



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION. NO. 225 OF 2014**

**CONSTANTINE MWIKAMBA MGHENYI.....PETITIONERS**

**VERSUS**

**THE INSTITUTE OF CERTIFIED**

**PUBLIC ACCOUNTANTS OF KENYA.....RESPONDENT**

**RULING**

1. The Petition herein was filed on 12<sup>th</sup> May 2014. Alongside the Petition and in exercise of the right donated under Article 23 of the Constitution, the Petitioner also filed an application for conservatory orders. The urgency of the Petition as well as the application dictated an early and expeditious hearing. The application was heard and on 21<sup>st</sup> May 2014 Lady Justice Mumbi Ngugi dismissed the intermediary application. The dismissal orders read as follows:

***“In the circumstances I find no basis for giving the conservatory orders that the Petitioner seeks and the application dated 12<sup>th</sup> May 2014 is hereby dismissed with costs”.***

2. The conservatory orders then sought by the Petitioner were to restrain the Respondent from conducting the elections of the Respondent’s council pending determination of the Petition. The Petition itself sought orders that the court do declare that the Petitioners rights to fair administrative action had been violated transgressed and trampled upon by the Respondent. The Petitioner also sought an order of certiorari to quash the decision of the Respondent declaring the Petitioner ineligible to vie for candidature in the Respondent’s council elections. The Petitioner also sought an order for compensation for violations of the Petitioner’s rights.

3. Having heard the parties on the intermediary application for conservatory orders, Mumbi Ngugi J dismissed the application. It is such dismissal which prompted the application by the Respondent to have the Petition itself now wholly dismissed. The main ground as stated on the face of the Petition is that this court had on 22<sup>nd</sup> May 2014 found that the Petitioner had not demonstrated any violations of his rights under Article 47, the very basis of the petition itself.

4. The Respondent’s application was orally urged by Mr. Ogembo. The Petitioner did not participate. Neither did the Petitioner file any response to the application. Mr. Ogembo was brief and, with pithy, stated that the court has an inherent jurisdiction to dismiss the Petition. Counsel stated that the Petition lacked the requisite substance. To support this contention Mr. Ogembo referred the court to the ruling delivered on 22<sup>nd</sup> May 2014 where Mumbi Ngugi J stated, inter alia as follows:-

**“[23] At any rate, the Petitioner has not demonstrated right under Article 47 of the Constitution”.**

**any violation of his**

5. It is important to understand the purpose and import of “conservatory orders” under Article 23 of the Constitution. The main purpose is to preserve the substratum of a Petition. Where the Petition is likely to be rendered nugatory if an intermediary conservatory order is not availed then the court will more likely than not grant the conservatory order sought.

6. Even then there are various considerations before the court can grant a conservatory order. The court must be satisfied that there is a prima facie case with a likelihood of success: see **Centre for Rights Education & Awareness & 7 Others –v- Attorney General [HCCP No. 16 of 2011]**. A party must also demonstrate a likelihood of success: see **Muhuri & 2 Others–v- Attorney General & Others [HCCP No. 7 of 2011]**, and not merely a potentially arguable case. Potential arguability is not enough: See **Board of Management of Uhuru Secondary School –v- City County Director of Education & 2 Others HCCP number 359 of 2015**. Then too the court must be satisfied that granting or denying the conservatory relief will enhance Constitutional values and objects: **Satrose Ayuma & Others –v- Registered Trustees of Kenya Railways staff Retirement Benefits Scheme [2011] eKLR** and also **Patrick Musimba –v- The NLC & Others [2015] eKLR**. The court, too, must consider whether it would be in public interest to grant or deny the conservatory orders: see **Gatirau Peter Munya –v- Dickson Mwenda Githinji & 2 Others [2014] eKLR**. Not forgetting the fact that the court must also consider whether denial of the conservatory order will render the Petition itself nugatory. See: **Martin Nyaga Wambora – v- Speaker of the County Assembly of Embu & 3 Others HCCP No. 7 of 2014**. It is along the forgoing principles that the court proceeds when exercising its discretion as to whether or not to grant any conservatory relief.

7. The standard evidently at trial is different. At the hearing of the Petition, the Petitioner must positively prove his claims lest he falls foul of the provisions of Sections 107 and 109 of the Evidence Act (Cap 80) Laws of Kenya.

8. At the intermediary stage too, the court is not bound to make any conclusive findings of law or of fact. The court does not venture into a detailed or minute scrutiny of the facts or of the evidence and the law. A demonstration by the applicant Petitioner on the rights to be infringed or violated will suffice. Where the Petitioner fails to demonstrate any rights duly infringed then the application may fail but it certainly does not mean that the Petition itself is also deemed to have failed.

9. I have read through the Ruling by Mumbi Ngugi J of 22<sup>nd</sup> May 2014. I am not convinced that the learned judge in anyway made conclusive and final findings of both fact and law. None of the deponents of the affidavits relied upon by the parties was put to test on their respective evidence through the age-old procedure of cross-examination. The submissions made by the parties too, during the hearing of the interlocutory application were limited to the application and not to the Petition. Even if the elections which the Petitioner sought to halt have been conducted, in my view, the Petitioner still has a right of recourse. If the Petition succeeds the court may still make a declaration and even award damages.

10. In my judgment, the contention by Mr. Ogembo that the ruling of 2<sup>nd</sup> May 2014 effectively determined the Petition is untenable in the circumstances.

11. I however note that since May 2014, the Petition herein has not been prosecuted in any way. No attempt has been made to further prosecute the Petition. The court always has innate powers to ensure an ever smooth process in judicial proceedings. In these respects, the court is enjoined to make such orders as may be necessary for the ends of justice. Such orders include termination of proceedings, stay of proceedings and case-management orders intended to ensure a more expeditious and fair dealing with the proceedings. It is not fair and just to any party when the other party goes mute and fails to take steps to prosecute a claim. It gets worse with time. It is for the court to act but even then still balance the scales of justice.

12. In conclusion, I would dismiss the application filed by the Respondent on 1<sup>st</sup> December 2014.

The same was not contested. It has failed. There will be no order as to costs.

13. In exercise of the inherent jurisdiction of the court, I also direct and order that the Petitioner do take such steps as may be necessary to prosecute the Petition. Such steps, if any, must be taken within the next three months and in default the Petition shall and dismissed.

14. Orders accordingly.

**Dated, Signed and Delivered at Nairobi this 21st day of October 2015.**

**J. L. ONGUTO**

**JUDGE**