Polytechnic, it could not take it over as a matter of course. It had to comply with the constitutional and legal procedures for acquisition of property. The decision in the Migori County case was therefore based on its facts.

30. It is necessary to understand what the expressions “*public*” or “*private*” mean. “*Private*” means “*personal affairs, peculiar to oneself, belonging to, or concerning an individual person or company...*” On the other hand the expression “*public*” means “**belonging to the people, pertaining to the community or nation, general, common to, shared in by, or open to all; generally known, in open view, unconcealed, not private, engaged in, or concerning the affairs of the community devoted to or directed to the general good**” – per Concise English Dictionary – Wordsworth Reference, 2007 Edition.

31. In this case, there is no evidence of the Polytechnic being a private institution. The idea may have been conceived by one or more community leaders, (like all ideas for establishment of primary/secondary schools), that a training institution be established in Ukunda. It does not mean that the institution given rise by the idea would remain under, in the realm of the individual or private idea.

32. In this case there are no facts to show that the Ukunda Boys Association (UBA) was started completely by the local community or the petitioners in 1967 or 1969. The Replying Affidavit of Harrison M. Gachuru shows clearly that the land on which the Polytechnic is build was donated by the County Council of Kwale, not the Petitioners or their predecessors in the management of UBA, or the Ukunda Youth Polytechnic. On the facts therefore the Petitioners have no constitutional or other legitimate claim against the First Respondent.

33. A public Polytechnic built on public land donated by the **County Council of Kwale** and title issued in the name of the Polytechnic and made a **training centre** under the County Council of Kwale cannot all of a sudden become a **Cultural and Welfare Organization**, registered as a Self-Help Groupon 14th November, 2012, and as such be regarded as a **privately owned** or administered institution.

34. I am of the firm opinion that a prayer for a declaration that the Ukunda Youth Polytechnic is a private institution is not only ill-conceived, but has no constitutional or legal basis, and consequently fails.

35. The argument by counsel for the First Respondent that the Petitioners’ required leave **under Order 53 of the Civil Procedure Rules** to seek judicial review reliefs is not correct. It is not correct because the grant of juridical reliefs in a Constitutional Petition for enforcement of rights or fundamental freedoms (under Article 22 of the Constitution), is a discretion expressly conferred and vested in this court by Article 23(a) of the Constitution – “**In any proceedings brought under Article 22, a court may grant appropriate relief, including –**

“(a) – (e)

(f) an order for judicial review.”

36. Leave is only required in respect of applications made under the Fair Administrative Action Act, 2015.

37. The claims against the Second, Third and Fourth Respondents are clearly not only ill-conceived but spurious, as no averments were made against these Respondents. I agree with the submission by counsel for the First Respondent that this is a case of chest-thumping and personal aggrandizement by people (the Petitioners) who driven by a misguided, desire to manage the resources of a public institution by whatever means, force included, without regard to established law and procedures. In this regard the comment by the Court of Appeal in **MUMO MATEMU VS. TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS [2013] eKLR** is apt –

“... we must hasten to make it clear that the person who moves the court for judicial redress in cases of this kind must be acting bona fide with a view to vindicating the cause of justice. Where a person acts for personal gain or private profit or out of political motivation or other oblique consideration, the court should not allow itself to be seized at the instance of such person and must reject their application at the threshold.”

38. Finally, any claim the Petitioners’ had, and in particular against the Second and Third Respondents regarding the opening and closing (freezing of accounts), would be contractual in nature, and therefore give rise to action in the ordinary civil courts, and not a Constitutional Petition.

39. In the ultimate therefore, I find and hold that the Petition herein is misconceived, incompetent and bad in law, and failed to show any violation of the Petitioners’ rights or fundamental freedoms.

40. Ordinarily, I would have ordered that this was public interest litigation. It is not, it is a case of self-aggrandizement. The Petition is therefore dismissed with costs against the Petitioners, if not agreed to be taxed by the taxing officer of this court.

41. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 19th day of July, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Miss Sidinyu holding brief Jumbale for Petitioners

Mr. Ngari for 4th Respondent

Mr. Ongele for 2nd Respondent

No Appearance for 3rd Respondent

Mr. S. Kaunda Court Assistant