

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ABDUL AZIZ ABUBAKAR

PAUL NYAMWEYA

JEREMIAH ODHIAMBO AMMBBAASSAAH

ELIZABETH NJUGUNA

VINCENT OUMA

ONYANGO.....PETITIONERS

V E R S U S

THE HON. ATTORNEY-GENERAL..... 1ST
RESPONDENT

THE MINISTER FOR YOUTH AFFAIRS AND SPORTS.....2ND
RESPONDENT

JUDGMENT

Introduction

1. In their petition dated 20th May 2011, the petitioners challenge the constitutionality of the guidelines contained in Legal Notice No. 7 of 2009 for the election of representatives to the National Youth Council.

2. The petition is supported by the affidavit of Abdul Aziz Abubakar sworn on 20th May, 2011.

3. The petitioners seek the following orders:

1. **A DECLARATION** that the publication and implementation of the National Youth Council Act, of 2009: Section 5 as read with the Guidelines on the Elections of Youth Representatives to the National Youth Council Legal Notice Number 7 of 4th February, 2011 is discriminatory, unconstitutional and therefore null and void, and that sections 6,7 13 and 14 to the extent that they have the effect of disenfranchising majority of the 14 million eligible youth from participating in the elections and having access to civil education and necessary information is in breach of the Constitution in particular Articles 35 and 55 as read with Article 10(1) & (2) and Article 73 (1) & (2) of the Constitution.

2. **AN ORDER OF INJUNCTION** permanently restraining the 2nd Respondent from carrying out any further elections on the basis of the “National Youth Council Act, of 2009: Guidelines on the Elections of Youth Representatives to the National Youth council Legal Notice Number 7 of 4th February, 2011 or until the provisions of the Constitution and section 13 and 14 of the guidelines have been complied with.

4. The petitioners also filed simultaneously with the petition a chamber summons application in which they sought various conservatory orders. On the 23rd of May 2011 orders were granted staying elections to the National Youth Council.

5. The petition was opposed by the respondents and an Answer to the petition dated 20th June 2011 was filed.

6. On 23rd June 2011, an application was made by the elected representatives of the National Youth Council from Ndia East, Molo, Elburgon and Nakuru Divisions to be allowed in the proceedings as Interested Parties through their representative, one Benson Murimi Mwai. Though their application was allowed and directions given for filing of documents in the matter, the Interested Parties did not subsequently participate in the proceedings.

7. The petitioners and respondent appeared before me on the 14th of December for the hearing of the substantive petition. Mr. Oluoch appeared for the petitioners while Mr. Bitta appeared for the respondents.

The Petitioners’ Case

8. Mr. Oluoch for the petitioners presented their case as set out in their petition dated 20th May, 2011, the affidavit in support sworn by Abdul Aziz Abubakar dated 20th May, 2011, and the written submissions dated 13th December, 2011.

9. The facts as presented by the petitioners were that the 2nd respondent advertised for elections at the grassroots to sub-locational level for the National Youth Council established under the **National Youth Council Act 2009**. The Minister was empowered under the Act to create guidelines for the election of Youth to the Council. The petitioners submitted that they were aggrieved by the publication of those guidelines in Legal Notice No. 7 of 2009 on three levels.

10. They argue, first, that the organ contemplated under the Act, in light of the powers conferred upon it, is under a duty to comply with the principles in the Constitution and the constituting Act. The Constitution at Article 10 requires that the principles of accountability and public participation be adhered to.

11. Further, they argue that Article 73 has not been complied with, and that the provisions of Article 27 on non-discrimination have been infringed. They also allege that the provisions of Article 35 on the right to information and Article 55 which imposes obligations on the state to ensure the realisation of the rights of the youth have been violated.

12. With regard to the provisions of Article 27, the petitioners allege violation of the provisions of this Article due to the provisions of Section 5-9 of the National Youth Council Act with regard to remuneration of members of the National Youth Council. They argue that the Act provides that the positions would be remunerative positions while section 3 of the guidelines provides that a certain level of elected representatives shall not be remunerative. They support their contention about the discrimination by stating that the 5th petitioner was a candidate and in the event that he made it to any stage at the provincial level, he would not be remunerated.

13. The petitioners allege violation of the right to information under Article 35 and state that the manner in which the elections were conducted, particularly the management of the register and the circulation of the calendar for the elections was not sufficient to ensure that the youth enjoyed their right to information and the right to elect a person of their choice.

14. The petitioners were also aggrieved by the manner of carrying out civic education prior to the elections. They allege that no civic education was carried out as set out in the guidelines.

15. They also complain about the timing of the elections for the Youth Council. They argue that while the guidelines provide that the elections would take place 2 months after the close of the election register, the register was purported to have been closed at the end of March. The elections were therefore, in the petitioners' view, not due till May 2011 but were called in April, 2011.

16. They therefore urged the court in light of their grievances with regard to the elections as set out above to grant the prayers sought in the petition.

The Respondents' Case

17. Mr. Bitta presented the case for the respondents in opposing the petition and relied on the Answer to the Petition filed on 21st June, 2011. He submitted that the petitioners had not alleged that any specific Article in the Constitution has been breached.

18. It was the respondents' case that the youth had been made aware of the various levels of representative positions that they could vie for. Some of these levels were made non-remunerative. All the youths were aware of this fact, and the non-remunerative positions applied across the board. None of the youth could therefore claim that what he had chosen to vie for is non-remunerative, and if one chose to vie for a non-remunerative position, one could not thereafter claim discrimination.

19. The respondents argued further that the Constitution has enshrined certain rights which are progressive, not absolute, and are dependent on the availability of resources by the State. It argued that the petitioners had not produced evidence to demonstrate that the guidelines were not intended to progressively realise the rights set out in Article 55.

20. The respondents referred to the annexures to their Answer to Petition which they contend demonstrate that the respondent had put in measures aimed at sensitising the youth. Among the annexures are newspaper advertisements and workshops held. They argued that the fact that the 5th petitioner had vied for a position supported their argument that there was sufficient information available to the youth, including the petitioner, to enable him vie for a position.

21. Mr. Bitta submitted that he had read the affidavit in support of the petition and there was no specific allegation by any individual that he was denied an opportunity to vie by the manner in which the register was administered.

22. With regard to the petitioners' contention that there had been a violation of the provisions of Article 35, Mr. Bitta submitted that the petitioners did not seek any information from the respondents which the respondents failed or declined to provide. Article 35 does not require and cannot be construed as meaning that the state has an obligation to publish all the information that it has on every issue. A proper reading of the Article can only lead to the inference that it is the state which determines what is important and publishes it. An individual has the right to information that affects his rights over and above what is provided by the state, but it is incumbent on the individual to seek information that affects his rights from the state. If the state declines, then the individual can seek redress from the court.

23. Mr. Bitta referred the court to the documents annexed to the Answer to the Petition and submitted that they clearly demonstrate that the general information was published. The onus was on the petitioners to seek information relevant to the enforcement of their fundamental rights which they never did.

24. With regard to the contention by the petitioners that the civic education undertaken was not sufficient, the onus was on them, in view of the legal position that he who alleges must prove, to establish this insufficiency. None of the petitioners has attempted to demonstrate the insufficiency of the civic education carried out, and all of them accept that they are aware of the elections.

25. Finally, it was Mr. Bitta's contention that no discrimination had been proved by the petitioners. The petitioners' grievance appears to be directed at certain guidelines and the appropriate remedy would have been an application in the Judicial Review Division as there was no violation of the provisions of the constitution. He urged the court to dismiss the petition.

Issues for Determination

26. From the pleadings and submissions before me, I take the view that the only issue for determination in this matter is whether there has been violation of the rights of the petitioners under Articles 27, 35 and 55 of the Constitution.

