



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

PETITION NO. 13 OF 2017

IN THE MATTER OF ARTICLES 1,2,3,10,12,19,20,21,22,23, 27,29,38, 47,49,50,73,80,81,99,193,258,& 260 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT, ACT NO. 9 OF 2011

AND

IN THE MATTER OF POLITICAL PARTIES ACT NO. 11 OF 2011

AND

IN THE MATTER OF THE LEADERSHIP AND INTERGRITY ACT, ACT NO. 19 OF 2012

AND

IN THE MATTER OF BARRING THE HON. MITHIKA LINTURI FROM VYING FOR MERU COUNTRY SENATORIAL SEAT

BETWEEN

FRANKLIN MITHIKA LINTURI.....PETITIONER

VERSUS

INDEPENDENT ELECTRICAL

& BOUNDARIES COMMISSION.....1ST RESPONDENT

RETURNING OFFICER, MERU COUNTY.....2ND RESPONDENT

ETHICS & ANTI-CORRUPTION COMMISSION...3RD RESPONDENT

BABRA NKIROTE MURIITHI.....INTERESTED PARTY

R U L I N G

The petition was filed on the 26th May 2017. It was accompanied by an application dated 25th of May 2017 seeking an order to restrain the 1st and 2nd respondents from barring the petitioner from presenting his nomination papers for clearance on 28th May 2017 to run for the position of Meru senator in the General Election scheduled for 8th August 2017. That prayer was granted ex-parte and the petitioner was duly issued with a nomination certificate to be the Jubilee candidate for the position of Meru Senator.

On 15th June 2017, the petitioner filed another application by way of Notice of Motion seeking several prayers. Mr. Kiogora, counsel for the petitioners informed the court that they were seeking the following prayers:-

1) Pending the hearing and determination of the petition herein, this Honourable Court be pleased to grant an order of a

temporary injunction barring, restraining, stopping and/or prohibiting the 1st respondent from omitting the petitioners name when publishing the names of the candidates in its Gazette Notice.

2) Pending the hearing and determination of the application herein, this Honourable Court be pleased to grant an order of a temporary injunction barring, restraining, stopping and/or prohibiting the 1st and 3rd respondents from further investigating, summoning and/or in any way acting upon the integrity report presented to the 1st respondent on the 1st June 2017.

3) Pending the hearing and determination of the petition herein, this Honourable Court be pleased to grant an order of a temporary injunction barring, restraining, stopping and/or prohibiting the 1st and 2nd respondents from recalling, canceling and or in any way varying the nomination certificate issued to the petitioner by the 2nd respondent on the 28th May 2017.

The application is supported by three affidavits. The first affidavit was sworn by the petitioner on 11th June 2017. The second affidavit was sworn on 19th June 2017 and there is a supplementary affidavit sworn on 27th June 2017. The 1st and 2nd respondents filed grounds of opposition to the application on 27th June 2017. The 3rd respondent filed a replying affidavit sworn by **Pius Ndiwa** on 22nd of June 2017. The interested party applied to be enjoined in this matter and her request was granted. She relies on her affidavit sworn on 16th June 2017.

Mr. Kiogora for the petitioner submit that the petitioner's constitutional rights have been violated. The petitioner has been condemned unheard. His constitutional rights under Articles 50(1), 10(1) and 47(1)(2) have been violated. The 3rd respondent purportedly sent a letter dated 26th May 2017 to the petitioner and the same was served upon the clerk to the National Assembly but that letter was not received. The letter was requesting the petitioner to appear before the 3rd respondent on 31st May 2017. The petitioner did not appear on that date as he had not been served. The 3rd respondent went ahead and issued an integrity report to the 1st respondent which report indicate that the petitioner is not a graduate of The University of Nairobi. Mr. Kiogora maintains that while investigations were being done, the 1st respondent issued a press release on 1st June 2017 indicating that it had received the integrity report from the 3rd respondent. Counsel further submit that although the interested party was enjoined in the suit, she has not shown her interest in the matter. There is no violation of any of her rights by the petitioner. The integrity report is based on uncertified documents provided by the interested party.

It is submitted further that the petitioner's rights under Section 4 of the Fair Administrative Action Act have been violated. The application is not speculative as the petitioner is entitled to seek the protection of the Court under Article 23 of the Constitution. The petitioner was never informed of the decision made by the 1st respondent. He learnt of the decision through the social media. No reasons were given for the decision by the 3rd respondent. There is no explanation as to why the petitioner was never called to defend himself. The 3rd respondent is an independent body and he is supposed to act in accordance with the laws of natural justice. The 3rd respondent acted on the directions of the interested party. It is the interested party who directed the 3rd respondent to carry out investigations as per her letter dated 12th June 2017. On 16th June 2017, the 3rd respondent seems to have obeyed the directions by the interested party and wrote a letter to her indicating that they are carrying out investigations.

Mr. Ngige counsel for the 1st and 2nd respondent opposed the application. Counsel submit that the application is speculative and preemptive. There is no communication from the 1st respondent indicating that the petitioner will be locked out of the nominations. Investigations are still on going. The integrity report does not make any recommendations. The petitioner is seeking an injunctive relief. The petition and the application does not meet the threshold required under the case of **GIELLA -VS- CASEMAN BROWN LTD [1973]EA 358**. The petitioner does not hold any degree and he has not addressed that issue. He has not approached the Court with clean hands. He will not suffer any irreparable damage since the salary of a Senator is known and can be computed in the event that he is blocked from participating in the elections. The 1st respondent has a statutory duty to act on any complaint. Until a recommendation is made, the complaints simply remains as a complaint. The application is hampering investigations.

Mr. Waudu appeared for the 3rd respondent. Counsel relied on the affidavit of **Pius Ndiwa**. Counsel maintains that the application does not meet the conditions necessary for the grant of conservatory orders. It is submitted that the applicant has not established a *prima facie* case and that he is likely to suffer prejudice. The applicant must establish that his case has a likelihood of success. The notice of motion dated 14th June 2017 is fatally defective. The application is not supported by the petition. The petition only seeks one prayer which is already spealt while the application has brought in several prayers. There are no allegations of violation of the petitioner's Constitutional rights by the 3rd respondent. The petition was brought as the petitioner feared that he would be barred from presenting his nominations papers. That fear is gone as the petitioner presented his nominations papers and has been gazetted.

Mr. Waudu submits that the petitioner alleges that he was condemned unheard. He has been summoned to go and give his information to the 3rd respondent on the issue of his degree but he is seeking orders to stop that process. He was duly summoned and the letter summoning him was received by the clerk to the National Assembly. Fresh summons were issued in June 2017. The University of Nairobi did confirm that the petitioner was not it's registered student for the Degree of the Bachelor of Commerce. That fact has been established. The integrity report is titled "**cases under investigations.**" The report is not recommending any kind of action to be taken. It is only indicating the complaints against each candidate vying for an elective post. Granting the orders being sought will not advance constitutional values. The issue is whether the petitioner meets the requirements of Chapter Six of the Constitution. The petitioner has not bothered to repute the allegations made against him. It would be easy for the petitioner to annex as evidence a copy of his degree certificate. He is not challenging the self declaration form he produced. The 3rd respondent is entitled to carry out investigations and find out if the petitioner has committed a criminal offence.

Counsel submit that the 3rd respondent is not guided by the interested party. The 3rd respondent only informed the interested party that the Commission was investigating the matter. There is no petition that would be rendered nugatory if the orders are not granted. There is no evidence that the 3rd respondent has exceeded its powers or infringed on petitioner's rights. Counsel relies on the case of **BOARD OF MANAGEMENT OF UHURU SECONDARY SCHOOL -VS- CITY DIRECTOR OF EDUCATION AND 2 OTHERS [2015]E KLR**. The

Court in that case summarized the conditions necessary for the granting of conservatory orders. Counsel also relies on the case of **ROYAL REED INTERGRATED AND 4 OTHERS -VS- ATTORNEY GENERAL & 3 OTHERS[2016]e KLR**.

Mr. Gitonga appeared for the interested party. Counsel submit that the dispute herein involves issues of integrity under Article 10 of the Constitution and is not a political matter. Any person has a right to allege that the Constitution is being violated. The complaint is criminal in nature and there is no requirement that the interested party must have an interest in the alleged criminal offence. Counsel maintains that the petitioner is seeking orders of injunctions which cut across all the proceedings whether they are constitutional or civil in nature. Counsel relies on the case of **MRAO LTD -VS- FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS [2003]e KLR**. The petitioner has not established that the complaints by the interested party is false or unfounded. If the petitioner establishes that he has a Bachelor of Commerce degree from The University of Nairobi then the complaint will be withdrawn. Investigations were conducted and it was proved that the petitioner made a representation that he has a Bachelor of Commerce Degree. The petitioner has been given an opportunity to be heard. The case is still under investigations and the integrity report is not a decision. The press release by the 1st respondent only indicated that the 1st respondent had received 106 integrity cases. The petitioner's case is one of them which is under investigations. In 2013 there was no requirement that a member of Parliament must have held a degree. However, the petitioner has failed in the declaration forms indicating that he had a Bachelor of Commerce Degree from The University of Nairobi. That was a lie and therefore the petitioner has failed in Constitutional morals. There is no *prima facie* case to warrant the granting of an order of injunction. No irreparable harm will be suffered. Investigations have to be finalized and once a decision is made the petitioner can come back to the court and seek relief.

The petition herein raises the following issues:-

- i. Whether an order of injunction should be granted to stop, restrain or prohibit the 1st respondent from omitting the petitioner's name as a candidate for the position of a senator in the Kenya Gazette.***
- ii. Whether the respondent should be restrained by an order of injunction from recalling, canceling and/or in any way varying the nominations certificate issued to the petitioner on 28th of May 2017.***
- iii. Whether the respondent should be restrained, barred, stopped or prohibited by an order of injunction from further investigating, summoning and/or in any way acting upon the integrity report presented to the 1st respondent on the 1st June 2017.***

The notice of Motion dated 14th June 2017 is brought under Articles 19, 23, 25, 47 and 50 of the constitution and section 4(3) of the Fair Administrative Action Act No.4 of 2015. I have carefully read all the three affidavits in support of the application. The totality of the issues raised in those affidavits is that;

- a) The respondent prepared an integrity report which includes the petitioner's name without granting him a hearing.***
- b) The integrity report alleges that the petitioner is culpable yet no input from the petitioner was obtained.***
- c) The petitioner was condemned unheard.***
- d) The petitioner has never been investigated, charged, tried or convicted of any offence under section 11 of the Oaths and Statutory Declarations for willfully making a false statement in a statutory declaration.***
- e) Since the integrity report was released without hearing the petitioner, the petitioner's constitutional rights under Articles 47 and 50 of the constitution and section 4 of the Fair Administrative Act were violated.***
- f) The third respondent acted on the directions of the Interested Party and failed to adhere to the rules of Natural justice while fulfilling its mandate.***
- g) The petitioner has not violated any provisions of the Constitution, Penal Code, Leadership and Integrity Act or Election Act.***

The dispute herein can be placed to the elections held on 4th of March 2013. Candidates were required to fulfill certain conditions before they were cleared for the elections. One of the conditions was a statutory declaration form (form 19). The petitioner filled that form on the 28th January 2013. There is also a self declaration form and the petitioner duly filled that other form on the same date of 28th January 2013. One of the questions in that form was the highest academic qualifications obtained by the candidate. The petitioner indicated that he has a Bachelor of Commerce, Insurance option, from The University of Nairobi obtained in 2001. This is as per the documents annexed in the affidavit of Pius Ndiwa. The petitioner, through his advocate contends that he did not make such a declaration. There is no averments in any of the three affidavits herein stating that the petitioner did not indicate that he has a Bachelor of Commerce Degree from The University of Nairobi. On 5th June 2017 the interested party filled a nomination dispute resolution complaint form provided by the 1st respondent. The complaint in that form is that the petitioner alleged that he is a holder of a Bachelor of Commerce Degree in Insurance which was not true. In is also indicated that the petitioner does not certify the moral and ethical requirement under Article 99 of the Constitution. The complaint was transferred to the relevant vetting committee of the 1st respondent for hearing and determination. This is as per the decision of the IEBC dated 9th June 2017 and signed by three commissioners. On 12th of June 2017 counsel for the interested party wrote to the 3rd respondent indicating that the petitioner had given false information under oath and had therefore contravened section 11 of the Oaths and Statutory Declarations Act. The 3rd respondent wrote to the interested party's counsel on the 16th of June 2017 and stated as follows:-

“The commission is still undertaking investigations into the matter and upon conclusion will forward the file to the office of the Director of Public Prosecution as provided in law”.

The petitioner contends that the 3rd respondent as an independent institution should not be working under the directions of the interested party. It is clear from the correspondence between the interested party and the 3rd respondent that the 3rd respondent merely acknowledged a receipt of the complaint by the interested party and informed her that investigations were being undertaken. The 3rd respondent has a statutory duty of investigating any complaints touching on the ethics of public officials including members of Parliament. Acknowledging receipt of the complaints and carrying out investigations does not amount to working under the directions of the interested party.

Mr. Kiogora for the petitioner contends that the application is not brought under order 40 of the Civil Procedure Rules. It is brought under Articles 19,23, 25, 47 and 50 of the Constitution. It is therefore his submissions that the authorities relating to the granting of interlocutory injunctions do not apply. It is true that the title to the application does not cite the Civil Procedure Act or Rules. However the prayers being sought are orders of injunction. Article 19 of the Constitution provides for Rights and Fundamental Freedoms which are granted to each individual. Article 23 empowers the High Court to determine applications for redress of a denial, violation, or infringement or threat to a right or fundamental freedom. The article provides for certain reliefs which include an order of injunction and a conservatory order. It is quite difficult to differentiate an order of injunction pursued through the provisions of the Civil Procedure Act and one sought through Article 23 of the Constitution. An injunction is intended to maintain certain required status before the Court can hear the main dispute. It is a temporary relief before the dispute can be heard. In the case of *MUNYA -VS- KITHINJI & 2 OTHERS [2014] KLR – SCK 877* the Supreme Court distinguished orders of injunction and conservatory orders. The court stated as follows:-

1) The domain of interlocutory orders was somewhat ruffled characterized by injunctions, orders of stay, conservatory orders and others. Injunctions, in a proper sense, belonged to the sphere of civil claims, and were issued essentially on the basis of convenience as between the parties and on balances of probabilities. The concept of stay orders was more general, and merely denoted that no party or interested individual or entity was to take action until the court had given the green light.

2) Conservatory orders bore a more decided public-law connotations; for these were orders that facilitated ordered functioning with public agencies, as well as upheld the adjudicatory authority of the Court in the public interest. Conservatory orders, therefore were not unlike interlocutory injunctions, linked to such private-party issues like “the prospects of “irreparable harm” occurring during pendency of a case; or “high probability of success” in the applicant’s case for orders of stay.

3) Conservatory orders ought to be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.

The order of the injunction under Article 23 is intended to stop the violation or infringement or threat to Constitutional rights. The applicant must show that indeed there is such a violation, denial, infringement or threat of infringement of one's Constitutional right. For one to fulfill such requirement he or she has to convince the court that indeed the respondent's action will lead to violation of rights. There will be need to establish that the complaint is well founded. This calls for the establishment of a *prima facie* case with a probability of success. There are no separate conditions for an injunction under the constitution and one under the civil procedure. Although the former is purely centred on The Bill of Rights while the latter deals with civil disputes. An injunction cannot be granted under Article 23 of the Constitution by simply alleging that one's Constitutional rights have been violated or that there is threat of violation. There must be proof of those allegations.

The record shows that on 26th May 2017 the 3rd respondent wrote to the petitioner through the Parliament address asking him to appear at it's office on the 31st May 2017. The petitioner maintains that he did not receive that summon. The respondent sent a second letter dated 15th June 2017 requesting the applicant to appear at it's office on 23rd of June 2017. By that time the petition had been filed before this Court. The issue is whether the petitioner's right to a fair administrative action has been violated. According to the petitioner there is an integrity report which concludes that he is culpable. The report was done without his input. He was not heard and never appeared before the 3rd respondent to answer to the complaints. It is therefore the petitioner's position that a decision has already been made and he has been found culpable. The respondent's maintain that investigations are still ongoing. The 3rd respondent prepared the integrity report even before receiving the alleged self declaration forms from the 1st defendant.

Section 2 of the Fair Administrative Action Act No.4 of 2015 defines an Administrative action to include

i. the powers, functions and duties exercised by authorities or quasi-judicial tribunals; -or

ii. Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

Section 4(3)(4) of the Act under which the current application is brought provide as follows:-

(3) where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision;

a) Prior and adequate notice of the nature and reasons for the proposed administrative action

b) an opportunity to be heard and to make representations in that regard;

c) notice of a right to a review or internal appeal against an administrative decision, where applicable

d) a statement of reasons pursuant to section 6;

e) notice of the right to legal representation where applicable;

f) information, materials and evidence to be relied upon in making the decision or taking the administrative action

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to;

a) attend proceedings, in person or in the company of an expert of his choice

b) be heard

c) cross-examine persons who give adverse evidence against him, and

d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

I have gone through the integrity verification report. The report is for the candidates for the 2017 General Election. The report covers Presidential candidate, candidates to the position of Governors, Senator, County Women Representatives, Members of National Assembly and Members of County Assemblies. Several candidates are indicated in the report. The status of some of the candidates is indicated as matters pending in court while others indicate that investigations establish culpability on the part of the candidate. The petitioner herein is not the only one whose status is indicated as culpable. It is indicated in the report that **investigations established that the candidate is not a graduate of University of Nairobi. He filled falsified declaration form to IEBC in 2013.** The 3rd respondent invited the petitioner to appear on 23rd of June 2017 to facilitate investigations on the allegations. It will be prudent for the petitioner to simply appear before the 3rd respondent and present his side of the story. He will be shown the self declaration forms and respond to the allegations made against him.

The petitioner is apprehensive that those investigations are being done at the behest of his political competitors. The petitioner cannot complain that he has been condemned unheard yet he would like this court to bare the 3rd respondent from hearing him. There is no decision that has been made to have the petitioner charged in court or barred from the elections. It is possible that after appearing before the 3rd respondent the petitioner will be able to clear the situation and indicate that he did not allege that he is a holder of a Bachelor of Commerce Degree, Insurance option, from The University of Nairobi. It is equally possible that the petitioner can establish to the 3rd respondent that he is a holder of a Bachelor of Commerce Degree or any other Degree from The University of Nairobi or any other University. I say so because in a letter dated 14th June 2017, the University of Nairobi did confirm that the Applicant did apply for admission to pursue a Bachelors Degree Course in Law and his application was considered on the basis of him being a Degree holder and not a Kenya Certificate of Secondary Education holder. It is therefore established that the petitioner has presented himself to The University of Nairobi as a Degree holder. If that is not the case then issues of integrity under Chapter 6 of the Constitution will follow him.

The integrity report contains names of other candidates whose cases are pending before the courts. There is no indication that the petitioner herein is being barred from contesting the position of Meru Senator. Even those who have already been charged are still contesting political positions. This is in line with the provisions of Article 99(3) which states as follows:-

“A person is not disqualified under clause (2) unless all possibilities of appeal or review of the relevant sentence or decision has been exhausted”.

Should the 3rd respondent recommend that the petitioner be charged in court, that decision will not stop the petitioner from pursuing his constitutional right to political participation under Article 38. The apprehension by the petitioner is unfounded. The 3rd respondent has a statutory duty to carry out the investigations and make its decision. The integrity report does not recommend that the petitioner be charged in court or be barred from vying for the position of a Senator.

The application herein does not meet the conditions for the granting of an injunction or a conservatory order. All what the 3rd respondent is doing is to carry out its mandate and investigate alleged criminal activities which touches on issues of integrity. This court cannot stop those investigations simply on the contention that the petitioner was condemned unheard. The final report on the investigations can only be done after the petitioner appears before the 3rd respondent and explain his side of the story. Barring the respondents from carrying out their investigations is tantamount to protecting the petitioner from the investigations. In my view, the complaint by the interested party is genuine and needs to be investigated. It would have been easy for the petitioner to indicate that he has the Bachelor of Commerce Degree and indicated so in the self declaration forms or that those forms were not the ones he filled. Such position will lead to further investigations as to the signatures and handwriting appearing on the documents.

Section 13 of the leadership and integrity Act No. 19 of 2012 provides for moral and ethical requirements. It is indicated that a person shall observe and maintain certain ethical and moral requirements which include:-

c) Accurately and honestly represent information to the public

g) Not falsify any records.

Section 13 (2) states as follows;

“A person who wishes to be elected to a state office shall for purposes of this section submit to the Independent Electoral and Boundaries Commission a self-declaration in the form set out in the first schedule”.

The application is based on the contention that the petitioner was condemned unheard. He has been given an opportunity to go and present his position on the matter. No final decision has been taken. Investigations are still ongoing. The 1st respondent relied on the information

that had already been obtained from The University of Nairobi which indicate that the petitioner did not graduate with a Bachelors Degree in Commerce in 2001. There is no *prima facie* case that has been established to warrant granting the orders of injunction. The petitioner has not been barred from participating in the coming elections. There will be no irreparable damage to be suffered by the petitioner if he is to appear before the commission. We are all governed by the constitution. We are all equal before the law whether one is a politician, a civilian, a judicial officer or a public servant. Granting the orders being sought is tantamount to barring the 3rd respondent from carrying out it's statutory obligations. No one is above the law and the petitioner should not find it difficult to present himself before the commission and respond to any issues raised against him. This application is based on the petitioner's apprehension that his name maybe excluded from the ballot box. It is purely speculative and has the aspects of pre-empting whatever future decisions the respondent may take. This court cannot conclude that the respondents are out to stop the petitioner from vying for the position of Senator of Meru County.

Article 47 of the Constitution on Fair Administrative Actions has not been violated. The same applies to Section 4 of the Fair Administrative Actions Act. The investigation process is still ongoing and the appearance of the petitioner before the 3rd respondent is part of administrative action. Similarly, I do find that there is no violation of Article 50 of the Constitution on fair hearing since the investigation process has not been concluded. The petitioner has not been condemned unheard. He has the opportunity to be heard before a final decision is made. Even if a decision to prosecute the petitioner is made, the petitioner still is protected by the Constitution under Article 99(3) and is entitled to exhaust all levels of appeals before he can be barred from political participation.

In the end, I do find that the application dated 14th June 2017 lacks merit and the same is hereby dismissed. Since the petitioner was convinced that his constitutional rights had been violated and was seeking the protection of the court, I do find that there is no need to condemn him to pay costs. Parties shall bear their own respective costs.

Dated signed and delivered at Meru this 30th day of June 2017.

SAID CHITEMBWE

JUDGE