REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

MISC. APPLICATION NO. 134 OF 2020

HOWARD ASHIHUNDU M'MAYI.....APPLICANT

VERSUS

THE INSTITUTION OF ENIGEERS OF KENYA.....1ST RESPONDENT

MATALANGA NATHANIEL

WILSON OMWOLO.....2ND RESPONDENT

RULING

1. By a chamber summons application dated 7th April, 2020, the Applicant, Howard Ashihundu M'mayi, challenged the provisional election results for the year 2020/2022 for the Council of the 1st Respondent, Institution of Engineers of Kenya, and sought orders as follows:

a) Spent

b) THAT pending Arbitration or referral to a suitable Alternative Dispute Resolution mechanism (ADR) and pending hearing and determination of this application *inter partes*, a conservatory order do issue in the form of temporary injunction restraining the 1st and 2nd Respondents either jointly or severally or through their agents and/or servants or any person claiming under or through them from declaring, ratifying, acting upon or adopting the provisional Presidential Election results of the Institution of Engineers of Kenya (IEK) of the year 2020/2022 Council Elections in its Annual General Meeting or in any way or manner installing the 1st Respondent as the duly elected President of the 1st Respondent, assuming office or executing duties of the President of the 1st Respondent.

c) THAT this Honourable Court be pleased to grant any relief that may be appropriate to secure the preservation of the subject matter of the Application.

d) THAT the costs of the application be provided for.

2. The application was grounded on the fact that the 1st Respondent was scheduled to ratify the impugned elections held on 23rd March, 2020 in an annual general meeting which was to be held on 9th April, 2020. In the elections the 2nd Respondent, Matalanga Nathiel Wilson Omwolo, was declared the winner with 595 votes and the Applicant received 294 votes.

3. The Applicant averred that he sought to be provided with electoral documents supporting the announcement of the impugned presidential results but the 1st Respondent declined to do so. He further deposed that the 1st Respondent's Election Code of Conduct for Candidates 2020 required that once a dispute of the electoral vote was declared and a petition filed, the 1st Respondent was supposed to refer the dispute to an alternative dispute resolution mechanism.

4. The Applicant's case was that despite formally declaring a dispute on 27th March, 2020, as well as submitting a written petition to the 1st Respondent, no steps to refer the matter to an alternative dispute resolution mechanism were taken. He averred that the 1st Respondent had instead proceeded to convene an annual general meeting culminating in the filing of this application.

5. The 1st Respondent on the other hand filed a notice of preliminary objection and grounds of opposition dated 24th April, 2020. It was

contended that the Applicant is in breach of this Court's directions of 15th April, 2020 requiring him to serve the respondents with the petition and other documents. According to the 1st Respondent, the Applicant's failure to comply with the directions violated Rules 14(1) and 15(2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 ('Mutunga Rules'). It is further the 1st Respondent's case that the orders sought by the Applicant had been overtaken by events since the 1st Respondent had held its annual general meeting on 9th April, 2020, prior to the institution of these proceedings, in which the 2nd Respondent was installed and assumed office as President of the 1st Respondent.

6. The respondents also filed replying affidavits sworn on 24th April, 2020 by Eng. Matalanga Nathaniel Wilson Omwolo and Eng. Collins Gordon Juma, and a further affidavit sworn on 22nd June, 2020 by Eng. Collins Gordon Juma. Through the affidavits it was deposed that in a special general meeting of the 1st Respondent held on 13th February, 2020 the election road map was discussed and subsequently shared with the members of the secretariat. Further, that in the run up to the elections, the Electoral Code of Conduct of the 1st Respondent was printed by the 1st Respondent's Chief Executive Officer and circulated to all election candidates. It is the respondents' case that the election rules also authorized agents of the candidates to observe and verify the fairness and credibility of the voting process and declaration of the results.

7. It is the respondents' deposition that the rules had, however, not been sanctioned by the general membership and Council of the 1st Respondent. Accordingly, it was not possible for the 1st Respondent to give effect to the contemplated rules which have nevertheless been relied upon by the Applicant in support of his case.

8. The respondents averred that a mock election was conducted on 19th March, 2020 but the results nullified due to system challenges and a similar exercise was also conducted on 21st March, 2020. It is deposed that the 1st Respondent through the Chairperson of the Scrutineers wrote to the members that new credentials containing username, voting code and password would be sent to the voters on the date of the election being 23rd March, 2020 before 6am to enable them participate in the elections and that voters who had not received their credentials by 8am were required to communicate to the scrutineers on the email and hotlines that were provided.

9. The respondents further averred that an independent systems audit carried out by the University of Nairobi confirmed that the system was secure and reliable and the process was therefore fair and credible. It is thus the respondents' position that the results announced by the 1st Respondent were correct and a fair and accurate expression of the wishes of the voters. According to them, it is curious that despite the Applicant's allegation that there were systemic failures there were no challenges to the election results of the other elective posts.

10. It was further averred that the Applicant is on record congratulating the incoming President and the entire Council during the annual general meeting held on 9th April, 2020 and the present application was therefore instituted with ulterior motives and would hamper the incoming Council's capacity to deliver on the election promises. The respondents additionally stated that the orders sought by the Applicant have since been overtaken by events and the application is not supported by a petition.

11. I have carefully considered the application and the responses thereto. It is noted that the respondents question the propriety of these proceedings. It is important that this particular issue be first determined before the Court can delve into the substance of the application.

