Bwanah v Milulu & another (Constitutional Petition E006 of 2024)
[2024] KEHC 7636 (KLR) (26 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7636 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CONSTITUTIONAL PETITION E006 OF 2024

RE ABURILI, J

JUNE 26, 2024

BETWEEN

TIMONSON JAIRUS AGIVER BWANAH ..... PETITIONER

AND

JAMES LIKEMBE MILULU ..... 1ST RESPONDENT

MUSIC COPYRIGHT SOCIETY OF KENYA (MCSK) ..... 2ND RESPONDENT

JUDGMENT

1. The petitioner Timonson Jairus Agiver Bwanah approached this court through a Notice of Motion application and a petition together with its supporting affidavit both dated 8th April 2024 seeking the following orders;

    1. A declaration issue invalidating the election of the 1st respondent as the nominated Regional Director representing Nyanza Region.

    2. A declaration do issue that the 2nd respondent resubmits a fresh list of nominees for election of Regional Director Nyanza Region without the name of the 1st respondent for election by member of the Music Copyright Society of Kenya Nyanza Region.

    3. A declaration that in compliance with order (b) above, the name of the Petitioner be included for nomination.

    4. In the alternative to (b & c) above an order be issued ordering fresh nominations for the Regional Director, Nyanza Region by the 2nd respondent.

    5. The respondents be condemned to pay the petitioners costs and incidentals to this petition and

    6. Such further, other and consequential orders as this Honourable court may lawfully make.

2. Parties agreed to have the petition and the application for conservatory orders to be canvassed simultaneously.

3. The petitioner's case is that the 1st respondent was duly elected as the Nyanza Director with effect from 29th November 2018 and served his 3 years' term upto 2021 and a further 3 years' term from 2021 to 2024 after which the 1st respondent was not eligible for re-election in the 2024 election cycle in compliance with Article 51 (a) of the MCSK Memorandum and Articles of Association as amended on the 5th July 2012.

4. The petitioner further stated that he had participated in the election cycle in 2018 with the 1st respondent when the 1st respondent emerged victorious. It was his case that he presented the same documentation for nomination and election in 2024 but his nomination was rejected without any reason whereas the 1st respondent's name was submitted as nominee in the 2024 election cycle in contravention of Article 51 MCSK Memorandum and Articles of Association.

5. The petitioner averred that the rules provide that no retiring regional director shall be eligible for re-election and as the 1st respondent is a retiring director representing Nyanza Region and therefore not eligible for reelection.

6. It was further averred that all the nominees who submitted their papers for the Nyanza region were all disqualified except for the 1st respondent who was not eligible for nomination and that the person who was eventually nominated by the 2nd respondent was not qualified for the position.

7. It was further averred that did not submit a list of only one member, the 1st respondent, which list was irregular and unlawful due to the provisions that bar the 1st respondent from re-nomination that he does not accept the nomination process as the same was marred with misinformation, transmission of false results, reporting information not given, irregular and unlawful nomination of the 1st respondent.

8. The petitioner averred that the 1st respondent's nomination fell short of the constitutional and statutory threshold.

9. In response, the 2nd respondent filed a replying affidavit sworn on the 16th May 2024 by its Chief Executive Officer who deposed that the claim as filed was an abuse of the court process in light of the provisions of Article 80 of the 2nd respondent's Articles of Association which contains an ADR mechanism that is arbitration which the petitioner ought to have exhausted.

10. The 2nd respondent denied the petitioner's allegations that the nomination process culminating in the nomination of the 1st respondent was marred with misinformation, transmission, false results and failure to give a reporting information.

11. It was further averred that the decision to disqualify the petitioner was based on a valid reason being that he failed to meet the eligibility criteria contained in Article 33 (g) of the 2nd respondent's Articles of Association by failing to furnish a certificate of good conduct and that the reasons for disqualification were forwarded in writing to the petitioner.

12. The 2nd respondent further averred that the 1st respondent has only been elected once as Nyanza Regional Director as his term was extended in the AGMs held in 2021, in 2022, his election was pushed to eight weeks before the 2023 AGM and that in 2023, there was no AGM due to financial challenges.

13. It was thus deposed that as per the Articles of Association, the 1st respondent has not served any other term following an election in the AGM and was thus found eligible for re-election for another one term.

14. It was the 2nd respondent's averment that the petitioner's claim was thus bereft of merit, outrageous and an attempt by the petitioner to block the 2nd respondent's legitimate action of conducting a proper nomination as stipulated in the Articles of Association.

15. The parties filed submissions to canvass the application.

The Petitioner's Submissions

16. The petitioner's counsel submitted that the nomination process that was done by the 2nd respondent was marred with misinformation, transmission of false results, reporting information not given, irregular and unlawful nomination of the 1st respondent who does not qualify to represent the society as the Nyanza Regional Director.

