REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. E469 OF 2021

BETWEEN

MAURICE OMURWA MAGEMBE..1ST PETITIONER/APPLICANT

JULIUS NYAMAWI MWACHIDWI..2ND PETITIONER/APPLICANT

AND

KENYATTA UNIVERSITY ....1ST RESPONDENT

THE VICE CHANCELLOR, KENYATTA UNIVERSITY...2ND RESPONDENT

KENYATTA UNIVERSITY STUDENTS'ASSOCIATION CONSTITUTIONAL REVIEW COMMITTEE – 2021......3RD RESPONDENT

DR.BERNARD KIVUNGE..4TH RESPONDENT

KENYATTA UNIVERSITY STUDENTS' ASSOCIATION, ELECTORAL COMMISSION...5TH RESPONDENT

DR.DANIEL OYOO..6TH RESPONDENT

RULING

1. By way of a Notice of Motion dated 1st November 2021, the petitioners seek orders that:

i. Spent;

ii. Pending the hearing and determination of this application, this honourable court be pleased to issue conservatory or interim orders ex parte in the first instance suspending the 2021/2022 academic year Kenyatta University Students' Association(KUSA)elections generally and suspending specifically the KUSA elections scheduled for 10th, 17th and 18th November 2021;

iii. Pending the hearing and determination of the petition, this hounourable court be pleased to issue conservatory or interim orders suspending the 2021/2022 academic year Kenyatta University Students' Association(KUSA)elections generally and suspending specifically the KUSA elections scheduled for 10th,17th and 18th November 2021;

iv. That this honourable court be pleased to make such further orders as necessary for the ends of justice.

v. Cost of this application be in the cause.

Petitioners' case

2. The application is supported by the 1st petitioner's sworn supporting affidavit of even date and the grounds set out on the face of the application as follows:

i. The respondents through the 5th and 6th respondents have expressly and openly communicated in writing that the petitioners are barred from contesting for elections to the Students' Governing Council of Kenyatta University Student's Association(KUSA).

ii. The respondents through the 5th and 6th respondents have additionally declined to clear the petitioners to contest in the said elections.

iii. The respondents' reasons for refusing to clear the petitioners to contest for election are premised on a document, the KUSA Constitution (Revised 2021) that has no force of law in the governance of KUSA as it was not passed by the Congress of KUSA and has instead been imposed by the respondents upon the Students at Kenyatta University.

iv. The respondents reasons for refusing to clear the petitioners to contest for election are further premised on a misapprehension of the provision of Section 41(1F) of the Universities Act, 2012 which bars students who have served for two terms as members of a student's council from serving in a student's council of any university or constituent college in Kenya.

v. The petitioners have never at any time served in a student's council of any university or constituent college in Kenya.

vi. The KUSA elections in which the petitioners seek to contest have been scheduled for 18th November 2021 pursuant to the impugned KUSA Constitution (Revised 2021).

vii. Other elections including the elections for the delegates that would elect the members of the Students' Governing Council are scheduled for 10th and 17th November 2021 pursuant to the impugned KUSA Constitution (Revised 2021).

viii. The petitioners will greatly be prejudiced if the elections scheduled for 18th November 2021 take place and they are not allowed to contest in those elections as they have spent substantial time and resources and expended significant effort in campaigning.

ix. In addition, the petitioners will greatly be prejudiced if they are not cleared to contest in the elections for reasons that lack foundation in law.

3. The petitioners reiterating the contents of their grounds as set out in the application say that they were part of the 16th Congress in the 2020/2021 academic year. This was extended by a notice dated 15th January 2021 due to the Covid 19 pandemic. In this electioneering period the 1st petitioner is part of a team called *the Frontline* with 7 members and the 2nd petitioner a group called *Let's Build the Brand* with a similar number of members.