27. I must register at the outset my concern at the dearth of facts to support the alleged violation of the petitioners' constitutional rights as alleged in the petition. The affidavit of **Abdul Aziz Abubakar** sworn in support of the petition on the 20th of May 2011 consists almost entirely of matters of law deponed to on the advice of Counsel. At paragraph 3 of the affidavit, Mr. Abubakar depones that he and the other petitioners are individual male and female adults of sound mind working for gain and on voluntary basis with various youth-led and youth-based organisations within the Republic of Kenya.

28. Paragraph 4-23 then set out matters of law and constitutional provisions which the deponent swears to on the basis of advice from his advocates on record. Paragraph 1-25 which is titled '**Facts**' beginning at page 7 of the affidavit again consists almost exclusively of matters of law deponed to on advice from the petitioners' advocate. It is only at paragraph 15, 18, 22, 23 and 25 of this later section that averments that approach facts and which can assist the court in determining whether the constitutional rights of the petitioners were violated as alleged are contained.

29. The averments in these paragraphs are as follows:

Paragraph 15: I know of my own knowledge that the 2nd Respondent failed to properly advertise the election calendar for all the potential youth voters to access and appropriate the information to their benefit and instead choose to circulate the information on email, Google groups and related websites instead of the official Kenya Gazette and the daily newspapers' accessible to all Kenyan Youth.

Paragraph 18: I know of my own knowledge that the registration process was closed on the 9th of May, 2011 and thus any elections were not due until the lapse of two months which would have placed the elections at the earliest on the 10 of July, 2011, subject to the carrying out of civic education as required by the guidelines.

Paragraph 22: I know of my own knowledge that in Kamukunji Constituency the registration and elections are being carried out at the same time as the elections for the Parliamentary elections and there has been a confusion among youth who have not been able to distinguish between the Party elections involving Party of National Unity, the Orange Democratic Movement and other Parties on one hand and elections for the National Youth Council.

Paragraph 23: I know of my own knowledge and information relayed to me by colleagues that the 1st Respondent ignored recommendation or queries' by the interested youth groups who attended the 1st Respondent's launch of the election guidelines in March, 2011 as to the capacity of the Ministry to carry out and conduct or manage elections and the need for civic education.

Paragraph 25: I know of my own knowledge that the process as currently ongoing has locked out interested candidates and robbed those who would have participated the opportunity to even know and learn what the whole process is all about.

30. The law with regard to the determination of constitutional petitions has been well articulated by the Court of Appeal in the case of **Rashid Odhiambo Aloggoh & 245 Others -**

v- Haco Industries Ltd Nairobi Civil Appeal No. 110 of 2001 (Unreported) where the Court of Appeal stated that -

‘...if the court had found that the facts were as stated by the appellants, then the court would have to move to the next stage, namely do the proved or admitted facts constitute or amount to a violation or contravention of the constitution?’

31. It is the duty of the court to consider the allegations set out in the pleadings and depositions and decide whether they constitute a breach of fundamental rights and freedoms of the petitioners. The petitioners, however, have an obligation. As the court stated in the case of *Anarita Karimi Njeru –v- Rep(1979) KLR 154* at page 156:-

“We would however again stress that if a person is seeking redress from the High court or an order which invokes a reference to the Constitution, it is important (if only to ensure that justice is done in his case) that he should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.”

32. In this case, the petitioners have not set out in their petition or in their affidavit in support sufficient information for the court to determine whether or not a violation of their rights is disclosed. What is before the court is somewhat generalised complaints with regard to the carrying out of the elections, the provisions of the National Youth Council Act, the alleged failure to carry out civic education, and the timing of the elections.

