



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. E145 OF 2021

IN THE MATTER OF ARTICLE 22(1) AND 165(3) (b) AND (d)(ii) OF THE CONSTITUTION

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND

FREEDOMS SECURED AND GUARANTEED UNDER ARTICLES 2, 3, 10, 22, 23,

24, 27, 38(2), 47, 48, 50(1)81(A), (D) & (E), 82(1)(D) & (2), 86, 88(4)(H) OF THE

CONSTITUTION AND SECTION 7(1) OF THE SIXTH SCHEDULE

AND

IN THE MATTER OF THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT

AND

IN THE MATTER OF THE ELECTIONS ACT

AND

IN THE MATTER THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT

AND

IN THE MATTER OF THE ACCOUNTANTS ACT AND THE BY LAWS

ADMINISTRATIVE DECISIONS AND POLICY GUIDELINES THEREUNDER

AND

IN THE MATTER OF THE INSTITUTE OF CERTIFIED

PUBLIC ACCOUNTANTS OF KENYA (ICPAK) ELECTIONS

BETWEEN

MICHAEL KIPYEGON YATOR.....PETITIONER

VERSUS

THE INSTITUTE OF CERTIFIED

RULING

APPLICATION

1. The Petitioner through an application dated 21st April 2021 seek the following reliefs:-

a) Spent.

b) Spent.

c) Pending the hearing and determination of this application and the petition, the Honourable Court be pleased to issue a conservatory order staying the conduct of ICPAK Elections slated for 17th to 20th May 2021 with the formal declaration of results slated for 4th June 2021 pursuant to the announcement published by the Respondent's Chief Executive Officer issued under the existing By Laws and Policy Governing Elections of Chairman and members of the Council for year 2021.

d) Pending the hearing and determination of this application and the Petition, the Honourable Court be pleased to order the Respondent to review its By Laws and Policy Governing Elections for year 2021 in order to align it with the constitution of Kenya prior to conducting the elections.

e) Pending the hearing and determination of this application and the petition, the Honourable Court be pleased to order the Respondent to produce the procurement process, audit report and functionality of the electronic voting technology system intended to be used by ICPAK in the upcoming elections.

f) Pending the hearing and determination of this application and the petition, the Honourable Court be pleased to issue a conservatory order restraining the Respondent from deploying the internally developed electronic voting system in the upcoming elections or at all.

g) Pending the hearing and determination of this application and the Petition, the Honourable Court be pleased to order the Respondent to put in place mechanisms to ensure that the elections are carried out by the Interested Party in a manner that complies with Articles 81, 86 and 88(4) of the Constitution.

h) Pursuant to any Conservatory Orders that the Court may issue stopping the elections of the Respondent, the Court directs that the current Chairperson and members of the Council as constituted under Section 11 of the Accountants Act remain in office pending the hearing and determination of this application and Petition.

i) The Honourable Court be pleased to order any suitable orders in the interim to facilitate the expeditious hearing and disposal of this matter in the interests of justice.

j) The costs of this application be in the cause.

2. The application is premised on several grounds on the face of the application and supporting affidavit of Michael Kipyegon Yator sworn on 21st April 2021.

RESPONDENTS RESPONSE

3. The Respondent is opposed to the Petitioner's application and filed a Replying Affidavit dated 26th April 2021 and Further Affidavit dated 25th May 2021.

BACKGROUND

4. The Petitioner a qualified Certified Public Accountant and a member of the Respondent filed a Petition herein on 21/4/2021 challenging Respondent's election cycle seeking to fill the position of chairperson and 3 council members in respect of election scheduled for 17th to 20th May 2021 as a voter.

5. The Petitioner is aggrieved by the manner in which the elections are carried out based on the guidelines and by laws made by the Respondent's; the main grievance relates to the deployment of an election technology and the powers exercised by the Respondent's council in conjunction with the Election panel over the said elections.

6. It is contended that the Petitioner is apprehensive that the elections continues to be opaque and does not facilitate a free and fair elections process by giving too much leeway to the partial council; some of whose members seek to re-elected.

