



**Njogu v Attorney General & another (Constitutional Petition
E043 of 2024) [2024] KEHC 13381 (KLR) (28 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13381 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CONSTITUTIONAL PETITION E043 OF 2024
DO CHEPKWONY, J
OCTOBER 28, 2024**

BETWEEN

BONIFACE NJOGU PETITIONER

AND

HON ATTORNEY GENERAL 1ST RESPONDENT

**CLERK TO THE SENATE/SECRETARY TO THE PARLIAMENTARY SERVICE
COMMISSION 2ND RESPONDENT**

RULING

1. The Petitioner herein filed Petition and Notice of Motion application both dated 25th October, 2024 under Certificate of Urgency and on the same day, the court directed the same to be served upon the Respondent and fixed it for inter-parties hearing on 28th October, 2024 at 14.30hours.
2. When the parties appeared before the court on 28th October, 2024, Counsel for the Petitioner informed court that having received court's directions late, they struggled to serve and it is only today that they managed to serve the Respondents physically. He urged the court to grant the conservatory orders pending the interparties hearing of the application.
3. In response, Counsel for the 1st Respondent indicated that they had just received the application and Petition to which they needed to be given an opportunity to respond since they have raised weighty issues. The Counsel for the 2nd Respondent equally sought for time to file a response to the application and Petition since they had just seen it alongside the directions an hour ago. However, counsel was opposed to the issuance of any conservatory orders given the weighty nature of the issues raised which the court needed to appreciate upon listening to all parties.
4. In rejoinder, the Applicant's Counsel had no objection the court granting the Respondents time to file their respective responses but proposed that the application be subsumed into the Petition. He also went on to urge the court to grant prayers number 2 and 3 of the application in the interim for the



reason that if the President goes ahead to appoint the nominees, the Application and the Petition will become moot. He has further argued that the IEBC Select Committee only serves for 90 days so that if the preservative orders are not granted the application will be overtaken by events.

5. The 1st Respondent's Counsel stated that he needs to seek further instructions to respond to the application which the court should first allow before granting any conservatory orders. Counsel agreed with the Applicant/Petitioner's counsel that the Application can be subsumed in the Petition. The 2nd Respondent's counsel was also opposed to the conservatory orders being granted. He accused the Applicant for non-disclosure of information given that there has been no IEBC in place for along time. He argues that a lot of information has not been disclosed and therefore they need time to file a response to the application. He pointed out that Mr. Malenya had through another counsel enjoyed conservatory orders since the amendment of the law in June, 2023, and it is only last week that Judgment was delivered in this other matter and now he is making the appointment/recruitment of the IEBC Commissioners.
6. Having listened to submissions and arguments by counsel for all parties herein, this Court wishes to point out that in issuing the directions it did on 25th October, 2024 in respect of this matter, it was alive and in appreciation of the strict legal timelines provided for the appointment/recruitment of the IEBC Select Committee by the President.
7. It is not in dispute that the application and directions were served upon the Respondents today to the extend that they would not have been in a position to adequately address and respond to the issues raised by the Petitioner/Applicant if the matter were to proceed for interparties hearing as scheduled. It is also not in dispute that the issues raised in the application adequately ventilated by the parties for the court's consideration. It is common ground and the counsel for the parties have agreed to have the application subsumed in the Petition so that both are heard and determined contemporaneously.
8. What is in issue and for determination is whether or not conservatory orders can issue at this stage pending the hearing and determination of this application and Petition. To determine this, this Court has to balance between the rights of the Petitioner and those of the Respondents alongside the interest of justice and the prejudice that will be suffered by the parties.
9. On conservatory order, the court in the case of Gatirau Peter Munya –vs- Dickson Mwenda Kithinji & 2 Others [2014] eKLR, held that:-

“Conservatory orders’ bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the ‘prospects of irreparable harm’ occurring during the pendency of a case; or “high probability of success” in the applicant’s case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”
10. Therefore, in this instant case, this Court has taken into consideration the concerns by the Petitioner/Applicant, being the appointment of the IEBC Select Committee as per the List of Nominees to be forwarded to the Present on firstly whether it aligns itself with the set constitutional requirement or criteria as provided for under Articles 10 and 54(2) of *the Constitution*, and secondly, whether the said statutory requirement comply with the constitutional threshold.



11. It will be appreciated that the court is mandated to protect the constitution and oversee the compliance of the current statutory provision in existence with the constitutional provisions so as to confirm whether or not they are likely to compromise constitutional values and good governance.
12. The Court is therefore required to consider the merits of the case, the public interest, and constitutional values. In this case given the strict timelines and the fact that the Respondents have not had a chance to respond to the application given that they were only served today the court finds that there is need to grant the Respondent leave to file and serve their respective responses while at the same time finds the need to preserve the subject matter so as not to render the application and Petition nugatory and an academic exercise.
13. The court therefore proceeds to make the following orders:-
 - a. Pending the hearing and determination of this application interparties, this Court is hereby pleased to grant a conservatory order staying the 2nd Respondent from transmitting to the President for appointment the list of nominees to the IEBC Select Committee.
 - b. Pending the hearing and determination of this application interparties, this Court is hereby pleased to grant a conservatory order staying the implementation of the communication by the 2nd Respondent transmitting the names of the IEBC Select Committee including publishing and gazettelement of their names to the President.
 - c. For expediency, the Notice of Motion application be and is hereby subsumed into the Petition for hearing and determination.
 - d. The Respondents are hereby granted leave of 7 days to file their respective responses.
 - e. The parties to canvass the application and Petition by way of written submissions.
 - f. The Applicant/Petitioner is granted three(3) days leave to file and serve a further affidavit, if need be, alongside written submissions upon being served with responses by the Respondent.
 - g. The Respondents are equally granted three(3) days corresponding leave to file and serve their written submissions upon being served with the Applicant's further affidavit and written submissions.
 - h. The matter to be mentioned on 12th November, 2024 for the purposes of taking further directions on highlighting or fixing of a date for Judgment of the Petition.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 28TH DAY OF OCTOBER , 2024.

D. O. CHEPKWONY

JUDGE

In the presence of:-

Mr. Malenya counsel for Petitioner/Applicant

No appearance for 1st Respondent

M/S Mutua S. counsel for 2nd Respondent

Court Assistant - Martin

