



Odhiambo & 2 others v Kisii University & 3 others (Constitutional Petition E004 of 2023) [2023] KEHC 24648 (KLR) (30 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24648 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CONSTITUTIONAL PETITION E004 OF 2023
PN GICHOHI, J
OCTOBER 30, 2023**

BETWEEN

**JAMES ORENKO ODHIAMBO 1ST PETITIONER
DANIEL KEBAYA MAGETO 2ND PETITIONER
MOSES MAMUTI 3RD PETITIONER**

AND

**KISII UNIVERSITY 1ST RESPONDENT
THE KISII UNIVERSITY INDEPENDENT ELECTORAL COMMISSION 2ND
RESPONDENT
MR STEVEN MOKAYA (CHAIRPERSON OF THE INDEPENDENT
ELECTORAL COMMISSION) 3RD RESPONDENT
THE ATTORNEY GENERAL 4TH RESPONDENT**

RULING

1. By a Petition dated 13th February 2023 and filed on 15th February 2023, the Petitioners acting also filed a Notice of Motion Application similarly dated 13/02/2023 under Article 10, 19, 22, 23, 159 and 165 of the *Constitution* and Rule 24 of the *Protection of Rights and Fundamental Freedoms Practice and Procedure Rules* 2013. They sought following reliefs:
 1. ... Spent.
 2. That this Court be pleased to issue an order quashing the results of Kisii University Students Association (KSUSA) Elections held on 08/02/2023 as it violated Section 41 (1) of the *Universities Act* 2012 as amended in 2016 and Article 81 of the Constitution of Kenya 2010.
 3. Spent



4. That pending the hearing and determination of this Petition, this Court be pleased to issue temporary conservatory orders restraining the 1st Respondent or any of its organs, agents, servants or howsoever from swearing in or facilitating in the office the persons elected pursuant to elections held on 08/02/2023.
5. That the costs of this Application be in the cause.
2. In support of that application are grounds on the face of the Motion and an Affidavit sworn by the 1st Petitioner in his capacity a student and ordinary/associate/honorary member of Kisii University Student Association pursuing a Diploma in Law (Para-Legal) at the 1st Respondent institution and on behalf of his Co-Petitioners.
3. Their grievance was that KAUSA Constitution 2017 upon which the elections were conducted offends Section 41 (1) of the Universities Act to the extent that it purports to set out, discriminate , curve out, deny and deprive a large number of Kisii University (1st Respondent) students who are entitled to constitutional rights of representation , public participation , and equality before the law without any discrimination.
4. They stated that Section 41 (1) of the Universities Act as amended in 2016 does not envisage and does not empower the 1st Respondent to segregate , discriminate and disempower Diploma students on mere basis of their enrolment to diploma program as done under Article 1.5 (2) (a) of the KSUSA Constitution 2017.
5. The Petitioners therefore contended that since Diploma students paid an annual subscription fee of Kshs. 2,000.00, they were entitled to vote, submit their bids to run for office and chose their representatives during an election.
6. Further, they stated that prior to those elections, the 1st Petitioner wrote to the 3rd Respondent Prior to those elections, the 1st Petitioner wrote a letter dated 3rd February 2023 to the 3rd Respondent informing the 3rd Respondent to comply with Section 41 of the Universities Act, the statute creating the KSUSA Constitution and Section 81 of the Constitution of Kenya by allowing Diploma students to participate in the upcoming elections of 8th February 2023.
7. They contended that since the university organs intended to swear into office on 17th February 2023 , the persons elected pursuant to the elections held on 8th February 2023, the Petitioners/Applicants and Diploma Students are doomed to suffer irreparable loss and damage unless the orders sought in the application herein are granted. They argued that their Petition has serious triable issues of both facts and law with overwhelming chances of success.
8. Upon being served, the 4th Respondent intimated to Court, through Mr. Nderitu for the Attorney General, that it has no intention of filing any response as the application did not involve them. That they supported the Application.
9. On their part , the 1st, 2nd and 3rd Respondents filed on 6th March 2023, a joint Replying Affidavit sworn by Steven Mokaya of the 3rd Respondent on 3rd March 2023. As an overseer of the 8th February 2023 student elections, he affirmed that the elections were conducted peacefully in line with the KSUSA Constitution 2017.
10. While reproducing the provisions set out in Article 4.2 (2), 1.5 (1) and 1.5 (2) of the KSUSA Constitution , he clarified that ordinary members were all undergraduate students of the 1st Respondent that had paid up their annual subscription fees. He distinguished these members as those eligible to participate in an election. He stated that associate members were all other students who



were not entitled to participate in elections. That it was in this category that the Petitioners and other Diploma students fell under.

11. He therefore deponed that in light of those provisions, the Petitioners' remedy lay in amending the Constitution to inclusively allow them to participate arguing that Article 6.9 of the KSUSA Constitution expressly sets out the manner of amending the Constitution. He urged the Petitioners to explore that option since the aforementioned provisions of the KSUSA Constitution had never been challenged since inception.
12. The Respondents maintained that the elections were conducted in line with the KSUSA Constitution and were thus blame free. Further, they stated that the application had been overtaken by events since the elected officials had been sworn into office on 28th February 2023.
13. In conclusion, the Respondents stated that the application lacked merit and therefore urged this Court to dismiss it with costs.
14. In a rejoinder, the Petitioners filed on 20th March 2023 a further Affidavit sworn on 14th March 2023. They reiterated the contents of their Application and Petition that the elections were done in contravention of Article 19 and 81 of the Constitution of Kenya and Section 41 of the Universities Act.
15. For those reasons, they termed the elections as flawed. Further, they stated that the entire process was discriminative and infringed on their political and fair representation rights, equal treatment, freedom of association, right to public participation and equal benefit of the law.
16. The Petitioners observed that based on the Respondents' interpretation of Article 6.9 and 6.10 of the KSUSA Constitution, the Petitioners were ordinary members since they were entitled to amend the KSUSA Constitution.
17. They stated that the orders were not overtaken by events as this court had power to order nullification of an impugned election and make appropriate orders as may be necessary to meet the ends of justice.

Submissions

18. Parties took directions to canvass the application herein by way of written submissions. In view of previous intimation, the 4th Respondent did not file any and it orally sought to be discharged from the proceedings at that juncture on the grounds that the Petitioners were not seeking any orders from them. The Court directed that they await the ruling herein.
19. On 29th March, 2023, the Petitioner filed written submissions on dated 23rd March 2023 on the Petition and not the Application herein. The Respondents did not file any submissions. The Court therefore reserved the matter for ruling on the Application.

Determination

20. The Court at this juncture considers the oral application by the 4th Respondent to be discharged from these proceedings. At a glance, the Petitioners state that: "The 4th Respondent is the principal legal advisor to the Government and is statutorily mandated by Article 156 (4) (b) of the Constitution to represent the National Government in court and has been sued in that capacity."
21. A look at the body of the Application does not reveal what the 4th Respondent has done or not done in the issues raised by the Petitioners. However, Mr. Nderitu orally stated that the 4th Respondent is supporting the application by the Petitioners. It is not clear at this how the 4th Respondent can make



those two arguments in one breadth. In the circumstances, this Court declines to discharge the 4th Respondent as sought at this stage.

22. Coming to the application herein, this Court has considered the arguments by the Petitioners/Applicants and the 1st, 2nd and 3rd Respondents. The Petitioners/Applicants are seeking interlocutory relief pending the hearing and determination of the Petition. In other words, the Petitioners are praying for conservatory orders. The applicable principles for the grant or refusal of conservatory orders were well enunciated by J.L. Onguto, J in the case of *Board of Management of Uhuru Secondary School vs. City County Director of Education & 2 Others* [2015] eKLR as follows:
- (i) The need for the applicant to demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he is likely to suffer prejudice.
 - (ii) The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.
 - (iii) Thirdly, the Court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.
 - (iv) Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.
23. Based on the above principles, it is also clear that the purpose of conservatory orders to maintain status quo pending the hearing on the main petition and without going into the merits of the petition. The issue for consideration therefore is whether the prayers sought in the Application are merited.
24. In their first substantive prayer, the Petitioners pray for an order quashing the results of the elections conducted on 8th February 2023. That is a final order that the Petitioners are asking the Court to issue at this stage before hearing the Petition herein. That relief is no available at this stage.
25. The Petitioners also seek to stay the swearing in ceremony that was scheduled to take place on 17/02/2023. However, it is noted from the material presented herein by the Respondents that the elected officials were sworn in on 28th February 2023. In the circumstances there is nothing to stay as the prayer has been overtaken by events .
26. In the circumstances, this Court finds that the Notice of Motion dated 13th February 2023 lacks merit. It is hereby dismissed. The costs to abide the outcome of the Petition.

DATED, DELIVERED AND SIGNED AT KISHI (VIRTUALLY) THIS 30TH DAY OF OCTOBER , 2023.

PATRICIA GICHOHI

JUDGE

In the presence of:

Applicant in Person

N/A for the 1st Respondent

N/A for the 2nd Respondent

N/A for the 3rd Respondent

N/A for the 4th Respondent

