



Muka & another v Malala & 11 others; Commission for University Education & 2 others (Interested Parties) (Constitutional Petition E002 & E001 of 2022 (Consolidated)) [2022] KEHC 10064 (KLR) (24 June 2022) (Ruling)

Neutral citation: [2022] KEHC 10064 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CONSTITUTIONAL PETITION E002 & E001 OF 2022 (CONSOLIDATED)
PJO OTIENO, J
JUNE 24, 2022
FORMELY NAIROBI CONSTITUTIONAL PETITION NO. E264 OF
2022
IN THE MATTER OF ARTICLES 2(1), 2(4), 3(1), 10(1) & (2), 22(2)
(B), 23,35,38,81(E), 88(4)(F) AND 165 OF THE CONSTITUTION
OF KENYA, 2010
AND
IN THE MATTER OF CHAPTER 6 OF THE CONSTITUTION OF
KENYA, 2010 ON LEADERSHIP AND INTEGRITY
AND
IN THE MATTER OF SECTIONS 19,22,23&29 OF THE PUBLIC
OFFICERS ETHICS ACT NO. 4 OF 2003
AND
IN THE MATTER OF 22(2) OF THE ELECTIONS ACT, 2012 NO. 24
OF 2011
AND
IN THE MATTER OF THE GUBERNATORIAL ELECTIONS FOR
KAKAMEGA COUNTY
IN THE MATTER OF DISQUALIFICATION FROM HOLDING STATE
OFFICE UNDER ARTICLE 75 OF THE CONSTITUTION OF KENYA,
2010
AND



**IN THE MATTER OF BREACH OF CONSTITUTIONAL RIGHTS
UNDER ARTICLE 38 OF THE CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF THE JURISDICTION OF THE HIGH COURT OF
KENYA UNDER ARTICLE 165(3)(D)(II) OF THE CONSTITUTION OF
KENYA, 2010**

BETWEEN

FRED MUKA PETITIONER

AND

CLEOPHAS WAKHUNGU MALALA 1ST RESPONDENT

**VICE CHANCELLOR UNITED STATES INTERNATIONAL
UNIVERSITY 2ND RESPONDENT**

UNITED STATES INTERNATIONAL UNIVERSITY 3RD RESPONDENT

COMMISSION FOR UNIVERSITY EDUCATION 4TH RESPONDENT

KENYA NATIONAL EXAMINATIONS COUNCIL 5TH RESPONDENT

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 6TH
RESPONDENT**

RETURNING OFFICER, KAKAMEGA COUNTY 7TH RESPONDENT

ETHICS AND ANTI CORRUPTION COMMISSION 8TH RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS 9TH RESPONDENT

**AS CONSOLIDATED WITH
CONSTITUTIONAL PETITION E001 OF 2022**

BETWEEN

FRANKLINE SHILINGI ANGUCHE PETITIONER

AND

MALALA CLEOPHAS WAKHUNGU 1ST RESPONDENT

UNITED STATES INTERNATIONAL UNIVERSITY 2ND RESPONDENT

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 3RD
RESPONDENT**

**JOSEPH AYATTA-COUNTY RETURNING OFFICER KAKAMEGA 4TH
RESPONDENT**

AND



COMMISSION FOR UNIVERSITY EDUCATION INTERESTED PARTY
ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED PARTY
DIRECTOR OF CRIMINAL INVESTIGATIONS INTERESTED PARTY

RULING

1. After the ruling on the Preliminary Objection, the 1st respondent applied that the orders given on the June 6, 2022 and restraining the gazette of the 1st Respondent's name by the 6th Respondent, be set aside. The reasons advanced for that request is that, if not gazetted, the 1st Respondent's constitutional right enshrined under article 38 would have been infringed in that he may have been excluded from the ballot before the matter is determined in the merit.
2. While the 6th and 7th Respondents supported that request, the 2nd Respondent took the neutral ground but the Petitioners opposed the application on the basis that to accede to it will defeat the very purpose of the petition.
3. The court has by its ruling and directions of 23/6/2022 underscored the need to hear the matter on the merits and the attendant constraint of time as the 6th Respondent must be given sufficient time to prepare for the conduct of the general elections. It is for that derth of luxury in time that the matter is due for hearing on the June 27, 2022 with parties being given strict timelines to file the necessary papers.
4. The court was told that the time for gazette is due today and it is important that the 1st Respondent is not left behind and thus excluded from participation in the elections as a candidate.
5. Two rights stand out for consideration by the court. The right of the Petitioners to question whether the candidature of the 1st Respondent sits in consonance with the law, and the right of the 1st Respondent to vie for the desired position. The duty of the court is to strike a balance between the two rights by ensuring that the 1st Respondent is not prejudice or his rights curtailed on the undetermined allegations while the Petitioners must get their day in court in a quest that can only be seen to seek observance and adherence to the law.
6. I consider it a grave matter to tinker with rights under article 38 as well as the Petitioner's right to be heard and therefore I have posed to myself the question whether the need to gazette the names of candidates for the elections of August 9, 2022 not later than June 24, 2022 is caste in store by some constitutional or statutory provisions. I have also posed to myself the question whether a decree by the court even if made after the timelines set for today deserve observance and obedience by the 6th Respondent.
7. In seeking to answer the first question, I have read but been unable to lay my hand on any provisions in the Constitution, Statute and Regulations that set the date of gazette to be not later than the 45th day of the election date.
8. That it is not in the law does not make the timelines less important for it is appreciated that preparation for elections is not just difficult and grueling but equally important to give the process and exercise the legitimacy and public acceptance it deserves. However the court appreciates that this is not the only matter that continues to pend in court and which the court is duty bound to determine expeditiously in the shortest time possible to give room for the 6th Respondent to properly execute its constitutional mandate in delivering a credible elections.



9. I do find and hold that the timeline for gazettelement has been left for determination by the 6th Respondent to give it latitude in navigating the process in a manner that is facilitative to its mandate as the executor. It is therefore a date that can be manipulated by the 6th Respondent as part of its duty to meet the obligations under article 11 of the Constitution.
10. Gazettelement of nominated candidates is governed by Regulation 51 (5) of the Elections (General) Regulations made pursuant to Section 109 of the Elections Act. It stipulates:-

“Upon receipt of a certificate under subregulation (1) and (2), the Commission shall publish a notice in the Gazette and, where two or more certificates are received at substantially the same time, such notice may be a composite one.”
11. A reading of the regulation leave no doubt that it is for notification and information to the public of those certified to participate at the elections and sets no timelines.
12. Consequently, and the court having appreciated its duty to deal with the matter expeditiously, the court discerns no valid reason to revisit the order on gazettelement. It reassures the parties, that with their commitment, the petition can be determined not later than the 29.6.2022.
13. The request is thus declined. Let parties comply with directions of June 23, 2022 and attend court for hearing as earlier scheduled.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 24TH DAY OF JUNE 2022.

PATRICK J O OTIENO

JUDGE

In the presence of:

Ms. Olucheli for the Petitioners

Mr. Malalah for the 1st Respondent

Ms. Odek for the 3rd and 4th Respondents

No appearance for the other Respondents

Court Assistant: Kulubi

