



**Kukena Co-operative Savings & Credit Society Limited & another v
Prosiwi Cabs Services & 4 others (Constitutional Petition E011 of 2024)
[2024] KEHC 15946 (KLR) (18 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15946 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CONSTITUTIONAL PETITION E011 OF 2024
RM MWONGO, J
DECEMBER 18, 2024**

BETWEEN

**KUKENA CO-OPERATIVE SAVINGS & CREDIT SOCIETY
LIMITED 1ST PETITIONER
DAVID MURIITHI KABABI 2ND PETITIONER**

AND

**PROSIWI CABS SERVICES 1ST RESPONDENT
COUNTY GOVERNMENT OF KIRINYAGA 2ND RESPONDENT
CHIEF OFFICER-DEPARTMENT OF TRANSPORT ROADS AND PUBLICS
WORKS-KIRINYAGA COUNTY 3RD RESPONDENT
CHIEF MAGISTRATES COURT AT KERUGOYA 4TH RESPONDENT
NATIONAL TRANSPORT AND SAFETY AUTHORITY 5TH RESPONDENT**

JUDGMENT

The Motion and Petition

1. The petitioners filed this notice of motion dated August 6, 2024 seeking the following orders:
 1. Spent.
 2. That pending the hearing and determination of the application interpartes, this Honourable Court be pleased to issue a Conservatory Order staying the illegal, Irregular and disruptive operations of the 1st Respondent at the entrance of Kerugoya Bus Park.



3. That pending the hearing and determination of the Petition, this Honourable Court be pleased to issue a Conservatory Order staying the illegal, irregular and disruptive operations of the 1st Respondent at the entrance of Kerugoya Bus Park.
 4. That pending the hearing and determination of the application this Honourable Court be pleased to issue a Conservatory Order restraining the 1st Respondent from operating as a non-compliant Public Service Operator.
 5. That pending the hearing and determination of this Application, this Honourable Court be pleased to issue an interim conservatory Order stopping/halting the payment of levies and taxes to the 2nd Respondent.
 6. That pending the hearing and determination of the Petition filed herewith this Honourable Court be pleased to issue an interim conservatory Order stopping/halting the payment of levies and taxes to the 2nd Respondent.
 7. That Pending the hearing and determination of this application, this Honourable Court be pleased to issue conservatory orders against the 1st Respondent restraining them from operating only in the designated Picking and Dropping Bays which are: Opposite Medicam and Around Amani Gardens.
 8. That the County Commissioner and the County Police Commander Kirinyaga County be Ordered to enforce compliance with the above orders against the 1st 2nd and 3rd Respondents.
2. The application is supported by the grounds on the face of the application and the Affidavit sworn by David Muriithi Kababi containing the following major averments:
1. On the 19th February 1997(27 years ago) the 1st Petitioner was issued with a Certificate of Registration by the Ministry of Cooperative Development and it henceforth commenced its operations of rendering quality transport services to the residents of Kirinyaga County.
 2. The 1st Petitioner has a fleet of around 450 public service vehicles which are owned by over 500 citizens, the majority of whom are Kirinyaga Citizens.
 3. The 1st Petitioner is fully compliant to operate as a Public Service Vehicle and more particularly it has satisfied the threshold set by the 5th Respondent to serve as what is popularly known as a 'Matatu.'
 4. The operations of the 1st Petitioner which are the only source of gain for over 500 families in Kirinyaga County and its Bordering Counties have been wholly paralyzed and brought to a complete standstill through the illegal, irregular and unconstitutional actions of the 1st - 3rd Respondents.
 5. On or about 2nd February, 2024, the 1st Respondent moved the Chief Magistrates Court at Kerugoya in Civil Case No. E017 of 2024 asserting that the 2nd and 3rd Respondents were restraining their operations and overpricing penalties. It is worth noting that the injunctive reliefs they were seeking were devoid of disclosure of material facts.
 6. The matter was heard and determined and on 22nd May, 2024, the 4th Respondent issued an interlocutory injunction restraining the 2nd and 3rd Respondents from the alleged interference with the operations of the 1st Respondent.



7. It is pitiful that the quiet adherence to this Honourable Court Orders hardly lasted a week and the 1st Respondent in silent collusion with the 2nd and 3rd Respondents reverted back to its hooliganism and illegal takeover of picking and dropping bays at the entrance of Kerugoya Bus Park.
 8. The 1st Respondent under the supervision of the 2nd and 3rd Respondents have openly been seen by all Transport Service Operators in Kirinyaga County as actors of contrary opinion to this Court's Orders.
 9. The forceful entry of the 1st Respondent in the Public Transport Service Industry and in illegally and irregularly self-allocation of picking and dropping bays has turned the Kerugoya Bus Park Stage into a chaotic and unruly place.
 10. The 1st Respondent popularly known as a Taxi Service Operator has turned itself into a Public Service Matatu' with riotous goons as its drivers and touts.
 11. The conduct of the 1st Respondent has dealt a hard blow on the 1st Petitioner/Applicant as the under-pricing and ill placement of vehicles at the very heart of the stage entrance has amounted to unfair competition and the 1st Petitioner/Applicant has suffered heavy losses as a result.
 12. Unless swift remedial action in form of conservatory and injunctive orders are issued by this Honourable Court restraining the unlawful actions by the respondents, the 1st Petitioner will be run down and reduced into a shell of a company unable to deliver on its mandate of supplying quality Transport services in Kirinyaga County and its bordering Counties.
3. The respondent on 23rd August, 2024 deposed a Replying Affidavit with the following major averments:
1. That the 1st Respondent is not legally tied to any particular destinations and/or route being taxi service providers but instead operate by picking and/or dropping passengers at legally designated parking bays by the 2nd Respondent herein.
 2. That though the 1st Respondent can pick and/or drop passengers anywhere in the Republic of Kenya, its operations have since its inception been limited to services within the 2nd Respondent and thus do not affect other towns.
 3. That it is not true that the operations of the 1st Petitioner have been paralyzed and brought to a complete standstill by any actions of the 1st Respondent.
 4. That it is not the Petitioners' members only who have invested in the transport industry in Kirinyaga county but that there are other players as well such as the 1st Respondent and its member who also have legitimate business expectations of earning from the said industry.
4. The 5th respondent on 23rd August, 2024 deposed a Replying Affidavit with the following major averments:
1. That the 5th Respondent role is to license the route where the Petitioner operators have been licenced.
 2. That in response to breach of Articles of *the Constitution* that the petitioners have mentioned, I have been advised by the Advocate that the Petitioner has not demonstrated how the 5th Respondent has violated these specific Articles in the precise manner as envisaged in *the Constitution*.



3. That I am further advised by the Authority's Advocate on record that the petitioners have not discharged the burden of proving clear and unambiguous threat and or violation of the Constitution to warrant the orders being sought by the Petitioner as against the 5th Respondent.

The Background

5. According to the Petitioners the background is as follows.
6. On or about 2nd February 2024, the 1st Respondent moved the Chief Magistrate's Court under a Certificate of Urgency in Civil Case No. E017 of 2024 asserting that the 2nd and 3rd Respondent were restraining their operations.
7. The matter was heard and determined and on 22nd May 2024, the 4th Respondent issued an interlocutory injunction restraining the 2nd and 3rd Respondents from the alleged interference with the operations of the 1st Respondent.
8. Immediately the Court Orders were issued, the 1st Respondent at the wee hours of 29th May 2024 and more specifically 4.00 am, the 1st Respondents through its servant/agents invaded the entrance of Kerugoya Bus Park which is the Picking/Dropping Bay allocated to the 1st Petitioner and through hired goons and hooligans proceeded to pull down/destroy the structures owned by the 1st Petitioner and they consequently proceeded to manhandle and molest clientele seeking to board the 1st Petitioner's vehicles.
9. The underserving actions of the 1st Respondent on 29th May 2024 spilled over and resulted in numerous assault cases which are before the Kerugoya Chief Magistrate's Court.
10. On even date, the activities of the 1st Respondent caused such a public uproar at Kerugoya Bus Park that the 2nd and 3rd Respondents filed an appeal and under Certificate of Urgency sought an Order to stay the Orders of the Lower Court.
11. The Court Orders were under Urgency stayed by this Honourable Court in Kerugoya High Court Appeal E057 of 2024 vide Court Order dated 31st May, 2024.
12. It is pitiful that the quiet and adherence to this Honourable Court Orders hardly lasted a week and the 1st Respondent in silent collusion with the 2nd and 3rd Respondents reverted back to its hooliganism and illegal takeover of picking and dropping bays at the entrance of Kerugoya Bus Park.
13. The 1st Respondent under the supervision of the 2nd and 3rd Respondents have openly been seen by all Transport Service Operators in Kirinyaga County as actors of contrary opinion to these Court Orders.
14. The forceful entry of the 1st Respondent in the Public Transport Service Industry and in illegally and irregularly self-allocation of picking and dropping bays has turned the Kerugoya Bus Stage into chaotic and unruly place.
15. The 1st Respondent popularly known as a Taxi Service Operator turned itself into Public Service 'Matatu' with riotous goons as its driver and touts.
16. The conduct of the 1st Respondent has dealt a hard blow on the 1st Petitioner/Applicant as the underpricing and ill placement of vehicles at the very heart of the stage entrance has amounted to unfair competition and the 1st Petitioner/Applicant has suffered heavy losses as a result.
17. The 2nd and 3rd Respondents despite being the primary custodians of the allocation of Picking and Dropping Bays at Kerugoya Bus Park have feigned lack of control over the hooliganism being engaged by the 1st Respondent.