7. The Petitioner filed the instant Petition seeking to invalidate specific provisions, that he alleges facilitate unconstitutional conduct in the election process, while also violating the fundamental rights and freedoms of the Petitioner. The Petitioner challenges the provisions of the **By-law 74 and Policies 3.0, 13.0 and 15.0** as being unconstitutional and seeks to enforce constitutional rights set out under various Articles in the Petition.

8. Contemporaneously with filing the Petition, the Petitioner filed the application herein above seeking conservatory orders to prevent the elections being conducted in a manner, that he alleges contravenes the Constitution, in two main respects:-

a) Excluding the use of the Interested Party in the conduct; and

b) Deploying a technology system; that is opaque in its development, Procurement and deployment, rendering the election an organized public relations mechanisms, conduct of elections under the existing structure inevitably leaves, the process subject to the control of the council, through the use of its unilaterally, appointed election panel.

ANALYSIS AND DETERMINATION

9. I have carefully considered the Applicant's application; and the Respondent's affidavit in response, as well as the rival, parties submission and from the same only one issue arises for consideration thus:-

a) Whether the Applicant has met the threshold to warrant granting of conservatory orders sought in the application dated 25th April 2021.

10. The applicant seeks a total of eight (8) conservatory orders, as already listed in the application herein above. The prayers are premised on several grounds on the face of the application and affidavit of the Applicant.

11. Any party applying for conservatory orders in a Constitutional Petition is required to demonstrate that he has a prima facie case with likelihood of success and that failure to grant the conservatory orders, would result into the party being prejudiced and the Petition rendered nugatory.

12. The Applicant contend that he was aware of the elections since January 2021 and also he was aware of the 43rd Annual General Meeting scheduled to be held for 4th June 2021 and the call for nominations closing on 4th March 2021. It is further Applicant's case that it was on 16th April 2021 when he became aware of the elections date was set for 17th to 20th May 2021. He contends he could not therefore have approached the Court seeking reliefs against the elections, whose date was unknown. He urges that he is not aggrieved by nomination process or holding of the AGM but only the elections process. It is admitted by the Applicant that the elections date is critical in these proceedings and as soon as elections date was communicated he proceeded to file that Petition on 22nd April 2021.

13. On perusal of the Respondent's Replying Affidavit at paragraph 11 – 15, it is contended that the Applicant was clearly aware as early as January 2021, that the Respondent intended to hold elections in May 2021, followed by the statutory Annual General Meeting in June 2021, using the impugned By-Laws and Policies. It is further urged that the Applicant has not pleaded ignorance of these facts. He was aware of the Respondent's intentions as stated herein above. He was aware of the nominations with closing date as early as 4th March 2021 but chose not to take action until about 3 weeks to the elections before lodging the current application.

14. Accordingly the Applicant admit having been aware of intended elections as early as January 2021. Further he was aware of the nomination early march 2021 and subsequently, which were to be conducted pursuant to the impugned laws, which he now seeks to have declared unconstitutional, yet in his supporting affidavit, he has not bothered to explain why it took him from January 2021 upto 21st April to file the instant application, seeking conservatory orders. The explanation for the delay should be contained in the pleadings but not in the Counsel submissions, which are not pleadings. The Applicants Counsel, seeks desperately to explain the delay in the submissions, which should have been done by way of an affidavit, hence the explanation in the submission cannot suffice.

15. Having considered the parties, rival pleadings, and submissions, I am satisfied that the Respondent informed all its members, including the Applicant, as early as January, 2021, publically of its intention of conducting the nominations and elections using the impugned By-Laws, policy, including the **1st and 2nd Schedule to the Accountants Act**. In view whereof I find nothing prevented the Applicant from approaching, the Court within a short and reasonable time prior to expiry of 4 months and prior to expiry of the term of council members to have the issue ventilated. I find, that the Applicant has not demonstrated why he intends to scuttle the election process. Reliance in support of this proposition is placed in the case of **Ndindi Oscar Okumu v Instiute of Certified Public Accountants of Kenya & IEBC (2020) eKLR**. Where the Court when dealing with identical facts as now reformulated in the Petition herein, observed and ruled as follows:-

“...Secondly, a party seeking conservatory orders must approach the court without unreasonable delay or immediately the process complained of commences but not approach the court at the eleventh hour to grant him/her conservatory orders as the case herein.”

