



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

PETITION NO. 1 OF 2017

(Before D. K. N. Marete)

ERIC CHERUIYOT.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

CHIEF OF STAFF AND HEAD

OF PUBLIC SERVICE.....4TH RESPONDENT

RULING

This is an application dated 2nd February, 2017 and seeks the following orders of court;

- 1. That this application be certified urgent and heard ex-parte in the first instance.*
- 2. That the Honourable court be pleased to set aside the ex-parte interim orders granted on 18th January 2017 and issued on 30th January 2017.*
- 3. That costs of this application be provided for.*

This is grounded as follows;

- 1. That this Honourable Court granted injunctive interim orders on 18th February 2017.*
- 2. That the respondents only realized that the said orders had been granted on 30th January 2017 when the application was scheduled for hearing and responses to the application had already been*

made.

3. That the effect of the said orders is to overturn previous decisions by the High Court which decisions were binding to the whole public having been made in a public interest litigation.

4. That public officers will now have the lee-way to participate in political campaigns as they serve in office during the election campaign period.

5. That intentions and purposes of the Leadership and Integrity Act, The constitution, Public Officers' Ethics Act, the constitutional values and principles of public service would be frustrated without a hearing.

6. That the time held presumption of constitutionality of Acts of Parliament would have been departed from ex-parte without a hearing.

7. That there was non-disclosure of material facts in that the petitioner did not disclose the fact that there was previous litigation over the same subject matter.

8. That the subsistence of the said orders is against public interest.

9. That the provisions of Section 43(5) of the Elections Act No. 24 of 2011 have not been suspended and the said orders will subsist in vacuum.

10. That if public officers continue to be in office while at the same time seeking elective posts, there will be a conflict of interest and clear contravention of the provisions of Article 232 (1) (a) of the Constitution.

11. That the statutory provisions of Section 43 (5) have been a subject of public interest litigation and the decisions thereof binding on all being decisions in rem.

12. That the provisions of Section 43 (5) are reasonable and justifiable in any comparable democratic and just jurisdictions.

13. That the provisions of Section 43 (5) of the Elections Act are premised on the constitutional foundational values seeking to promote good governance, integrity in leadership and the values of public service enjoined in the Constitution.

14. That the application has been brought timely and without undue delay.

The 1st respondent vide a 1st Respondent's Replying Affidavit to the 2nd- 4th respondents application dated 2nd February, 2017 supports the application on various grounds and factual issues raised therein.

The petitioner/respondent vide Grounds of Opposition dated 6th February, 2017 raises the following grounds/issues in opposition;

1. That the application does not meet the threshold for the discharge of the orders.

2. The application for discharge is *res judicata*.

The applicants submit that conservatory orders were made in the midst of non disclosure. It is their submission that the constitutionality of Section 43, Elections Act has been determined and the cited authorities are in the public domain. The petitioner is deemed to have known these but declined to disclose the same to facilitate a determination of the interim orders made by court. She seeks to rely on the authority of **Aviation & Airports Services Vs. Kenya Airports Authority 2014 eKLR** as follows;

18. Thus when a party comes to Court on an application supported by an Affidavit under oath and

fails to outline and disclose matters that are material to the granting of orders, such a party is acting in a manner suggesting that they are pending falsehood while under oath. The consequences of such conduct are well settled in law. Any advantage gained by such non-disclosure, the grant of ex-parte orders will be taken away from the offending party. In the case of Ruaha Concrete Co. Ltd et al versus Paramount Universal Bank Ltd et al, HCCC No.430 of 2002, the Court outlined in that case the principles of non-disclosure and the consequences which will follow as a result of non-disclosure.

The duty is not to make full and fair disclosure of all material facts, the material facts are those which is material for the judge to know in dealing with the application, and the applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to any additional facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries. The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including:-

(a) The nature of the case the applicant is making when he makes the application.

(b) The order for which the application is made and probable effect of the order on the Defendant or the Plaintiff.

(c) The degree of the legitimate urgency and the time available for the making of the inquiries.

19. Filing another suit during the pendency of a similar suit is clearly an abuse of the process of the court. It is immaterial that the claimant has taken the step to have the first suit withdrawn, the fact of filing a new suit during the pendency of the earlier suit and failing to disclose this fact to the court during the granting of ex-parte orders is tantamount to peddling falsehoods while under oath. This is to be discouraged and avoided by all means possible and a party so offending must pay the cost.

In the result, I find that preliminary objection with regard to non-disclosure of material facts is well founded in law. The up-shot is that the application and the suit herein are dismissed with costs to the respondent and interested party.

It is her submission that orders made on a standpoint of non disclosure should be discharged.

The 2nd - 4th respondent again submitted on a case of discharge of these orders on the basis of public interest and the consequences the orders as set out. This was to the extent that a general election is in the offing and the sustenance of these orders are likely to derail the election process.

The 2nd – 4th respondents in the penultimate submit that the sections of law the subject matter of this petition are still in our law books. They have not been suspended and are still in force. Again, the circular of the 4th respondent that triggered this petition is merely a communication of the law. It is their submission that if these orders remain in place, they would;

1. Cause confusion in the public service.
2. Cause a violation of the law and constitution, particularly Article 232 (1) (a) that prescribes in partiality of the officers.
3. Cause a violation of Section 43 (5) and (6) of the Election Act besides Section 23 (3) of the Leadership and Integrity Act precluding public officers from engaging in the activities of a political party.
4. Violation of Section 12 (1) (c) and (d) of the Political Parties Act that excludes activities that may compromise neutrality of public servants.