18. The conduct of the 1st Respondent has caused untold embarrassment to the entire clientele of the 1st Petitioner/Applicants and resulted into a public uproar.
19. The 1st Respondents unlawful actions on site are unjustified as they are not even supported by the 2nd and 3rd Respondents as their designated zones are temporal and are only restricted to sites opposite Medicam and around Amani Gardens. The designated zones have been left to complete abandon.
20. On 15th August 2024, and in order to fast track the matter, the Court directed the parties to file written submissions on the substantive petition.

Violations Alleged in the Petition

21. The Petition is grounded upon and alleges breaches or violations as follows (as contained at Pages 26-29 of the Petition):
 1. By the 1st 2nd 3rd and 4th Respondents: violation of Article 10;
 2. By the 1st 2nd 3rd and 4th Respondents: violation of the Petitioners' By-Laws, the *Co-operative Societies Act*, The County Government Act, *The Constitution*, The *National Transport and Safety Authority Act* No 33 of 2012. The NTSA (Operation of Public Service Vehicles) Regulations, 2014;
 3. Court Orders Issued by Kerugoya Chief Magistrates Cour dated 28th May 2024;
 4. By the 2nd Respondent: Obligations under Article 21 of *the Constitution*;
 5. By the 2nd and 3rd Respondents: Failure to uphold the rule of law, democracy, public participation and other aspects of good governance and accountability espoused under Article 232 of *the Constitution*;
 6. By the 2nd and 3rd Respondents: Violation of the Petitioners' various fundamental freedoms in the Bill of Rights in conformity with Art 20 of *the Constitution*;
 7. By the 1st 2nd and 3rd respondents' interference by actions in breach of Article 46;
 8. By the 1st 2nd and 3rd respondents acts and omissions of interference making a mockery of the 1st petitioners' statutory duty to abide by its By Laws in violation of the principles in Article 232 of *the Constitution*;
 9. By the 1st 2nd and 3rd respondents' failure to give reasons for interference with the petitioner's operations since 29th May 2024 contrary to Article 47(2) of *the Constitution*
22. Ultimately, the Petitioners seek the following reliefs and prayers from this Court:
 - i. A declaration that the actions of the 1st Respondents are brazen, illegal, egregious, discriminatory and in violation of the petitioner's constitutional rights.
 - ii. A declaration that the 2nd and 3rd Respondent's violation of this Honourable Court Orders as issued in an appeal brought by themselves is contemptuous.
 - iii. A declaration that the 1st Respondents actions infringes and or violates the Petitioner's fundamental rights and freedoms particularly the right to Economic and Social Rights Consumers Rights under Article 43 of *the Constitution* of Kenya, 2010.



- iv. A declaration that the 1st and 2nd Respondents inaction infringes and or violates the Petitioner’s right to a fair administrative action under Article 46 and 47 of the Constitution of Kenya, 2010.
- v. A prohibitory order prohibiting the 1st Respondents from restricting the operations of the 1st Petitioner at the Kerugoya Public Bus Park.
- vi. General damages consequential upon the declarations of violations of the fundamental rights and freedoms of the petitioners is prayers (i, ii, iii, iv and v) above as may be assessed by this Honourable Court.
- vii. Exemplary/vindictory, aggravated and/or punitive damage for arbitrary, highhanded and oppressive conduct of the 1st Respondent towards the petitioners.
- viii. Interest at court rates.
- ix. Any other further relief that the Court may deem fit and just to grant.
- x. Costs of the suit

