



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

ENVIRONMENT AND LAND PETITION NO.19 OF 2016

IN THE MATTER OF THE ARTICLES 1,2,10,22,28,40,47,

55.57 AND 186 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF RULE 4 OF THE CONSTITUTION OF KENYA

(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)

PRACTICE AND PROCEDURE RULES

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS UNDER

ARTICLES 40,47,55 AND 57 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF CANCELLATION OF BOOKING OF THE

SOCIAL HALL BY THE LETTER DATED 28TH NOVEMBER 2016

BETWEEN

ATHUURI AGIKUYU UASIN GISHU COUNTY.....PETITIONER

AND

THE UASIN GISHU COUNTY GOVERNMENT.....RESPONDENT

JUDGMENT

By an amended petition dated 12th April 2018 the petitioner filed this petition in court pursuant to the court's leave granted on 4th April 2018 averred that it is a duly registered community based organization by Article 22(2)(d) of the Constitution. By virtue of Article of rules 4(2)(iv) of the Constitution of Kenya (protection of rights and fundamental freedoms) practice and procedure rules filed this petition on behalf of its members.

THE PETITION

It was the petitioner's case that it had made urgent arrangements to source for an alternative venue at a greater inconvenience owing to the abrupt changes which led to a lower turnout. It was their contention that the respondent's actions was a nullity, unlawful and unconstitutional which contravened Article 47 of the Constitution. That the members were not given an opportunity to be heard before such decision was made contrary to section 4 of the Fair Administrative Action Act. Further the respondent contravened section 7(2), (2)(i) of the Fair Administrative Action Act and Article 10 of the Constitution.

The petitioner prayed for the following orders:

- a) That a declaration do issue pursuant to article 2(4) of the Constitution of Kenya 2010 that the Acts and/or omissions of the respondent in issuing the letter dated 28th November 2016 are a nullity and invalid for failure of compliance with articles 1,10,40 and 47 of the Constitution of Kenya 2010 and the respondent has no mandate whatsoever to deny the petitioner a chance to use a public facility to enjoy its cultural rights.
- b) That the petitioner be paid damages for the breach of the right to fair administrative action and damages for costs incurred by the breach.
- c) That the costs of the petition be awarded to the petitioner.
- d) That any other appropriate relief that the court may deem fit to grant

Counsel agreed to canvass the petition by way of written submissions which were filed.

PETITIONER'S SUBMISSIONS

Counsel reiterated the contents of the petition and urged the court to allow it as prayed. Counsel relied on the case of **Multiple Hauliers East Africa Ltd v. A.G & 10 Ors** (2013) eKLR where the court emphasized administrative action to be in regard with Article 47 of the Constitution. See also **Abott v. Sullivan** (1952) 1KB and **Dry Associates v. Capital Markets Authority & Anor** ptn no.328/2011.

In regard to section 7(2) of the Fair Administrative Action Act Counsel submitted that the respondent failed to follow the procedure in issuance of notices and that the decision ought to have been reviewed under section 7(2)(i) of the Fair Administrative Action Act, and violated Article 10 of the Constitution.

Counsel urged the court to award Ksh 5,000,000 as damages for breach of their rights. See **Isaac Gathungu Wanjohi v. A.G & Ors**, High Court Ptn no. 154/2011.

RESPONDENT'S SUBMISSIONS

Counsel submitted that on Article 1 of the Constitution which delegates power to the County Government and the 4th schedule has provided the respondent with functions to provide including cultural activities, public entertainment and public amenities, and management of facilities.

Counsel submitted that the petitioner could have addressed their grievances to the respondent. Counsel cited the case of **Benard Murage v. Fine Serve Africa Limited & 3 Ors** [2015] eKLR where the court held that when there is an alternative remedy then it ought to be pursued first. See also **Damian Delfonte v. The A.G of Trinidad and Tobago** CA 84 of 2004.

That Fair Administrative Action Act was enacted to cure the mischief of administrative bodies going against the Constitution in the guise of acting administratively and mischief of litigants running to court at the slightest whim, crying foul and claiming huge remedies disproportionate to the action.

Counsel also submitted that not every failure to act should amount to an action for breach of a statutory provision. This shows the petitioner is motivated by profit and by politics. See the case of **Re Hardial Singh & Ors** [1979] KLR 18, [1976-80] 1KLR 1090 where courts can exercise power so long as it is within the law.

Counsel relied on section 9 of the Fair Administrative Action Act which gives the procedure for a remedy on judicial review. The allegation on infringement without sufficient proof should not be entertained by the court. In **Peter Ochara Anam & 3 Ors v. Constituent Development Fund Board & 4 Ors** [2011] eKLR where the court held that, "where there exists sufficient and adequate legal avenue, a party ought not to trivialize the jurisdiction of the court pursuant to the Constitution. Such a party had to seek redress under the relevant statutory provision, otherwise such available statutory provisions would be rendered otiose."

