Kenya National Union of Nutrionists and Dieticians v Kenya Nutritionists and Dieticians Institute (Petition E296 of 2021) [2023] KEHC 22329 (KLR) (Constitutional and Human Rights) (22 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22329 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E296 OF 2021

HI ONG'UDI, J

SEPTEMBER 22, 2023

BETWEEN

KENYA NATIONAL UNION OF NUTRIONISTS AND DIETICIANS ..... PETITIONER

AND

KENYA NUTRITIONISTS AND DIETICIANS INSTITUTE ..... RESPONDENT

JUDGMENT

1. The petition dated 29th July 2021 was filed under *the Constitution* for the alleged contravention of Articles 1, 3, 10, 27(1)(2)(4)&(5), 35, 47, 73 and 258 (6) of *the Constitution*. The petition seeks the following orders:

    i. A declaration that the respondent's administrative actions leading to and including publication as well as implementation of the Nutritionists and Dieticians (Training Institutions) (Fees)Regulations, 2019 dated 9th December 2019 vide Legal Notice No.216 published in a Gazette Notice Vol. CXXII – No.16 dated 24th January 2020 without public participation of the petitioner's members or the nutritionists and dieticians within the Republic contrary to the *Nutritionists and Dieticians Act*, *Fair Administrative Action Act* and *the Constitution* are illegal ,unlawful, un-procedurally fair, discriminatory ,null and void.

    ii. An order of certiorari to call, remove ,deliver up to this Court and quash or revoke the Nutritionists and Dieticians (Training Institutions) (Fees)Regulations,2019 dated 9th December 2019 vide Legal Notice No.216

published in a Gazette Notice Vol.CXXII – No.16 dated 24th January 2020 and all preceding decisions leading to the publication of the said Regulations as well as all consequential administrative decisions in execution of the said Regulations including but not limited to the decision by the respondent's Council on 3rd July 2020 communicated by a letter Ref: KNDI/REG/9/6/2021 dated 17th June 2021 by the respondent to all nutritionists and dieticians as well as the further decisions in the latter letter hereof and any further decisions purportedly executing the Regulations hereof made in violation of the Fair Administrative Actions Act and *the Constitution*.

iii. A conservatory order to restrain or prohibit the respondent from implementing the Nutritionists and Dieticians (Training Institutions) (Fees)Regulations,2019 dated 9th December 2019 vide Legal Notice No.216 published in a Gazette Notice Vol.CXXII – No.16 dated 24th January 2020 in any manner or implementing all consequential administrative actions arising therefrom including execution of the respondent's decision by a letter Ref: KNDI/REG/9/6/2021 dated 17th June 2021 by the respondent to all nutritionists and dieticians on the punishment of the petitioner's members for failure to pay fees and penalties levied under the Regulations hereof, imposing and charging any fees and or refusing to render any service under the *Nutritionists and Dieticians Act* unless afee so charged or demanded by the respondent is in execution of the Regulations hereof.

iv. Costs of the petition.

v. Any other relief that the Court may deem fit to grant in the circumstances of the petition.

The Petitioner's case

2. The petitioner's case is supported by its Secretary General, Michael Ouma Odero's affidavit of even date and a supplementary affidavit dated 18th February 2022. The case is that the respondent's Nutritionists and Dieticians (Training Institutions) (Fees) Regulations, 2019 are unlawful for their failure to comply with *the Constitution* and the law.

3. He informs that the petitioner is a registered Union with over 2000 members who comprise of nutritionists and dieticians. He deposes that on or about May 2021, the respondent in violation of the constitutional requirement of public participation from the petitioner's members', published the Nutritionists and Dieticians (Training Institutions) (Fees)Regulations, 2019 dated 9th December 2019 vide Legal Notice No.216 published in a Gazette Notice Vol.CXXII – No.16 dated 24th January 2020.