Petitioners’ submissions

Whether the Applicant is deserving of the Conservatory Orders as prayed

- 23. The Petitioners appear not to have made out their submissions in accordance with the order of the Court requiring the parties to file the same on the substantive petition.
- 24. Nonetheless, the petitioners’ submissions are that the issue of grant of Conservatory Orders was addressed in the case of *Okiya Omtatah Okoiti v Nairobi City County & 5 others* [2015] eKLR. Whereas such orders can be granted under Article 23(3)(c) of the Constitution, in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR the Supreme Court expressed itself as follows regarding such orders;

“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.”
- 25. They rely on the application as drawn and on the annexures. Upon being served with a Replying Affidavit by the 1st Respondent they have confirmed that the operations of the 1st Respondent at the entrance of Kerugoya Bus Park were self-endorsed and had not been permitted by the 2nd and 3rd Respondent.
- 26. The designated places of operation of the 1st Respondent are as we had stated in our application. The areas are: ‘Opposite Medicam and around Amani Gardens. The prayers in our subject application are therefore merited.
- 27. They submit that the 1st Respondent in their Replying Affidavit have not proved any compliance with the set standards of operation of the 5th Respondent and hence it is apparent that their operation as



Public Service Operators are in complete violation of set measures for quality transport services hence in violation of the set Law. The right not to have any manner or form of discrimination applies evenly to all transport service providers. The 1st Respondent cannot demand preferential treatment for being a taxi operator and demand for benefits enjoined by Matatu Operators while still not complying with requirements of a Matatu operator.

1st Respondent submissions

28. The 1st Respondents commence their submissions by stating that they “are made in opposition to the Petitioners /Applicant’s Notice of Motion Application dated 06/08/2024”
29. Clearly, too, the 1st Respondents did not capture the Court’s orders of 15th August 2024, that submissions were to be made on the substantive petition. Nor did they comprehend that conservatory orders were extended at each mention date including 9th October, 2024 when the date for judgment was fixed in court. Such conservatory orders operated to keep the application live until the petition was concluded.
30. In any event, for what they are worth, the 1st respondent’s submissions are: that the Petitioners have failed to adduce any evidence of connivance and or co-operation between the 1st and 2nd Respondents herein aimed at stalling the operations of the 1st Petitioner hence the same is mere hearsay.
31. In any event the Petitioners confirm in Paragraph 9 a of their Supporting Affidavit that the 1st Respondent actually sued the 2nd Respondent asserting that the 2nd Respondent was restraining it from lawfully picking and dropping passengers to and from Mwea.
32. It can be safely deduced from the Petitioner’s Application and Petition that the 1st Respondent is basically being bullied and forced out of competition by the 1st Petitioner/Applicant.

The 2nd and 3rd Respondents submissions

33. The 2nd and 3rd respondents captured the essence of the court’s orders. Their submissions are stated to be made in response to the petition and Notice of Motion dated 6th August 2024), in compliance to the Court’s orders.
34. They correctly submit that the reference by the petitioners to Kerugoya High Court Civil Appeal No E057 of 2024 County Govt of Kirinyaga v Prosiwi Cabs Services offend the rule against sub judice on the ground that the same is still ongoing in court and has not been concluded.
35. They submit that the Petitioners make a general claim of violation of Article 47 and 27 of *the Constitution* of Kenya in Paragraphs 9 and 10 of the Petition respectively. They assert that, without substantiating, the petitioners accuse the 2nd and 3rd Respondents of interfering with their operations.
36. They cite the case of Federation of Women Lawyers Kenya (FIDA-K) &5 others v Attorney General & another [2011] eKLR Petition 102 of 2011, where the High Court observed that:

“Mere differentiation or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause, it is necessary to show that the selection or differentiation is unreasonable or arbitrary that it does not rest on any basis having regard to the object which the legislature has in view or which *the constitution* had in view.” (Emphasis added)



37. They urge that the Petitioners have not, as advised in the above-quoted dictum, shown that the differentiation in the levies imposed on the 1st Petitioner and 1st Respondent are unreasonable or arbitrary. The petition has thus not substantiated the alleged violation of this right.
38. For purposes of grant of conservatory orders, the 2nd and 3rd Respondents have Invited this Court to weigh the Petitioners' alleged and unsubstantiated violation of rights against public interest.

4th and 5th Respondents Submissions

39. There are no submissions filed by these respondents

Issues for Determination

1. Whether the applicant should be granted conservatory orders.
2. Whether the Petitioners should be granted the reliefs sought in the Petition

Analysis and Determination

40. The petitioner seeks for Conservatory Order staying the illegal, irregular and disruptive operations of the 1st Respondent at the entrance of Kerugoya Bus Park.
41. Further, to issue conservatory orders against the 1st Respondent restraining them from operating only in the designated Picking and Dropping Bays which are: Opposite Medicam and Around Amani Gardens.
42. The issue of grant of Conservatory Orders was addressed in the case of *Okiya Omtatah Okoiti v Nairobi City County & 5 others* [2022] eKLR where it was stated that:

“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 Applicant’s case for orders of stay.”
43. The Petitioner/Applicant based its petition on allegations that the Respondent had forcefully entered the transport industry in Kirinyaga County and was operating at the entrance of Kerugoya bus park and that the 1st Respondent was non-compliant with all the requirements necessary for the operations of a Public Service Transport Service Provider.
44. The designated places of operation of the 1st Respondent are stated to be ‘Opposite Medicam and around Amani Gardens’.
45. The 1st Respondent submits that the Petitioner herein failed to prove the grounds for which this Application was brought. In that regard the petitioner failed to provide evidence of the 1st Respondent operating at the entrance of Kerugoya bus park.
46. The 1st respondent deposed that it is not only the Petitioners' members who have invested in the transport industry in Kirinyaga county since there are numerous other players as well. These include the 1st Respondent and its members who also have legitimate business expectations of earning from the said industry.



47. The 1st respondent submits that the Petitioner/Applicant does not want any competition whatsoever and that the 1st Respondent is a threat to its business and should not be allowed to operate.
48. *The Constitution* provides in Article 47 as follows:
- “ 1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”
49. On its part the 5th Respondent deposed that the petitioners have not discharged the burden of proving a clear and unambiguous threat and or violation of *the Constitution* to warrant the orders being sought by the Petitioner as against the 1st Respondent.
50. Further, they submit that the Petitioners, in Paragraphs 9 and 10 of the Petition respectively, have made a mere general claim of violation of Articles 47 and 27 of *the Constitution* of Kenya. The petitioners accuse the 2nd and 3rd Respondents of interfering with their operations, without substantiating proof.
51. Clearly however, the petitioners and the 1st Respondent have the right to operate their business in a fair atmosphere with their competitors without either of them being afforded unfair advantage.
52. In this regard, the 1st Respondent asserts that is not legally tied to any particular destinations and/or route being taxi service providers but instead operate by picking and/or dropping passengers at legally designated parking bays by the 2nd Respondent herein.
53. In Republic v Nairobi City County Government & 2 Others Ex-Parte Nucleur Investments Ltd & Another [2015] eKLR the Court held as follows:
- “In my view, whereas the ex parte applicants are entitled to be protected in carrying out their businesses, this protection ought not to be interpreted to mean that the ex parte applicants have exclusive right to use the areas allocated to them by the Respondent. To do so would result to the stifling of competition in the business world, a situation which would be conducive to promotion of monopolistic policies rather than free market economy to the detriment of the consumers of transport services. Article 46(1)(c) of *the Constitution* protects the rights of the interests of the consumers.”

Conclusions and Disposition

54. Ultimately, and in light of all the foregoing, it is my considered view that both the petitioners and the 1st Respondent are in General entitled, and should be allowed, to run their businesses in a conducive environment and without disruptions.
55. It appears that some of the parties did not appreciate that this Court ordered the parties to file submissions on the substantive petition, and instead made their submissions on the application. I have treated the matter on its substantive merits.
56. The Court ultimately has not found that the petitioners have demonstrated that any of their constitutional rights have been abrogated as asserted in the petition.
57. Accordingly, the petition is dismissed in its entirety, with the result that all extant interim orders issued in this matter by this Court are hereby discharged.



58. Orders accordingly.

59. Each party to bear own costs.

DELIVERED AT KERUGOYA THIS 18TH DAY OF DECEMBER 2024

R. MWONGO

JUDGE

In the presence of:

1. Wambui G - for Petitioner/Applicants
2. Otuke - for 1st Respondent
3. Muthoni for 2 - 3 Respondents
4. No representation - for 4th Respondent
5. No representation - for 5th Respondent