The Court proceeded and concluded as follows:-

“The holding of the elections scheduled almost three (3) months to date of the application herein in my view will not render the Petition nugatory as urged by the petitioner/Applicant.”

16. In this matter the Respondent has demonstrated that it acted in accordance with its constitution, observing the timeliness and using the

applicable By-laws and policies. The elections as per Applicant were set for 17th – 20th May 2021. The Application was filed on 21st April 2021 following tedious process of preparation by the Respondent for the elections since January, 2021. The application cannot in view of the aforesaid, be said to have been filed within a reasonable time, due to the delays since January, 2021. This Court notes once again no plausible explanation, has been offered by the Applicant, through an affidavit for the delay. In view whereof, I find the Respondent has demonstrated, that there is unexplainable delay on part of the Applicant, in approaching this Court, after a period of about 4 months since Applicant became aware of the elections. In addition as of the time of this Application the date of elections had long passed and elections must have been conducted.

17. The Applicant contend, that the members of the Respondent including the Applicant, are being subjected to a voting formality, where their votes do not count and that there is a continued violation of the Constitution, in applying by-laws and policies, that have not been aligned to the constitution, and further by implementing a policy, made without the approval of members contrary to **Section 9(4) of the Accountant Act**, amongst many other complaints. It is also urged, that the Respondent will not suffer any prejudice even if elections, are handled by the Interested Party, in conformity with the Constitution. It is stated that the candidates will not also suffer any prejudice, provided elections are held in a free and fair manner.

18. One of the condition required to be satisfied by an Applicant seeking conservatory orders is that unless the Court grants the conservatory orders, there is a real danger that he will suffer prejudice as a result of violation or threatened violation of the Constitution.

19. In the instant application, and upon perusal of the prayers thereto, it is clear, that there is no allegation, that his individual rights or fundamental freedoms as enshrined in the Bill of Rights, has been denied, violated, or infringed or is threatened as provided under, **Article 22 of the Constitution**, I note the applicant only alleges and takes issue with Constitutionality of the legislation as specifically pleaded in the application and Petition. In the Respondent's Affidavit, it is clearly deponed, that the Applicant is an eligible voter, in the elections which were scheduled for 17th – 20th, May, 2021 and to which the Applicant has not been excluded, from participating in the aforesaid elections.

20. Further it has not been demonstrated that any eligible member of the Respondent has been denied participation in the aforesaid elections, either as a member or as a candidate. In view of the above, I find that it has not been shown, that there is a real danger, that the applicant stands to suffer prejudice, if the conservatory orders are not issued in his favour. In addition no prejudice, has so far been demonstrated, and as such, it turns out that the Applicant only, intended to stop the election with no justification. The Respondent in support of the above proposition sought reliance in the case of **Centre for Rights Education and Awareness (CREAW) & 7 Others**, where it was clearly held, that, a party seeking a Conservatory Order is required to demonstrate, that unless the Court grants the Conservatory Order, there is real danger, that he will suffer prejudice, as a result of the violation or threatened violation of the Constitution. What amounts to real danger was dealt with by Mwangi, J in **Martin Nyaga Wambora vs. Speaker of the County of Assembly of Embu & 3 Others [2014] eKLR**, where he expressed himself as follows:-

“To those erudite words I would only highlight the importance of demonstration of “real danger”. The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the Court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the Court's attention.” (Emphasis added)

21. I am alive to the fact that the Applicant has to demonstrate a prima facie case with likelihood of success before the elections could be suspended, as proceeding to suspend elections without a Court making a finding of unconstitutionality, of the instruments utilized to conduct the elections, would be, in my view, determining the Petition in an application without hearing all the parties. It will be haste, for Court, at preliminary stage to find a statute unconstitutional, without hearing the parties on the issues. Reliance is placed in the case of **Bishop Joseph Kimani & Others vs. Attorney General & others** where the Court quoted with approval the case of **Kizito Mark Ngaywa v. Provincial Administration (2011) eKLR**, where the Court held as follows:-