4. He notes that the alleged forums convened to discuss the Regulations, were not actual public participation forums and the subject of discussion in the forums did not include discussion of the impugned Regulations. In particular he pointed out that the meeting dated 24th May 2018 held at Pwani University was a Special General Meeting that focused on reports of the Chief Executive Officer and election of the acting Chairperson. Similarly the meetings held on 31st August 2018, 19th January 2019 and 22nd January 2019 discussed like matters whose content did not contain a discussion of the impugned Regulations.

5. He asserts that the petitioner's members were not given prior notice of the respondent's intention to publish the impugned Regulations, He adds that they were not consulted nor their views taken into

consideration prior to the Regulations being published. Being an administrative decision on the part of the respondent, he avers that its members' were not given reasons for the decision made in line with the dictates of the Fair Administrative Actions Act.

6. He further asserts that the impugned Regulations are inconsistent with the preamble of the *Nutritionists and Dieticians Act* No. 18 of 2007 which informs that the Act was enacted to ensure that nutritionists and dieticians effectively participate in matters relating to their industry. He stresses therefore that it was incumbent on the respondent to ensure participation of the petitioner's members in compliance with Article 10 and 47 of *the Constitution* before enacting the Regulations.

7. It was likewise averred that the impugned Regulations were also prejudicial as they provide punitive and oppressive charges for services rendered to the petitioner's members. He deposes that this has resulted in 2205 of the petitioner's members being deregistered owing to the respondent's decision made on 3rd July 2020. The said members have been rendered incapable of earning a living, causing them hardship and suffering. He further states that the petitioner's members who fail to pay fees or penalties for the various services rendered by the respondent will not be able to access these services whatsoever.

8. In the supplementary affidavit, in addition to reiterating the assertions in his supporting affidavit avers that the petitioner by dint of Article 22 and 258 of *the Constitution* and Section 14(1)(e) of the *Labour Relations Act* has the necessary locus standi to institute this suit as the Trade Union that represents nutritionists and dieticians. He further asserts that the respondent's replying affidavit is incompetent and incurably defective and as such should be struck out.

The Respondent's case

9. The respondent in response to the petition filed a replying affidavit dated 1st December 2021 as sworn by its Chief Executive Officer, Dr. David Okeyo. He informs that the respondent as established under the Nutritionist and Dieticians Act has the authority to provide for the regulation of the standards and practices of the profession.

10. He avers that the petitioner has no locus standi to institute this suit as it does not represent the purported over 5000 professional nutritionists and dieticians. He points out that there was no authorization from the alleged professionals for it to act on their behalf. Further that the petition was filed without authority of the registered members of the respondent.

11. He additionally deposes that the petitioner in its annextures included names of persons who had not consented to being part of this suit. Likewise, it is stated that the suit was filed without a valid resolution of the members. Similarly, that the petitioner has not shown that the persons named in the petition are members of its union.

12. He deposes that contrary to the petitioner's allegation the respondent conducted the public participation exercise across the Country with the aim of acquiring views and comments on the proposed Nutritionists and Dieticians (Training Institutions) (Fees) Regulations, 2019. He asserts that during the consultative public participation sessions members of its profession supported the proposed training fees.

13. He asserts that the petitioner's Secretary General was in attendance in the consultative meetings and was even granted an opportunity to address its views in the forums. He avers that since the respondent duly conducted public participation it cannot be blamed if the petitioner and its members failed on their part to participate in the process. Equally, he states that the petitioner never raised any objection

since 2019 hence the petition is an afterthought. Correspondingly he avers that the petition has been brought in bad faith since it is clear that the respondent complied with the law.

14. He further depones that the *Nutritionists and Dieticians Act*, 2007 under Section 24 allows for removal of non-compliant professionals from the register. It is also noted that deregistration of its professionals is in line with Section 19 of the Act. He informs therefore that prior to the deregistration of these professionals the respondent issued a notice and warning of the deregistration in the standard newspaper vide its publications dated 8th September 2017, 16th August 2019, 16th May 2019, 19th February 2020 and 25th June 2020. On top of this, the respondent sent out mass SMS to the members. In the end all the professionals who had failed to comply by 30th June 2020 were deregistered on 3rd July 2020 by an Order of the Council.

15. He makes known that some of the professionals who had not complied and as a result deregistered have since re-applied and paid the requisite charges to have their names re–registered. Further that all those that made commitments in writing have since been restored. Considering this, he depones that it is clear the petition lacks merit since the respondent carried out its mandate in compliance with Article 10 and 47 of *the Constitution*.

The Petitioner's submissions

16. The firm of Litoro and Omwebu Advocates on behalf of the petitioner filed written submissions and list of authorities dated 21st April 2022. Counsel identified the issues for determination as:

    i. Whether the evidence adduced vide the respondent's replying affidavit is incompetent and incurably defective.

    ii. Whether the petitioner has Locus Standi.

    iii. Whether the respondent conducted public participation prior to enacting the Nutritionists and Dieticians (Training Institutions) (Fees)) Regulations, 2019 dated 9/12/2019.

17. On the first issue counsel submitted that the replying affidavit was incompetent and incurably defective for the reason that the respondent had failed to mark the annexures to its affidavit as required under Rule 9 of the Oaths and Statutory Declarations Rules. To buttress this point reliance was placed on the case of Francis A. Mbalanya v Cecilia N. Waema [2017] eKLR where it was held that it is trite in law that an affidavit and the annextures attached on it constitute evidence. Indeed, where a person seeks to proof a fact by way of affidavit, he is obligated to exhibit any document on his affidavit. The failure to comply with that law, can only lead to striking out of the offending documents.

18. Similar dependence was placed on the case of Jeremiah Nyangwara Matoke v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR. Counsel as such asserted that the exhibits to the replying affidavit ought to be expunged from the record and further that the defect cannot be cured by Article 159 of *the Constitution*.

19. On the second issue, Counsel submitted that the petitioner being the duly registered Union of Professional Nutritionists and Dieticians, has the necessary locus standi to institute this suit. In support reliance was placed on the case of Mumo Matemu vs. Trusted Society of Human Rights Alliance and 5 Others (2014) eKLR where it was held that Articles 22 and 258 have empowered every person, whether corporate or non-incorporated, to move the Courts, contesting any contravention of the Bill of Rights, or *the Constitution* in general. Akin reliance was placed on the cases of Haki Na Sheria Initiative v

Inspector General of Police and 2 others (2015) eKLR and Priscilla Nyokabi Kanyua V Attorney General & Another [2010] eKLR.

20. On the third issue, Counsel submitted that the making of the Nutritionists and Dieticians (Training Institutions) (Fees)) Regulations, 2019 did not constitute public participation hence unlawful in light of Article 10 of *the Constitution*. He cited the case of Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR where it was held that a public participation programme, must show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or public official must take into account the subsidiarity principle that is those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.

21. Comparable reliance was placed on the case of Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR. Counsel stressed that being that the petitioner's members would be most affected by the dictates of the impugned Regulations it was mandatory on the part of the respondent to involve them and have them participate in the process.

22. Counsel submitted that the respondent had failed to produce any cogent evidence to prove that it actually conducted public participation in respect to the impugned regulations and that the alleged public participation exercise met the set threshold for sufficient public participation. He added that the respondent's actions had infringed on the petitioner's fundamental rights as set out under Articles 10, 47, 24, 27, 73(1)(a) and 75(1)(c) of *the Constitution* and Sections 4 and 5 of the Fair Administrative Actions Act.

23. To that end Counsel relying on the case of Senate of the Republic of Kenya & 4 others V Speaker of the National Assembly & another; Attorney General & 7 others [2020] eKLR submitted that an invalid action is invalid ab initio. He urged the Court to allow the petition.

The Respondent's submissions

24. The respondent filed written submissions and a list of authorities dated 10th May 2022 through the firm of Kwamboka Marie and Associate Advocates who identified the issues for determination as:

    i. Whether the petitioner has locus standi to institute these proceedings.

    ii. Whether there was public participation prior to publication of Legal Notice No.216 published in Gazette Notice Vol.CXX11 – No.16 dated 24th January 2020.

    iii. Whether the professionals were duly notified and consulted over the stated fees in the impugned Regulation.

25. On the first issue, counsel while relying on the averments in the respondent's replying affidavit submitted that the petitioner lacks the requisite locus standi to institute this suit. It was also pointed out that the petitioner had not adduced any evidence to show that the members it had listed were indeed members of its Union and that it had received authorization to institute these proceedings on their behalf. Counsel argued that in this regard the burden to prove this allegation lies on the petitioner as held in the case of Raila Odinga and others v IEBC (Petition No.5 of 2013).

26. In support of this issue, counsel cited the case of Republic v Registrar of Societies ex parte Narok Muslim Welfare Association (2017) eKLR where it was held that it is important to appreciate that the lack of capacity to sue and be sued is a weighty matter that goes to the root of the validity of the proceedings before Court hence lack of legal capacity is grave. Also see (i) Nation Media Group Limited V Cradle the Children's Foundation CA No.149 of 2013 (ii) Alfred Njau and 5 others v City Council of Nairobi (1983) eKLR.

27. On the second issue, Counsel referring to the respondent's affidavit submitted that the allegation that there was no public participation was a misrepresentation of the facts as the respondent had duly conducted public participation in compliance with the law before enacting the impugned Regulations. This was said to be evident from the stakeholder meetings held on 15th April 2018, 23rd April 2019, 30th April 2018, 15th January 2019 and 2nd May 2019.

28. Counsel relied on the South African case of Minister of Health and another v New Clicks South Africa (Pty) Ltd and Others (CCT 59/2004) [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) (30 September 2005) where it was held that the forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. Akin reliance was also placed on In the matter of Mui Coal Basin Local Community (2015) eKLR.

29. On the final issue, Counsel submitted that the respondent issued a notice and warning to the professionals regarding the effects of the Regulations on their registration status on diverse dates as published in the standard newspaper on 8th September 2017, 16th August 2019, 16th May 2019, 19th February 2020 and 25th June 2020.Additionally, the respondent sent out mass SMSs to its members to inform them of this.

30. This decision is submitted to be in line with the respondent's mandate under Section 19 and 24 of the Act. In view of this Counsel submitted that the respondent had adhered to the provisions of Article 10 and 47 of *the Constitution*. She argued that the petitioner had not clearly demonstrated what provisions of *the Constitution* had been violated by the respondent by carrying out its mandate.

31. To that end Counsel submitted that the petition was devoid of merit and brought in bad faith. She argued the court to dismissed the petition with costs.

Analysis and determination

32. From the parties' pleadings and submissions, it is my view that the issues that stand out for determination are as follows:

    i. Whether the petitioner has the requisite locus standi to institute this suit.

    ii. Whether the respondent's replying affidavit dated 1st December 2021 is incompetent.

    iii. Whether the respondent conducted public participation before enacting the Nutritionists and Dieticians (Training Institutions) (Fees) Regulations, 2019.

    iv. Whether the petitioner is entitled to the reliefs sought.

Whether the petitioner has the requisite locus standi to institute this suit.

33. The respondent herein challenged the petitioner's legal standing to file this suit. The respondent in this regard asserted that the petitioner had not received authorization from the purported professionals to file the suit. Further that the suit had been filed without a resolution from the members. Equally that it had failed to show whether the persons listed in the petition were its members. The petitioner opposed this stressing that its authority to approach this Court is grounded under Article 22 and 258 of *the Constitution*.

34. The Court of Appeal discussing the issue of locus standi in the case of Randu Nzai Ruwa & 2 others v Secretary, the Independent Electoral and Boundaries Commission & 9 others [2016] eKLR held as follows:

> "While Article 48 of *the Constitution* recognizes the importance of access to justice as an essential instrument for the protection of human rights, it must, at the same time be borne in mind that "...the rights and fundamental freedoms in the Bill of Rights...belong to each individual and are not granted by the State". See Article 19 (3) (a).Taken together with Articles 22, and 258 these Articles are a stark departure from the narrow scope of Section 84 of the former Constitution in so far as the concept of locus standi is concerned. The former Constitution and the cases decided during its reign provided and held in no uncertain terms that only a party aggrieved and whose interests were directly affected could institute proceedings for protection, under the Bill of Rights....
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> This conservative requirement had the effect of limiting access to justice as it treated litigants, other than those directly affected, as mere or meddlesome busy bodies, ignoring the fact that every judicial system has a built-in mechanism to protect its process from abuse by busy bodies, cranks and other mischief makers. Today, decisions like Maathai v Kenya Times Media Trust (1989) KLR 267and El Bussaidy v Commissioner of Land and others (2002) IKLR 508 have no relevance except for the history they represent."
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> .....
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> 28. It still remains to reiterate that the landscape of locus standi has been fundamentally transformed by the enactment of *the Constitution* in 2010 by the people themselves. In our view the hitherto stringent locus standi requirements of consent of the Attorney General or demonstration of some special interest by a private citizen seeking to enforce a public right have been buried in the annals of history. Today by dint of Articles 22 and 258 of *the Constitution*, any person can institute proceedings under the Bill of Rights, ..."
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> ....the intention of the framers of *the Constitution* from which those rules are derived, was to allow any person who genuinely believed that there was a violation of fundamental freedoms and constitutional rights to approach the court for redress."

35. As can be appreciated from the pronouncement of the upper courts, the scope of locus standi is wide. The petitioner in the instant suit alleged that it lodged this petition on behalf of its members as the trade union for the nutritionists and dieticians. This is because the respondent had implemented the Nutritionists and Dieticians (Training Institutions) (Fees) Regulations, 2019 in violation of the Constitutional principles and the law.

36. It is noted that the petitioner in its supporting affidavit and supplementary affidavit demonstrated that it is a duly registered Union for the nutritionists and dieticians in Kenya. *The Constitution* under Article 22(2)(d) makes known that an association acting in the interest of one or more of its members

has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of rights has been violated. It is my humble finding that the petitioner capably lodged this suit as it has the necessary locus standi to do so.

Whether the respondent's replying affidavit dated 1st December 2021 is incompetent.

37. The petitioner in its supplementary affidavit dated 18th February 2022 asserted that the respondent's replying affidavit was incompetent and incurably defective for the reason that it had failed to mark the annexures to its affidavit as required under Rule 9 of the Oaths and Statutory Declarations Rules. The respondent did not make a response to this or submit on the same.

38. Rule 9 of the Oaths and Statutory Declarations Rules states as follows:

> All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner, and shall be marked with serial letters of identification.

39. The legal basis for this rule is that an affidavit and the annexures attached to it constitute evidence. Considering this, where a person seeks to proof a fact by way of affidavit, he is obligated to exhibit any document on his affidavit to support his case. Consequently, before a Court can receive such a document in evidence, the law provides that such a document must be sealed by the Commissioner for Oaths and marked with serial letters.

40. The effect of the failure to comply with Rule 9 of the Oaths and Statutory Declarations Rules has been discussed severally. In the case of Jeremiah Nyangwara Matoke(supra),the Court citing a number of authorities with approval observed as follows:

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> " 23. In the case of Abraham Mwangivs. S. O. Omboo & others HCCC No. 1511 of 2002 Hayanga J (as he then was) quoted Order 41 of the Rules of Supreme Court of England that dealt with forms of affidavits and exhibits. That Order 41 divided exhibits into documents and non-documents and maintained that fly papers are misleading and fraught with uncertainty. He held:
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> "Exhibits to affidavits which are loose fly sheets for identification attached to them and do not bear exhibits marks on them directly must be rejected. The danger is so great. These exhibits are therefore rejected and struck out from the record. That being the case the application fails and is dismissed."
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> 24. Similarly, in the case of Francis A. Mbalanya vs. Cecilia N. Waema [2017] eKLR, the annextures had not been marked completely. The judge held that:
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> "The law that requires the sealing and marking of annexures with serial letters is in mandatory terms and must be complied with... in the instant case, the law has provided in mandatory terms the manner in which evidence by way of annextures can be received by court. The failure to comply with that law, like in the instant case can only lead to one thing, the striking out of the offending documents. However, considering that the supporting affidavit in itself complies with the law, it is only the annexures that can be expunged from the record, and not the supporting affidavit and the application."

41. In like manner the Court in the case of Chris Munga N. Bichage & 2 others v Independent Electoral & Boundaries Commission & 2 others [2017] eKLR opined as follows:

> "

"40. So what is the legal effect of the failure to seal and serialise the exhibits as provided for in Rule 9?

41. This question arose in the case of Musikari Nazi Kombo v Moses Masika Wetangula and 2 others [2013] eKLR and I think this is a good place to begin as I associate myself fully with the dictum of the Learned Judge.

42. The Court held that;-

"1. The legal requirement relating to securely sealing and marking exhibits in an affidavit entailed a substantive legal act within the context of the production of evidence and the admissibility of evidence, and it was not a legal technicality. The requirement would serve to ensure that only proper documents were placed before the Court and admitted in evidence.

2. Allowing documents brought in an improper and inappropriate manner to form part of the Court's record would prejudice the administration of justice and it would also go against the Law of Evidence as it would defeat the aims of safeguarding the fairness of the trial process.

3. The document titled "Principal Register of Voters PRV" and annexed to the Petitioner's further affidavit was not securely sealed and marked with serial letters of identification as required by Law. As there was no basis laid in the further affidavit for its introduction as an annexture and its sources were unknown, the document was inadmissible."

44. In my considered view, the sealing of the exhibits and their serialization is a fundamental step provided by law. Failure to properly seal the exhibits goes to the root of the evidence envisaged and it would be against all tenets of substantive justice to allow admission of evidence whose propriety is questionable in law."

42. A perusal of the replying affidavit's annextures discloses that indeed they were not securely sealed under the seal of the commissioner and were not marked with serial letters of identification.

43. It should conversely be appreciated that the replying affidavit was made in compliance with the law. I say so because an affidavit must clearly state the place and date where it was made and it must be made before a Magistrate or a Commissioner for oaths. The making of an affidavit is governed by the *Oaths and Statutory Declarations Act*. Section 5 of the Act provides as follows:

> Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.

44. It is abundantly clear that the replying affidavit is legally sound in substance. The contention is only in its form. This means that the replying affidavit cannot be deemed to be incompetent and defective as it complied with the rules of making an affidavit. The form of the replying affidavit being its attendant annextures in support of the respondent's case is however defective and as such cannot hold water in the context of this case.

45. As pronounced in the numerous authorities, such annextures are not admissible and as a consequence are customarily struck out from the Court record. It is worthy to mention that the Court of Appeal

in the case of Bank of Africa Limited v Juja Coffee Exporters Limited & 4 others (2018) eKLR guided as follows in such circumstances:

> 23. It is evident that there has been a difference of opinion in the High Court on the construction of Rule 9 of the Oaths and Statutory Declarations Rules.
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> There is considerable force in rooting for compliance with procedural rules despite the provisions of Article 159 of *the Constitution*. As the Supreme Court has reminded us severally, 'Article 159(2) (d) of *the Constitution* is not a panacea for all procedural shortfalls. All that the Courts are obliged to do is to be guided by the principle that "justice shall be administered without undue regard to technicalities." In the case of Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others [2014] eKLR the Supreme Court agreed with the dicta of Kiage, JA in Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR that:
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> "Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned..."
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> 24. Ultimately, the Supreme Court has reposed considerable scope for discretion in the courts, on a case by case basis, when it opined thus:
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> "In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent. Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159 (2) (d) of *the Constitution*."

46. The Court as such held as follows:

> " 25. In this case, Mr. Gichuhi submits that Rule 9 should be disregarded in view of Article 159 of *the Constitution*. But that is a simplistic way of approaching the subject. We must examine the facts and circumstances of the case against the provisions of Article 159(2) (d). Having done so, we are persuaded that Rule 9 aforesaid is not peremptory in terms, the employment of the word 'shall' notwithstanding..."

