



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

PETITION NO 28 OF 2014

HON. GEORGE MUTURIA KALIUNGA & 6 OTHERS.....PETITIONERS

VERSUS

CABINET SECRETARY, MINISTRY OF EDUCATION

SCIENCE AND TECHNOLOGY.....1ST RESPONDENT

PRINCIPAL SECRETARY, MINISTRY OF EDUCATION

SCIENCE AND TECHNOLOGY.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

Infringement of right to education

[1] This petition seeks for:

- a) A declaration that the 1st and 2nd respondent's purported change of the name and location of Karichu Technical Training Institute to Kaelo Technical Training Institute, vide a letter dated 29/08/2014, without any factual and/or legal basis and therefore affording the residents of Antubetwe Kiongo Ward Residents an opportunity to be heard, is discriminatory to the residents of Antubetwe Kiongo Ward contrary to Article 27 of the Constitution of Kenya and derogates on Antubetwe Kiongo Ward residents' right to a fair administrative action under Article 47 of The Constitution of Kenya, a fair hearing under Article 25(c) and 50(1) of the Constitution of Kenya, and education under Article 43(1) (f) of The Constitution of Kenya, and is ipso facto, null and void ab initio.*
- b) A judicial review order of certiorari calling into this court and quashing, the 1st and 2nd respondents' change of the name and location of Karichu Technical Training Institute to Kaelo Technical Training Institute, announced vide a letter dated 29/8/2014.*
- c) A judicial review order of mandamus compelling the 1st and 2nd respondents to maintain Karichu Technical Training Institute, situated in Antubetwe Kiongo Ward, Igembe North Constituency (sub-county) within Meru County, as proposed and approved.*
- d) A permanent injunction, restraining the 1st and 2nd respondents and their officers, servants, agents, representatives and/or any other person or institution acting for, through, on their*

behalf, or at their behest, direction or instructions, from changing the name and location of Karichu Technical Institute. Situated in Antubetwe Kiongo Ward, Igembe North Constituency (sub-county) within Meru County.

c) Costs of the petition and interest thereon at court's rate.

The petition is supported by two affidavits sworn by Hon. George Muturia Kaliunga, the grounds set out in the petition and other grounds canvassed in the submissions filed on herein.

Brief background as set out by Petitioners

[2] Sometimes in 2013, the Ministry of Education, Science and Technology launched a Plan to establish 135 Technical and Vocational Training Colleges in the country (hereafter the Government Plan). A criterion for identifying the specific counties and areas to erect a Technical Institute was set out in the Plan. According to the Petitioners, on 1st November, 2013, pursuant to the said Government Plan, the County Government of Meru forwarded six proposals for consideration for the establishment of a Technical Institute thereto. Karichu Technical Training Institute was one of the proposed sites for the establishment of a Technical Institute. Thereafter, on 4th March 2014, the Ministry personnel visited the proposed site of Karichu Technical Training Institute and were satisfied that it met all the conditions and criteria set for selecting suitable site and place for the establishment of a Technical Institute. Subsequently, on 7th August, 2014, the Respondents advertised tenders in the Standard Newspaper for the establishment of various Technical Institutes in various counties including Karichu Technical Training Institute which appears as item No 12. On 26th August, 2014, Karichu Technical Training Institute was also published as the duly approved site for the building of a Technical and Vocational College for Meru County. However, the Petitioner accused the 1st and 2nd Respondents that, in a letter dated 29th August, 2014 they unilaterally and unlawfully attempted to change the name and place of the approved institute from Karichu Technical Training Institute into Kaelo Technical Training Institute, and from Karichu to Kaelo which fall in two different Wards. Both these places are within Igembe North Constituency, Igembe North Sub-County in Meru County.

The Petitioners' gravamen

[3] The major complaint by the Petitioners is that the approved site for the establishment of a technical and training institute for purposes of the Government plan is Karichu Technical and Training Institute and not Kaelo. The proposal of Karichu Technical Training Institute was done by the Governor as per the criteria set in the Government Plan. Therefore, the attempted change of name and the site for the establishment of a technical and training institute by the Ministry was done without consulting the residents of Antubetwe Kiongo Ward where Karichu falls and without following the laid down procedures; thus, inequitable, unfair, unjust and unconstitutional. It is in that unlawful and unilateral change of site that the Petitioners saw violation of article 27, 43(1) (f), 47 and 50 of the Constitution. They also accused the area Member of Parliament of using politics to influence the change of site to Kaelo. In any event, they urged that Karichu Technical Training Institute was already partly established with 15 students and is therefore most suited for the establishment of the technical and training institute. On these reasons, the Petitioners sought for declaration of infringement of the Constitution by the 1st and 2nd Respondents and an order quashing the decision to change the location of the proposed technical and training institute from Karichu to Kaelo, a permanent injunction prohibiting any such change whatsoever, and an order of mandamus that the proposed technical and training institute be established at Karichu as had been approved.

Petitioners' submissions

[4] The Petitioners submitted in support of their above position. The submissions reiterated in *ex tenso* the content of the Petition and the affidavits filed herein. They however emphasized that Karichu Technical and Training Institute was the selected and approved site from the six proposals made by the County Government of Meru for the establishment of the proposed Institute under the Government Plan.

And any change thereof, without consulting the residents of AntubetweKiongo Ward was discriminatory, unilateral and unlawful and should be so declared by this court. In support of their arguments, they cited the case of **JOHN KIPLAGAT BARBARET & 3 OTHERS vs. AG & 4 OTHERS [2014] eKLR, GENERAL COMMENT 18 OF ICCPR, KHRC vs. NGOCB [2016] eKLR, KURIA GREENS LTD vs. REGISTRAR OF TITLES [2011] eKLR, ROYAL MEDIA SERVICES LTD vs. AG & 6 OTHERS [2015] eKLR and HUTCHINGS BIEMER LTD vs. BARCLAYS BANK OF KENYA & 2 OTHERS [2006] eKLR.**

[5] On costs, the Petitioners submitted that they were unreasonably and unjustifiably caused to incur costs of this petition by the unjustifiable action of the 1st and 2nd Respondents in writing the latter dated 29th August, 2014. On that basis, they requested for costs of the petition to be awarded to them.

Respondents returned fire

[6] The Respondents opposed the Petition vehemently through the Replying Affidavit filed on 23rd April 2015 and the submissions filed on 16th August 2016. The main argument by the Respondents is that, in implementing the Government Plan, the Governors and Members of Parliament were to consult and come up with an agreed proposal on the establishment of the technical and training institute in their respective jurisdictions. The Members of Parliament were also informed vide letter dated 9th May 2014 that the establishment of the institutes would be a cost-sharing venture where CDF was to contribute Kshs. 10,000,000. They were also to adhere to the conditions given by the Ministry on the matter namely;

- (1) Provide evidence on site by the leaders in the County and other stakeholders, to wit; minutes of Sub-county Development Committee; and of BOG in case a school or other GoK Institution is involved
- (2) Proposed name of the Technical and Vocational Institute;
- (3) Land and service;
 - (a) Copy of Title Deed, or allotment letter; land size;
 - (b) Three phase electricity BE PROVIDED;
 - (c) Undertaking to finance geothermal surveyor to the site; and
 - (d) Undertaking to finance activities in compliance with NEMA requirements
- (4) Other conditions;
 - (a) The identified site should not be located in a constituency with an existing Technical and Vocational Colleges (Technical Training Institute or Institution of Technology or National Polytechnic)
 - (b) Undertaking for provision of security for the identified sites.

According to the Respondents a consultative meeting in which the Petitioners as residents of Igembe North Constituency participated, was convened and Kaelo was agreed to be the suitable place for the establishment of a technical and training institute for Meru County. The area MP and Deputy County Commissioner were also present during the said consultative meeting. They produced letter dated 11th June 2014 and Minutes identifying the 8 acres of land alienated by Antuambui Secondary School and Nkiriana Primary School for the project.

[7] The Respondents submitted that they received two proposals; one from the County Government and another from the area MP. Upon receipt of these proposals, they dispatched officers to inspect the sites

and found that; (1) Karichu did not meet the conditions set out by the Ministry as there existed a youth polytechnic called Karichu Polytechnic; but (2) Kaelo met the conditions for the establishment of a technical training institute. Kaelo was therefore approved and construction commenced only to be rudely interrupted by the petitioners without any justifiable cause. According to the, these petitioners have not even demonstrated that the Karichu site satisfied the conditions by the Ministry; and for this, Respondents labelled them as “*indolent litigants*”...” *just engaging in political antagonism of wards in Igembe North Constituency*”. Such are but political motivations for which no relief is grantable. They cited the case of **JOHN KIPNG’ENOKOECH & 2 OTHERS vs. NAKURU COUNTY ASSEMBLY & 5 OTHERS [2013] eKLR** in support of their said position. According to the Respondent the intention of the Government was not to abolish existing youth polytechnics but to advance vocational training by constructing technical training institutes in Counties with none. Again, they emphasized that these institutes were meant to be established in every Constituency and not in every ward. And as residents of Igembe North Constituency, the Petitioners and residents of AntubetweKiongo Ward all will be served by the institute. Therefore, they contended that the Petitioners have not shown with any degree of precision how their right to education has been infringed by having the institute in Antuambui Ward within the same Constituency. Indeed, they have no locus standi to complain on a project which is being carried through in accordance with the Government Plan. The Respondents lamented that this petition would open a Pandora’s Box where each ward will stake a claim of its own to have an institute in their ward; a recipe for chaos and havoc in Government development plans for Constituencies. The Respondents argued that the Petition does not meet the threshold and should be dismissed.

[8] On orders of certiorari and Mandamus, the Respondents argued that these are discretionary reliefs and therefore, the Petitioner should invoke the supervisory jurisdiction of the court under the Law Reform rather than seek them under constitutional jurisdiction. And as no illegality that has been demonstrated, certiorari would not issue. The Respondent supported this view by citing the case of **KIPNG’ENO (supra)** and **GITONGA MITHIKA vs. CHAIRPERSON IGEMBE CDF COMMITTEE & 4 OTHERS [2016] eKLR**. Based on the foregoing, the Respondents beseeched the court to dismiss the Petition.

DETERMINATION

Of jurisdiction

[9] First things first. The Respondent argued that, as orders of certiorari and mandamus are prerogative and discretionary, the Petitioners should have invoked the supervisory jurisdiction of this court under the Law Reform rather than the constitutional jurisdiction. That submission is a legal circumlocution on which I wish to only state the following. I have stated in the past every time I have the occasion to, that with the enactment of article 23(3) (f) of the Constitution of Kenya, 2010, judicial review is one of the reliefs which a party may seek and obtain in a constitutional petition. And therefore, gone are the days when courts held that you could not mix relief of judicial review with constitutional declarations. I am delighted to see courts including the Court of Appeal to be reinforcing that the purview of judicial review especially when it has been sought in a constitutional petition is not to be restricted to the traditional grounds as were developed by common law; intense interrogation of matters complained of and application of principle of proportionality has begun to be favoured in judicial review. You may refer to the analysis on this position in the matter of **R vs. PUBLIC PROCUREMENT AND REVIEW BOARD & 3 OTHERS Ex Parte LIVE TELECOMMUNICATION PVVT LTD [2014] eKLR**. On this basis, I do not, therefore, accede to the submission by the Respondents that, as orders of certiorari and mandamus are among the relief sought; the Petitioner ought not to have sought those orders within the constitutional jurisdiction of the court. This court has jurisdiction to deal with orders of judicial review within a constitutional petition. The question would be; whether the petition meets the threshold for issuance of orders sought?

Issues

[10] I now turn to the major issues of the petition which are:

(a) Whether there was a unilateral and illegal change of site for the establishment of a technical training institute for Igembe North Constituency of Meru County? Under this broad issue, I will examine two discordant arguments; by the Petitioner that Karichu Technical and Training Institute was the approved proposal; and by the Respondents that Kaelo Technical and Training Institute was the approved proposal.

(b) What orders are appropriate in the circumstances of the case?

(c) Who pays costs?

Politicising development

[11] From the arguments presented by the parties, I should state that; allocation of development funds or resources by National Government to a particular Constituency is a matter of government policy to benefit all the residents of that Constituency; not all of a particular class or ward but all. Therefore, such development agenda is guided by national policy and not by the desires of sectarian interests of an individual or a group of people who wish to use it as a reward to a portion of the people of the recipient constituency who are considered to be loyal to or to have voted for, or as a way of punishing those who are perceived or did not vote for the area Member of Parliament. That type of practice of rewarding political loyalists or sycophants, and punishing the others is the greatest tragedy that has for many years befallen our nation, and is a complete negation of the Constitution which stands for devolution of and equitable allocation of resources to the people of Kenya regardless of their political affiliation, which is also political right of the people. As pundits have it, such is a practice which punishes a person for exercising his or her rights in political suffrage. And, I dare say that political motivation of such nature will never find a relief in law. Was this the case here?

[12] From the record, the Petitioners accuse the area MP for exerting political influence on the selection of the site for the establishment of a technical and training institute. Likewise, the Respondents accuse the Petitioners especially the 1st Petitioner who is the Member of the County Assembly of AntubetweKiongo Ward to be routing for the establishment of the technical and training college in his ward for selfish political reasons. These accusations are serious and could be true. However, this court will not be concerned with the personal desires of these politicians but the overall good of the people of Igembe North Constituency. To begin with, I totally agree that a project such as this should be and viewed as a development for the entire Constituency for the benefit of all residents in that Constituency; it should not be viewed as a development for the particular ward in which it will be established. I say so because a Constituency normally consists in more than one ward. Igembe North Constituency has five wards. Therefore, the Government usually sets out an objective criterion to govern such developments, and as long as the technical and training institute is established in accordance with the objective criterion set out by the Ministry, it is for the entire Constituency. It is futile, therefore, to attack this reality and it would be even greater futility to view this in any other way as that would be disastrous and a negation of the national values, constitutional principles of good governance and allocation of resources. What is this criterion that was set by the Ministry?

Selection criteria

[13] The Respondents provided information and documents which will act as useful guide here. The Government Plan required Governors and Members of Parliament to consult and come up with an agreed proposal on the establishment of the technical and training institute in their respective jurisdictions. The Members of Parliament were also informed vide letter dated 9th May 2014 that the establishment of the institutes would be a cost-sharing venture where CDF was to contribute Kshs. 10,000,000. The establishment of the Technical and Training Institute was also to adhere to the conditions given by the Ministry on the matter, namely;

(1) Provide evidence on site by the leaders in the County and other stakeholders, to wit; minutes of Sub-county Development Committee; and of BOG in case a school or other GoK Institution is involved

(2) Proposed name of the Technical and Vocational Institute;

(3) Land and service;

(a) Copy of Title Deed, or allotment letter; land size;

(b) Three phase electricity BE PROVIDED;

(c) Undertaking to finance geothermal surveyor to the site; and

(d) Undertaking to finance activities in compliance with NEMA requirements

(4) Other conditions;

(a) The identified site should not be located in a constituency with an existing Technical and Vocational Colleges (Technical Training Institute or Institution of Technology or National Polytechnic)

(b) Undertaking for provision of security for the identified sites.

Public participation/consultation

[14] It is needless to state that it is now a constitutional principle that such development should gather sufficient public participation in order for it to gain legitimacy and justification. I am aware there is no exact measure of what amounts to sufficient public participation as that will depend on the facts of each case. I am, however, acutely alive to the huge acrimony the term consultation elicited during the coalition government. But, be that as it may, involvement of the persons concerned in the process and giving all pertinent information through such mediums of easy reach to the residents of the Constituency are important considerations in public participation. This was also one of the fundamental considerations set out in the criteria by the Ministry in the selection of a suitable location for the establishment of a technical and training institute. I have perused the documents submitted to the court by the Petitioner especially the letter dated 1st November, 2013. Other than the letter from the Ministry calling for proposals and the reply by the County Government which was signed by Hellen N. Nangithia, CES-EDUCATION AND TECHNOLOGY, MERU COUNTY, there is absolutely nothing to show that there was any consultation on the matter with the leaders in the County and other stakeholders, for instance; minutes of Sub-county Development Committee; and of BOG in case a school or other GoK Institution is involved. I also note that Karichu Technical Institute or Polytechnic was already in existence at the time the project was rolled out. This portends two things. One, the said institution and stakeholders thereto ought to have been consulted when making the proposal. Two, existence of Karichu as a polytechnic or technical institute offended the selection criteria for the establishment of a Technical and Training institute within that locality. As it was argued by the Respondents, the Government Plan was not to abolish existing technical or vocational colleges but to establish technical and vocational colleges where there is none. As such, Karichu could not have been a competent choice for the establishment of the institute under the Government Plan. Accordingly, from the record, the Petitioners have not proved that Karichu was the duly selected site for the establishment of a technical institute under the Government Plan. It is, therefore, untenable for the Petitioners to expect consultation on a misnomer or accuse the Respondents of not consulting the residents of AntubetweKiongo for any change of a site which never was.

Of discrimination

[15] In light of the above, the Petitioners cannot even claim discrimination under article 27 of the Constitution because the institute was for the entire Igembe North Constituency and not specifically for AntubetweKiongo Ward. Therefore, the institute should be established in any part of the Constituency which meets the set criteria and is agreed upon after due public participation and consultation with the relevant stakeholders. Here I must remind that claims of discrimination must be established in a specific

manner lest we risk spreading Article 27 of the Constitution far too thin to achieve its purpose if each and every argument that is perceived to be discriminatory is to be treated as prohibited differential treatment even those that happen to coincide with government policies for general good and development of all residents of Igembe North Constituency. I insist that a well-focused construction of Article 27 should be one directed at laws, practices and policies that perpetuate prohibited forms of discrimination and which are ascertained to be so rather than a crude reduction of every argument on development agenda on education and other social issues into aspect of discrimination without proof. I do not therefore find any discrimination in this matter upon the residents of AntubetweKiongo Ward. Accordingly, I do not wish to raise the prospect of theoretical, innocuous or *de minimus* perceptions of disadvantages into prohibited discrimination- that would be trivializing the right protected under Article 27 of the Constitution. At least violation of a right needs to be established by the person alleging discrimination. None has been established here. On this, see the case of **TURBO TRANSPORTERS [2012]eKLR**. Does that mean Kaelo it is?

Selection of Kaelo obscure

[16] As I stated earlier, this court will not assist politicians to effect schewed development agendas to reward those who voted for them or deny those who did not vote for them as a way punishment, on resources which are public and not personal resources. I have also considered the documents provided and the arguments presented by the Respondents. The documents have been vehemently objected to by the Petitioners. Again, although the Respondents talked of consultative meeting, the documents presented do not meet the threshold of what one would call consultative especially given the fact that the institute was for the entire constituency and a thoroughly substantial and inclusive consultation at all levels of leadership in the County was needed. Looking at the said documents, I have serious doubts whether there was public participation in the entire process of identifying Kaelo as the apt site for the establishment of a technical and training institute under the Government Plan. But, I must sound a warning; the argument by the Respondents that Karichu Polytechnic was already in existence was like holding a ‘Maasai Simi’ by either of the sharpened sides as it would certainly cut you; to say the least, it is self-defeatist arguement especially when I place it upon the threshold below:-

Other conditions;

(a)The identified site should not be located in a constituency with an existing Technical and Vocational Colleges (Technical Training Institute or Institution of Technology or National Polytechnic)

Alleged violation of right and Constitution

[17] Based on the above analysis, the Petitioners may have been motivated by selfish or political desire in insisting on establishment of Karichu Technical and Training Institute when it was clearly in violation of the specific conditions set out by the Ministry for the establishment of training and vocational colleges under the Government Plan. Such motivation cannot found any legal relief. On this I am content to cite the case of **JOHN KIPNG’ENOKOECH(supra)**, that:-

Where a person is acting 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 a person and must reject the application at the threshold...”

Right to Education

[18] Whereas in the foregoing circumstances, there is no proof of violation of right of the residents of AntubetweKiongo Ward in relation to having the proposed technical and training college established at Karichu, there is however evidence that the right to education for the residents of Igembe North Constituency is at stake here; and I wish to assign it paramount importance as a matter of the Constitution. I will, therefore, follow after the constitutional command that courts should always serve substantive justice in each case by fashioning such relief as may be appropriate in the circumstances of

the case. The facts of this case are unique as both sites seem to have substantial flaws in the manner they were selected. Therefore, in the circumstances of this case, I will not strike down one site and leave the other as that will be against the evidence before me and would be no remedy in law to the residents of Igembe North Constituency. Accordingly,

(a)I declare that both Karichu Technical and Training Institute and Kaelo Technical and Training Institute did not meet the threshold set out by the Ministry of Education, Science and Technology for the establishment of a Technical and Training Institute within Igembe North Constituency.

(b)I direct the Ministry to re-start the process again and within reasonable time only establish Technical and Training Institute for Igembe North Constituency in accordance with the law and the set criteria by the Ministry of Education, Science and Technology.

(c)Any party is at liberty to apply.

(d)Each party shall bear own costs of the petition.

[19] I must thank counsels in this matter for their industry.

Dated, signed and delivered in open court at Meru this 2nd day of November, 2016

F. GIKONYO

JUDGE

In the presence of:

Kiongo for Respondents

M/s Muna for Mbaabu for Petitioners

F. GIKONYO

JUDGE