



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

MILIMANI COMMERCIAL COURTS

(CONSTITUTIONAL AND HUMAN RIGHTS DIVISION)

PETITION NO. 6 OF 2017

IN THE MATTER OF ARTICLES 1,2, 3,4, 19, 20, 23, 27, 28, 35, 232,

248, 259 AND 260 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

ACT, 2011 AS AMENDED BY THE ELECTION LAWS (AMENDMENT) ACT 2016

AND

IN THE MATTER OF THE FIRST SCHEDULE TO THE INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION ACT, 2011 AS AMENDED BY THE ELECTIONS LAWS (AMENDMENT) ACT 2016

BETWEEN

APOLLO MBOYA.....PETITIONER

AND

THE SELECTION PANEL FOR THE APPOINTMENT OF

COMMISSIONERS OF THE INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....1ST RESPONDENT

THE NATIONAL ASSEMBLY.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

By a notice of motion dated 9th January 2017 expressed under the provisions of Articles 1, 2, 3, 4, 4, 10, 19, 29, 21, 22, 23, 27, 28, 35, 232, 248, 258, 259 and 260 of the constitution of Kenya, Rules 18 and 19 of the High Court) Organization and Administration) Rules, 2016, the inherent jurisdiction of the court and all other enabling provisions of the law the applicant moved this honourable court seeking orders that the said application be certified as urgent and conservatory orders restraining the Respondents from vetting or approving the names of the candidates for the positions of chairperson and members of the Independent Electoral and Boundaries Commission transmitted by his Excellency the president of the Republic of Kenya pending the hearing and determination of the application and the petition.

The application is premised on the grounds stated on the face of the application and the annexed affidavit of the applicant annexed thereto. The application was presented before me yesterday *ex parte* and I certified it as urgent on account of the reasons stated in the certificate of urgency and I ordered that the all Respondents be served to attend court today, i.e. 10.1.2017. The applicant served all the Respondents who appeared through their advocates despite the short notice.

Counsels for the Respondents applied for seven days to file their grounds of objection and Replying affidavits which they could not file on account of the short notice. The petitioner did not oppose the adjournment but asked the court to grant interim conservatory orders in terms of prayer two of the application pending the hearing and determination of the application. The petitioner emphasised the need to preserve the *status quo* pending the hearing of the application and submitted that the process used in selecting the names of the chair person and members of the Independent Electoral and Boundaries Commission was flawed and cited several provisions of the law which in his view were violated.

All the counsels for the Respondents submitted that the petitioner has not established a case for the granting of interim orders as sought and that the orders sought would affect the persons selected by the first Respondent yet they are not parties to these proceedings.

The issue for determination in my view is whether or not the petitioner has demonstrated a case to warrant this court to grant interim orders as sought.

A “conservatory order” is for the purpose of preserving the subject matter of the suit and maintaining the *status quo* pending the determination of the motion. Such a order has an effect of injunction. It is now well established that the principles for the grant of interlocutory injunctions that were devised by Lord Diplock in the **American Cyanamid** case, apply in public law matters.^[1] Once an application for a conservatory order to preserve the subject matter is not found to be frivolous, the applicant is entitled to a conservatory order pending the determination of the motion.

By its very nature the grant of a conservatory order involves the exercise of judicial discretion. The exercise of the court’s discretion in matters of this kind cannot be arbitrary or capricious. While it is desirable that the court’s discretion under the Constitution to fashion a remedy in particular circumstances, ought not to be fettered, there is no basis for the proposition that the intention of the framers of the Constitution was to exclude the principles of law applicable to particular remedies.

In an application of this nature the onus is on the applicant to satisfy the court that it should grant the orders sought. However, such a discretionary remedy ought to be granted on the basis of evidence and sound legal principles. Conservatory orders ought be granted in conformance with the following principles:-

1. Prima facie case with a chance of success.
2. Existence of real danger that would prejudice the applicant if the interim conservatory orders are not granted.
3. Public interest to grant it.

4. Consistency with the Constitutional values.

5. Proportionality

A party seeking an Conservatory Order is required to demonstrate that he has a prima facie case with a likelihood of success and 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.^[2]

I have reviewed the facts and the law and considered the submissions by all counsels in this case and guided by the above principles, I am highly persuaded that it would be prudent to allow the Respondents to file their Responses then hear all the parties and determine the application. Also, as pointed out by counsels for the Respondents, the order sought will affect persons who are not parties to this case. To me, such a scenario poses a danger of granting orders affecting other persons without giving them the benefit of a hearing.

Accordingly, I find that this is not a proper case for granting interim orders as sought. I direct all the Respondents to file their grounds of objection and Replying affidavits within seven days from today and that this matter be fixed for mention after the seven days to confirm compliance and for directions on hearing of the applicants application.

Orders accordingly

Dated at Nairobi this 10th day of January 2017

John M. Mativo

Judge

^[1] R. v. Secretary of State for Transport Ex parte Factortame Ltd. [1990] 1 AC 603,

^[2] Centre For Rights Education and Awareness (CREAW) & 7 Others.