47. It is regrettable in the circumstances of this case that the respondent failed to respond to this grave component after the petitioner filed its supplementary affidavit. This is because once the petitioner alleged that the replying affidavit was incompetent due to its annextures, the respondent whose case is dependent on proving it's compliance with the law would have seen the need to make a response or even sought leave to file a supplementary affidavit attaching the said annextures in compliance with Rule 9 of the Oaths and Statutory Declarations Rules.

48. Failure to plead its case in this regard for this Court's consideration ties this Court's hands in view of exercising its discretionary power as guided by the Court of Appeal in consideration of Article 159(2) (d) of *the Constitution*. Bearing this in mind, I find that the replying affidavit is competent contrary

to the petitioner's allegation. On the other hand, I find that the annextures attached to the replying affidavit as adduced in Court are incompetent for their failure to comply with Rule 9 of the Oaths and Statutory Declarations Rules. As a consequence the exhibits are hereby expunged from the court record.

Whether the respondent conducted public participation before enacting the Nutritionists and Dieticians (Training Institutions) (Fees) Regulations, 2019

49. The petitioner's key contention is that the respondent prior to enacting and implementing the Nutritionists and Dieticians (Training Institutions) (Fees) Regulations, 2019 failed to observe the principle of public participation. It pointed out that the claim by the respondent that it conducted public participation was false as the meetings held concerned other matters. It was stressed that the implementation of the impugned Regulations was never a topic of discussion for the stakeholders.

50. The respondent opposed this assertion arguing that it had duly conducted public participation in compliance with the law before enacting the impugned Regulations. In particular the respondent pointed to the stakeholder meetings held on 15th April 2018, 23rd April 2019, 30th April 2018, 15th January 2019 and 2nd May 2019 in this regard.

51. As discussed in the previous issue, the lack of valid annextures to the respondent's replying affidavit ultimately renders the replying affidavit incomplete. This is because the respondent's case is anchored on proving that it complied with the law. This as can be discerned is through the adduced evidence which has since been determined to be incompetent.

52. Nevertheless the Supreme Court in the case of Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others [2018] eKLR held as follows in view of such circumstances:

> " [10] Be that as it may, as a court of Law, we have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any unopposed application, the Court will as a matter of cause grant the sought orders. It behooves the Court to be satisfied that prima facie, with no objection, the application is meritorious and the prayers may be granted. The Court is under a duty to look at the application and without making any inferences on facts point out any points of law, such as any jurisdictional impediment, which might render the application a non-starter. We see no such jurisdictional issue in the application before us. Hence we have proceeded to consider the facts before us as against the jurisprudence for grant of stay orders set by this Court."

53. Manifestly, the lack of evidence in the respondent's case does not automatically make the petitioner's case merited. This Court as guided by the Supreme Court is obliged to interrogate the facts of the case against the law on the public participation principle.

54. The Court of Appeal speaking to the importance of public participation in the case of Legal Advice Centre & 2 others v County Government of Mombasa & 4 others [2018] eKLR stated as follows: -

> " The purpose of permitting public participation in the law-making process is to afford the public the opportunity to influence the decision of the law-makers. This requires the law-makers to consider the representations made and thereafter make an informed decision. Law-makers must provide opportunities for the public to be involved in meaningful ways, to listen to their concerns, values, and preferences, and to consider these in shaping their decisions and policies. Were it to be otherwise, the duty to facilitate public participation would have no meaning."

55. Public participation is a key element in the legislative functions at all levels. This was appreciated in the case of Republic v County Government of Kiambu Ex parte Robert Gakuru & another [2016] eKLR where the Court held that:

> " 50. However, it must be appreciated that the yardstick for public participation is that a reasonable opportunity has been given to the members of the public and all interested parties to know about the issue and to have an adequate say. It cannot be expected of the legislature that a personal hearing will be given to every individual who claims to be affected by the laws or regulations that are being made. What is necessary is that the nature of concerns of different sectors of the parties should be communicated to the law maker and taken in formulating the final regulations. Accordingly, the law is that the forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case."