12. Rule 10 of the Mutunga Rules provides as follows:

> **"(1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.**
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> **(2) The petition shall disclose the following—**
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> **(a) the petitioner's name and address;**
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> **(b) the facts relied upon;**
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> **(c) the constitutional provision violated;**
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> **(d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;**
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> **(e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;**
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> **(f) the petition shall be signed by the petitioner or the advocate of the petitioner; and**
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> **(g) the relief sought by the petitioner.**
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> **(3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.**
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> **(4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court."**

13. Rule 4(1) of the same rules require that claims for violation of constitutional rights should be made in accordance with the Rules by stating that:

> **"Where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules."**

14. Further, Rule 11 of the Rules provide as follows:

> **"Documents to be annexed to affidavit or petition**
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> **(1) The petition filed under these rules may be supported by an affidavit.**
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> **(2) If a party wishes to rely on any document, the document shall be annexed to the supporting affidavit or the petition where there is no supporting affidavit."**

15. The respondents have argued that since a petition was not filed together with the chamber summons, this Court cannot issue interlocutory orders since the orders given would be final in nature with no further proceedings to be conducted. The Applicant conceded that the application was not accompanied by a petition. The question therefore is whether the failure to file a petition is fatal to the Applicant's case or whether the same can be cured by Article 159(2)(d) of the Constitution.

16. The power to strike out pleadings should be exercised sparingly and only in the clearest of cases. In the case of **Co-operative Merchant Bank Ltd v George Fredrick Wekesa, Civil Appeal No. 54 of 1999** the Court of Appeal stated that:

> **"The power of the Court to strike out a pleading under Order 6 rule 13(1)(b)(c) and (d) is discretionary...Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact… A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment."**

17. Similarly, in **Yaya Towers Limited v Trade Bank Limited (In Liquidation), Civil Appeal No. 35 of 2000** the Court of Appeal again expressed itself thus:

> **"A plaintiff is entitled to pursue a claim in our Courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the court, it must be allowed to proceed to trial. In *Lawrence v Lord Norreys* (1890) 15 App Cas 210 at 219, Lord Herschell said:-**
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> > **"It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be sparingly exercised, and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved."**
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> > **If the defendant assumes the heavy burden of demonstrating the claim is bound to fail, he will not be allowed to conduct a mini-trial upon the affidavits…**
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> > **I would add that the object of the summary procedure of striking out is to ensure that defendants should not be troubled by claims against them which are bound to fail having regard to the uncontested facts. In principle if there is any room for escape from the law, well and good; it can be shown. But in the absence of that, it is difficult to see why a defendant should be called on to pay a large sum of money and a plaintiff permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which must fail. .... The object is to prevent parties being harassed and put to expense by frivolous vexatious or hopeless litigation."**

18. The petition is the foundation of a claim alleging violation of constitutional rights and fundamental freedoms or breach of constitutional provisions. As per Rule 10 of the Mutunga Rules, the petition discloses the parties, the facts, the constitutional provisions violated, the injury sustained or likely to be sustained as a result of the violations, and the relief sought by the petitioner. Courts have upheld the importance of complying with the above stated requirements in respect of constitutional petitions - see **Anarita Karimi Njeru v Republic (1979) KLR 154**; **Mumo Matemo v Trusted Society of Human Rights alliance [2014] eKLR;** and **Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR.**

19. The importance of having proper pleadings on record was affirmed by the Supreme Court in **Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others [2018] eKLR; Civil Application No. 26 of 2018** when it held that:

> **"[8] We have no hesitation in finding that the purported Replying Affidavit filed by the 1st Respondent is fatally defective as the same contravenes all the legal requirements for the making of an affidavit. Hence it has no legal value in the matter before us. We have checked all the eight copies of the Replying Affidavit as filed in the Court Registry and confirmed that none of the copies was signed, commissioned and dated. Consequently, as the same is defective, it is deemed that there is no Replying Affidavit on record filed by the 1st Respondent.**

[9] A Replying Affidavit is the principal document wherein a respondent's reply is set and the basis of any submissions and/or List of Authorities that may be subsequently filed. Absence this foundational pleading, the Replying Affidavit, it follows that even the Written Submissions purportedly filed by the 1st Respondent on 17th August, 2018 are of no effect. Curiously, we further note that even the said Written Submissions are not dated, though this possibly might not have been fatal had the foundational document, the Replying Affidavit, been in order. From a perusal of the Written Submissions, it is clear to us that they are substantially based and relies on the undated and unsworn Replying Affidavit. Also, there are no Grounds of Objection raising any specific points of law of any preliminary or jurisdictional nature. The upshot is that as the 2nd and 3rd Respondents had categorically stated that they do not oppose the application, the Court will be excused for therefore deeming the application as being unopposed entirely."

20. It is indeed appreciated that the instant application is unique in that the Applicant is seeking protective orders in respect of a dispute that is required to be resolved in another forum. Nevertheless, the application is founded on alleged violation of rights and it is only a petition which can provide the necessary details of his claim. If the Applicant were to succeed at the end of the day, any relief to be granted should flow from the petition.

21. In the matter before this Court the Applicant has not filed a petition. There is therefore no basis for seeking interlocutory orders. The petition like a plaint informs the respondent of the petitioner's claim thereby enabling the respondent to appropriately meet the claim. Where there is no petition, there is no case to be heard by the court, and as correctly submitted by the respondents, Article 159(2)(d) of the Constitution cannot cure such a defect as it goes to the substance of the matter.

22. Having reached the conclusion that there is no proper case before this Court, I find no reason to explore any other issue raised in this matter. The correct thing to do is to strike out the application. The application is therefore struck out. Considering the relationship between the parties, I direct the parties to meet their own costs of the proceedings.

Dated, signed and delivered virtually at Nairobi this 10th day of February, 2021.

W. Korir,

Judge of the High Court