REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL PETITION NO. 377 OF 2015

CONSOLIDATED WITH PETITION NO. 395 OF 2015 AND JR NO. 295 OF 2015

KEVIN K. MWITI & OTHERS…..……..APPLICANTS

VERSUS

KENYA SCHOOL OF LAW.....1ST RESPONDENT

COUNCIL FOR LEGAL EDUCATION.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. The subject of this ruling revolves around two issues. The first is whether or not to grant the adjournment sought by the Respondent. This limb of the application was not seriously opposed. **Mr Ochieng Oduol**, learned counsel for the Respondent who appeared with **Mr Bwire** for the Respondent informed the Court that they required only an hour to file their replying affidavit and proceed with the application seeking conservatory orders.
2. While that proposal seemed fair enough, that course of action has been rendered impracticable by the fact that I am due to travel to Mombasa this morning to attend the Labour and Employment Court Rules Committee in Mombasa which Committee is looking t the proposed amendments to the said Rules.
3. Whilst **Mr Amoko** and **Prof Ojienda, SC** learned counsel for the petitioner did not seriously oppose the application for adjournment, it was their view that this Court ought to grant temporary conservatory orders pending the inter partes hearing of the application. That this Court has the powers to grant temporary conservatory orders pending inter partes hearing is not in doubt. In the Privy Council Case of **Attorney General vs. Sumair Bansraj (1985) 38 WIR 286 Braithwaite J.A**. expressed himself follows:

"Now to the formula. Both remedies of an interim injunction and an Interim declaration order are excluded by the State Liability and Proceedings Act, as applied by Section 14 (2) and (3) of the Constitution and also by high judicial authority. The only judicial remedy is that of what has become to be known as the "Conservatory Order" in the strictest sense of that term. The order would direct both parties to undertake that no action of any kind to enforce their respective right will be taken until the substantive originating motion has been determined; that the status quo of the subject matter will remain intact. The order would not then be in the nature of an injunction, … but on the other hand it would be well within the competence and jurisdiction of the High Court to "give such directions as it may consider appropriate for the purpose of securing the enforcement of … the provisions" of

the Constitution…In the exercise of its discretion given under Section 14(2) of the Constitution the High Court would be required to deal expeditiously with the application, inter partes, and not ex parte and to set down the substantive motion for hearing within a week at most of the interim Conservatory Order. The substantive motion must be heard forthwith and the rights of the parties determined. In the event of an appeal priority must be given to the hearing of the appeal. I have suggested this formula because in my opinion the interpretation of the word in Section 14 (2) "subject to subsection (3) and the enactment of Section 14(3) in the 1976 Constitution must have…the effect without a doubt of taking away from the individual the redress of injunction which was open to him under the 1962 Constitution. On the other hand, however, the state has its rights too…The critical factor in cases of this kind is the exercise of the discretion of the judge who must "hold the scales of justice evenly not only between man and man but also between man and state."

4. According to the petitioner, it is nolonger able to provide legal education as a result of the decision by the Respondent to decline its application for full accreditation. It was submitted that the said action whose legality is being challenged in these proceedings will have the effect of prejudicing not only the students some of whom were just recently admitted but the applicant's teaching fraternity as well as the public. According to the petitioner, the admission of the said new students was undertaken following a discussion with the Respondent. It was contended that the effect of the decision would adversely affect the marking of the exams and the graduation of the students of the applicant. On the other hand, it was contended that the grant of the temporary conservatory orders would not prejudice the respondent in any way.
5. To the petitioner, this Court has power under Article 23 of the Constitution to grant the orders sought notwithstanding the fact that the decision to close the petitioner as a Legal Education provider has been made.
6. On the part of the Respondent, the grant of the said orders was opposed primarily on the basis that a decision having been taken to disallow the application for full accreditation by the applicant, the effect of the grant of the orders sought herein would be to in effect grant the same accreditation to the petitioner and that jurisdiction this Court does not have.
7. It was further submitted that the issue of prejudice does not arise as there is an exit plan provided by the law where an application for full accreditation has been declined and the provisional accreiditation lapses as in this case. To the respondent, the decision does not affect the students who are already in the institution who can continue with their education and finalise their studies.
8. There were other issues raised which I am not prepared to delve into at this stage of the proceedings.
9. In determining this application, the Court is not required-indeed it is forbidden- from making definite and conclusive findings on either fact or law. I will therefore refrain from making any determinations whose effect would be to prejudice the hearing of the main Petitions/Application. As , **Musinga, J** (as he then was) in Petition No. 16 of 2011, Nairobi – **Centre For Rights Education and Awareness (CREAW) & 7 Others** stated that:

   "...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner'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."

10. In **The Centre for Human Rights and Democracy & Others vs. The Judges and Magistrates Vetting Board & Others Eldoret Petition No. 11 of 2012**, it was held by a majority as follows:

    "In our view where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any Constitutional or legal right or any burden is imposed in the contravention of any Constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has

powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission."

11. In **Judicial Service Commission vs. Speaker of the National Assembly & Another [2013] eKLR** this Court expressed itself as follows:

"Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute *in situ*. Therefore such remedies are remedies in rem as opposed to remedies in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person."

12. This position was reinforced by the Supreme Court in **Gitirau Peter Munya vs. Dickson Mwenda Kithinji and 2 Ors [2014] eKLR** where the highest Court in the land held:

"'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*."

13. In this case, it is contended that the decision which has been taken by the Respondent has led to anxiety among students and staff of the petitioner. The petitioner not a new institution applying to offer legal education in this country for the first time but has been existence for quite some time. It was granted a provisional accreditation by the Respondent and based thereon has been offering legal education. The petition is challenging the decision to decline full accreditation. The Respondent contends that its decision does not affect the continuing students.
14. In considering whether or not to grant conservatory order, it is my view that the principle of proportionality plays a not remote role. As was stated by **Ojwang, AJ** (as he then was) in **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589** the Court, in responding to prayers should always opt for the lower rather than the higher risk of injustice. The learned Judge expressed himself as follows:

"…Although the court is unable at this stage to say that the applicant has a prima facie case with a probability of success, the Court is quite convinced that it will cause the applicant irreparable harm if his prayers for injunctive relief are not granted; and in these circumstances, the balance of convenience lies in favour of the applicant rather than the respondent. There would be a much larger risk of injustice if the court found in favour of the defendant, than if it determined this application in favour of the applicant".

15. In my view since it is not contended that the petitioner intends to admit more students to its Legal Education programme between now and the time when the inter partes hearing of the application shall have taken place it would be prudent not to subject the already admitted students and the public to an unnecessary anxiety.
16. This Court in my view ha powers to preserve the status ante pending the hearing inter partes or the petition itself. Article 23 of the Constitution does not exclude the grant of other orders not particularised therein in fact the provision gives the Court powers to grant appropriate relief and appropriate relied must of necessity depend on the circumstances of the case.
17. Having considered the submissions made herein I hereby grant the adjournment sought by the Respondent and further grant a temporary conservatory order preserving the status quo ante

thereby permitting the petitioner to continue operating as a legal education provider with respect to the students who have already been admitted to the institution pending the hearing and determination of the application dated 5th October, 2015 inter partes or until further orders of the Court.

18. The costs of the application will be in the course.

Dated at Nairobi this 8th day of October, 2015

G V ODUNGA

JUDGE

Delivered in the presence of: