



**Gikunda & 3 others v Kenya Judicial Staff Association & 5 others
 (Constitutional Petition E243 of 2024) [2024] KEHC 5602 (KLR)
 (Constitutional and Human Rights) (22 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5602 (KLR)

**REPUBLIC OF KENYA
 IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
 CONSTITUTIONAL AND HUMAN RIGHTS
 CONSTITUTIONAL PETITION E243 OF 2024**

LN MUGAMBI, J

MAY 22, 2024

BETWEEN

**VINCENT KIOGORA GIKUNDA 1ST PETITIONER
 OSCAR J SOI 2ND PETITIONER
 FRANK SARUNI MEGIRI 3RD PETITIONER
 ANTHONY OCHEING ONIALA 4TH PETITIONER**

AND

**KENYA JUDICIAL STAFF ASSOCIATION 1ST RESPONDENT
 KENYA JUDICIAL STAFF ASSOCTIONA ELECTION BOARD 2ND
 RESPONDENT
 BORU WAKO 3RD RESPONDENT
 EVENSON NGIGI 4TH RESPONDENT
 ANDREW OMWENGA MOTARI 5TH RESPONDENT
 LINET MURUGI 6TH RESPONDENT**

RULING

1. The 1st, 2nd, 3rd and 4th petitioners (applicants) moved this court through a notice of motion application dated 15th May, 2024 under a certificate of urgency of even date.
2. The matter is supported by the affidavit of Vincent Kiogora Gikunda sworn on 15th May, 2024.



3. Briefly, the motion seeks the following orders.
 1. Spent
 2. Spent
 3. That pending the hearing and determination of the petition, this Honourable court be pleased to issue a conservatory order restraining the respondent either by itself or its agent from conducting its national Office Elections slated for 25th May, 2024.
 4. Costs be provided for.
 5. Any other relief this court will be pleased to issue in the circumstances.

Petitioners/Applicants' Case

4. The deponent, Mr. Vincent Kiogora Gikunda deponed that he is a Court Assistant who effective 2016 when he was appointed to the position. He has served in various stations. He is presently based at Milimani Commercial Court. As a Court Assistant, he is also a member of Kenya Judicial Staff Association, (KJSA), the 1st Respondent in this petition.
5. He stated that he developed an interest in vying for a position in the National Executive Council Office as the Organizing Secretary of KJSA.
6. On 8th May, 2024, he wrote to the 2nd Respondent (Kenya Judicial Staff Association Elections Board) seeking a clarification on eligibility criteria for nomination as a candidate in the forthcoming elections through in a letter dated 8th May, 2024 (annexure VKG – 1). On 11th May, 2024 the Chair of the Elections Board responded to the letter by indicating that the Elections would be conducted pursuant to the Rules and regulations for conducting National Elections, 2024 that were adopted at the Annual General Meeting of 16th December, 2023 (annexure – VKG 2).
7. The applicant, through a letter of even date (VKG 3) immediately wrote to the Elections Board (2nd Respondent) seeking to be given audience citing the retrospective application of the elections rules which he contended went against the principle of reasonableness and legitimate expectation and was thus a violation of his right to Fair Administrative Action. This letter was never responded to.
8. On 14th May, 2024 the four petitioners/applicants received individual notifications rejecting their nominations (as indicated in the letter VKG 4). The reason given for the rejection was that they had failed to meet the eligibility criteria of KJSA rules and Regulations for conducting National Office Election, 2024, namely “Attendance of three Annual General Meetings (AGM) that were held on 25th June, 2022, 25th February, 2023 and 16th December, 2023.
9. The applicants further contend that Rule 3(1) (a) which the respondents relied on to bar their candidature in the forthcoming cannot be applied considering that no AGM has been conducted following its adoption. The applicants point out that previous AGMs have been marred with irregularities including failure to notify all members of the meetings or sending notification to members after the meeting has taken place. The deponent stated that the 4th petitioner/applicant is a case in point as he was notified of the Annual General Meeting by President Boru Wako on 16th December, 2023 at 12.52 p.m. yet that meeting had commenced at 9.00 a.m. The deponent provided the screenshot notification as annexure VKG 6.
10. The deponent further cited Article 15(1) (a) KJSA constitution which he stated allows the Association to hold one Annual General meeting hence it was not plausible for the 2nd Respondent to disqualify



them for failure to attend the meetings of 25th February, 2023 and 16th December, 2023 which did not comply with the provisions of KJSA constitution.

11. Following the rejection of their nomination, the petitioners/applicants filed an appeal against disqualification before the Dispute Resolution Committee of the Association on 13th May, 2024 (annexture VKG 7) but their appeal was unsuccessful. The decision of the Dispute Resolutions Committee was conveyed via the letter of 14th May, 2024 (annexture VKG 8). The deponent swore that the composition of the Dispute Resolution Committee was irregular as it comprised former members Andrew Omwenga Motari and Millicent Owino whose membership to KJSA ceased after they were appointed as Judicial Officers and are therefore currently members of Kenya Judges and magistrate's Association. The deponent stated that lack of a properly constituted Dispute Resolution Committee deprives the membership of the Association an internal Appeal mechanism that they can address their grievances against the actions of the Respondents that do not align with the Fair Administrative Action.
12. The petitioners/applicants thus, urged the court to intervene and determine if the application of Section 3(1) (a) of KJSA Rules and Regulations for conducting National Office Elections, 2024 contravenes Article 10, 27, 28, 36, 38 and 47 of the Constitution, especially, whether the Respondents actions violate the Applicant's right to fair administrative action and equal benefit of the law.

Respondents' Case

13. The Respondents responded to the application through the replying affidavit sworn by BORU WAKO (3rd Respondent) sworn on 19th May, 2024.
14. Mr. Wako depones that he is the President of the KJSA (1st Respondent) in the affidavit sworn on his own behalf and on behalf of the 1st, 2nd, 4th, 5th and 6th Respondents.
15. The deponent states that the application by the Applicants is made in bad faith, is misguided and is an abuse of court process with the sole aim being to forestall KJSA Elections slated for 25th May, 2024.
16. He stated that the 1st Respondent is registered as an Association under Societies Act, Cap 108 Laws of Kenya and thus lacks the capacity to sue or be sued under its own name (A copy of 1st Respondent certificate of Registration annexure BW -1A was exhibited as proof of registration). He thus contends that the Association should have been sued through its 11 officials.
17. He further swears that the 2nd Respondent is an organ of the 1st Respondent and thus cannot be sued in its own name.
18. That since the petitioners/applicants have not specified that 3rd – 6th Respondents have been sued in their representative capacity, then the petition is against them in their personal capacities which cannot therefore stand as it discloses no cause of action against them.
19. The respondent deponed that Article 8 of the KJSA Constitution specifies the business that can be undertaken by the General Assembly once every year and decisions taken at the General Assembly are binding on all the members. The General Assembly has the authority to adopt such rules as may be necessary for transaction of its business.
20. The Respondent stated that the notice of the 10th Annual General Meeting was issued on 23rd November, 2023 and adoption of Election Rules formed part of that notice as shown in annexure – BW 2. The meeting was subsequently held on 16th Decembers, 2023 during which the enacted Elections Rules were discussed and adopted as shown in the copy of minutes – BW 3, that are due for confirmation and signing at the Annual General Meeting scheduled for 25th May, 2024.



21. The deponent stated further that this particular resolution is captured under Minute 6/16/12/23 of the Annual General Meeting held on 16th December, 2023 that agreed that the rules be applied in the upcoming elections and also in subsequent elections thereby ratifying the immediate application of the Rules.
22. That rule 3(1) (a) of the 1st Respondent Rules provides that a candidate offering themselves for elections must have been “an active member of the 1st Respondent for no less period of three years and attended the LAST three Annual General Meetings either physically or virtually (per the 1st Respondent Election Rules annexed as BW 4).
23. That the petitioners were misleading the court by misquoting the rule to read “At LEAST three Annual General Meetings’ and not the LAST Three Annual General Meetings, as ratified by the 1st Respondent’s General Assembly.”
24. It was further stated on behalf of the Respondent’s that Rules were adopted on 16th December, 2023 and thus any aggrieved member of the 1st Respondent had sufficient time to question that validity as indeed the 2nd petitioner even admitted that he attended the General Meeting held on 16th December, 2023 in which the impugned rules were adopted.
25. The 1st Respondent duly issued a notice on 4th May, 2024 in compliance with rules intending to hold its Annual General Meeting on Saturday, 25th May, 2024 at Lake Naivasha Resort. It has already paid for the venue and the service provider who is to provide online voting service as evidenced by the copies of the notice of Annual General Meeting – annexure BW 5 and the payment advice for Lake Naivasha Resort and Tinda Pixels Communications.
26. The respondent further stated that the 2nd respondent issued a notice calling for expression of interest for all those intending to vie for positions in the 1st Respondent’s National Executive Council positions as evidenced by annexure BW 6 – upon which the petitioners expressed their interest in vying for National Secretary, President, Trustee and Secretary General positions. However, on 14th May, 2024, the 2nd Respondent relying on Rule 3.1 (a) of 1st Respondent’s Election Rules communicated to 1st, 2nd and 3rd petitioners that they could not participate in the elections having not attended the last three Annual General Meetings as indicated in the copies of the letters BW 7, BW 8 and BW 9 that are annexed to the affidavit. As for the 3rd petitioner, the reason for rejection was because he had submitted an incomplete application late hence it was not considered.
27. The Respondents’ further state that contrary to the allegation that the petitioners were denied audience by Dispute Resolution Committee, an opportunity was given to the 1st, 2nd and 4th petitioners through the email dated 14th May, 2024 annexure- BW 10.
28. The allegation by the petitioner that 5th and 6th Respondents are not members of 1st Respondent was also denied. The respondents assert that they 5th and 6th Respondent are bonafide members of 1st respondent. The respondent further contend that the time of current National Executive Council comes to an end on 25th May, 2024 and the 11 positions will fall vacant, as such, the Petitioners prayer to have the election postponed because of four positions out of 11 is unjustifiable.
29. The respondents contend that nothing stops the 1st respondent General Assembly from reconsidering the application of rule 3.1 (a) of the 1st Respondent during the Annual General Meeting provided that proper procedure for moving the General Assembly is followed. That in fact, the 4th petitioner has already filed a motion which seeks to have the rule amended on the floor of the Annual General Meeting and everyone locked out on the basis of the application of the rule to be allowed to contest in



the elections to be held on the same day. The respondent annexed the said motion BW 11 and urged this Court instead refer the issues raised in the Petition to the General Assembly.

30. That is clear that the petitioners want to circumvent the role of the majority members of 1st respondent as expressed in the Annual General Meeting held on 16th December, 2023, where the current Election Rules were adopted by imposing candidates who do not meet the agreed threshold for nomination.
31. The respondent thus urge the court to dismiss the notice of motion and the petition.

Analysis and Determination

32. After a careful perusal of the application and the response, and upon listening to the brief arguments made by advocates for the parties yesterday, Mr. Shadrack Wambui for the petitioners and Mr. Saluny for the Respondents, the court finds that the main issue for determination in this application is whether a conservatory order should be granted to restrain the respondents from conducting elections, confirming the list of validly nominated candidates and/or printing elections materials for the National Executive Council of Kenya Judicial Staff Association pending the hearing and determination of this petition.
33. In determination of this particular issue, it is necessary that I remind myself of the need for restraint and desist from venturing into issues or expressing views on matters that properly lie for determination after the full hearing of the petition.
34. Having said so, it is also important to reckon that the principles underlying issuance of conservatory orders are now well settled.
35. In the case of *Gatirau Peter Munya Vs Dickson Mwenda Kithinji* (2014) eKLR, the Supreme court stated thus: -

“Conservatory orders should 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.”
36. The High Court in *Muslim for Human Rights (Muhuri) & 20 Others Vs Attorney General and 20 Others*, Petition 7 of 2011 held thus: -

What is clear to me from the authorities is that strictly a “Conservatory Order is not an injunction as known in Civil matters or generally in other legal proceedings but is an order that tends to and is intended to preserve the subject-matter or set of circumstance that exist on the ground in such a way that the Constitutional proceedings and cause of action is not rendered nugatory.

“A Conservatory Order would enable the court to maintain the status quo or existing situation or set of facts and circumstances so that it would be still possible that the rights and freedoms of the claimant would still be capable of protection and enforcement upon determination of the Petition and the trial was not a futile academic discourse or exercise.”
37. At this stage, my view is that the court is required to satisfy itself the petition raises “A serious question for determination” as opposed to a merely arguable case for in reality, anything can attract a contrary view. The court must thus, keenly examine the quality and weight of the issue raised by the petitioners.



38. Further, the applicant for conservatory order must demonstrate is that the substratum of the petition will be rendered nugatory if the conservatory order is not granted and finally, it is in public interest to grant the order.
39. The above are the key considerations that the court must take into account in deciding whether issuance of a conservatory order is merited.
40. At the preliminary analysis stage; my view is that the applicant is not required to demonstrate that “the case is more likely to succeed than not” for that would mean I delve into detailed analysis of the merits of the case itself.
41. The question that I must now ask is, have the applicants’ demonstrated “serious issue concerning violation of Constitution that calls for this court’s intervention?”
42. The petitioners’ contention is that the 1st respdoent passed, during the last Annual General Meeting held on 16th December, 2023; a regulation that requires candidates offering themselves for elections to have attended 3 General meetings. That despite this rule having been made last year, the respondents have now interpreted and applied it retrospectively to bar the petitioners from contesting in the elections of 1st respondent officials slated for 25th May, 2024.
43. The Respondents on the other hand argue that the said regulation 3.1 (a) of the 1st respondent was duly processed and passed during the last Annual General Meeting held on 16th December, 2023 to apply to the upcoming elections.
44. The rule that is the subject matter of the present controversy is rule 3.1 (a) of the Kenya Judicial Staff Association (KJSA) Rules and Regulations, National Office Elections (2024) which provides: -
- “Rule 3(1) – A candidate should: -
- a. She/he must have been an active member for no less than a period of three years and attended the last three Annual General meetings either physically or virtually.”
45. The Respondent further attached the unconfirmed and unsigned minutes of the Annual General meeting of 16th December, 2023, and cited Minute 6/16/12/23, where it is indicated that: -
- “it was further agreed that these rules be applied in the coming KJSA elections and also subsequent elections.”
46. The petitioners contended the retrospective application is unreasonable and not procedurally fair considering that subsequent to the adoption of these rules, there has not been three Annual General Meetings held, hence the rule is discriminatory and against some of the members.
47. Counsel for the respondent argued the 1st Respondent is an Association and it is members of the 1st Respondent who saw it fit to pass the guidelines for members who would be interested to contest positions in the Association. According to the respondents, the petitioners are:
- “asking the court to intermeddle with affairs of 1st respondent when the Annual General Meeting intended to apply the rule as it is....”
48. The response that the 1st respondent is an Association and members can pass rules through the Assembly is true but the rules have to comply with the Constitutional Standards.



49. What is raised in this petition is an infringement of constitutional rights of the petitioners arising from the actions of the respondents.
50. Under Article 3 of *the Constitution*, “Every person has an obligation to respect and uphold *the Constitution*.”
51. The 1st Respondents as an association is not exempt. Its actions are subject to principles of constitutionality enshrined under Article 47(1) of *the Constitution* as well as Article 10.
52. In this regard, permit me to make the following observations.
53. Firstly, although it is indicated by the respondents that the AGM passed a resolution that Rule 3.1 (a) was to apply in the upcoming elections and subsequent elections, these minutes are yet to be confirmed by the membership. They are still in the unsigned state and are yet to be confirmed.
54. Secondly, that particular rule itself does not state that it is to apply retrospectively.
55. Thirdly, the exclusion requirement for existing members at the time the rule was adopted as opposed to those who might join the association later on needs to be examined against the principle of reasonableness and required by Article 47(1) of *the Constitution* and also be assessed on its discriminatory effect, if any.
56. Moreover, not even a single Annual General meeting has been held since this rule was adopted.
57. It is my considered view that the issues raised by the petitioner are pertinent as opposed to not merely being arguable. They raise serious constitutional questions that the court has to look into in determining whether the respondents’ actions are in violation of petitioners’ constitutional rights.
58. On whether the petition would be rendered nugatory if the conservatory orders are not granted, I have no difficulties answering this question.
59. A derogation from the constitutional values and principles that has the ability to violate the rights of another is serious enough to warrant an intervention by the court by way of a conservatory order.
60. Democratic governance through an election or representation of people at any level forms part of national values and principles of governance under Article 10 which binds all persons. It is upon this court to ensure that these principles are upheld by all persons. The resources invested by the respondent cannot stand in the way of upholding constitutional ideals.
61. This court is guided by the Supreme Court decision that: -
- “Conservatory orders should be granted on inherent merit of the case, being in mind public interest, the constitutional values and proportionate magnitudes, priority levels attributable to the relevant cause.”
62. The upshot is that I find that a conservatory order is merited in this case. I thus allow the applicants’ prayer to the effect:
1. That pending the hearing and determination of this petition, a conservatory order restraining the respondents from conducting its National Office Elections on 25th May, 2024 or any other date is hereby issued.
 2. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF MAY, 2024.



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L N MUGAMBI

JUDGE

