REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 2 OF 2017

IN THE MATTER OF AN APPLICATION UNDER ARTICLES 165 (3) (A), (B), (C), (4)

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 CONTRAVENTION & THREATENED CONTRAVENTION OF ARTICLE 1, 3, 10 (2), (A), (C), 33 (2), 39 (3), 75 (1), (C), 94 (4), 117, 124 (1), 131,(1) & 131 (1) (1) (E) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CONSTITUTIN OF KENYA IN SO FAR AS THE CONSTITUTION HAS BEEN AND STANDS TO BE VIOLATED

AND

IN THE MATTER OF THE NATIONAL ASSEMBLY (POWERS AND PRIVILEGES) CAP 6

AND

THE NATIONAL ASSEMBLY STANDING ORDERS

AND

IN THE MATER OF THE FOURTH SCHEDULE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF A CONSTITUTIONAL PETITION BY

PHILIPH NJUGUNA WARUTHI.....PETITIONER

VERSUS

MILLICENT GRACE AKOTH ODHIAMBO MABONA.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

THE SPEAKER, NATIONAL ASSEMBLY.....3RD RESPONDENT

RULING

By a petition dated 4th January 2017, the petitioner moved to this court seeking declarations that utterances attributed to the first Respondent made on 20.12.2016 concerning the president of Kenya constitute a violation of Article 131 (1) (3) of the Constitution, that the said utterances constitute a violation of the oath of office of the first Respondent as a member of the national assembly and is in contravention of the ethical requirements mandated of the first respondent under article 99 (1) (b) of the constitution of Kenya as read with section 9 (10) (b) and 10 (2) (a) of the Public officers ethics act and a further declaration that the third respondent is bound to take appropriate action against the first respondent under the standing orders. The petitioner also sought a further declaration that the first respondent issues an immediate apology not later than 48 hours from the date of the order to the people of Kenya and a permanent injunction restraining the first Respondent to from further uttering the words complained of.

The petition was accompanied by a notice of motion filed under certificate of urgency seeking conservatory orders pending hearing an determination of the petition. The application was certified as urgent on 5.1.2017 and the petitioner was directed to served all the respondents for *inter partes* hearing today (12.1.2017). Service was effected as ordered and the first and second respondents appeared through their advocates but there was no appearance for the third Respondent though duly served.

The parties are agreeable to proceed with the petition instead of the application so as to expedite the matter, but counsel for the petitioner insisted on interim orders in terms of prayer two of the application pending the hearing of the petition or the application *inter partes*, a position that was supported by the counsel for the AG.

Counsel for the first Respondent stated that he has just been instructed and asked for seven days to file his clients papers but opposed the granting of interim orders.

In *Nancy Makokha Baraza vs Judicial Service Commission & 9 Others**[1]*the court stated *inter alia* that:-

> *" The Constitution gives the court wide and unrestricted powers which are inclusive rather than exclusive and therefore allows the court to make appropriate orders and grant remedies as the situation demands and as the need arises."*

A party may seek and the court may grant an interim order in the form of a conservatory order. Properly so called conservatory orders are intended to help create and or maintain a given state of affairs. It may take the form of a stay order or an injunctive order. It may be negative or positive in form. At the time of grant the court is duty bound to state its effect and extent.

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.[2] 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.

The pathway to be followed by a court seized with an application under Article 23 (3) (c) is now relatively clear. First, 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. As was stated by Musinga J (as he then was) in the case of *Centre for Rights Education and Awareness and 7 Others –v- The Attorney General* **[3]**

> *"[Arguments] in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the Applicant's application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a conservatory order only requires 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".*

In my view, it is not enough to merely establish a prima facie case and show that it is potentially arguable but rather there must also be evident likelihood of success. The prima facie case, in other words, ought to be beyond a speculative basis. This was well stated by M. Ibrahim J (as he then was) in the case of *Muslims for Human Rights (MUHURI) & Others –v- Attorney General & Others* ***[4]***,who whilst agreeing with Musinga J's statement cited above stated as follows:-

> *"I would agree with my brother that an applicant seeking conservatory orders in a Constitutional case must demonstrate that he has a prima facie case with a likelihood of success"* (emphasis).

A similar position was held by Ngugi J and Muriithi J sitting respectively in *Jimaldin Adan Ahmed & 10 Others -v- Ali Ibrahim Roba and 2 Others* ***[5]*** and *Micro Small Enterprises Association of Kenya* (Mombasa -v- Mombasa County Government.[6]

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.[7]

Further, 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.[8]

The fourth principle is well captured by the Supreme Court of Kenya in the case of *Gatirau Peter Munya –v- Dickson Mwenda Githinji & 2 Others* ***[9]*** is that the court must consider conservatory orders also in the face of the public interest dogma.

> *"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 on the "prospects of irreparable harm occurring during the pendency of a case; or "high probability of success" in the applicants 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".

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.[10] At this point in time the first Respondent is yet to file her response and I strongly hold the view that this is a proper case for the first Respondent to Respond to the allegations in question so that the court can be in a better position to appreciate all the facts and make a proper determination.

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. In a nutshell, 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.[11]

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. Accordingly, I find that this is not a proper case for granting interim orders as sought. I direct all the Respondents do 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 and /or on the hearing of the petition.

Orders accordingly

Dated at Nairobi this **12th** day of **January** 2017

John M. Mativo

Judge

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[1] [2012]eKLR

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

[3][HCCP No. 16 of 2011]:

[4] CP No. 7 of 2011

[5] [2015] eKLR

[6] [2014] eKLR

[7] see Patrick Musimba –v- The National Land Commission & 4 Others HCCP 613 of 2014 (No. 1) [2015] eKLR and also Satrose Ayuma & 11 Others –v- Registered Trustees of Kenya Railways Staff Retirements Benefits Scheme [2011] eKLR.

[8]see Patrick Musimba –v- The National Land Commission & 4 Others HCCP 613 of 2014 (No. 1) [2015] eKLR and also Satrose Ayuma & 11 Others –v- Registered Trustees of Kenya Railways Staff Retirements Benefits Scheme [2011] eKLR.

[9] [2014] eKLR

[10]see Centre for Human Rights and Democracy & 2 Others –v- Judges and Magistrates Vetting Board & 2 Others HCCP No. 11 of 2012

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