33. I have considered these general allegations against the information contained in the respondents’ Answer to the Petition and the documents annexed. The facts that emerge are as follows:

- i. That the 2nd respondent organised a retreat in Naivasha involving various stakeholders to prepare the Guidelines contained in Legal Notice No. 7 of 2010.
- ii. Between April and December 2010, the 2nd respondent organised sensitisation workshops country wide. Attendance sheets from the workshops showing representation from youth from various parts of the country are annexed.
- iii. A review of the Guidelines to align them with the Constitution was carried out and then the Guidelines were circulated countrywide.
- iv. Nationwide voter registration was launched and advertisements carried in local FM stations and the Standard Newspaper of 18th March 2011 and the Standard and Star Newspapers of 31st March 2011.

34. From the above information and the annexures to the Answer to the petition, and in the absence of a response to the Answer to the Petition to controvert the matters set out therein, I am unable to find anything that amounts to a violation of the petitioners’ rights under Articles 27, 35 and 55 of the Constitution.

Alleged Violation of Article 27

35. Article 27 contains the general prohibition against discrimination. The petitioners complain that some of the positions for the youth in the National Youth Council are non

remunerative. The fact that some positions are not remunerative does not, in my view, amount to discrimination. It seems to me to be a reasonable differentiation given the different levels of responsibility that each of those positions will carry. Further, given that none of the petitioners was prohibited from vying for the remunerative positions, there is nothing before me that justifies the allegation that there has been discrimination.

Alleged violation of Article 35

36. Article 35 of the Constitution provides that-

(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.

37. As submitted by Counsel for the respondents, the petitioners would need to show that there is information held by the state which they have requested for and which the state has failed or declined to provide. The court would then, in exercise of its constitutional mandate, make a determination on whether the refusal by the state to provide the information requested by a party is reasonable or not. This is not the case in this petition.

The petitioners complaint as set out in paragraph 15 of the affidavit of Mr. Abubakar is that the 2nd Respondent failed to *‘properly advertise the election calendar for all the potential youth voters to access and appropriate the information to their benefit and instead choose to circulate the information on email, Google groups and related websites instead of the official Kenya Gazette and the daily newspapers’ accessible to all Kenyan Youth.*

38. Even assuming that the 2nd respondent had indeed failed to circulate information about the elections as alleged, such failure would not amount to a violation of Article 35 if the petitioners had not requested for such information and been denied access to it. However, the respondents have answered this allegation, in my view, quite effectively. They state that they advertised the voter registration and the elections on FM radio and two newspapers circulating throughout Kenya on different dates. I therefore find no violation of Article 35 of the Constitution, and indeed no failure by the respondents to give information with regard to the youth elections as alleged.

Alleged Violation of Article 55

39. The petitioners allege violation of their rights under Article 55 of the Constitution. Article 55 contains the general provisions with regard to the state’s obligations to youth and provides as follows:

‘The State shall take measures, including affirmative action programmes, to ensure that the youth—

(a) access relevant education and training;

(b) have opportunities to associate, be represented and participate in political, social, economic and other spheres of life;

(c) access employment; and

(d) are protected from harmful cultural practices and exploitation.’

40. The National Youth Council Act 2009 and the National Youth Policy 2007, though preceding the constitution, form part of the state’s agenda towards ensuring fulfilment of the state’s constitutional obligations to the youth. The National Youth Council elections organised by the 2nd respondent and the various activities such as workshops and seminars are, in my view, a demonstration of the respondents’ commitment to meeting the state’s constitutional obligations to the youth. There is nothing in the material presented by the petitioners that demonstrates a violation of Article 55.

Conclusion

41. The petitioners may be dissatisfied with various provisions of the Guidelines and regulations published under the Act. This, however, does not translate to a violation of the constitutional rights of the petitioners. Certainly, they have not presented to this court any material on which the court can find that there has been violation of any of their rights under the Constitution.

42. I therefore find this petition totally without merit and dismiss the same with no order as to costs.

Dated and Delivered at Nairobi this 2nd day of March 2012.

Mumbi Ngugi

Judge



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