The 1st respondent associated with the submissions of the 2nd – 4th respondents. It was her submission that the two matters that determined the constitutionality of Section 43 (5) and (6) of the Elections Act are in Nairobi where the petitioner also is.

Again, the sustenance of these orders would have absurd effect on the 1st respondent discharge of her mandate. The implementation of section 43 (5) and (6) is only hours away and if the orders are sustained, the 1st respondent would be frustrated in executing her constitutional and legal mandate.

Mr. Kibet, counsel for the 1st respondent came in to support the respondents' earlier submissions on public interest. He sought to rely on the case of **Gitirau Peter Munya vs. Dickson Mwenda Kithinji and 2 Others (2014) eKLR** where the highest court in the land held;

66. "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 level attributable to the relevant causes."

68. Dealing with the circumstances under which the court would grant conservatory orders the Supreme Court in Munya's case (supra) expressed itself as follows;

"Bearing in mind the nature of the competing claims, against the background

of the public cause, we have focused our perception on the public interest, and the concept of good governance, that runs in tandem with the conscientious deployment of the scarce resources drawn from the public. Proper husbandry over public monetary and other resources, we take judicial notice, is a major challenge to all active institutions and processes of governance; and the Courts, by their established attribute of line-drawing, must ever have an interest in contributing to the safeguarding of such resources...These principles dictate that our conscientious sense of proportions, stands not in favour of allowing the conduct of fresh elections for Meru County's gubernatorial office, during the pendency of an appeal. By our sense of responsibility, the Court's contribution to good governance in that context, takes the form of an expedited hearing for the appeal. Just that."

It was his concluding submission that if these interim orders were allowed to subsist public servants intending to contest shall remain in office and would divert public resources in funding their campaigns in contravention of Article 10 of the Constitution on National Values and Governance.

The Petitioner at the hearing of the application submitted that the respondents were duty bound to demonstrate a case of lack of disclosure on their part. Two, they also had to demonstrate that these orders were obtained fraudulently.

It is the further submission of the petitioner that the High Court in entertaining the applications in the three matters referred to was exercising his jurisdiction under Article 165 (3) and Article 23 (1.) These are two separate jurisdictions and it was not incumbent on the petitioner to make a disclosure to this extent. Moreover, this was a court interpretation of the law and not material facts as would require disclosure by the petitioner.

The petitioner also raised the issue of *res judicata* in that the subject matter of this application was raised at a hearing on 30th January, 2017. Here, the respondents sought a discharge of these orders and this was declined by the court. This matter is therefore spent and the court is *functus officio*.

The petitioner again submits that in granting the orders herein, this court must have been persuaded that

there was a *prima facie* case. Further, if these orders were discharged the petitioner and public servants would suffer irreparable loss as they would be forced out of employment by midnight on the following day.

In the penultimate, the petitioner dismissed the link between these conservatory orders and corruption in the public service. It was his submission that there are enough checks and balances including institutions dealing with this. He therefore prayed that this application be dismissed with costs.

I have looked at the respective cases and submissions of the parties in this application. These are not only compulsive but also opposing. The subject matter of this application is of great public interest and importance. The respondents submit a case of massive prejudice on their part, and particularly that of the 1st respondent in a continued stay of public servants interested in participating in the general elections would jeopardize the 1st respondent's preparation for such elections. It is their submission that this would go against public interest and therefore this court should look at the bigger good and set aside the orders sought. In any event, should the petitioner succeed in the petition, these public servants would be adequately compensated in damages.

The petitioner would not listen to this. It is their submission that setting aside of the interim orders of court would occasion irreparable loss to the parties concerned. In the circumstances, damages would not be an adequate remedy as they would be required and forced to vacate office by the midnight the following day: 7th February, 2017.

At the hearing of this matter on 30th January, 2017, the respondents made an oral application for setting aside of these conservatory orders but this was declined.

Looking at the conflicting cases of the parties on the public interest involved in this petition I would rely on the authority of **Gitirau Peter Munya vs. Dickson Mwenda Kithinji and 2 Others** (*supra*) where the Supreme Court juxtaposed the issue of public interest *vis-à-vis* the subject matter in dispute. From the onset, this court elaborately combed through the petition and original application both dated 16th January, 2017 in granting the interim orders now in dispute. This was on the basis that conservatory orders would be necessary to preserve the subject matter pending hearing and determination of the application.

In the cause of proceedings, other intervening circumstances, including this application arose. What has not changed is the position of the subject matter of this petition and this still requires preservation until determination of the original application or the petition as set out. Setting aside these conservatory orders would amount to an obliteration of the subject matter and therefore defeats the cause of action in this petition. This would result in deciding the matter at interlocutory level to the detriment of the petitioner. It would occasion gross injustice to the petitioner.

Further, public interest is two fold: public interest as set out by the respondents in their pleadings and submissions and public interest involved in a justiciable resolution of the issues in dispute in this petition. A calculated balancing act must be had in the circumstances.

I am therefore inclined to dismiss this application with orders that each party bears their own costs of the application.

Delivered, dated and signed this 14th day of February, 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Simiyu instructed by Musyoka Murambi & Associates for the Petitioner.

2. M/s. Kibet & Obondi instructed by Murugu, Rigoro & Company Advocates for the 1st Respondent.

3. Mr. Mutinda & Miss Langat instructed by State Law Office for the 2nd – 4th Respondents.