4. The petitioners with regards to the KUSA Constitution (Revised Edition 2021) state that on 7th July 2021 the Congress was presented with a draft of the new KUSA Constitution. The members of the 16th Congress shared their feedback on the draft including areas that they were opposed to. These comments were submitted in writing on 9th July 2021. The Constitution Review informed the Congress that their comments would be considered and a further draft be presented to them once ready. It is claimed that this never materialized. It is their assertion that they never voted for the KUSA Constitution (Revised Edition 2021) only submitted their comments for consideration.

5. The members of the 16th Congress in a meeting held on 18th October 2021 with the 5th respondent were informed that they were not eligible to contest in the upcoming elections for the 2021/2022 academic year owing to the provisions of the KUSA Constitution (Revised 2021).

6. The petitioners aggrieved by this decision wrote to the 5th respondent on 22nd October 2021 informing him that the operative law for the elections was the KUSA Constitution (2017).This communication was followed by a demand letter from their advocates to the 5th respondent dated 25th October 2021.

The 5th respondent responding to the petitioners grievance on 26th October 2021 informed them that he was not the proper party to address the validity of the Constitution owing to his limited mandate under Article 50 of the KUSA Constitution (Revised 2021).Furthermore, that according to Section 41(1F) of the Universities Act they were disqualified as a member of the student's council can only hold office for one year.

Respondents' case

7. The respondents in response and opposition to the Notice of Motion application and petition filed their grounds of opposition dated 15th November 2021 stating that:

i. The petition and application dated 1st November 2021 are incurably defective on account of non-compliance with Rule

11(2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

ii. The petitioners did not exhaust the legal remedies available to them under Article 57 of the KUSA Constitution (Revised 2021) before filing the petition herein.

iii. In the absence of a prayer in the petition seeking to quash the KUSA Constitution (Revised 2021) the orders sought should not be granted.

8. The respondents in addition filed a replying affidavit dated 15th November 2021 sworn by Dr. Daniel Oyoo who is the chairperson of the 5th respondent. The respondents on the issue of the KUSA Constitution (Revised 2021) aver that by an internal memo dated 23rd September 2021 the students were informed that the revised Constitution had been approved by the University Senate on 15th September 2021 and was available for access on the University website. Following this, the vice-chancellor by a letter dated 8th October 2021 appointed the members of the KUSA Electoral Commission, 2021 through an election conducted under the revised Constitution.

9. The respondents argue that being that the academic and election year that begun on 1st October 2021 runs only for one year, the same should be allowed to proceed. This is because stopping the elections on behalf of two students would be prejudicial to the students' fraternity, operations of various committees and organs of the University. Moreover there are already four teams of seven that are contesting in the impugned elections.

10. They state that the structure of the University's student governance is divided into the Students Governing Council and Congress. It is averred that the petitioners served the 16th congress for academic year 2019/2020 which was extended to 2020/2021. This is because the forerunner, the KUSA Constitution (2017) did not make provision for electronic voting. It is asserted in addition that the members of the students governing council and congress voted for the constitutional review process that led to enactment of the KUSA Constitution (Revised 2021).

11. The members of the Students Governing Council and Congress having been in office for two years were disqualified from participating in the elections to pave way for those who had not had an opportunity to be part of these two bodies. By a Notice dated 18th October 2021 the students were informed of the scheduled elections by the 5th respondent. This information and the enabling regulations for the elections, the KUSA Constitution (Revised 2021) were well within the petitioners knowledge but they failed to act upon it.

The Analysis and Determination

12. I have perused the pleadings and the petitioners/applicants submissions dated 15th November 2021. In my view the only issue for determination at this stage is:

Whether this Court, should grant the sought conservatory orders.

13. The guiding principles upon which Kenyan Courts make findings on interlocutory applications for conservatory orders within the framework of Article 23 of the Constitution are now fully settled. This Court in the case of **Wilson Kaberia Nkunja v The Magistrate and Judges Vetting Board and Others Nairobi High Court Constitutional Petition (2016) eKLR** summarized the three main principles for consideration on whether to grant conservatory orders as follows: -

(a) An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.

