



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
HUMAN RIGHTS AND CONSTITUTIONAL DIVISION
PETITION NO 225 OF 2014
CONSTANTINE MWIKAMBA MGHENYIPETITIONER
VERSUS
THE INSTITUTE OF CERTIFIED
PUBLIC ACCOUNTANTS OF KENYA..... RESPONDENT
RULING

Introduction

1. The petitioner filed this application and petition under Certificate of Urgency on 13th May 2014. In the application, he seeks to have orders issued to stop the respondent from holding the elections for its Council scheduled for 24th May 2014. The basis of his claim is that the respondent has violated his legitimate expectation to vie as a candidate in the elections and his right under Article 47 of the Constitution. He seeks the following orders:

1. *THAT this matters is certified urgent and placed before the duty Judge for hearing and forthwith.*

2. *That the court do issue conservatory and/ or interim orders to restrain the Respondent from conducting the Council elections pending determination of this application or any further orders of the court.*

3. That the court do issue conservatory orders and/ or interim orders to restrain the respondent from conducting the Council elections pending inter partes hearing and final determination of this Petition or any further orders of the court.

4. That costs of this application be provided for.

2. The basis of the application is that the petitioner/applicant is a duly registered Certified Public Accountant and a member of the Institute of Certified Public Accountants of Kenya (ICPAK) and a holder of registration number 4713; that the respondent as a public body established under the Accountants Act Number 15 of 2008; and that it is mandated by the Accountants Act and the Constitution to ensure that it fulfils its fair administrative action towards the petitioner in making decisions concerning his rights to participate in the Council elections.

3. The petitioner alleges that by virtue of section 11 and the Second Schedule of the Accountants Act and rule 56 of the By Laws, he submitted his nomination forms for the elections. He contends that prior to submitting his nomination forms, he received confirmation of his eligibility and the eligibility of all his supporters from an official of the respondent, one Ms Lucy Onyango.

4. He contends however, that sometime in March 2014, he was informed by the respondent through its Acting Chief Executive Officer of his disqualification to vie in the elections. He alleges that he was not given reasons for his disqualification, but states that he was informed at a meeting held on 4th April 2014 that the reason for his disqualification was that Ms Sophie Wakio Malombo, Reg No 11341, one of his supporters was not of good standing.

5. The petitioner contends that the respondents further sent a letter dated 2nd May 2014 to his Advocates advising them that the reason for disqualifying the petitioner from vying was because one of his supporters, Ms. Sophie Malombo, did not possess the required Continuous Development Points (CPD) to nominate the applicant. He contends that the reasons given by the respondents for disqualifying him from vying as a Council Member was not reasonable

since the applicant had already received clearance of his nomination and that of his supporters to allow him to contest for the post of Council Member.

6. The application is opposed. The respondent has filed two affidavits sworn by Makori and Lucy Onyango in which they deny the allegations by the petitioner and ask that his application be dismissed with costs.

The Petitioner's Submissions

7. Ms. Oyagi submitted on behalf of the petitioner that he was seeking an order to stop the conduct of the elections of the respondent scheduled for 23rd May 2014. She contended that the applicant was denied fair administrative action and legitimate expectations as the respondent failed to inform him of the proper reason for his disqualification as a candidate in the Council elections. He contended that the reasons given for his disqualification had been resolved and that he had been informed that he could vie. He contended further that he had not been informed of his right to challenge the decision not to allow him to vie.

8. Ms Oyagi submitted that the respondent's by-laws do not provide a mechanism for challenging a disqualification; that the petitioner was informed that he had been disqualified on the basis that one of his proposers was not qualified as she was not fully paid up and had not attained the requisite CPD for 2013. It was his contention that even if one of the people who nominated him was disqualified for not being fully paid up, this should not disqualify him as he was fully paid up. He alleged that in any event, his proposer could not be disqualified for not having attained the CDP threshold as she was a new member.

9. Ms. Oyagi submitted that as a public body, the respondent was required, under Article 21, to safeguard the rights of its members, and that there is nothing in the rules that stops a candidate of good standing from vying for elections even if his supporters are not of good standing. It was also her contention that the date of 6th June 2014, on which date the respondent was scheduled to hold its annual general meeting and announce those elected through the online ballot, was not cast in stone and the elections should be stopped pending the hearing of the petition.

The Response

10. In response, Mr. Ogembo for the respondent drew attention to the respondent's by-laws and the provisions on elections. He submitted that nominations to the Council were called for under the provisions of the by-laws; that the nominations were to be received by 14th March 2014, and the outcomes of nominations were to be opened and scrutinized at a meeting of the Council scheduled for 27th March 2014, the only organ of the respondent that could deal with the issue of qualification or disqualification of candidates.

11. According to the respondent, the nominations were opened and scrutinized; successful nominations were picked; and the voting papers despatched, with the elections scheduled to take place online from 24th May 2014. The respondent contends that the petitioner was informed on 27th March 2014 that his nominations was not successful, and was given the reasons; that he called the respondent on the same date saying that he was not furnished with reasons; that the Executive Officer, Mr. Makori, personally called him for a meeting on 4th April 2014 and the reasons for his disqualification were explained to him.

12. The respondent, contends that what the petitioner is challenging was the validity of the reasons for his disqualification, not the failure to give him reasons. It was its case therefore that there was no violation of the petitioner's right to fair administrative action under Article 47 as alleged. Mr Ogembo therefore asked that the application be dismissed with costs as the petitioner had not shown a violation of his rights or a prima facie case to warrant the grant of an injunction in his favour.

13. Conversely, according to Mr. Ogembo, the respondent is under a statutory obligation to hold its Annual General Meeting by the 6th of June 2014, and any orders issued in favour of the petitioner would adversely affect the respondent in the exercise of its statutory mandate.

Determination

14. I have read the petitioner's application and the affidavit in support, as well as the affidavit of Lucy Onyango, the respondent's Human Resources Manager sworn on 16th May 2014 and another sworn by Mr. Edwin Makori, the Acting Chief Executive officer of the respondent, also sworn on the same date. I have also considered the submissions of Counsel for the parties, and I take the following view of the matter.

15. First, the petitioner has an obligation to present some evidence on the basis of which the Court can conclude that his rights were violated by the respondents to merit the grant of orders in his favour. He alleges violation of the right to fair administrative action and of his legitimate expectation that he would vie for a seat on the respondent's Council. From the grounds in his application, he is aggrieved that he was not given reasons for his disqualifications, but at the same time, in both the said grounds and in his affidavit in support of the petition, he makes it evident that it is not that he was not given reasons for his disqualification; rather, his complaint is that he does not consider the reasons valid or reasonable.

16. At paragraph 9 of his affidavit in support of the application, the petitioner confirms that his supporter, Ms. Malombo, had an outstanding subscription. He states, however, that she was called by Ms. Onyango and she regularised her position by paying the outstanding subscription of Ksh 5,000.00 on 13th March 2014 through M-pesa transaction number ETJ68JD786. It is on this basis that he alleges that the reasons that he was given for his disqualification are not valid.

17. To vie for the Council, the petitioner was required to be nominated by two persons of good standing. The reasons for the disqualification of the petitioner's supporter, Ms. Malombo, was that she was not a person of good standing as she had not paid her subscription on the due date and did not have the required continuous development points for 2013.

18. I have considered the respondents by-laws made under the provisions of the Accountants Act. Section 9(4) provides that ***“The Council may with the approval of the Minister, issue by-laws, regulations and guidelines to govern matters affecting the operations of the Institute and practice by members of the Institute.”*** As a member of the respondent, the petitioner is bound by the by-laws made by the Council.

19. As submitted by the respondent, by-law No 10 states that if a member's subscription is unpaid after the due date, the member shall forfeit his rights of voting, proposing or seconding candidates of the institute:

“any member whose subscription remains unpaid after the due date shall be deprived of his rights of voting, proposing or seconding candidates for, and of being appointed or elected to, any office of the Institute.”

20. By-law 6 defines the due date as 1st January of each year:

“Annual subscriptions shall become due and payable on the first day of January in each year from all members on the register of the Institute on the preceding 31st day of December.”

21. As averred by the petitioner, one of his proposers, Ms. Malombo, paid her subscription on 13th March 2014. The question then is whether the alleged assurance by Ms. Onyango, which she has denied giving, can override the express requirements of the by-laws. In my view, the answer is in the negative.

22. Secondly, the petitioner alleges that his proposer, whom he concedes at paragraph 19 of his affidavit had not attained the requisite continuous development points that would qualify her as a nominator for elective office, was granted exemption. However,, no evidence of such exemption has been presented and, according to the respondent, there is no provision for exemption and all members are required to obtain the continuous development points.

23. At any rate, the petitioner has not demonstrated any violation of his right under Article 47 of the Constitution. While he alleges that he was not given reasons for his disqualification, he proceeds to contradict his own assertion by showing that he was indeed given reasons, but that he did not like or accept the said reasons. What he is inviting the Court to do is to inquire into the merits of the said reasons.

24. However, even if the Court could properly do this, on the basis of the material before me, such an inquiry would not be of assistance to the petitioner. The provisions of the by-laws governing the institute’s membership and elections to Council are clear. The reasons given for the disqualification of the petitioner are based on the by-laws. His attack on the reasons for his disqualification is based on what he was allegedly told by the Human Resources Officer of the respondent, and there is nothing before me that demonstrates that she had the authority to give such assurances, which she denies giving.

25. In the circumstances, I can find no basis for giving the conservatory orders that the petitioner seeks, and the application dated 12th May 2014 is hereby dismissed with costs to the respondent.

Dated and Signed at Nairobi this 21st day of May 2014

MUMBI NGUGI

JUDGE

Delivered and Signed at Nairobi this 22nd day of May 2014

W.K. KORIR

JUDGE

Ms. Oyagi instructed by the firm of Mwangi & Guandaru & Co. Advocates for the petitioner

Mr. Ogembo instructed by the firm of Okoth & Kiplagat & Co. Advocates for the respondent



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