“It is a very serious legal and Constitutional step to suspend the operation of statutes and statutory provisions. The courts must wade with care, prudence and judicious wisdom. For the High Court to grant interim orders in the regard, I think one must at the interlocutory stage actually show that the operation of the legislative provision are a danger to life and limb at the very moment... It is my view the principle of presumption of Constitutionality of Legislation in (sic) imperative for any state that believes in democracy, the separation of powers and the Rule of Law in general. ...Conservancy orders to suspend operation of statutes, statutory provisions or even Regulations should be wholly avoided except where the national interest demand and the situation is certain... I am still of the view that “there is no place for conservatory or interim order in petitions, which seek to nullify or declare legislation/statutes unconstitutional, null and void.” (Emphasis added)

22. In the instant application, the Applicant seeks to merely suspend the operation of the legislative and policy, that has guided elections, of the Chairman and Council members of the Respondent since 2008. In such situation, an academic gesture cannot stand. There is need of production of evidence, which is probable and merely possibility of threat or danger. The Applicant herein should have endeavoured to meet the key threshold before granting of conservatory orders, he is seeking. He should have, demonstrated the threat or danger, he is likely to suffer (if any), if the orders are not granted. I find, if any, it is remote and can be remedied by other means, as opposed to stoppage of the elections, of 22,000 plus member body, who were ready to vote in their own constituted elections. I find, the Applicant's evidence in support of the application, scanty and without any existence of imminent danger that the Applicant stands to suffer at all, if conservatory orders, are declined.

23. This Court upon perusal of the affidavit in support of the application, noted, that there existed, no identifiable prejudice, that was outlined in the supporting affidavit of the Applicant. I note, the Applicant's counsel, in his written submissions, introduced the issue of identifiable prejudice. This goes against the cardinal rule, that each party is bound by its pleadings. I find, therefore it is not open for Petitioner's counsel, to “sneak” in and plead evidence, not pleaded through his written submissions and allowing, that would prejudice the Respondent, who would not have an opportunity to contest, the new evidentiary matters through filing of pleadings, thus having been objected to by the Respondent's Counsel and being against the pleadings, it is accordingly rejected.

24. It is submitted by the Respondent, that if the application is allowed, the entire membership of the Respondent, stands to suffer loss. The

Respondent urges, that the principle of proportionality is the cornerstone in making a decision, whether a party has made out a case for conservatory orders or not. Reliance on this proposition is placed in the case of **Simeon Kioko Kitheka & 18 others vs. County Government of Machakos & 2 others [2018] eKLR**, where the Court held as follows:-

“In considering whether or not to grant conservatory order, it is my view that the principle of proportionality plays a very central position.”

25. The Respondents in urging this, Court to decline granting conservatory orders, contend that the Respondent will suffer loss, if it otherwise properly proposed elections, is not allowed to proceed and concluded as scheduled. I have considered party’s pleadings and submissions and I find, that the Respondent has demonstrated, that if the application is allowed, it will throw into confusion, the prescribed statutory calendar of the Respondent, and further undermine the Respondent’s discharge of critical duties to the entire membership. Further the Respondent showed that the impugned process started in February 2020, in which the Respondent spent huge sums of its members funds in the process, of preparing for conduct of the elections and lastly it is not in dispute, that the term of current chair-person and the Council members will come to an end in June, 2021, as stipulated by the provisions of **1st and 2nd Schedule to Accountants Act**. It is noted, that the Act does not provide for an official holding office, past statutory deadlines. Allowing Applicant’s prayers would therefore, in my view, throw the intended orderly transition into disarray, to the detriment of the Respondent’s entire membership.

