



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
PETITION NO. 8 OF 2014

KELVIN KARIUKI KINYUNE.....PETITIONER

versus

DEDAN KIMATHI UNIVERSITY OF TECHNOLOGY.....RESPONDENT

JUDGMENT

1. By a Petition dated 16th June 2014 the Petitioner KELVIN KARIUKI KINYUNE on behalf of the Student Congress of DEDAN KIMATHI UNIVERSITY OF TECHNOLOGY move this court for the following orders:

- a. A declaration that the schedule of events for Dedan Kimathi University of Technology Student Organization 2014/2015 election as posted by Elector Commission is illegal hence null and void.*
- b. A declaration that there was no participation in the appointment of the members of the Electoral Commission by the petitions as required in the KUCTSO constitution hence the notice dated 5th June 2014 declaring successful applicants for DekUTSCO Electoral Commission is null and void.*
- c. An order compelling the respondents to initiate a referendum in respect of the proposed amended constitution and approve it on or before the 8th week of the second semester 2014.*
- d. Cost of the application.*

2. The petition was supported by the affidavit of the petitioner in which he deponed that he had been given authority by over 231 students and that he intended to vie for the position of chairman of DeKUTSO.

3. He further deponed that on 9th June 2014 one Kilongi Watitei purporting to be the chairman of the Electoral Commission posted on the University notice Board a schedule of events purporting to indicate the dates of the election as 27th June 2014 with a deadline for collection and submission of nomination forms set for 13th June 2014. On 5th June 2014, the Dean of Student one Muriithi Kaimoe posted the list of successful applicants. On 10th June 2014 the said dean signed several nomination forms purporting to give Rules and Regulations governing the process of nomination which documents are illegal, unprocedural and in gross contravention of the current constitution and in particular Article 12(9) which provides that elections should be held within the first 8 weeks of the second semester.

4. It was deponed that the university was currently in its first semester and if elections are held as scheduled all the students will suffer great prejudice as they are not ready for the election process since most faculty departments shall be conducting continuous assessment test and the interested candidates will not have sufficient time to source for funds and other logistics in preparation for the campaigns. It was further deponed that the students have been pushing for adoption of the draft constitution which will provide for a proper more consistent and reliable framework for conducting elections.

5. Together with the petition the petitioner also filed a notice of motion under certificate of urgency in which he sought an order of temporary injunction refraining the respondents, their agents, servants and all representative from executing the schedule of events dated 9th June 2014 pending hearing and determination of the petition. The said application was certified urgent and fixed for hearing interpartes.

6. In response to the said petition the respondent filed a replying affidavit sworn by professor P.N. Kioni on 20th June 2014 in which he deponed that the petitioner did not have the locus standi to file the petition on behalf of the 231 students since the list he submitted was of the students assenting to the students constitution review process in the year 2013/2014. It was stated that the petitioner was not vying for any position since he has not submitted his nomination papers as per Article 12.3(iv) of the constitution approved in January 2008.

7. It was deponed that the process of preparing, organizing and planning for the year 2014/2015 student election had been fair transparent, accountable and according to the constitution and that the petition has been brought in an attempt to try and illegally elongate the term of the outgoing officials whose term of office terminated on 27th day of June 2014. It was stated that the timelines set in the current constitution were affected by the accreditals of the university by the government.

8. It was further stated that as per the current constitution the 1st semester runs from January to April and second semester May to August while since the upgrading of the institution into a university in February 2008 the 1st semester runs from February to April and since May 2011 when the government introduced double intake the 1st semester now runs from May – August and 2nd Semester September – December.

9. At the hearing herein Mr. Ombongi appeared for the petitioner while Mr. Gitibi appeared for the respondent and it was agreed that the main petition be heard together with the application for injunction. On behalf of the petitioner it was submitted Universities Act 2012 at section 41 establishes the University Association which oversees and plans in consultation with the senate the student activities. It was submitted that the students were never involved in the setting of the schedule of events by the respondents thereby contravening the said statutory provision. It was therefore submitted that all those events be declared null and void.

