



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 133 OF 2013

BETWEEN

MICHAEL MUTINDA MUTEMI.....PETITIONER

AND

**PERMANENT SECRETARY, MINISTRY OF EDUCATION.....1ST
RESPONDENT**

ATTORNEY GENERAL.....2ND RESPONDENT

CABINET SECRETARY, EDUCATION.....3RD RESPONDENT

JUDGMENT

1. The Petition herein is dated the 25th February, 2013 and is supported by an Affidavit sworn by the Petitioner on his own behalf. The Petitioner states that he is the father of one, Mutinda Belteshazzar Mumo, who in February 2013 was offered a Form 1 slot to further his education at Othaya Boys High School.

2. The Petitioner simultaneously with the Petition filed an Application for interim reliefs and this Court ordered the Respondents to ensure that the Form 1 slot for Mutinda was reserved for his admission later and pending inter-partes hearing. After the inter-partes hearing a break-down of the school fees for the 1st term was made and it was ordered that the Petitioner would pay a first installment of Kshs.20,000 to the school by 11th March, 2013 and a subsequent Kshs.10,000 by 11th April,2013 after which directions would be given by the Court on the 19th April, 2013 the date when the issue of school fees for the year 2013 was to be settled.

3. Later, the Petitioner filed an Application dated 17th June, 2013 and in the said application he sought that the Cabinet Secretary of Education should be enjoined in this matter, which prayer was granted by consent of parties.

4. The Petitioner now contends that the Principal of the Othaya Boys High School initially declined to admit his son for the reason that he was unable to secure the required school fees. He adds that for reasons beyond his control, his business suffered a major setback and this has impacted on his inability to raise requisite funds. The Petitioner seeks the indulgence of this Court to enable him organize himself as he has other school going children, but his prayer is that his own dire circumstances should not deny or affect the future of his son's secondary education.

5. The Petitioner has added that prior to moving this Court, he made an effort to have this issue resolved and to that end he sought audience with the Nyeri County Director of Education, one Mr. Harrison, as well as the Director of Secondary Schools based at Jogoo House, one Mr. Masese, to no avail.

6. The Petitioner also complains that the Respondents are determined to deny his son his right to education as provided for in **Article 43(1)** and **Article 53 (1) (b)** of the **Constitution** and he believes that the Respondents have no interest in his socio- economic situation and contends that his son has a right to seek bursary from the Respondents because under the Constitution and the **Basic Education Act**, the Respondents are tasked with the responsibility of providing free and compulsory education as well as cushioning vulnerable families like his.

7. Further, that he tried to apply for a bursary from the Constituency Development Fund in his locality but found that the kitty only offered a maximum of Kshs.4,000 per year yet his son's school fee for the year 2013 alone was amounting to about Kshs.50,000. The Petitioner adds that he has used more than Kshs.30,000 so far to secure his son's right to education and seeks that the Respondents should pay the costs of the Petition so that he may utilize the same for his son's fees. That in the event there is another bursary kitty other than the CDF one, then the Respondents ought to inform him about it and the form and manner of applying for the same.

8. He concludes that education is the process by which people acquire knowledge, skills, habits, values or attitudes and helps one develop an appreciation of their cultural heritage and live more satisfying lives and therefore to deny his son this right is unconstitutional, illegal and malicious. It is for these reasons that the Petitioner prays for the following orders:

“a) That the Respondents [should] award his son Mutinda Belteshazzar Mumo an entire High School Education Bursary (sic)

b) Costs of the Suit”

The Respondents' Case

9. The Respondents state that this Petition is misconceived and an abuse of Court process and that it does not disclose any cause of action against the Respondents and does not disclose any constitutional violation or breach by the Respondents. The Respondents contend that the Petitioner knows the procedure of accessing a bursary for his son but has not demonstrated to this Court that he has applied for one.

10. The Respondents also add that the Government is doing its best to meet its obligations as stipulated in **Article 43** of the **Constitution** which deals with socio-economic rights and in doing so it has set up a bursary fund at the national and constituency level for needy students. As such the Petitioner should follow the due process just like other Kenyans have done.

11. The Respondents conclude that the realization of socio-economic rights by the state is subject to the availability of resources at the State's disposal. They add that there are many parents who are struggling to keep their children in school and the Petitioner should not be an exemption. The Petitioner's rely on the holding in **Matthew Okwando vs The Minister of Health and Medical Services Petition Number 94 of 2012** where the Court, and of relevance to this matter stated as follows;

“It is not unreasonable for the Petitioner and other concerned Kenyans to demand that a concrete policy framework be rolled out and implemented to address the containment and treatment of various health afflictions. These, however, are matters of policy which the State is expected to address in light of its clear constitutional obligations. In the absence of a focused dispute for resolution by the Court, I am reluctant to express myself on the broad

matters raised in the Submissions unless there is sufficient material that there has been a violation of the Constitution and the Court is required to act to provide the requisite relief.”

