



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

PETITION NO.26 OF 2014

**IN THE MATTER OF ARTICLE 38 OF THE CONSTITUTION OF KENYA 2010, ON
POLITICAL RIGHTS OF THE INDIVIDUAL**

AND

**IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION OF KENYA 2010, ON RIGHT
TO FAIR ADMISTRATIVE ACTION**

BETWEEN

JEMIMAH ONGERA OGETO.....PETITIONER

VERSUS

MAENDELEO YA WANAWAKE ORGANIZATION.....1ST RESPONDENT

ESTHER MOKUA.....2ND RESPONDENT

RULING

The petitioner filed a Notice of Motion under **Article 22 and 23** of the **Constitution** and **Order 40 Rules 1 and 2** of the **Civil Procedure Rules** dated 9th July 2014 seeking orders that:-

- 1. The application be certified urgent and be heard ex-parte in the first instance.*
- 2. A conservatory order be issued in the nature of prohibition, prohibiting the 1st respondent either by itself, agents, servants, employees, any of its organ including NEC and its elections board and/or whomsoever claiming through it from conducting its National Elections Scheduled for the 12th July, 2014, pending the hearing and determination of the petition herein.*
- 3. A conservatory order be issued in the nature of an injunction restraining the 2nd respondent from claiming, presenting herself and/or performing the functions of Chair Lady Maendeleo ya Wanawake Organisation, Kitutu Masaba Sub County and/or attending meetings of Maendeleo ya Wanawake Organisation as chair lady Kitutu Masaba Sub County, pending the hearing and final determination of the petition herein.*
- 4. Costs of this application be awarded to the petitioner/applicant.*

The application is supported by an affidavit from the petitioner herein in which she avers that she is a life member of MYMO and fully eligible to contest any elective seat in the said organisation in accordance with the organisation constitution; that in the months of May and June this year MYWO announced a Schedule of its elections from grass roots starting 12th June 2014 to culminate in national elections that were to be held on 25th June 2014 and it was a requirement under the nomination rules that a candidate vying for any position from the sub county(Constituency) to the National Level MUST be a life member of MYWO for a period of not less than 3 years preceding the elections though for elections at ward level one is required to be a life member of MYWO only.

The petitioner further states that she was interested in running for position of chairlady MYWO Kitutu Masaba Sub County as she was eligible and had been prevailed upon by members to contest and in compliance with MYWO NEC circular notice of elections, she submitted her nomination forms as required on 3rd June 2014 before the close of nomination deadline on 5th June 2014.

On 2nd July 2014, she was one of the persons elected as delegates at ward level in preparation for taking part in the Sub County level upward to national level and on 4th July 2014 all delegates elected at ward level within Kitutu Masaba converged at Tombe CDF Office to elect Sub County officials in accordance with MYWO's election rules and regulations.

However that while at Tombe CDF office the venue of the Sub County of Kitutu Masaba MYWO's elections, the returning officer appointed by MYWO to oversee elections in Kitutu Masaba Sub County arrived in one vehicle in the company of DDO Manga District, the Divisional Social Welfare office Manga Division and the 2nd respondent Esther Mokuu, together with other delegates. Later the said public officer campaigned openly for the said Esther Mokuu, cleared her to run against the petitioner despite being ineligible to contest for any election at Sub County level and thereby flouting the election rules and regulations issued by MYWO.

Furthermore, that the 2nd respondent took out a life membership certificate of MYWO only on 14th May 2014 therefore she fell short of the three years life membership period preceding the election requirement in MYWO's election rules and regulations and that when petitioner's supporters and herself protested the clearance of the 2nd respondent to contest for chair in MYWO Kitutu Masaba Sub County contrary to election regulations, the presiding officer and returning officer overseeing the elections heard none of them and simply proceeded to declare the 2nd respondent as duly elected chair of MYWO Kitutu Masaba Sub County.

The petitioner thus contends that by declaring the 2nd respondent as duly elected chair of MYWO Kitutu Masaba Sub County, there was violation of the election rules and regulations of MYWO, and that she and her supporters were denied a fair administrative action guaranteed under **Article 47** of the **Constitution** because of these breaches. The petitioner avers that the upcoming national MYWO elections will not be free and fair as illegitimate delegates in the likes of the 2nd respondent would take part in the elections of national officials, hence this application. The petitioner states that no amount of damages will adequately compensate her if the orders sought herein are not granted.

When the matter came before court on 10th July 2014, Mr. Begi learned counsel for the petitioner submitted as follows:-

- *Annexure JOO3 at page 13, item 4 of annexure item 4 showed that the elections were postponed from 12th June 2014 to 4th July 2014 and that changes to the dates for the elections were made through short message service on telephones.*
- *At page 14 item 4 – requirement for life membership for not less than 3 years and further submitted that their contention is that 2nd respondent was not eligible to contest as chairlady of Kitutu Masaba because she did not have the requisite qualifications.*
- *That the petitioner was the only qualified candidate though 1st respondent campaigned for 2nd respondent. He referred to page 10 of the application for a copy of the life membership*

certificate for 2nd petitioner which was issued on 15th May 2014 and thus did not meet 3 years requirement.

- Petitioner was denied an opportunity to participate in a free and fair election and despite protests she was denied a fair administrative action.
- The 1st respondent is a body corporate established under the relevant laws of the Country, and that becoming a member thereof always comes at a premium. It was unfair that petitioner was denied an opportunity to contest.
- That though the petitioner had come to court at the eleventh hour, an election organized in violation of the rules cannot be supported and if national elections proceed as planned, the petitioner would miss her opportunity and the MYWO of Kitutu Masaba will be denied their opportunity to vie for a national position.

The issue of determination in this matter is whether this court ought to grant ex-parte prayers 2 and 3 of the notice of motion dated 10th July 2014. Before deciding on this issue a brief look at what a conservatory order means is helpful.

In **Judicial Service Commission -vs- Speaker of the National Assembly & another – Petition No.518 of 2013 High Court in Nairobi**, Odunga J held:-

“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 respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”

In **Mombasa High Court Petition NO.7 of 2011 Muslim for Human Rights (Muhuri) & others -vs- AG & others** Hon. Ibrahim J (as he was then) described a conservatory order as one which would:-

“Enable the court to maintain the status quo or existing situation or set of facts and circumstances so that it would still be possible that the rights and freedoms of the claimant would still be capable of protection and trial was not a futile academic discourse or exercise.” The learned judge went ahead and set out 4 parameters to be applied in considering whether to grant a conservatory order which are:-

- a. judicious exercise of discretion;**
- b. establishment of an arguable case which raises serious or fundamental issues;**
- c. degree of irretrievability, that is whether the application or case will be rendered nugatory if the conservation is not granted;**
- d. balance of convenience as between the applicant, the respondent and where applicable national or public interest.”**

I entirely agree with the above holding by my learned colleagues.

In the instant case the petitioner seeks a conservatory order in the form of a prohibition to halt the national elections to be held on 12th July 2014 by the 1st respondent on the grounds that the 2nd respondent did not meet the qualifications to be elected chair of MYWO Kitutu Masaba; the election conducted for chair lady of Kitutu Masaba sub county was clearly not free and fair. From the pleadings and affidavit evidence and the annexures presented to this court by the petitioner, one can clearly see that there was a breach in the constitution of MYWO in the manner in which the 2nd respondent was elected chair of MYWO Kitutu Masaba. She had not been a life member of MYWO for 3 years as at 4th July 2014.

The question that arises now is whether a breach in the manner in which Kitutu Masaba Elections were

conducted mean that the National Elections already designated to take place on 12th July 2014 should be stopped.

Article 22 (1) of the **Constitution** provides that every person has the right to institute court proceedings claiming that his rights or fundamental freedoms in the Bill of Rights have been denied, violated or infringed or are threatened. **Article 22 (3)** on the other hand provides that:- “*in any proceedings brought under Article 22, a court may grant appropriate relief including declaration of rights, injunction, conservatory order or an order of compensation and an order of judicial review.*” Is the instant case a public interest case?

The Indian Supreme Court case of **Pattraaj Nathuji Thawara -vs- State of Maharashtra, Indian & others [2004] 1 Misc.755 S.C 753 of 2004** adopted meaning of Public Interest as set out in **Shrouds Judicial Dictionary Vol.4 (V. Ed)** as:-

“A matter of public or general interest does not mean that which is interesting as gratifying curiosity or a love of information or amusement but that in which a class of community have a pecuniary interest, or some interest, by which their legal rights or liabilities are affected.”

In the instant case, the petitioner in my humble view has not demonstrated why the court should stop a national election already organized, prepared and set to go on 12th July 2014. My view of the matter is that the petitioner's complaint is of a personal nature as between her and the 2nd respondent, involving the manner in which her branch conducted elections and elected the 2nd respondent who did not meet the three year life membership requirement. Granting prayer 2 of the application would clearly elevate this dispute to a matter of public interest when in fact it is not.

For the above reasons and for the reason that it would not serve the public good to grant the prayer, I decline to grant conservatory orders in terms of prayer No.2 of the application.

In contrast however, prayer No.3 seeks conservatory orders in the nature of an injunction restraining the 2nd respondent from claiming, presenting herself and/or performing the functions of chair lady MYWO Kitutu Masaba County and/or attending meetings of MYWO as chair lady of Kitutu Masaba Sub County pending the hearing and final determination of the petition herein.

The requirements of an injunction were clearly set out in the case of **Giella -vs- Cassman Brown Limited [1973] E.A 358** which are:-

- 1. That the applicant must satisfy the court that he has a prima facie case with a probability of success;*
- 2. That the applicant will otherwise suffer irreparable injury which is un-compensable in damages;*
- 3. If in doubt, the court will determine the application on a balance of convenience.*

A *prima facie* case was defined by the Court of Appeal in the case of **Mrao -vs- First American Bank of Kenya and 2 Others [2003] KLR 125** thus:-

“A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case 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.”

Has the petitioner presented “*a prima facie case?*” I think so. I say so because:-

- 1. The petitioner has presented evidence that she was a life member of the 1st respondent's organization for a period of 3 years thus she qualified to be elected chair of Kitutu Masaba*

County.

2. It is a requirement for every member who wants to vie for position of chair with the 1st respondent's organisation to be a life member for over and above 3 years.

3. The 2nd respondent only became life member of MYWO on 15th May 2014 and therefore did not qualify as per 1st respondent's constitution to vie for chair lady.

4. Circumstances under which 2nd respondent was elected as chair of 1st respondent in Kitutu Masaba County are therefore not clear and according to the petitioner's affidavit evidence, the rules of 1st respondent's Constitution may have been breached.

For the above reasons, I allow prayer 3 of the Notice of Motion dated 10th July 2014. The petitioner/applicant shall serve the respondents with the application for inter partes hearing on 30th July 2014.

Dated and delivered at Kisii this 11th day of July, 2014.

R.N. SITATI

JUDGE

In the presence of:-

Mr. Ngaini for A. Begi for Petitioner

N/A] not yet served for 1st Respondent

N/A] not yet served for 2nd Respondent

Mr. Bibu - Court Assistant