9. It was further submitted that the elections should be held as per the constitution in particular section which establishes the 8th week of the 2nd semester as the date for election. It was further submitted that the respondent had refused to initiate a referendum on the draft constitution and further violated Article 12 of the current constitution in violation of the Electoral Commission.

10. On behalf of the respondents Mr. Gitibi submitted that the university has undergone changes and that elections of 2012 and 2013 were all held at the same period of time with the current elections since the outgoing officials were elected on 28th June 2014 and student body devolved on 16th June 2014 for new elections. It was submitted that the petitioner did not have the authority of the students population to file the petition and that the list..... was that in support of constitutional review.

11. It was submitted that the electoral commission was duly constituted as per Article 12 of the current constitution and therefore the petition should be dismissed.

12. In the pleadings and submission herein the court has identified the following issues for determination:

a. Whether the petition is properly filed on behalf of the students

b. Whether the court has jurisdiction to hear the petition herein.

c. Whether the petitioner has made up a case for the grant of the orders sought.

13. The following facts are undisputable:

a. The current constitution of the respondent is the 2008 constitution.

b. There has been a constitutional review process which has not been completed.

c. The outgoing officials were elected on 28th June 2013.

d. The respondent has undergone changes since the passing of 2008 constitution.

14. The provision for the filing of representation suit is order 1 rule 8(1) of CPR which provides this

8(1) where numerous persons have the same interest in any proceeding the proceedings may be commenced unless the court otherwise order, continued by or against anyone or more of them as representing all or as representing all except one or more of them

(2) The parties shall in such case give notice of the suit to all suits persons either by personal service or where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as he court in each case may direct.

15. Order 4 rule 4 provides that where the plaintiff sues in a representative capacity the plaintiff shall state the capacity in which he sues.

16. Whereas the petitioner has stated that he is petitioning on behalf of 291 students of the respondent's it is clear from the affidavit in reply to the petition that the petitioner has not annexed the authority of the 291 students to enable him petition on their behalf and further the petitioner has not complied with orders 1 rule 8 of the Civil Procedure. It is therefore clear that at this stage the petition is not a representative petition. however the petitioner has a right to institute the proceedings hereon.

17. The issues herein is in respect of the elections to the student body of the respondent. Article 12.8 and 15 of the constitution provides for dispute resolution mechanism starting with the filing of a petition to the electoral commission or filing a reference for arbitration to the office of the dean or principal. Appeal can be filed against the commissions ruling to the dean and then to the principal whose decision is final in a petition or arbitration. Article 15 of the constitution provides the decision of the dean of student or his/her designer on any matter pertaining to the students organization shall be binding to the parties concerned.

18. I therefore take the view that this court is not the correct forum for the petitioner to ventilate the issues herein having not exhausted the avenues provided for in the constitution of the respondent. It therefore follows that the petition herein is none suited.

19. The constitution of the respondent currently in force has provided for the setting up of election dates and the appointment of electoral commission under Article 10(11) from the evidence provided by the respondent I find that the procedure was duly followed and that the election calender of the respondent was changed by an administrative action not in their control and therefore until such time when the draft constitution shall be passed I find no fault with the actions taken by the respondent noting that the petitioner has not established any special loss he will suffer should the elections be held as scheduled.

20. The court can not micro manage the respondent so long as its activi are in conformity to the universities Act, the petition having failed to provide evidence to support his contention that the students body was not consulted. It is not for this court to order the respondent to conduct a referendum on the proposed constitution.

21. I therefore find no merit on the petition herein which I hereby dismiss with no order as to cost.

Dated, signed and delivered at Nyeri this 15th day of October 2014.

J. WAKIAGA

JUDGE

Court: Judgment read in open court in the presence of Mr. Ombongi for the petitioner and Mr. Gitibi for the respondent.

J. WAKIAGA

JUDGE