



**IN THE HIGH COURT AT NAIROBI**

**MILIMANI LAW COURT**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 29 OF 2014**

**CONSOLIDATED WITH PETITION NO. 65 OF 2014**

**BETWEEN**

CHARLES OMANGA .....1<sup>ST</sup> PETITIONER  
PATRICK NJUGUNA ..... 2<sup>ND</sup> PETITIONER  
JEREMIAH ODHIAMBO ..... 3<sup>RD</sup> PETITIONER  
TABITHA MUMBI MUHORO ..... 4<sup>TH</sup> PETITIONER  
HUSSEIN ABDULLAHI TIGE ..... 5<sup>TH</sup> PETITIONER  
TERESIAH WAMBUI MUGO ..... 6<sup>TH</sup> PETITIONER  
MICHAEL TAMBO ..... 7<sup>TH</sup> PETITIONER  
GRACE WANJIRA WAMITI ..... 8<sup>TH</sup> PETITIONER  
HASSAN ABDIKADIR ..... 9<sup>TH</sup> PETITIONER

**AND**

THE ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT  
SAMUEL KAZUNGU KAMBI ..... 2<sup>ND</sup> RESPONDENT

**JUDGMENT**

**Introduction**

1. The two petitions were consolidated because they relate to the 2<sup>nd</sup> respondent who is the Cabinet

Secretary in charge of the Labour portfolio. He is a State Officer within the meaning of **Article 260(k)** of the Constitution.

2. In **Petition No. 29 of 2014, Charles Omanga v Hon Kazungu Kambi and the Attorney General**, the petition dated 22<sup>nd</sup> January 2014 seek the following principal orders:-

1. *An order of access to the 1<sup>st</sup> respondent's self-declaration form.*
2. *An order compelling the 1<sup>st</sup> respondent to produce his university degree.*
3. *Costs of this Petition.*
4. *Any other relief deemed fit and just by this Honourable Court.*

3. In **Petition No. 65 of 2014, Patrick Njuguna and 8 Others v Attorney General and Kazungu Kambi**, the petitioners seek the following orders:-

- a. *A Declaration that the Interested Party Hon. Kazungu Kambi was duly appointed as the Cabinet Secretary for Labour pursuant to the provisions of Article 132, 152 and 155 of the Constitution of Kenya, 2010 and his removal from office can only be pursuant to Article 152 which provides removal by the President upon a motion or vote of members of the National Assembly on gross misconduct or violation of the Constitution and such a motion has to be supported by a third of members of the National Assembly.*
  - b. *A Declaration that the only legal entity authorised to gauge and authenticate and university degree in Kenya is the Commission for Higher Education, the commission has not discredited any education qualification held by Hon. Kazungu Kambi and there is no barometer outside the framework of the Commission of Higher Education to gauge the shallowness of a university degree. University degree shallowness cannot be gauged unless subject to the benchmarks and criterion set by the Commission of Higher Education.*
  - c. *A Declaration that a petition brought to court challenging the appointment of the interested party on the issue of integrity without providing proof of it is an abuse of the court process.*
  - d. *Costs of the petition be awarded to the Petitioners.*
4. As the prayers in **Petition No. 65 of 2014** demonstrate, the petition was filed ostensibly as a defence to **Petition No. 29 of 2014**. For reasons that will become apparent, I will deal with the issues in **Petition No. 65 of 2014**.

#### **Petition No. 65 of 2014**

5. The petitioners seek a declaration that a petition has been brought to court challenging the appointment of Hon. Kazungu Kambi on the issue of integrity without providing proof of it is an abuse of the court process. The core argument of the petitioners the Cabinet Secretary was lawfully appointed and can only removed in the manner prescribed by the Constitution.
6. A petition for enforcement of the Constitution is brought under **Article 258** which at sub-article (1) provides that. *“Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.”*
7. In this case the petitioners are not claiming that the Constitution has been contravened or is threatened with contravention. Their case is that the 1<sup>st</sup> petitioner has filed a petition challenging the petitioner's appointment. A petition cannot be filed to defend another petition; it can only be filed to enforce the Constitution in terms of **Article 258(1)**. The petition as framed does not raise any issue that is contentious or is in dispute, the declaration sought cannot be granted in the absence of a live dispute arising from a contravention or threatened contravention of the Constitution.
8. This court has always emphasised that although it has jurisdiction under **Article 165(3)(d)** of the Constitution to interpret the Constitution such interpretation is part of its ordinary jurisdiction to

resolve disputes. It is not a jurisdiction to decide on matters academic or theoretical. In *John Harun Mwau v The Attorney General High Court Nairobi Petition No. 65 of 2011 [2012]eKLR*, the Court observed that the jurisdiction vested in the High Court to interpret the Constitution is not exercised in a vacuum; that there must be a real controversy or dispute between parties before the court in order for it to exercise its jurisdiction. Likewise, in *Jesse Kamau and 25 Others v The Attorney General, Nairobi Misc. App. No. 890 of 2004 (Unreported)*, it was held that the court cannot be subjected to proceedings where the questions for determination are abstract and hypothetical. In the absence of a real dispute between parties before it, the Court would be engaging in an academic exercise, or, at best, giving an advisory opinion, a role that is vested in the Supreme Court in this country by the Constitution under **Article 163(6)** of the Constitution (See also *National Conservative Forum v Attorney General Nairobi Petition No. 438 of 2013 [2013]eKLR*).

9. In light of my findings, the **Petition No. 65 of 2014** lacks merit and is dismissed. I now turn to the other petition which deals with the right to information under **Article 35**. I shall limit myself to the arguments and issues related to whether the court should issue the prayers sought in the petition.

### **Petition No. 29 of 2014**

10. The petitioner avers that prior to his appointment as a Cabinet Secretary, the 2<sup>nd</sup> respondent has asserted categorically that he is a university degree holder and therefore qualified to be appointed as a Cabinet Secretary. That upon assuming office, the 2<sup>nd</sup> respondent conducted himself in a manner incompatible with the status of a degree holder. The petitioner therefore has reason to believe that the 2<sup>nd</sup> respondent is not a degree holder as alleged and that he must have given false and misleading information on his competence and abilities contrary to **Article 73** of the Constitution.
11. In the circumstances the petitioner has invoked the provisions of **Article 35(1)** of the Constitution which gives the right to every citizen access to information held by the state demanding the self-declaration form signed by the 2<sup>nd</sup> respondent pursuant to **section 13(1)** of the *Leadership and Integrity Act (Chapter 182 of the Laws of Kenya)*. The petitioner avers that it also invokes the provisions of **Article 35(1)(b)** to access information relating to the 2<sup>nd</sup> respondent to enable the petitioner exercise his constitutional right to good governance.
12. In support of the petition, Mr Aduda, counsel for the 1<sup>st</sup> petitioner, submits that the purpose of this petition is to enable the petitioner enforce the provisions of **Article 73** of the Constitution which states that the authority assigned to a State Officer is a public trust to be exercised, inter alia, in a manner that is consistent with the purposes and objects of the Constitution. He urges that as a result of the 2<sup>nd</sup> respondent's conduct, the petitioner is entitled to invoke the provisions of **Article 35** of the Constitution to seek pertinent information to enforce the provisions of the Constitution.
13. Mr Aduda argued that **Article 35** is self-propelling in that there is no requirement that before one can invoke the provision one must comply with certain requirements in the form of request and that the right can only accrue on denial of the same. Counsel submitted that the argument is fortified by the fact that unlike other provisions, there is no requirement for Parliament to enact legislation to give effect to the provision. Counsel urged that as the Constitution is the supreme law of land, the provision must be given effect without any pre-conditions. Counsel cited *Nairobi Law Monthly v Electricity Generating Company Nairobi Petition No. 278 of 2011 [2013]eKLR* and *Joseph K. Nderitu and 23 Others v The Attorney General NKU Petition No. 29 of 2013 [2014]eKLR* to support his case.
14. The petitioner avers that the allegations and requests have been set out in the petition in a manner that has allowed the 2<sup>nd</sup> respondent to respond to the allegations of facts against him. The petitioner points to the fact that the 2<sup>nd</sup> respondent has stated that he has completed his degree and

awaits graduation. The petitioner argues that it requires the petitioner to provide his self-declaration to seek relief in regard to the 2<sup>nd</sup> respondent's qualifications and to petition the legislature in terms of **Article 119** of the Constitution for it to pass a motion requiring the President to remove the 2<sup>nd</sup> respondent. Mr Aduda urged that the court should determine this matter with under regard to technicalities as required by **Article 159** of the Constitution.

### 1<sup>st</sup> Respondent's Case

15. The 1<sup>st</sup> respondent filed grounds of opposition dated 31<sup>st</sup> March 2014 and written submissions dated 7<sup>th</sup> April 2014.

16. As regards **Article 35** of the Constitution, it submits that the current jurisprudence confirms that right to information is not absolute. Counsel cited the case of *National Association for Financial Inclusion of the Informal Sector v Minister of Finance and Another* **Petition No. 40 of 2012**[2012]eKLR and *Kenya Society for the Mentally Handicapped (KSMH) v Attorney General and Others* **Nairobi Petition No. 155A of 2011**[2011]eKLR to argue that in order to enforce the right there must be a demonstration that a specific request has been made and the request declined.

17. The 1<sup>st</sup> respondent also submits that the petitioner has not demonstrated that the information sought is intended to assist the petitioner pursue his rights and fundamental freedoms.

### 2<sup>nd</sup> Respondent's Case

18. The 2<sup>nd</sup> respondent opposes the petition through his replying affidavit sworn on 3<sup>rd</sup> February 2014 and written submissions dated 5<sup>th</sup> March 2014.

19. The 2<sup>nd</sup> respondent submits that the petitioner's case is misconceived in the sense that even if the information were available, the petitioner has failed to direct the request has failed to direct the request to the right body. Mr Ogetto, counsel for the 2<sup>nd</sup> respondent, urged that the right information does not crystallise until a request is made to the relevant body and declined. Counsel cited the *Kahindi Lekalhaile and 4 Others v Inspector General National Police Service and 3 Others* **Petition No. 25 of 2013**[2013]eKLR and *Andrew Omtatah Okoiti v Attorney General and 3 Others* **Petition No. 92 of 2011** [2011]eKLR to support this proposition.

20. The 2<sup>nd</sup> respondent contends that the right under **Article 35** is not self-propelling as the right is not absolute. Counsel submitted that the right may be limited under the general limitation provided in **Article 24** and the right to privacy of the individual protected in **Article 31**. Counsel cited the case of *Maryan Hussein Mohamed v Director of Immigration and Registration of Persons and Another* **Nairobi Petition No. 173 of 2013**[2013]eKLR.

21. The 2<sup>nd</sup> respondent further submits that the petitioner has not demonstrated that he intends to enforce a right or fundamental freedom as the manner of appointment and removal of a Cabinet Secretary is provided for by the Constitution and in the circumstances the court cannot be called upon to conduct a review of the appointment of commence the process of removal. Counsel submitted that to do so would violate the doctrine of separation of powers. He cited several cases among them *Mumo Matemu v Trusted Society of Human Rights Alliance and 5 Others* **CA Civil Appeal No. 290 of 2012** [2013]eKLR and *Kenya Youth Parliament and 2 Others v Attorney General and Another* **Nairobi Petition No. 101 of 2011**[2012]eKLR to support the proposition that the Court should exercise restraint in entering merit review of functions mandated by other State organs.

22. The 2<sup>nd</sup> respondent's case is that the petition lacks merit and should be dismissed as an abuse of the court process.

## **Determination**

23. The issue for determination in this matter is whether the petitioner is entitled to the 2<sup>nd</sup> respondent's self-declaration and university degree certificate under **Article 35(1)** of the Constitution. **Article 35** provides as follows;

**35. (1) Every citizen has the right of access to—**

**(a) information held by the State; and**

**(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.**

**(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.**

**(3) The State shall publish and publicise any important information affecting the nation.**

24. As I stated in the case of *National Association for the Financial Inclusion of the Informal Sector v Minister of Finance and Another* [Supra], a reading of **Article 35** shows that the right of access contains three key elements. The first is the entitlement to information from the state or to information held by another person required for exercise or protection of a fundamental right and freedom. The second element contained in **Article 35(2)** is the right to correction or deletion of untrue or misleading information that affects a person. **Article 35(3)** is the third element which imposes on the State the obligation on the State to publish and publicise important information.

25. This case concerns **Article 35(1)**. The petitioner argues that this provision is self-propelling and that a person is entitled to apply to the court directly for such information to be given. In my view, this is the wrong approach. **Article 35** is part of the Bill of Rights and any person is entitled to enforce these rights under **Article 22(1)** claiming, "***that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.***" [Emphasis mine] How is the right to information threatened unless a person has been requested and has been denied the information? A person moving the court to enforce fundamental rights and freedoms must show that the rights sought to be enforced is threatened or violated and that is why in the case of *Kenya Society for the Mentally Handicapped (KSMH) v Attorney General and Others Nairobi Petition No. 155A of 2011 (Unreported)*, the court stated that, "[43] *I am not inclined to grant ..... the application as the Petitioner has not requested the information from the state or state agency concerned and that request rejected. Coercive orders of the court should only be used to enforce Article 35 where a request has been made to the state or its agency and such request denied. Where the request is denied, the court will interrogate the reasons and evaluate whether the reasons accord with the Constitution. Where the request has been neglected, then the state organ or agency must be given an opportunity to respond and a peremptory order made should the circumstances justify such an order.*"

26. In *Andrew Omtatah Okoiti v Attorney General and 2 Others (Supra)*, Musinga J., stated that, "*Before an application is made to court to compel the state or another person to disclose any information that is required for the exercise or protection of any right or fundamental freedom, the applicant must first demonstrate that a request for the information required was made to the state or to the other person in possession of the same and the request was disallowed. The court cannot be the first port of call. The petitioner herein did not demonstrate that he requested the JSC to avail to him any information that he considered necessary and the same was not granted. In that regard, prayer 4 of the applicant's application is rather premature.*"

27. There may well be circumstances where the Court may be required to make an order in the first instance but I think the Court should not exercise coercive power before the State organ, institution or body is given an opportunity to meet its constitutional obligation to provide the

information. The right to information is not an absolute right. Each institution or person is entitled to assert any limitations consistent with **Article 24** of the Constitution. The approach I have laid out earlier empowers the custodian of information to make the necessary judgment regarding the information and leaves the court to make an assessment whether the reasons are valid or accord with constitutional standards. For example, in *Nelson O. Kadison v Advocates Complaints Commission and Attorney General Nairobi Petition No. 549 of 2013* [2013]eKLR, the petitioner requested information about an advocate from the Advocates Complaints Commission. The Commission responded by refusing to give an information regarding the Advocate on the ground of Advocate/Client confidentiality. In that case the court ruled that a blanket refusal to provide information was inconsistent with **Article 24** and directed the Commission to reconsider its decision in light of its constitutional obligation.

