



**Towett alias Seiyo v Cabinet Secretary for the Ministry of Interior  
and National Administration & another (Constitutional Petition  
E002 of 2024) [2024] KEHC 16483 (KLR) (20 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16483 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
CONSTITUTIONAL PETITION E002 OF 2024**

**F GIKONYO, J**

**DECEMBER 20, 2024**

**IN THE MATTER OF: ARTICLES 22 & 23 OF THE CONSTITUTION OF KENYA  
ARTICLES 1(1), 2(2), 3(1), 10, 33, 35, AND 232(1) OF THE CONSTITUTION OF  
KENYA AND ALL OTHER ENABLING POWERS AND PROVISIONS OF THE LAW  
THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION  
AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS)  
HIGH COURT PRACTICE AND PROCEDURE RULES 2013**

**BETWEEN**

**KIPSIELE ARAP TOWETT ALIAS SEIYO ..... PETITIONER**

**AND**

**THE CABINET SECRETARY FOR THE MINISTRY OF INTERIOR AND  
NATIONAL ADMINISTRATION ..... 1<sup>ST</sup> RESPONDENT**

**HON ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Public Participation in establishing administrative units**

1. The 1<sup>st</sup> respondent by a Gazette Notice No. 1766 issued on 14.02.2024 established administrative units as service delivery coordination units in the country including the narok Amalo sub-county in narok county.
2. The 1<sup>st</sup> respondent further in the said gazette notice designated Sogoo as the headquarters of the newly created Narok Amalo Sub-county. The petitioner contends that this was done without conducting any effective and qualitative public participation that meets the constitutional threshold. Yet, the designated headquarter is set to be launched by the president of the Republic of Kenya.



## The application

3. Before this court is a notice of motion dated 06.03.2024 filed by the petitioner/applicant herein which is expressed to be brought under Articles 19,20,21,22,23, 165(4), and 258 of the Constitution, section 3A of the Civil Procedure Act, rules 19 and 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules,2013, and section 10 of the Judicature Act.
4. The petitioner/applicant seeks the following orders;
  1. Spent.
  2. Spent.
  3. That this honourable court be pleased to issue conservatory orders suspending part of the gazette notice No. 1766 issued on 14.02.2024 by the 1<sup>st</sup> respondent purporting to designate Sogoo as the Headquarters of the newly created Narok Amalo Sub-County in Narok County pending the hearing and determination of this petition.
  4. That directions be given for expeditious hearing and determination of the substantive petition owing to the urgency of the matter.
  5. That the cost of this application be provided for.
5. The application is based on the grounds set out on in the application and the supporting affidavit sworn by the chairperson of the petitioner, Kipsiele Arap Towett on 06.03.2024.
6. The petitioner contends that the 1<sup>st</sup> respondent failed to consider the strategic infrastructural development, social amenities, population density, and strategic location of the Ilmotiok trading centre and thereby disregarded it as the headquarters of the newly created Narok Amalo sub-county; and instead, designated Sogoo as the Headquarters despite lacking basic infrastructure, social amenities, and population quota.
7. The petitioner contends that the 1<sup>st</sup> respondent did not conduct any effective and qualitative public participation within the newly created Narok Amalo sub-county prior to the designation of Sogoo as the headquarters of the newly created sub-county.
8. The petitioner/applicant contends that the 1<sup>st</sup> respondent purported to hold a meeting on 17.01.2023 at Park Villa Hotel in Narok County which meeting was attended by selected individuals from Sogoo, Sagamian, and parts of Melelo ward. This meeting was held outside the jurisdiction of the newly created sub-county and residents of the wider Narok Amalo Sub County were not involved.
9. The petitioner/applicant contends that the 1<sup>st</sup> respondent did not place any notice in the newspaper or other media calling for public participation in the designation of Sogoo as the headquarters of the newly created Narok Amalo Sub County.
10. The petitioner/applicant contends that the 1<sup>st</sup> respondent did not utilize any other various forms of communication such as local radio stations and social media to reach different categories of audiences and/or residents of the newly established Narok Amalo Sub County to inform them on any intended public participation on the headquarters of the created sub-county.
11. The petitioner/applicant contends that the Maasai Council of Elders from both narok south and West and the Kipsigis Myoot Council of Elders by a memorandum dated 13.06.2023 agreed on the creation of the new sub-county pending public participation on the location of the headquarters.



12. The petitioner/applicant averred that on 21.12.2023, the Ilmotiok Voice of Reason forum (IVRF) held a meeting to discuss the gazettelement of Narok Amalo Subcounty and its headquarters. The meeting resolved that the headquarters of the newly created sub-county be Ilmotik trading centre for reasons that Ilmotiok trading center has a physical plan that has all the requisite social amenities, is at the centre of the newly created Narok Amalo Sub-county, has public institutions such as schools, vocational training centre, big planned recreational/social hall, and health care; is already an administrative centre, it has a chiefs camp, ministry of education office, agricultural offices and police post; has a sufficient supply of electricity and water; is a mining centre that is mining sand and building stones; is densely populated; is on a tarmacked highway; historically has been the centre of coordination of the kipsigis and Maasai communities since time immemorial. these two communities are dominant in narok county.
13. The petitioner/applicant averred that the newly created subcounty is constituted of three wards and five locations whereby the Ilmotiok trading centre is enclosed with three locations, Ilmotiok, mulot, and Eneleraii, which are densely populated. While sogoo is enclosed with two locations, sogoo and sagamian which are sparsely populated.
14. The petitioner/applicant averred that on 22.01.2024 more than 3000 residents of Ilmotiok ward, parts of Mara, Sagamian, Sogoo, and Melelo wards conducted public participation on the location of the headquarters of the newly created Narok Amalo Sub County and unanimously agreed that Ilmotiok trading centre to be the headquarters of the newly created sub-county. This public participation was conducted at Ilmotik Trading Centre. The views collected from the said public participation reaffirmed and confirmed the resolution of the Ilmotiok voice of Reason Forum (IVRF).
15. The petitioner /applicant averred that the 1<sup>st</sup> respondent thereby went ahead and designated Sogoo as the headquarters of the newly created sub-county without conducting any effective public participation.

### **The response**

16. The 1<sup>st</sup> and 2<sup>nd</sup> respondents opposed the application herein.
17. The respondents filed grounds of opposition dated 27.03.2024.
18. The respondents contend that the application has not met the threshold for grant of conservatory orders as was held in [Ezra Chiloba v Wafula Wanyonyi Chebukati & 7 Others](#) [2018] eKLR.
19. The respondents contend that the orders sought cannot be issued at the interlocutory stage and if granted will determine the issue raised in the main petition and will deny the respondents their right to a fair hearing.
20. The respondents contend that the petitioner/applicant has substantially failed to demonstrate that unless the conservatory order is granted it stands to suffer real danger or prejudice and that there is an arguable case if the order sought is not granted the applicant is likely to suffer irreparable harm. The respondents relied on Article 23(3) of the [Constitution, Wycliff Indalu Adieno v Attorney General & 2 Others](#) [2014] eKLR, [Ahmed Issack Hassan v Law Society of Kenya Disciplinary Tribunal & 2 Others](#) [2018] eKLR, [Nyaga Wambora v Speaker OF the County Assembly of Embu & 3 Others](#) [2014] eKLR.
21. The respondents contend that public interest outweighs narrow private interest hence the application should be declined. The respondent relied on the supreme court in [Gatirau Peter Munya v Dickson Mwenda Kitbinji and 2 Others](#) [2014] eKLR



22. The respondents contend that the applicant's rights and fundamental freedoms have not been breached or threatened and therefore the application is incompetent, misconceived, misplaced, and is an abuse of court process therefore the same ought to be dismissed.

### **Directions of the court**

23. The application was canvassed by way of written submissions.

### **The Petitioner/applicant's Submissions**

24. The petitioner/applicant submitted that the petitioner has a prima facie case with a likelihood of success. The petitioner/applicant contends that the respondents designated Sogoo as the headquarters of the Narok Amalo sub-county without conducting meaningful, effective, and qualitative public participation.
25. The petitioner/applicant submitted that the purported designation of Sogoo as the headquarters of the newly created Narok Amalo sub-county is not suspended as sought in the Application the Supremacy of the Constitution and the application of Constitutional principles will be overlooked. The orders sought herein are required to preserve the petition from being rendered an academic exercise where successful.
26. The petitioner/applicant submitted that whereas it is within the mandate of the 1st Respondent to create and/or establish a sub-county but the residents of the newly created sub-county must agree on the headquarters and in this case the residents did not agree on Sogoo as the headquarters of Narok Amalo Sub-County. It is, therefore, in the public interest that the conservatory orders sought in the Application be issued. There is no prejudice whatsoever that the 1st Respondent will suffer if the orders sought are issued.
27. The petitioner/applicant relied on [\*Centre For Rights Education and Awareness \(CREAW\) & 7 Others, Gitirau Peter Munya v Dickson Mwenda Kithinji And 2 Ors\*](#) [2014] eKLR and Articles 10 And 232 (1) of the [\*Constitution\*](#) of Kenya.

### **The Respondents' Submissions**

28. The respondents submitted that the Applicant/Petitioner has not adduced evidence to demonstrate that the 1st Respondent did not carry out public participation. The respondents contend that public participation does not imply that each of the county residents of Sogoo or Amalo Sub-county must give their oral views in the public forums. Therefore, the applicant's submission on lack of public participation is one without any justifiable reason. The respondents relied on Article 23 (3) (c) of the [\*Constitution\*](#) of Kenya, 2010, [\*Nairobi metropolitan PS v Saccos Union Ltd & 25 others v county government of Nairobi & 3 others\*](#) [2014], section 4 and 8 of the [\*National Government Co-ordination Act\*](#).
29. The respondents submitted that the actions taken by the 1st Respondent to designate Sogoo as the headquarters were well within the law and did not amount to any violation of the [\*Constitution\*](#).
30. The respondents submitted that the Applicant/Petitioner has failed to plead with precision, in particular by disclosing which alleged provisions of the Constitution were violated, it would be difficult for the Court to grant the orders sought in the Notice of Motion Application. the respondents relied on [\*Wycliff Indalu Adieno v Attorney General & 2 others\*](#) [2014] eKLR and [\*Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others\*](#) [2017] eKLR.



31. The respondents submitted that the Applicant/Petitioner has substantially failed to meet this test and the Court should be reluctant to grant the Orders sought as they are against the public interest. The respondents have relied on *Abmed Issack Hassan v Law Society of Kenya Disciplinary Tribunal & 2 others* [2018] eKLR.
32. The respondents submitted that the Applicant/Petitioner has not demonstrated that he stands to suffer irreparable harm if the Conservatory orders sought are not granted.

### **Analysis and Determination.**

33. This court has considered the application, the supporting affidavit, the grounds of opposition, and the respective parties' submissions.

### **Issues**

34. The main issue for determination: -
  - i. Whether a conservatory order is merited?.
35. The threshold for grant of conservatory orders was established by the Supreme Court in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR as follows:

“(86) “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 the 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 supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.

(87) The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

- (i) the appeal or intended appeal is arguable and not frivolous; and that
- (ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.

(88) These principles continue to hold sway not only at the lower Courts but in this Court as well. However, in the context of the *Constitution* of Kenya, 2010, a third condition may be added, namely:

- (iii) that it is in the public interest that the order of stay be granted.



(89) This third condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that run through the Constitution.”

36. The principles applicable to the granting of conservatory orders have also been the subject of discussion by various Courts. In Petition E408 of 2020 *Okiya Omtatah Okoiti v Judicial Service Commission; Philomena Mbete Mwilu & another (Interested Parties)* [2021] eKLR this collated the principles as established by various decisions in the following fashion -

23. The locus classicus is the Supreme Court in Civil Application No. 5 of 2014 *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* (2014) eKLR where at paragraph 86 stated the Court stated as follows: -

(86) ..... Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant courses.

24. In *Wilson Kaberia Nkunja v The Magistrate and Judges Vetting Board and Others* Nairobi High Court Constitutional Petition No.154 of 2016 (2016) eKLR after going through several decisions, the Court rightly so, summarized three main principles for consideration on whether to grant conservatory orders as follows: -

(a) An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.

(b) Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and

(c) The public interest must be considered before grant of a conservatory order.