(b) Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and

(c) The public interest must be considered before grant of a conservatory order.

14. In the **Board of Management of Uhuru Secondary School v City County Director of Education & 2 others [2015] eKLR** it was stated that:

"25. Foremost, the applicant ought to demonstrate a prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice….

26. It is in my view that it is 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….

28. Once the applicant has established to the court's satisfaction a prima facie case with a likelihood of success the court is then to decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of the specific right or freedom in the Bill of rights….

29. Thirdly, flowing from the first two principles, is whether if an interim Conservatory order is not granted, the petition or

its substratum will be rendered nugatory. It is indeed the business of the court to ensure and secure so far as possible that any transitional motions before the court do not render nugatory the ultimate end of justice….

30. The fourth principle which emerges from the various cases and is well captured by the Supreme Court of Kenya in the case of Gatirau Peter Munya –v- Dickson Mwenda Githinji & 2 Others [2014] eKLR is that the court must consider conservatory orders also in the face of the public interest dogma.

31. Finally, the court is to exercise its discretion in deciding whether to grant or deny a conservatory order. The court must consequently consider all relevant material facts and avoid immaterial matters. The court will consider the applicants credentials, the prima facie correctness of the availed information, whether the grievances are genuine legitimate and deserving and finally whether the grievances and allegations are grave and serious or merely vague and reckless."

i) Has a prima facie case been established?

15. This court in determining whether a prima-facie case is demonstrated must look at the case as a whole considering, the pleadings, and the factual basis while being careful not to make any definitive finding either of fact or law as that is the reserve of the court that will ultimately hear the petition.

The Court of Appeal in the case of **Mrao v First American Bank of Kenya Limited & 2 Others [2003] eKLR** on the question of prima facie case observed as follows:

"So what is prima facie case? I would say that in civil case it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter".

The learned judge observed further that;

"…………..it is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case".

16. A reading of the petitioners' pleadings reveals that they raise a concern of their fundamental rights that revolve specifically around the right to equal treatment and the right to fair administrative action by the respondents under Article 27 and 47 of the Constitution owing to the respondents' actions in this matter. From the facts averred in this matter it is reasonable to argue that the petition highlights a *'threat'* of fundamental rights and freedoms as envisaged in the Constitution. To that end I am inclined to find that the petitioner's case does disclose a prima facie case, satisfying the first principle.

ii) Whether if a conservatory order is not granted, the petition will be rendered nugatory

17. In the case of **Muslims For Human Rights (MUHURI) & 2 Others -vs- Attorney General & 2 Others High Court Petition No. 7 of 2011**, the court while considering the circumstances under which a court should grant conservatory orders, observed as follows:

"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. Through a Conservatory Order the court is able to "give such directions as it may consider appropriate for the purpose of securing of … the provisions of the Constitution (see – BANSRAJ above)". 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. "

18. A perusal of the prayers sought by the petitioners reveals that this matter is not only premised on the petitioner's desire to run in the ongoing elections. The validity of the KUSA Constitution (Revised 2021) or its lack thereof can only be determined at the full hearing of the petition by adducing the necessary evidence.

19. As at this stage the impugned Constitution enjoys presumption of constitutionality by virtue of its enabling Statute the Universities Act Cap 210B and its counterpart the Universities (Amendment) Act, 2016 that relates to university affairs in Kenya. This position was affirmed by the Court of Appeal of Tanzania in the case of **Ndyanabo v Attorney General [2001] EA 495** which was a restatement of the law in the English case of Pearlberg vs. Varty [1972] 1 WLR 534. In the former, the Court held that:

"Until the contrary is proved, legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, legislation should receive such a construction as will make it operative and not inoperative"

20. What is more the effect of grant of the conservatory orders being a stay of proceedings is not an exercise conducted nonchalantly. It is noted in **Halsbury's Laws of England** 4th edition volume 37 at paragraph 330 that:

"the stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his

litigation towards the trial on the basis of the substantive merits of his case, and, therefore, the Courts general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue".