28. It is in light of the aforesaid principles that I turn to consider the petitioner's prayers. The first document requested is self-declaration form signed pursuant to **section 13(1)** of the *Leadership and Integrity Act* which provides as follows;

*Moral and ethical requirements*

*13(1) For the purposes of Articles 99(1)(b) and 193(1)(b) of the Constitution, a person shall observe and maintain the following ethical and moral requirements—*

- a. *demonstrate honesty in the conduct of public affairs subject to the Public Officer Ethics Act (No. 4 of 2003);*
- b. *not to engage in activities that amount to abuse of office;*
- c. *accurately and honestly represent information to the public;*
- d. *not engage in wrongful conduct in furtherance of personal benefit;*
- e. *not misuse public resources;*
- f. *not discriminate against any person, except as expressly provided for under the law;*
- g. *not falsify any records;*
- h. *not engage in actions which would lead to the State officer's removal from the membership of a professional body in accordance with the law; and*
- i. *not commit offences and in particular, any of the offences under Parts XV and XVI of the Penal Code (Cap 63), the Sexual Offences Act (No. 3 of 2006), the Counter-Trafficking in Persons Act (No. 8 of 2010), and the Children Act (Cap. 141).*

*(2) A person who wishes to be elected to a State office shall, for the purposes of this section, submit to the Independent Electoral and Boundaries Commission a self-declaration in the form set out in the First Schedule. [Emphasis mine]*

29. The *Leadership and Integrity Act* ("the *Act*") is legislation enacted to, inter alia, establish procedures and mechanisms for the effective administration of **Chapter Six** of the Constitution. A self-declaration form is one of the forms required to be submitted by to the Independent Electoral and Boundaries Commission by person seeking electoral office. For purposes of this case it is not disputed that the 2<sup>nd</sup> respondent is not an elected State officer. He is appointed as a member of the Cabinet. In the circumstances, the provisions of the **section 13** of the *Act* do not apply to the 2<sup>nd</sup> respondent. Furthermore, **section 13(2)** of the *Act* is clear that the custodian of self-declaration forms is the Independent Electoral and Boundaries Commission from whom such a request must be made. The prayer for the self-declaration form in the circumstances lacks merit and is dismissed.

30. The second prayer seeks an order to compel the 1<sup>st</sup> respondent to produce his university degree certificate. Under **Article 35(1)(b)** of the Constitution, the petitioner must demonstrate that the information sought is required for the protection or exercise of any right or fundamental freedom. In this respect the scope of **Article 35(1)(b)** is narrower than that of **sub-article 1 (a)**. While **sub-article 1 (a)** refers to the State and its instrumentalities, the latter provision refers to any other person other than a State instrumentality. **Sub-article 1(b)** is an implicit limitation on a person's

right to privacy and personal autonomy only to the extent necessary to enforce the right or fundamental freedom of another person. That is why the reference to right or fundamental freedom is limited to the exercise or protection of the rights contained in the Bill of Rights. It is not applicable to the enforcement or exercise of any other rights under the law or generally.

31. The petitioner's case is that he seeks to enforce the provisions of **Article 73** in respect of the Cabinet Secretary. **Article 73** is part of **Chapter Six** of the Constitution which deals with leadership and integrity. It is not part of **Chapter Four** and the petitioner has not demonstrated that he requires 2<sup>nd</sup> respondent's degree certificate to exercise or protect any of his rights or fundamental freedoms enumerated in **Part 2 of Chapter Four** of the Constitution. The petitioner's petition must therefore fail.

### **Disposition**

32. In view of what I have stated above, the consolidated petitions are dismissed with no order as to costs.

**DATED and DELIVERED at NAIROBI this 5<sup>th</sup> day of May 2014.**

**D.S. MAJANJA**

**JUDGE**

**Mr Aduda instructed by Aduda and Company Advocates for the 1<sup>st</sup> petitioner.**

**Mr Mutua instructed by Kithi and Company Advocates for the 2<sup>nd</sup> to 9<sup>th</sup> petitioners.**

**Ms Mwangi, Litigation Counsel, instructed by the State Law Office, for the 1<sup>st</sup> respondent.**

**Mr Ogetto instructed by Ogetto, Otachi and Company Advocates for the 2<sup>nd</sup> respondent.**