12. The Respondents therefore seek that the Petition be dismissed with costs.

Determination

13. For a very long time socio-economic rights were regarded as secondary rights while civil and political rights were considered absolute. With the advent of various International Covenants such as the International Covenant on Economic Social and Cultural Rights socio-economic rights are now part of Kenya's primary law through the Constitution of Kenya, 2010 and they are now at par with other fundamental rights. They are provided for in **Article 43** of the **Constitution** which states that;

“Every person has the right—

(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;

(b) to accessible and adequate housing, and to reasonable standards of sanitation;

c. to be free from hunger, and to have adequate food of acceptable quality;

d. to clean and safe water in adequate quantities;

(e) to social security; and

(f) to education.

2. A person shall not be denied emergency medical treatment.

(3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependants.”

14. The application of the rights provided for in **Article 43** of the Constitution is also articulated in **Article 20(5)** of the **Constitution** which provides that;

“In applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles—

(a) it is the responsibility of the State to show that the resources are not available;

(b) in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and

c. the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.”

Article 21 (2) of the **Constitution** also provides that;

“(2) The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43.”

15. **Article 21** as illustrated above draws us to look at the following in view of the Government's efforts in achieving the progressive realization of these socio-economic rights: legislative steps, policy and other measures and the setting of standards. While socio-economic rights are therefore clearly justiciable, States are required to apply as much practicability as possible in the realization of these rights and within the available resources and allocation thereof.

16. But Mumbi Ngugi, J. held in **Mitubell Welfare Society vs. The Attorney General & 2 Others Petition No. 164 of 2011** that;

"The argument that socio-economic rights cannot be claimed at this point two years after the promulgation of the Constitution ignores the fact that no provisions of the Constitution is intended to wait until the state feels it is ready to meet its constitutional obligations. Article 21 and 43 require that there should be "progressive realization" of

socio- economic rights, implying that the state must be seen to be taking steps, and I must add be seen to take steps towards realization of these rights.....Granted also that these rights are progressive in nature, but there is a constitutional obligation on the state, when confronted with a matter such as this, to go beyond the standard objection....Its obligation requires that it assists the court by showing if, and how, it is addressing or intends to address the rights of citizens to the attainment of the socio-economic rights, and what policies, if any it has put in place to ensure that the rights are realized progressively and how the Petitioners in this case fit into its policies and plans."

17. I wholly agree with the learned judge and I should now pose the question whether the Respondents have fulfilled their obligations in accordance with **Article 43** and **21** of the **Constitution** in the context of the Petitioner's complaints in this case. The Respondents submit that the Government is **doing its best** to meet its obligations and in terms of the availability of resources they state that it has set up bursary funds at both national and constituency levels to assist needy students like the Petitioner's son.

18. Sadly, the Respondents have failed to demonstrate concrete policy measures, guidelines and the progress made by the Government towards the realization of economic rights and particularly the right to education. While I would like to believe that there must be a Department within the Education Ministry which handles cases of needy students, the Government must be seen to take firm steps in achieving the right to education generally and I say so cognizant of the fact that there is a policy dubbed "*the free primary education*" programme which does not cover secondary education. That fact notwithstanding, it is important and fundamental that the Government demonstrates its political and financial commitment in that regard and the actions taken towards the progressive realization of the right to education in a holistic manner.

19. In the oft-quoted case South African case of **Government of the Republic of South Africa v Grootboom case CCT 11/00** it was held that;

"Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as

possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources"

20. I adopt these words as if they were mine and would add that measuring a State's performance in the implementation of the right to education is an onerous task in the absence of generally accepted criteria, benchmarks and methodology for evaluating the adequacy and effectiveness of steps taken towards its realization. Developing the core competence for measuring implementation is decidedly crucial considering all variables involved and the different spheres of Government involved in this determination.

Further, whereas this may not be the right case to extrapolate on the meaning of the right to education under **Article 43(f)** (*the issue here is limited to the right to a bursary and the arguments made were very narrow*), the following issues need to be brought to the attention of the Respondents as they formulate policies towards the realisation of that right;

i) *the obligation of progressive achievement exists independently of the increase in resources (Limburg Principles on the implementation of the International Covenants on Economic, Social and Cultural Rights) This means that the State must effectively use the resources available and not wait for increased resources (the "when the funds are available" argument) before implementing the right to education.*

ii) *It is no excuse for the State to claim that one socio-economic right is subordinated to another; for example that the right to basic education (and the laptop project for example) must override the right to housing or that the right to basic education is more important than the right to further education. Policies must be designed and resources applied in a meaningful, practical and result based formulae than the focus on one for political or other reasons.*

iii) *there may be need for the Ministry of Education to adopt an incremental approach to implementation as is happening now but it needs a structure, publicised framework.*

I have deliberately digressed to state the above because the Respondents can avoid an avalanche of litigation by setting out clear policies that are indicative of their appreciation that socio-economic rights are here to stay. The defence of progressive realisation may not be here for too long and other judgment of this Court are clear in that regard. In South Africa for example, in the case of **Section 27 and 2 others vs Minister for Education, Case No.24565 of 2012**, Kollapen J. sitting at the High Court in South Africa at North Gauteng made declarations that included that the failure by the Limpopo Department of Education and the Department of Basic Education to provide text books to schools in Limpopo was a violation of the right to basic education, and that the two Departments should develop a 'catch-up/remedial'

plan for affected Grade 10 learners in Limpopo. The Court went even further to demand updates on how the orders would be implemented.

21. Let this judgment therefore be a wake up call to the Respondents that **Article 43** of the **Constitution** does not sit there like a defected football player who has lost a match. It is indeed alive and has started the run towards full realisation as opposed to a slow shuffle in the name of progressive realisation.

22. Turning back to the present Petition, the only information I have from the Respondents is that there is a bursary fund at the national and constituency level while the Petitioner states that the CDF Bursary Kitty was only willing to offer Kshs.4,000 per annum. Whether this amount is reasonable enough in gearing towards the goal to attain the progressive realization of the right to education is not a question that can be answered by this court but by the relevant Ministry, because very many considerations must have gone into place to establish the criteria and that criteria has not been placed before me.

23. I note in any event that the Petitioner is also a small scale businessman and while his spouse is employed, they have other school going children but this is a picture that sounds all too familiar for a majority of Kenyan families and homes today. The Petitioner also states that he spent about Kshs.30,000 in filing this Petition, a large sum it looked at in the context of his explained dire economic situation but perhaps it is money well spent because the issues he has raised, albeit narrowly to his situation have implications beyond him.

24. But having said all the above, it is the duty of the Petitioner to demonstrate that his son's right to education has been infringed in a way that would call for the express intervention of this Court. In the case of **Trusted Society of Human Rights Alliance vs. The Attorney General & 2 Others Petition 229 of 2012** it was held that;

"This harkens to the rule of law enunciated in the famous case of Anarita Karimi Njeru v The Republic (1976-1980) 1 KLR 1272 and its progeny to the effect that a constitutional petition must state, with reasonable precision, the provisions of the Constitution which are alleged to have been contravened and the manner in which they are infringed. In that case, Justices Trevelyan and Hancox stated that: 'We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a 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."

The point made is that it is not enough to claim a right and alleged infringement but an obligation also exists to show with some measure of clarity that there is infringement of that right. A Court cannot be left to pontificate on a theorization devoid of material particulars.

25. I say so because the evidence before this Court shows that the Petitioner's son's slot at Othaya Boys High school was secured by an order of this Court and subsequently I issued a further order to determine how the school fees for 2013 would be settled. When this matter

came up for directions, the Petitioner amended his stance and sought a full bursary for the year 2013 and the future for his son to be able to attend the said school.

26. The information before this Court now shows that the Petitioner in fact applied for a bursary through the Ministry of Education from the Constituency Bursary Committee on the 18th February, 2013 before he moved the Court. The application forms were received by the said High school with the Head teacher, a Mr. Muriithi indicating that the Petitioner's son is indeed needy. It is unclear, to me what action was taken upon such determination was made.

27. However, the very fact that the Petitioner's son was admitted to the school and the school indeed accepted his needy status and the fact that some money was procured from the CDF kitty should not be seen as an infringement on his right to education.

28. Having so said and noting my sentiments above regarding the need to have the right to education, I will not dismiss the Petition. I say so because I believe that the Petitioner is still deserving of a remedy and under **Article 23** of the **Constitution**, this Court is obligated to grant “*an appropriate relief*” where a matter deserving of it is brought to its attention.

29. In the event, I will order as follows;

i) *Let the 1st and 3rd Respondents within 30 days file a report indicating what measures they have taken upon the Petitioner's Application for a bursary for his son's school fees.*

ii) *Let the Petitioner also file a report within 30 days indicating the responses from his local CDF on any assistance to him for purposes of paying school fees.*

iii) *Final orders will be made upon receipt of those reports.*

30. No party has succeeded or lost and so each should pay its own costs.

31. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 1ST DAY OF NOVEMBER, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Petitioner present in person

Miss Mwangi for Respondent

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE

Further Order

Mention on 6/12/2013

ISAAC LENAOLA

JUDGE



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