



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CIVIL CASE PETITION NO. 17 OF 2018.

JACKSON N. MASIKA.....PLAINTIFF

VERSUS.

THE GOVERNOR BUNGOMA COUNTY.....1ST DEFENDANT

THE COUNTY ASSEMBLY OF BUNGOMA....2ND DEFENDANT

THE SPEAKER,

COUNTY ASSEMBLY OF BUNGOMA.....3RD DEFENDANT

JUDGMENT

The Petitioner Jackson N. Masika is a resident of Bungoma County. The 1st Respondent is the Governor of Bungoma County and 2nd Respondent is the County Assembly of Bungoma. By notice of Motion dated 13.12.2017 the Petitioner sought the following orders;

1. **THAT** pending the hearing of this Application/Petition the Honourable Court be pleased to grant a conservatory order of stay of the decision of the 1st Respondent to appoint the County Executive Committee members, Bungoma County.
2. **THAT** pending the hearing of this Application/Petition Honourable Court be pleased to grant a conservatory order of injunction to restrain the appointed members from taking office and performing the said roles and functions of the County Executive members, Bungoma County.
3. **THAT** pending the hearing of this application/petition, the 1st respondent be restrained from carrying out the swearing in ceremony of the County Executive Committee members scheduled for 14th December, 2017.

The application is premised on the grounds that;

1. **THAT** on 1st of November 2017 the 1st Respondent nominated 10 individuals as members of the County Executive Committee, Bungoma County.
2. **THAT** in the said appointments, the 1st Respondent failed to appoint any members of the Youth and persons with Disabilities in complete disregard of the Constitutional requirements.

The Respondent Governor of Bungoma County opposed the Petition and filed a Replying Affidavit sworn on 30th January, 2018 in where he deponed inter alia;

1. **THAT** I further wish to state that as the Governor of the County Government of Bungoma, I have the sole prerogative and mandate of nominating and appointing the County Executive Committee Members with the approval of the Assembly, from among persons who are not members of the Assembly.
2. **THAT** in the said nomination and appointment, I am guided by the law to observe the following:-
 - (a) The nomination must reflect the community and cultural diversity of the County.
 - (b) The nomination must take into account the Principles of affirmative action as provided for in the constitution.

3. **THAT** although there is no legal requirement that I should advertise for the vacancies of the Ten slots for the County Executive Committee Members, I duly advertised for the same on 29th August 2017 in order to invite diverse professionals from the public so that I can pick them in compliance with the constitution based on the qualification stated in Section 35 of the County Government Act, Regional Balance, disabilities, Youth and Gender and the face of the County.

4. **THAT** I know from my knowledge that more than 400 people applied for the said consideration.

This Petition which was originally filed as Kisumu Employment & Labour Relations Case No. 47/2017 was on 20.8.2018 forwarded to this court for hearing and determination. By Consent this Petition was to be canvassed by way of written submissions; on 7.11.2018 the court therefore issued the following directions;

By Consent the Petition be disposed of by way of written Submissions. Petitioner to file and serve within 21 days. The Respondent to file Response within 14 days of service. Mention on 15.1.2019 to highlight.

The Petitioner did not file written submissions as directed. The Respondent did file their written submissions on 26.2.2019 when this Court directed that a Ruling date be given.

The Petitioner filed his petition in the ELRC Court which rightly in my view found that it had no jurisdiction and by ruling dated 20.8.2018 directed that the Petition be heard in the High Court Bungoma. The parties agreed on mode of canvassing this petition; by way of written submissions. Directions were duly issued on 7.11.2018 where the petition was to file and serve their submission within 21 days. Even as at 11.2.2019 almost 3 months later they had neither filed nor served their submissions. This court on 11.2.2019 allowed the Respondent to file his submissions.

Where a court has given directions that a suit or petition or application be canvassed by way of written submission, the court is asking the parties to prosecute their case by way of submissions. This would be by the party in a petition showing how his fundamental rights have been infringed, or what provisions of the constitution have been violated by the Respondent. In short in the submissions he shows why the court should grant him the prayers sought. Where, as in this petition the petitioner was seeking conservatory orders, he will, in the submission show how his application satisfies the criteria granting conservatory orders which include that he has a prima facie case with chances of success, it is a matter of Public interest, or existence of real danger of prejudice to him, if orders are not granted. Where he does not file submissions, this court will be unable to appreciate his case to grant the orders sought.

In my view therefore as the Petitioner has failed to file the submission to prosecute his petition, this court will not find it necessary to consider the Response of the Respondent. I therefore dismiss this Petition with costs.

Dated at Bungoma this 13th day of June, 2019.

S.N. RIECHI

JUDGE