



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.96 OF 2019

IN THE MATTER OF: VIOLATION OF FUNDAMENTAL RIGHTS UNDER ARTICLES 22, 23 & 47 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: HUMAN RESOURCE MANAGEMENT PROFESSIONALS (ELECTIONS TO THE COUNCIL,) REGULATIONS, 2015 IN PURSUANT TO SECTION 7(2) OF THE ACT NO.52 OF 2012

AND

IN THE MATTER OF: INSTITUTE OF THE COUNCIL OF HUMAN RESOURCE MANAGEMENT (IHRM) ELECTIONS 2019

AND

IN THE MATTER OF: ELECTIONS SCHEDULED FOR 15TH & 16TH MARCH 2019

BETWEEN

ABDINOOR MOHAMMED ABDI.....1ST PETITIONER

KHEIRA MOHAMED.....2ND PETITIONER

VERSUS

THE INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS

OF KENYA (ICPAK).....1ST RESPONDENT

THE GOVERNING COUNCIL, INSTITUTE OF

HUMAN RESOURCE MANAGEMENT (IHRM).....2ND RESPONDENT

EDWIN MAKORI.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

THE CABINET SECRETARY, MINISTRY OF PUBLIC SERVICE,

YOUTH & GENDER AFFAIRS.....5TH RESPONDENT

RULING

1. Before me is a Notice of Motion dated 12/3/2019 seeking that the Honourable Court do issue a Temporary order of injunction restraining the 1st, 2nd & 3rd Respondents jointly and severally, their agents, functioning or workers by whatever name called from arranging,

conducting and/or holding the election of the Institute of Human Resource Management on the 15th & 16th March 2019 or any other date pending the hearing and determination of this petition. That costs be provided for.

2. The application is premised on grounds 1 to 9 on the face of the application and is supported by supporting affidavit of Abdinoor Mohammed Abdi sworn on 12th March 2019 together with the annexures attached thereto.

3. The application is opposed by the Respondents. The 1st and 2nd Respondents filed grounds of opposition and Replying affidavit by the 2nd Respondent sworn by Dorcas Wainaina on 14th March 2019.

Petitioners/Applicants averment

4. The Petitioners contend that section 3 of the Human Resources Management Professionals Act, 2012 establishes the Institute of Human Resource Management. That as per election calendar, election pertinent to the Leadership of the Institute of Human Resource Management is conducted after every three (3) years in line with the provisions of section 7(2) of the Act, guided by Human Resource Management Professionals, (*Elections to the Council*) Regulations, 2015. That the current leadership of council of the Institute of Human Resource Management (**IHRM**) was elected and gazetted under gazette notice No.3570 dated 10th May 2016, for a period of three (3), years and the election of new office holders was set after expiry of three (3) years. That the election is meant to be arranged as per the Act and conduct of the Chairman and six (6) council members and not three (3) as is the case in the instant situation and notice, by arranging in respect of the three (3) council members, the Respondents are causing and perpetuating overlaps in the election calendar of the 2nd respondent outside the contemplation of the laws and regulations.

5. The Petitioner further contend the governing council of the 2nd Respondent appointed the 2nd Respondent to arrange and conduct the election of the chairperson and new council members for Rift Valley, Coast/Eastern Region and Nairobi (*North Eastern*) Region for the period April 2019 – 2022. The Petitioner aver that under the Constitution of Kenya 2010, the Respondent are jointly and severally enjoined to deliver a credible and verifiable election and always uphold the dignity and integrity of the Institute of Human Resource Management (**IHRM**). It is further petitioners' contention the election is being arranged and set to be conducted without adherence to the Prerequisites of the law, Rules and Regulations and in flagrant breach of reasonableness expected by the membership in matters pertinent to the proposed election. It is further contended by the Petitioners the said election as commenced and set is anchored on a shambolic process with likelihood of a sham election, contrary to the Law and Regulations. It is further contended that it is envisaged in the law that the 1st Respondent is required to conduct and ensure credible election of chairperson and new members of the council of **IHRM** through a credible process, which conspicuously lacks in the election slated for 15th and 16th March 2019, as the election is anchored on an incompetent process.

6. It is further Petitioners contention, that the national values and principles of good governance espoused in Article 10 of the Constitution bind all state organs, state officers, public officers and all persons; adding Article 165 (3) (d) of the Constitution confers jurisdiction on the High Court to hear any question respecting to the interpretation of the Constitution. The Petitioners referred to the provisions of **IHRM** professional (*Elections to the Council*) Regulation, 2015, 9(1) as regards who are to be elected and in which there should be reflection of regional diversity of the people of Kenya and distribution in the regions as set out in Form E in the schedule of the Regulations, urging that they are aware the Returning Officer has cleared three (3) candidates in respect to the North Eastern region without considering the criteria set out in the Regulations notwithstanding two of the cleared candidates had not worked in the North Eastern region for at least one (1) year as completed and would not be able to articulate the issues affecting that region.

7. It is further Petitioners contention, that for 2nd respondent to conduct the said elections, it is conditional that unstructured supplementary Service Data (**USSD**) from Safaricom Kenya is procured by the Requisitioning Officer to safeguard the integrity of the elections and that it is mandate of Requisitioning Officer to oversee all attempts pertinent to the said election; which technology the petitioner aver has not been procured to ensure a free, fair and verifiable process of election.

8. The Petitioners further contend the elections of **IHRM** Professionals (*Elections to Council*) as arranged herein fly the face of Regulations and that the same is illegal, irregular, null and void, ab initio. That the provision of **Section 7(2) HRMD Act No. 52 of 2012**, the Gazette Notice No. 11305 has convoluted the election Calendar and deserves to be quashed and the election calendar aligned in the Act. That the vacant seats as declared, it is alleged contravene the law as the 2nd Respondent ought to have declared six (6) vacant positions and that of the Chairman vacant and not of three (3) and that of the Chairman.

Respondent's Response

9. The Respondents case is that the election of the officials of the 2nd Respondent is a matter that is purely governed by the provisions of Human Resource Management Professional (*Elections to the Council*) Regulations, 2015 and that the 2nd Respondent has fully complied with the entire provisions of the Regulations in arranging and seeking to conduct the elections herein. That the 3rd Respondent was properly appointed as a Returning Officer for the purpose of the election in accordance with the provisions of the law and Regulations, who issued and released an official timetable of election to all members way back on 8th February 2019, in strict adherence to clause 5 of the Regulations. That Notice of Elections was published as required by the rules at least 21 days to deadline for submitting nomination papers. That all candidates submitted their nomination forms to the 3rd Respondent through 2nd Respondent as per clause 7 (3) (c) of the Regulation before 4.00 pm on 1/3/2009, in strict compliance with the Regulation. That in strict compliance with clause 8(1) of the Regulations, the 3rd Respondent duly published the list of nominated candidate on the 2nd Respondent's website. That in strict accordance with clause 9(6) of the Regulations, the 3rd Respondent has already sent ballot papers to **ALL** eligible voters which was done on 22nd February 2019 being 21 days to the date of election. That in strict compliance with clause 10(2), the 3rd Respondent has already sent letters of notification to candidates and their agents on 7th March 2019.

10. The Respondent further rely on the grounds of opposition.

11. I have very carefully considered the pleadings herein, and counsel oral submissions and only one issue arises in this application being:-

a) Whether the Petitioners have met the constitutional threshold to justify granting the orders sought herein?

12. In the instant application the Petitioners seek to question the nomination process that commenced way back in February 2019 and which process was conducted openly for all members to see. The Petitioners herein never participated in the nomination process and have not in their application disclosed a credible list of members who the Petitioners aver have been disenfranchised from the election process and are likely to stand to suffer prejudice. The Petitioners alleged only 4000 members out of 12000 members would be allowed to take part in the election. No list of all members has been attached to the application giving the names of the 8000 members who are likely to be disenfranchised nor have they referred to any provision of the Regulation, stating that the 8000 members are eligible to take part in the election. The Petitioners have not even urged that they have been disenfranchise, being some of the expected voters.

13. The Petitioners have not disputed, that they were aware of the commencement of the election process in February 2019 and that the 3rd Respondent did not strictly comply to the letter with Human Resources Management Professional (*Elections to Council*) Regulations, 2015. The Petitioners did not raise any complaint but the Petitioners choose to approach court on 12th March 2019, few days to the election seeking an order of injunction to scuttle the election process. With all fairness, I find the Petitioners have not laid a good basis for seeking an equitable orders of injunction. I find the Petitioners have come to the court, without clean hands as no good and justifiable explanation for delay has been disclosed, since the list of candidates for the election was published 21 days ago in public forum accessible to all members and nothing has been shown to the court, that prevented the Petitioners from initiating any action for equitable relief in good time.

14. I find that by granting the application herein, the 2nd Respondent stands to suffer irreparably as it has fully put into process the election, as the electronic ballot papers were dispatched to voters on 22nd February 2019, which cannot be recalled back and that the mandate of the outgoing council members has ended and the stoppage is likely to cause confusion or vacuum in the leadership of the 2nd Respondent. At any rate after hearing the petition there would be nothing stopping the Honourable Court from nullifying the results of the election should it find in the petition, that the process was not carried out in accordance with the dictates of the constitution as there is no damage that shall have been suffered by the petitioners, which does not have a remedy instead of placing an entire 12000 members in jeopardy by the Petitioners laches.

15. In an application for orders of injunction, dealing with a Constitutional petition, the court is guided by the principles set out for granting such relief. In the case of **Anarita Karimi Njeru vs Republic [1978] eKLR** Court of Appeal stated:-

"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 reasonable degree of precision that which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed."

16. In the case of **Okiya Omtata Okoiti vs Kenya National Examination Council [2018] eKLR**, Hon. Lady Justice Okwany stated:-

"For a party to prove violation of their rights under the various provisions by the Bill of Rights they must not only state the provisions of the Constitution allegedly infringed in relation to them, but also the manner of infringement and the nature and extent of that infringement and the nature and extent of injury suffered (if any) (see John Kimanu vs Town Clerk)."

Also see Kagema, NBI Petition No. 1039 of 2007). See also **Li weli Mwangi Kahwal & 8 others vs The Kiambu County [2017] eKLR; Augustin Michael Murandi & 2 others vs Nolturesh Loitoktok Water & Sanitation Co. Ltd & another [2017] eKLR**.

17. Having considered the pleadings the affidavits, filed by the counsel and grounds of opposition as well as counsel submissions, I find that the Petitioners has failed to meet the threshold established for the redress from the High Court on a matter involving reference to the constitutional application for equitable relief.

18. I decline to grant the orders sought by Petitioners/Applicants in the application dated 12th March 2019.

19. The Notice of Motion dated 12th March 2019 is hereby dismissed. Costs shall be in the cause.

Dated, signed and delivered at Nairobi this 14th day of March, 2019.

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J .A. MAKAU

JUDGE

In presence of:

Court Assistant – Kombo

Mr. Mose for Petitioners (present)

Mr. Ogembo for 1st and 2nd Respondents (absent)

Miss Chibole for 4th and 4th Respondents (absent)

No appearance for 3rd Respondent.