25. There is also the need to ascertain whether the conservatory order sought will delay the early determination of the dispute. (See Nairobi High Court Constitutional Petition No. E243 of 2020 *Kenya Tea Development Agency Holdings Limited & 55 Others v The Cabinet Secretary Ministry of Agriculture, Livestock, Fisheries & Co-operatives & 2 Others and Kenya Small Tea Holders Growers Association (Kestega) (Interested Party)* (unreported).

37. In *Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others* [2015] eKLR, the Court summarized the principles for grant of conservatory orders as: -

(i) The need for the applicant to demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he is likely to suffer prejudice.

(ii) The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.

(iii) Thirdly, the Court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.



**(i) Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.**

38. The above principles are, however, not exhaustive. Depending on the nature of the matter under consideration, there may be other parameters that a Court ought to look into. Such may include the effect of the orders on the determination of the case, whether there is imminent danger of infringement of the human rights and fundamental freedoms in the Bill of Rights, the applicability of the doctrine of presumption of constitutionality of statutes, application of the doctrine of laches, the doctrine of proportionality, among many others.
39. Consequently, in dealing with an application for conservatory orders, the court must strike a delicate but proportioned balance; not to prejudice the Petition, but, also not to deny interlocutory remedy where it is deserved. The remedy of conservatory order therefore, largely depend on the circumstances of the case and the exact nature of the relief being sought on interim basis. This forms the functional basis for granting conservatory orders.

**Claim of sectarian or personal interest**

40. On the one hand, the petitioner/applicant claims that there was no effective and qualitative public participation in designating Sagoo as the headquarter for the newly created Narok Amalo Sub County.
41. And on the other hand, the petitioner/applicant averred that on 22.01.2024 more than 3000 residents of Ilmotiok ward, parts of Mara, Sagamian, Sogoo, and Melelo wards conducted public participation on the location of the headquarters of the newly created Narok Amalo Sub County and unanimously agreed that Ilmotiok trading centre to be the headquarters of the newly created sub-county. This public participation was conducted at Ilmotik Trading Centre. The views collected from the said public participation reaffirmed and confirmed the resolution of the Ilmotiok voice of Reason Forum (IVRF).
42. The respondents have accused the petitioner of promoting personal or private interest of particular or some of the wards within the newly created Narok Amalo Sub County rather than public interest for all persons within the sub-county. They also argued that a conservatory order sought will compromise the petition.
43. Within the above framing, the argument by the respondent is not a trifle.
44. Thus, a dilemma which the court should not engage a wager- toss a coin- at interlocutory stage in determining on which side of the divide the die falls.
45. The quality of public participation in public-decision making in the context of the facts emerging from the material placed before the court, favors a complete evaluation of the issues in the main hearing of the petition rather than at interlocutory stage. *Re Bivac International SA (Bureau Veritas)* (2005) 2 EA 43.
46. Accordingly, there is no prima facie case established for grant of a conservatory order. *Mrao v First American Bank of Kenya Limited & 2 Others* (2003) KLR 125

**Conclusion and orders/directions**

47. Properly situated, public participation stems from the sovereign authority of the people. Art. 1 of the [Constitution](#). It is a substantive element in public-decision making. It is not a mere procedural ritual without probative value in the outcome. Given its importance in public-decision making, it is prudent in the circumstances of this case to evaluate the claim of lack of public participation in the substantive hearing of the petition rather than in an interlocutory application. The application for conservatory



order, is therefore, unsuccessful. The petition shall be fast-tracked to avoid any prejudice to the parties concerned.

48. In the end, the following orders issue: -

- a. The Notice of Motion dated 06.03.2024 is dismissed with no orders as to costs given the nature of the proceedings and the observation by the court in reaching its decision on the application.
- b. The Petition to be heard on the basis of priority and appropriate directions be given by the court between the parties.
- c. In the meantime, parties to comply with all requirements under the Mutunga Rules.

49. Orders accordingly.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS  
20<sup>TH</sup> DAY OF DECEMBER, 2024**

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**HON. F. GIKONYO M**

**JUDGE**

In the presence of: -

Petitioner absent-but had notice of date

Respondents absent but had notice of date

Otolo C/A