17. It was further submitted that the manner in which the nomination elections for the Nyanza Region fell way short of the constitutional status.

18. The petitioner further submitted that the 2nd Respondent did not furnish the Petitioner with sufficient reasons why the Petitioner was disqualified.

19. It was submitted that the primary rules governing elections of the Governing Council of the 2nd Respondent do not provide a mechanism for resolving disputes relating to elections and that Article 80 of the Articles of Association does not specifically bar a court process before arbitration is undertaken nor does it oust the jurisdiction of this court to deal with electoral disputes by the 2nd Respondent.

20. It was further submitted that the 2nd Respondent through their Replying Affidavit clearly demonstrated bad faith through which the Petitioner was disqualified particularly that there was no good faith on the part of the 2nd Respondent to approach arbitration with a neutral ground.

21. The petitioner's counsel submitted that the petition herein touches of fundamental human rights which rights cannot be determined through an Arbitration process.

22. It was submitted that the 2nd Respondent stated that it disqualified the Petitioner of a document that the Petitioner did not provide yet the Petitioner provided that document within the timelines

    set by the Respondent and thus to allege that such a document was not supplied was a sign of bad faith on the 2nd Respondent and gave the impression that the 2nd Respondent did not want the Petitioner to contest for the position that he applied and contested for.

23. The petitioner submitted that his fundamental rights as provided for in chapter four of *the Constitution* have been breached and its only through an order of this court that such a declaration can be made and not through arbitration. The petitioner relied on Article 47 of *the Constitution* of the Republic of Kenya 2010 which states that, "every person has the right to fair administrative action that is expeditious, efficient lawful, reasonable and procedurally fair."

The 2nd Respondent's Submissions

24. It was submitted that Article 80 of the 2nd respondent's Articles of Association provides for an alternative dispute resolution mechanism and as the matter before court touches on the applicability of various provisions of the 2nd respondent's Articles of Association specifically that the nomination process was unfair, the parties herein ought to have referred the matter to arbitration first.

25. Reliance was placed in the case of Revital Healthcare (EPZ) Ltd & Another v Ministry of Health & 5 Others [2015] eKLR where it was held interalia that where there is a parallel remedy, constitutional

relief should not be made unless the circumstances of which the complaint is made include some feature which make it appropriate to take that course.

26. It was submitted that in this matter, the petitioner has not demonstrated that the arbitration process provided for undr Article 80 is not sufficient hence the need to invoke this court process and as such the instant petition should be dismissed with costs.

Analysis and Determination

27. I have considered the pleadings filed herein as well as the parties' respective submissions. The first issue for consideration is whether the application for conservatory order and therefore the petition raises any constitutional questions.

28. The petitioner has alleged that the failure of the 2nd respondent to include him in the nomination list for the regional elections was a breach of his constitutional rights and similarly that the inclusion of the 1st respondent despite him having already served two terms was a breach of *the constitution* and the 2nd respondent's articles of association.

29. On that note, is the instant petition is competent? In determining this question, this court will inquire as to whether there was a constitutional matter raised in the first instance and, next, whether it was pleaded with sufficient particularity.

30. The jurisprudence in this jurisdiction in this regard has been settled for a long time that a petitioner should be specific as to the right violated and give particulars of it. It is a rule of good sense that aids in the crystallization of issues before the court and, moreover, gives opportunity to the other party to know the exact nature of the complaint levelled against him and therefore be in a position to give an appropriate answer. It provides structure, sense and symmetry to the litigation and prevents it from being an unruly free-for-all. The cases of Anarita Karimi Njeru v Attorney General (No. 1) 1979 I KLR 154, Mumo Matemu v Trusted Society Of Human Rights Alliance & 5 Others [2013] e KLR and Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR are clear and authoritative expositors of that position. Indeed, *the Constitution* of Kenya (Protection of Rights and Procedure Rules, 2013) reflect that thinking in requiring under Rule 10(2) that constitution petitions must contain, inter alia,

    (i) The facts relied upon;

    (ii) The constitutional provision violated;

    (iii) The nature of injury caused or likely to be caused;

    (iv) The relief sought.

31. I have perused the entire petition and I note that the petitioner has not quoted any Article of *the constitution* that he alleges was violated and how that violation has occured. The petition is simply brought under certain Articles of *the Constitution*. In his submissions, he alleges that his right to fair administrative action under article 47 of *the constitution* was violated. It is trite that submissions do not replace pleadings nor are they evidence.

32. Having perused the petition, I find no difficulty in finding and holding that the petition does not meet the threshold of formal competency as set out in the aforesaid Mutunga Rules and the case law cited. I say so quite cognizant of the fact that so long as there is a sufficiency of information, as to the constitutional right violated with particulars supplied, then a court of competent jurisdiction ought, in the spirit of a rights-centric constitutional dispensation such as ours, to take the matter

up, investigate and provide redress or relief if merited, careful not to defeat substance at the altar of procedural technicalities.