Counsel further submitted that a person approaching the court in the name of public interest litigation this court was referred to the Indian Supreme Case **Ashok Kumar Pandey v. State of West Benga** where the court held that, "courts must be careful to see that a body of persons or member of public, who approaches the court is acting bona fides and not for personal gain or private motive or political motivation or other oblique consideration. The court must not allow its process to be abused for obliques considerations."

Counsel submitted that the duty of the court is to protect devolution as was held in case of **Speaker of the Senate & Anor v. A.G & Anor**, Advisory Opinion Reference no. 2/2013 eKLR and in **R v. A.G & Anor ex-parte Stephen Wanyee Roki** [2016] eKLR. Counsel therefore urged the court to dismiss the amended petition.

ANALYSIS AND DETERMINATION

The issues for determination in this petition are as follows:

- a) Whether the respondent's decision was in violation of the Fair Administrative Actions Act

b) If so does the amended petition have merit?

The petitioner is a registered community based organization based in Uasin Gishu County. Article 260 of the Constitution defines a person to include a company, association or other body of persons whether incorporated or unincorporated.

The gist of this petition is that the petitioner made reservations for the Social Hall for a cultural event on 3rd December 2016 paid the requisite fee that the police was also paid to offer security which was approved by the Kenya National Police Service vide a letter dated 30th November 2016.

That the petitioner made a request vide a letter dated 3rd October 2016 to the County Secretary requesting to hire the Social Hall, 64 Stadium, Committee Room, Public address system for purposes of holding a cultural event which was approved by the venue caretaker and the Director Social Services.

It is on record that the respondent wrote to the chairman of the petitioner on 29th November 2016 which letter was received by the petitioner on 2nd December 2016 that the booking for use of the social hall had been cancelled due to another county function that had been unforeseen. The petitioner alleges that they were not given enough notification, as the event was to take place the following day, and that it is against Article 47 of the Constitution. The said article provides as follows:

- (1) *Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*
- (2) *If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.*
- (3) *Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—*
 - (a) *provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and*
 - (b) *promote efficient administration.”*

Fair administrative action broadly refers to administrative justice in public administration and is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations and that the right to a fair administrative action, though a fundamental right is contextual and flexible in its application and can be limited by law.

The right to Fair Administrative Action is a constitutional right and as was stated by the Constitutional Court of **South Africa** in the case of **President of the Republic of South Africa and Others v. South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1**, that;

“Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...”

The decision in question can only be challenged on grounds of **illegality, irrationality and procedural impropriety**. I have considered the material before me and I do not find that any of the three has been established. The decision of the respondent County government has not been shown to be *illegal* or *ultra vires* and outside their functions. Further that the respondent gave reasons for the cancellation of the event that the hall was to be used to a function of a national nature. What more could the respondent do, were they to go to hire an alternative venue for a national function and yet they have their own.

Section 7 (2) of the Fair Administrative Action Act provides for grounds of review which include bias, procedural impropriety, ulterior motive, failure to take into account relevant matters, abuse or discretion, unreasonableness, violation of legitimate expectation or abuse of power. None of these has been proved in this case.

This court is guided by the Court of Appeal decision stated in the case of **Judicial Service Commission v Mbalu Mutava & another** [2014] eKLR; that;

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected

by Article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

In *Dry Associates Ltd v. Capital Markets Authority and Another*, [2012] eKLR the Court observed that;

“Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law or judicial review under the Law Reform Act (Cap 26 of the Laws of Kenya) but is to be measured against the standards established by the Constitution.”

The petitioner in their request to hire the social hall, only indicated that its purpose was to hold a cultural event, which was not clear as to what exactly would take place. The respondent averred that they had an obligation to hold a cultural and public entertainment and the Chief Officer Education, Culture and Social services had indicated that the same venue was required for purposes of Jamhuri Day celebrations and the National Kenya Music and Cultural Festivals which was to take place from the 1st -9th December. The events would affect the whole nation as compared to the cultural event which was not disclosed, apart from annexure R which is an invitation card that shows the event was for installation of an elder which would have a small impact to the nation.

The issue on alternative remedy available was to be exhausted by the petitioner before moving to court. Section 9 of the Fair Administrative Action Act provides that :

(1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.

(2) The High Court or a subordinate court under sub- section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

(5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.

The above section has given the guideline on how an aggrieved person should move the court when a decision has been made which is against their constitutional rights. The petitioner was to move the court by way of judicial review and not a petition. There was also no evidence that the petitioners had exhausted the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law before approaching the court.

The petitioner just moved to court immediately after they got the letter of cancellation of their booking without attempting to deal with the internal mechanisms. This was done in haste.

I have considered the petition, the submissions by Counsel and relevant judicial authorities and come to the conclusion that this petition lacks merit and is therefore dismissed with no orders as to costs.

Dated and delivered at Eldoret on this 15th day of May, 2019.

M.A. ODENY

JUDGE

JUDGEMENT READ IN OPEN COURT in the presence of Mr.Mathai holding brief for the Petitioner and Miss.Kebenei for the Respondent.

Mr.Mwelem – Court Assistant