26. The Respondent urge, that the elections are not immutable, contending, that one criteria, that the Applicant has to satisfy is, whether if a conservatory order is not granted, the Petition alleging violations of or threat, or violation of rights, will be rendered nugatory. The elections were scheduled for 17th – 20th May 2021, which have already been held and results released. The holding of the elections as scheduled, in my view, did not nor do they render the Petition, in any manner nugatory. The elections, are not immutable, as the Court can indeed nullify them, if it finds they were conducted on the basis of unconstitutional framework. In support of the above proposition, support is found in a decision of Court of Appeal in the case of **Nelson Andayi Havi vs. Law Society of Kenya & 3 others (2018) eKLR**, in the case, the Applicant who indeed sought to contest for LSK presidency election sought to stop the elections and have the Appeal heard so that he could participate in the said elections. the Court held as follows:-

“Those elections are not immutable; this Court can nullify them if it finds that they were conducted on the basis of an illegal and unconstitutional framework that among other things discriminated against or disenfranchised the applicant and other members of LSK. The applicant will then have an opportunity to contest if it is determined with finality that indeed he is eligible to run for the office of president of LSK. The determination of this Court after hearing the intended appeal will have two possible consequences. If the appeal is dismissed and we have in the meantime stopped the elections, it will mean losses that are not petty cash for a professional society that is financed primarily by members’ subscriptions. It will also throw into confusion the prescribed statutory calendar and disrupt or undermine the discharge of critical statutory and national functions vested in LSK such as regulation of the legal profession, resolution of complaints against practitioners, and assisting in the administration of justice and the practice of law in the country. If on the other hand the appeal succeeds, the applicant will have an opportunity to contest in the ensuing by-election. The primary prejudice that he will suffer is a delay in the realization of his ambition to lead the LSK, which we think can be mitigated or reduced substantially by fast-tracking the hearing and determination of his appeal. (Emphasis added)

27. The Court further has jurisdiction to issue and enforce any remedial reliefs where conservatory orders have not been granted, if it finds in favour of the applicant. Reliance is placed in **Okiya Omtatah Okoiti & another vs. Nairobi City County Assembly & 5 others; Mike Sonko Mbuvi Gideon Kioko & another (Interested Parties) (2021) eKLR**, where the Court stated as follows:-

“The obtaining legal position in this matter is, therefore, that regardless of what is likely to happen in the event the conservatory orders are not granted, this Court is firmly possessed of the jurisdiction to issue and enforce any remedial reliefs. Putting it clearer, on one hand, in the event the nominee is approved by the County Assembly of Nairobi City and eventually takes over the office of the Deputy Governor of Nairobi City County, and subsequently, ascends to the office of the Governor of Nairobi City County, and on the other hand, the Petitions are, at the end of the day, successful, then the Court will issue orders for the removal of the nominee from any office she would then be holding courtesy of the impugned process.” (Emphasis added)

28. I am aware in Constitutional Petitions, before a conservatory order is granted, the Applicant has to establish a prima facie case with probability of success. He has to demonstrate prejudice that he is likely to suffer if orders are declined. The standard of prima facie case was defined in the case of **Board of Management of Uhuru Secondary School v. City County Director of Education & 2 others [2015] eKLR** where the Court stated:-

“It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The prima facie case ought to be beyond a speculative basis. (Emphasis added)

29. Upon considering the applicant’s case, I find, that the Applicant has failed to demonstrate existence of prima facie case with likelihood of success in this application. The Petitioner/Applicants case is anchored on alleged interpretation and application of the Constitution. The elections, which were to be conducted by the Respondent are neither political or for a body established under the Constitution, nor are they elections in exercise of sovereign power of the state by adult suffrage or to political or state officers or on exercise of popular sovereignty, pursuant to the Constitution, under **Article 38 of the Constitution**. It is noted herein, that the Petition, is purely based on alleged violations of the rights and remedies are already codified under the **Elections Act** which has defined parameters of elections, contemplated by the Constitution without first seeking an order declaring the entire provisions of **Elections Act** invalid or unconstitutional.

30. In my view, I find that the Respondent, being regulated by a valid and Constitutional Act of Parliament, in which the Applicant, has not sought to declare the provisions of the law, that grants Respondent and its members powers, to regulate their election unconstitutional, in any manner, the Applicant has not established a prima facie case, with likelihood of success.

31. *In view of the conclusion that I have come to on a number of issues, in the application dated 21st April 2021, I find that the Application, is without merits and I proceed to dismiss the same with costs to the Respondent.*

Dated, Signed and Delivered at Nairobi on this 3rd day of June, 2021.

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J. A. MAKAU

JUDGE