56. Following an interrogation of the facts of this case as deposed by the petitioner and respondent, a number of things stand out. The respondent in its averments in the replying affidavit stated that it had held a variety of meetings with the stakeholders however failed to specify whether the substance of the meetings was discussion of the impugned Regulations. Further in its affidavit, the respondent did not state when the advertisements or notices of exercise were made, when the comments and suggestions were to be received and when the stakeholder meetings would be held.

57. I take note that other than calling for meetings, the existence of the element of public participation is made manifest in the following manner as provided under Section 5 of the *Statutory Instruments Act*, Act No. 23 of 2013:

> Consultation before making statutory instruments
>
> (2) In determining whether any consultation that was undertaken is appropriate, the regulation making authority shall have regard to any relevant matter, including the extent to which the consultation—
>
> a. drew on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument; and
>
> b. ensured that persons likely to be affected by the proposed statutory instrument had an adequate opportunity to comment on its proposed content.
>
> (3) Without limiting by implication the form that consultation referred to in subsection (1) might take, the consultation shall—
>
> a. involve notification, either directly or by advertisement, of bodies that, or of organizations representative of persons who, are likely to be affected by the proposed instrument; or

b. invite submissions to be made by a specified date or might invite participation in public hearings to be held concerning the proposed instrument.

58. Further Section 5A of the provides as follows:

Explanatory memorandum

(1) Every statutory instrument shall be accompanied by an explanatory memorandum which shall contain—

a. a statement on the proof and demonstration that sufficient public consultation was conducted as required under Articles 10 and 118 of *the Constitution*;

b. a brief statement of all the consultations undertaken before the statutory instrument was made;

c. a brief statement of the way the consultation was carried consultation;

d. an outline of the results of the consultation;

e. a brief explanation of any changes made to the legislation as a result of the consultation.

(2) Where no such consultations are undertaken as contemplated in subsection (1), the regulation-making authority shall explain why no such consultation was undertaken.

(3) The explanatory memorandum shall contain such other information in the manner specified in the Schedule and may be accompanied by the regulatory impact statement prepared for the statutory instrument.

59. The petitioner argued that the meetings referred to were the usual Annual General Meetings and Special Annual meetings as seen from the pages 37 and 38 of the petitioner's supplementary affidavit. The respondent also made general averments as to the meetings it held with regard to fulfilling the principle of public participation.

60. I perceive this to go contrary to the principles of public participation under the law which requires clarity on the call to participate and the topic of discussion so that the relevant person can participate meaningfully. In addition this goes against the principles stipulated by the Supreme Court in the case of British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties);Mastermind Tobacco Kenya Limited (The Affected Party) [2019] eKLR as follows:

"

"(i) As a constitutional principle under Article 10(2) of *the Constitution*, public participation applies to all aspects of governance.

(ii) The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.

(iii) The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.

(iv) Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to 'fulfill' a constitutional requirement. There is need for both quantitative and qualitative components in public participation.

(v) Public participation is not an abstract notion; it must be purposive and meaningful.

(vi) Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.

(vii) Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.

(viii) Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.

(ix) Components of meaningful public participation include the following:

a. clarity of the subject matter for the public to understand;

b. structures and processes (medium of engagement) of participation that are clear and simple;

c. opportunity for balanced influence from the public in general;

d. commitment to the process;

e. inclusive and effective representation;

f. integrity and transparency of the process;

g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter."

1. It is my considered view in light of these facts that the respondent did not uphold the principle of public participation before enactment of the Nutritionists and Dieticians (Training Institutions) (Fees) Regulations, 2019. Inevitably, the lack of compliance with the public participation principle obviously renders the impugned Regulations unconstitutional.

2. The upshot of the foregoing conclusion and for the reasons set out above, I find that the petition dated 29th July 2021 has merit and is hereby be allowed and the prayers (i), (ii) & (iii) as set out in paragraph 1 of this Judgment are granted, with costs to the petitioner.

Orders accordingly.

Delivered virtually, dated and signed this 22nd day of September, 2023 in open Court at Milimani, Nairobi.

H. I. Ong'udi

Judge of the High Court

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