33. In the circumstances, I am not satisfied that this petition is competent.

34. Even if I was to find that this petition is competent, which it is not, it is my opinion that it violates the doctrine of exhaustion. Reasons for this finding is found below.

35. Public authorities or bodies, like the 2nd respondent generally exercise powers, duties and functions conferred by the parent statute in relation to their particular areas of competence. It was for that reason, as a general rule, that courts of law would normally be slow to interfere with the exercise of those authorities' administrative discretion on substantive grounds.

36. The doctrine of exhaustion of administrative remedies was settled in the case of Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the plaintiffs and other Members/ Beneficiaries of the Kenya Ports Authority Pensions Scheme) SC petition No 3 of 2016; [2019] eKLR, wherein the court stated as follows at paragraph 118:

> ".....Even where superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute."

37. In the case of R v National Environmental Management Authority, CA No 84 of 2010; [2011] eKLR the Court of Appeal observed as follows:

> 'The principle running through these cases is where there was an alternative remedy and especially where parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it...". [Emphasis added]

38. I am also persuaded by the High Court's reasoning in Anthony Miano *& others v Attorney General & others, HC petition No E343 of 2020*; [2021] eKLR where the court referred to the doctrine of exhaustion (by citing a 5-judge bench in Mombasa High Court Constitutional Petition No 159 of 2018 consolidated with Constitutional Petition No 201 of 2019 (2020) eKLR which had elaborately dealt with the doctrine of exhaustion.) The court stated at paragraph *35*:

> ".....What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, the regulatory scheme involved, the nature of the interests involved – including the level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies...". [Emphasis added.

39. The Court of Appeal in Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others [2015] eKLR, where the court stated that:

> " It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution."

40. In the case of William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR the court also dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

> " However, our case law has developed a number of exceptions to the doctrine of exhaustion. In R. v Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte The National Super Alliance Kenya (NASA) (supra), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus: .....
>
> the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.
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> 61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in Night Rose Cosmetics [1972] Ltd v Nairobi County Government & 2 others [2018] eKLR."

41. From the foregoing decisions, this court is invited to interrogate whether an internal dispute resolution mechanism was available to the petitioner, and the suitability of the internal appellate mechanism to determine the issue.

42. The 2nd respondent submitted that Article 80 of the 2nd respondent's Articles of Association provides for an alternative dispute resolution mechanism and as the matter before court touches on the applicability of various provisions of the 2nd respondent's Articles of Association specifically that the nomination process was unfair, the parties herein ought to have referred the matter to arbitration first. On his part, the petitioner asserted that the issues he was raising were constitutional matters and were not within the purview of arbitration.

43. Article 80 of the 2nd respondent's Articles of Association provide as follows:

> "Where differences arise between the Society on the one hand and any of the members, their executors, administrators or assigns on the one hand touching on the true intent or construction, or the incidents or consequences of these Articles, or the statutes, or touching on anything then or thereafter done, executed, omitted, or suffered in pursuance of these Articles, or of the statutes or touching on breach or alleged breach of these Articles or any claims on account of any such breach or alleged breach or otherwise any of the affairs of the society, every such difference shall be referred to the decision of an arbitrator, to be appointed by the parties in difference, or if they cannot agree upon a single arbitrator to the decision of two arbitrators, of whom one shall be appointed by each of the parties in difference."

44. In the instant case, the petitioner alleges violation of his constitutional rights. As earlier observed, he has not specified which Article of *the Constitution* was violated and the nature of violation. It is clear that there is an alternative dispute resolution provided within the 2nd respondent.

45. Courts have on n many occasions reiterated the position that where there are alternative avenues legally provided for in dispute resolution, there should be postponement of judicial consideration of such disputes until after the available avenues are fully adhered to or unless it is adequately demonstrated that the matter under consideration falls within the exception to the doctrine of exhaustion.

46. The Petitioner has not demonstrated any of the exceptions discussed above. As a result, this Court's jurisdiction has been improperly invoked. The Petitioner ought to lay his claim as provided in the Articles of Association of the 2nd respondent and if unsatisfied, follow the correct appeal procedure.

47. For the foregoing reasons, this Court declines jurisdiction on the basis of the doctrine of exhaustion.

48. In the end, I find the application for conservatory orders and the petition herein as a whole incompetently filed and the same are hereby struck out with an order that each party shall bear their own costs of the petition and of the application dated 8th April 2024 respectively.

49. I so order.

50. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 26TH DAY OF JUNE, 2024.

R.E. ABURILI

JUDGE