21. In the second principle it is my considered view that although a discernable prima facie case has indeed been established by the petitioners they have not demonstrated how in the event the orders are not granted the petition will be rendered nugatory.

iii) Whether the public interest has been established

The essence of this principle was aptly expounded and set by the Supreme Court's guidance in the case of **Gatirau Peter Munya v Dickson Mwenda Githinji & 2 Others [2014] eKLR** where the purpose of conservatory orders were defined as follows:

> **"conservatory orders' bear a more decided public Law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the "prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the applicant's case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes …. The principles to be considered before a Court of Law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal ….. These principles continue to hold sway not only at the Lower Courts, but in this Court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added, namely…. That it is in the public interest that the order of stay be granted. This third condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that run through the Constitution."**

23. The Court of Appeal emphasizing the element of public interest in the case of **Kenya Medical Supplies Agency (KEMSA) v Mavji Kanji Hirani & 8 others [2018] eKLR** opined as follows:

> **We accept as good law the rather commonsensical proposition that in the tussle for supremacy between private and public interests, the latter must prevail. The courts have a duty to identify and uphold the public interest, alive to the fact that their decisions ought to conduce to the attainment of that which is for the advancement of the public good. We were of that the same view in DELLIAN LANGATA LIMITED vs. SIMON THUO MUIA & 4 OTHERS [2018] eKLR when we delivered ourselves as follows;**
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> **"What is more, this appears to have been a case of an individual attempting to trump and negate the rights of the public in view of the fact that the other sub-divided plots such as sub-plot E were meant for development of schools and other public amenities. We must hold that the interest of the public overrides that of an individual. We echo the sentiments of this Court in EAST AFRICAN CABLES LIMITED vs. THE PUBLIC PROCUREMENT COMPLAINTS, REVIEW & APPEALS BOARD AND ANOTHER [2007] eKLR expressing the philosophy behind the view that public interest should take precedence in the following words:-**
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> **"We think that in the particular circumstances of this case, if we allowed the application the consequences of our orders would harm the greatest number of people. In this instance we would recall that advocates of Utilitarianism, like the famous philosopher John Stuart Mill, contend that in evaluating the rightness or wrongness of an action, we should be primarily concerned with the consequences of our action and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable."**

24. I am guided by the reasoning in the authorities cited above. The principle of public interest as established by the Supreme Court exhibits a unique aspect to consider in grant of conservatory orders. My interpretation of this facet is that the purpose of conservatory orders is to facilitate the orderly functioning within public agencies, as well as to uphold the adjudicatory authority of the court in public interest. This court therefore has a duty to consider the importance of proportionality in granting the desired orders.

25. The petitioners owing to the time sensitivity of the election timelines had an opportunity to approach this Court at the earliest opportune time to have this Court hear and determine the petition matter as a matter of priority. It is disclosed from the parties pleadings that the Calendar for KUSA 2021 Elections was published as early as 18th October 2021. The reason for approaching the court right before the elections commence is a fact that was not shared by the petitioners.

26. Against this backdrop and guidance in this last principle, it is my humble view that the petitioners have not justified grant of the conservatory orders under this principle. This is because the balance of proportionality on the issuance of the conservatory orders under this principle will only be injurious to public interest and the operations of the 1st respondent as a public body.

27. An appropriate balance must be maintained between any adverse effects of granting the orders and the fundamental rights and freedoms of persons as against the purpose which it intends to achieve. Grant of the conservatory orders in the manner sought would be disproportionate to the harm that is sought to be cured by such orders.

28. In a nutshell it is my considered opinion that, although the petition discloses a prima facie case, the petition and application fail to satisfy the principle of public interest and whether the petition will be rendered nugatory.

29. The upshot is that the application dated 1st November, 2021 lacks merits and is dismissed with costs.

DELIVERED ONLINE, SIGNED AND DATED THIS 16TH DAY OF NOVEMBER, 2021 IN OPEN COURT AT MILIMANI NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT