



**Ouma v Orengo & another (Constitutional Petition E001 of 2023)
[2023] KEHC 186 (KLR) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 186 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CONSTITUTIONAL PETITION E001 OF 2023
RE ABURILI, J
JANUARY 19, 2023**

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 22, 23, 73, 159, 165, 226, 229, 232, 258 AND 259 OF THE CONSTITUTION OF KENYA AND IN THE MATTER OF SECTIONS 7, 9, 31, 33, 34, 36, 37, 38, 64 AND 67 OF THE PUBLIC AUDIT ACT, 2015 AND IN THE MATTER OF SECTIONS 30(2) & (3) AND SECTION 35 OF THE COUNTY GOVERNMENT ACT, 2012 AND IN THE MATTER OF SECTIONS 130 AND 155 OF THE PUBLIC FINANCE MANAGEMENT ACT, 2012 AND IN THE MATTER OF THE DIRECTIONS GIVEN BY THE GOVERNOR, COUNTY GOVERNMENT OF SIAYA ON THE APPOINTMENT OF THE SIAYA COUNTY TASKFORCE ON AUDIT OF COUNTY GOVERNANCE SYSTEMS AND GOVERNANCE REFORMS VIDE LETTERS DATED 3RD OCTOBER 2022

BETWEEN

EVERLYNE AOKO OUMA PETITIONER

AND

**HON. JAMES ORENGO GOVERNOR COUNTY GOVERNMENT OF
SIAYA 1ST RESPONDENT**

COUNTY ASSEMBLY OF SIAYA 2ND RESPONDENT

RULING

1. On 6/1/2023, the Petitioner herein Everlyne Aoko Ouma who describes herself in her Petition dated 6/1/2023 as a registered voter in St Theresa’s Primary School, Yala Township Ward, Gem Constituency in Siaya County, filed a petition seeking several orders among them:
 - a. that the establishment and or appointment of the members of the Siaya County Taskforce on audit of County Government systems and governance Reforms by the 1st Respondent vide letter dated 3/10/2022 was unconstitutional therefore null and void *ab initio*.



- (b) A permanent injunction restraining the 1st Respondent from receiving or making public and or acting upon the recommendations of the Report of the aforesaid Taskforce.
 - (c) A permanent injunction restraining the 2nd Respondent by itself and or through its lawful assignee or employees from receiving and or making public and or considering and or debating and or acting upon the recommendations of the report of the aforesaid Taskforce.
 - (d) An order that the 1st Respondent do personally refund all the expenses incurred and allowances received by the members of the aforesaid Taskforce.
 - (e) Costs of the Petition.
 - (f) Any other further relied this court may deem fit to grant.
2. The Petition is supported by the affidavit sworn by the Petitioner and annexing documents which include her voter registration card, NTV News extract dated December 29, 2022; copies of Auditor General's Report for the year 2019/2020 Financial Year and SRC Report dated 1/12/2022.
 3. Simultaneous with the filing of the Petition, the Petitioner filed a Notice of Motion dated 6/1/2023 in which she seeks in Prayer 2, a temporary conservatory order restraining the 1st Respondent by himself, and or through his lawful assignees from receiving and or making public and or acting upon the recommendations of the report of the Taskforce.
 4. At paragraph 3, the Petitioner/applicant seeks for interim conservatory order restraining the 2nd Respondent by itself, and or through its lawful assignees and or employees from receiving and or making public and or considering and or debating and or acting upon the recommendation of the Report of the Taskforce.
 5. The Petitioner further seeks conservatory orders suspending the Taskforce appointed by the 1st Respondent vide letter dated 3/10/2022.
 6. The other prayers 5, 6, 7, 8, 9 and 10 are repetitive of the above prayers.
 7. The main reasons for the Petition and the prayers for consideration of orders are contained in the grounds in support of the application and from paragraph 5 in the grounds, the Petitioner asserts that it is evident from the findings of the interim Taskforce Report submitted on 29/12/2022 that the appointment of members to the taskforce was unconstitutional and the same usurps the constitutional and statutory roles of the Auditor General, Siaya County Internal Audit Committee and Siaya County Public Service Board under Article 226 of the Constitution as read with Section 7(1)(a) of the Public Audit Act, Section 155 of the Public Finance Management Act and Section 59(1)(h) of the County Government Act.
 8. The urgency involved is that the 1st Respondent is expected to receive the Report on 20/1/2023 hence it is prudent to issue interim conservatory orders to preserve the substratum of the Petition and not to render the same nugatory.
 9. The 1st Respondent filed a Replying affidavit sworn by Phillip Richard Owade, the Siaya Count Attorney whereas the 2nd Respondent represented by Mr Philip Richard Owade, it is deposed that the application by the Petitioner is frivolous, incompetent, vexatious and bad in law and the same should be disallowed; that the application does not meet the threshold for grant of conservatory orders; that no *prima facie* case has been demonstrated with likelihood of success; that it has not been shown that if the orders sought are not granted then the petition shall be rendered nugatory; that it has not been demonstrated that the petitioner's rights have been violated or threatened to be violated; that it is in the



public interest that the conservatory orders are declined; that there is no demonstration of breach of law on the part of the 1st Respondent in appointing the Taskforce and or how the terms of Reference are in conflict with the constitutional mandate of the Office of the Auditor General; That no prejudice is demonstrated to be occasioned to the petitioner if the conservatory orders are not granted.

11. It was further deposed that there was no evidence that the Terms of Reference of the Taskforce are in the exclusive mandate of the Auditor General; that there is no law that prohibits the Governor from appointing a taskforce to carry out the mandate assigned to the Interested Party and that in any event, the terms of reference go beyond the kind of audit that is ordinarily done by the Auditor General and that therefore in the circumstances, the interested part does not in any way exist to usurp the functions of the Auditor General.
12. According to the 1st Respondent, the Constitution places a lot of significance on transparency and accountability in public affairs, these being principles and values of governance and public service hence the public resources must be deployed in a manner that is transparent and accountable and that there is no limitation either in the Constitution or in any statute in the manner in which an audit of how public resources has been put to use is to be done in order to established whether public resources have been prudently and accountably used so long as the same does not undermine the authority of the Auditor General.
13. Further, that the petitioner-applicant has not demonstrated the manner in which the terms of reference usurps the Constitutional and statutory mandate of the Auditor General.
14. The 1st respondent further contended that the public interest in any audit exercise of public resources is usually so significant that it will be against the interest of justice and that of the public to limit the power of the taskforce to undertake the exercise especially because there is no law that expressly forbids them from doing so.
15. It was further deposed that the executive authority of a county government is vested in the Governor and the County Executive Committee and that the Governor, within the framework of the law, is solely responsible to the people on the deployment and use of resources entrusted to him hence, there is no limitation placed upon the Governor on how he can exercise accountability to the people.
16. It was deposed that therefore, the Governor can on that account alone appoint a taskforce or any other body to facilitate accountable leadership.
17. It was deposed that the audit by the Auditor General in itself does not in itself a bar to the appointment of a taskforce to undertake an audit with a view of appraising the Governor and his administration of the state of affairs of Siaya County at the point of taking over the leadership mantle.
18. It was further deposed that it is in the public domain that the Siaya County Government has had a myriad of challenges relating to financial impropriety and lack of accountability in the use of financial resources, low on resource revenue collection and human resource related challenges, which matters that have taken prominence in mainstream media and which are under active investigations by the Ethics and Anti-Corruption Commission as shown by annexed Star Newspaper headlines on what EACC had unearned.
19. That the Taskforce was appointed to assist the 1st respondent appreciate the problems in the county as he engages in his tour of duty with a view of informing his administration of the strategies for averting the same and therefore the taskforce does not in any way threaten to usurp the powers of the Auditor general or any other internal organ of the County Government.



20. According to the deponent, submission of the report to the second respondent and its consideration or debate will be in accordance with its constitutional and statutory mandate of oversight and representation.
21. the 1st respondent was curious of the support by the 2nd respondent of the prayers for conservatory orders for the release of the taskforce report which is clear attempt to neglect their oversight and representation function as required of them by the Constitution and statute.
22. That no prejudice is demonstrated to be suffered if the report is released to the public as the position of the Governor is held on behalf of the people hence it is in the public interest that the report is made public. That such release will be in consonance with the dictates of Article 10 and 232 of the Constitution on Transparency and Accountability.
23. it was contended that the application violates the ripeness doctrine in the sense that the report is not yet released.
24. The application was argued orally by counsel for the parties.
25. Mr Maua advocate for the petitioner submitted that the main reason for the application was based on the interim report released on December 29, 2022 dealing with embezzlement of funds in the year 2020-2021 and 2021-2022 Financial Years, irregular transfer of funds from County Bank accounts, doubtful payment claims to individual staff, amounts paid to individuals for training activities, payroll system which touch on ghost workers, double payments and duplication of names and issues of pending bills. That those are issues which annexures 3A paragraphs 3, 4, 5 of the Auditor General's Report captures. Counsel submitted that those issues fall in the mandate of the Auditor General hence the taskforce is taking over the functions of the Auditor General as if they are on a review of the Report of the Auditor General. further, that public funds were being used in total violation of the Public Finance Management Act.
26. It was argued that only the Auditor General can do an audit and the county has an internal auditor. further, that the Auditor General and Internal audit Committee did their work and submitted the reports to the 2nd Respondent. Further, that the 1st Respondent had not demonstrated the steps taken based on recommendations of the Auditor General which might have failed leading to the establishment of the Taskforce which was formed to misuse public funds and without involvement of the Public Service Board of Siaya County. Further arguments were that the impugned Taskforce was never gazetted as required by law and that the actions of the Taskforce directly contravenes Articles 226 of the Constitution as read with Section 7(1)(a) and 31(1)(a) of the Public Audit Act and Section 155 of the Public Finance Management Act and Section 59(1)(h) of the County Government Act.
27. Counsel wholly relied on the application and supporting affidavit and prayed for conservatory orders.
28. Supporting the application for conservatory orders and associating himself with what Mr Maua had submitted, Mr Okoyo counsel for the 2nd respondent submitted that on the issue of Gazettement, Section 30(2)(j) of the County Government Act provides for functions of the Governor which include:

“ 30(2)(J) Sign and cause to be published in the county Gazette, notice of all-important formal decisions made by the governor or by the county.”
29. It was therefore submitted that it was mandatory for the Taskforce to be gazetted by the Governor otherwise it is unconstitutional. Reliance was placed on Section 32 of the Public Audit Act which mandates that all the reports must be submitted or be tabled before the 2nd Respondent. Counsel



- submitted that there is no indication that the 1st Respondent wishes to place the report before the 2nd Respondent.
30. It was argued that the w1st Respondent was usurping the supervisory role of the 2nd Respondent. That it is in the public interest that a conservatory order be issued because public funds have been used to pay allowances to the mebers of the Taskforce yet the Report is a replica of the Auditor General's Report.
 31. Opposing the application for conservatory orders and relying on the Replying affidavit of Philip Richard Owade sworn on 19/1/2023, Mr Okanda counsel for the 1st Respondent submitted that the court at this stage is to consider the threshold for grant of conservatory orders not the merits of the petition. He on several authorities filed. To support this first argument, counsel relied on *Kathambi Ruchami & 2 Others v Head of Public Service and 3 Others*, where the court stated that a prima facie case must be established. That the Petitioner must demonstrate that there has been a violation or threatened violation of her rights and that unless the conservatory order is granted, the petition will be rendered nugatory. He cited *Kennedy Omolo Anjejo v CEO NHIF Board and 3 Others* [2022] eKLR at paragraphs 10, 11 and 12 of the decision.
 32. It was submitted that the Petitioner/application had not demonstrated that there is danger or imminent danger of her rights being violated and that neither had she demonstrated that the public interest in this matter is threatened by this court failing to issue the conservatory orders.
 33. Further, that the Report is in the public interest and that the new Governor is simply seeking to understand the state of affairs in Siaya County Government. It was argued that the presentation of the Report to the County Assembly does not violate or threaten to violate the rights of the Petitioner. To the contrary, that to stop the 1st Respondent from submitting the Report to the 2nd Respondent will be violating the constitutional and statutory requirement although the 2nd Respondent can, upon receiving of the report, write and plead subjudice or say that it does not wish to debate the report, and with reasons.
 34. On the contention that the petitioner had not demonstrated that it was in the public interest for this court to grant her conservatory orders, it was submitted that Audit is a process to establish the status of affairs of the County Government and that Article 10 speaks to transparency and accountability. That granting conservatory orders will go against the public interest. Counsel submitted and relied on the case of *CREW & Another v Speaker of the National Assembly* [2017]e KLR paragraph 5 on the purpose of conservatory orders. Further, that no prejudice has been demonstrated if the orders sought are not granted.
 35. It was submitted that the Petitioner admits that the Report is not released yet. and that she had not annexed the interim report hence it would be premature to stop submission of the report to County Assembly, a Report which does not exist.'
 36. On the issue of gazettment, it was submitted that at this stage, this court is not called upon to determine the merits of the petition and that County Gazettes were declared unconstitutional.

Analysis and Determination

37. This court has considered the application, grounds, supporting affidavit, the annextures and the Replying affidavit by the 1st Respondent together with the oral submissions by counsel on record. The issue for determination is whether the application for conservatory orders has merit.
38. To establish the merit thereof, the court must be satisfied that the application meets the threshold for grant of conservatory orders. That threshold is now settled. In *Board of Management of Uburu*



Secondary School v City County Director of Education and 2 Others [2015] eKLR cited in Kathambi Ruchiemi & 2 Others v Head of Public Service and 3 Others, the court stated as follows as the conditions for grant of conservatory orders:

- a. The applicant must demonstrate an arguable prima facie with likelihood of success, and to show that in the absence of the conservatory orders, he/she is likely to suffer prejudice.
 - b. 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;
 - c. Whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.
 - d. Whether the public interest will be served or prejudiced by the decision to exercise discretion to grant or deny a conservatory order.
39. There are more judicial pronouncements on this question of whether or not to grant conservatory orders.
40. In the Law Society of Kenya v Office of the Attorney General & another, Judicial Service Commission (Interested Party) [2020] eKLR, the Court stated that:

“In the instant application and applying the principles, that an Applicant seeking conservatory orders or interim orders is required to satisfy before grant of interim orders; as hi have set them out herein above, I find, that the Applicant has satisfied the aforesaid principles in regard to the granting of interim or conservatory orders. The Applicant has demonstrated an arguable prima facie case with likelihood of success and shown in absence of the conservatory orders he/she is likely to suffer prejudice; the Applicant has further met the second principle that grant or denial of conservatory relief will enhance the Constitutional values and objectives of a specific right or freedom in the Bill of Rights; thirdly the Applicant has demonstrated, if interim orders or conservatory orders are not granted, the Petition or its substratum will be rendered nugatory and finally has demonstrated that public interest will be prejudiced by a decision not to grant conservatory orders.”

41. In David Ndi & others v Attorney General & others [2021 eKLR, the learned Judges in granting Conservatory Orders held that:

“... Such orders are granted to preserve the substratum of the Petition and therefore, where it is contended that there is a threat of violation of the Constitution, any stage in the chain of a constitutional process under challenge may properly be the subject of a conservatory order as long as that action is consequential to the process under challenge...”

42. Lenaola J, (as he then was) in Wilson Kaberia Nkunja v Magistrates and Judges Vetting Board & another [2016] eKLR summarized the main principles for grant of conservatory orders as follows:

“It therefore follows that an applicant must satisfy three key principles in order to make out a case for the grant of conservatory orders that is:-

- 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 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.”
43. In *Center for Rights Education and Awareness (CREAW) & Another v Speaker of the National Assembly & 2 others* (2017) eKLR, the Court was emphatic that:
- “A party who moves the court seeking conservatory orders must show to the satisfaction of the Court his or her rights are under threat of violation; are being violated or will be violated and that such violation or threatened violation is likely to continue unless a conservatory order is granted. This is because the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedom and preserve the subject matter pending the hearing and determination of a pending case or Petition.”
44. Additionally, the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, Supreme Court Application No. 5 of 2014 3 Court stated:
- “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.”
45. In *Progress Welfare Association of Malindi & 3 others v County Government of Malindi & 4 others* Petition E 2 of 2020, the Court dismissed the application for conservatory orders as the applicants failed to aver and prove that “they were facing imminent and actual danger, and that they will suffer as a result of the violation of the *Constitution*. The Court emphasized that the applicant must show that the probability as opposed to mere possibility of the danger occurring is real and imminent.”
46. The question is whether the petitioner/applicant has satisfied the above conditions which are now well established.
47. Having considered the application and opposition thereto as argued, it is clear that the impugned Taskforce is already in place and it has already undertaken its mandate as per the terms of Reference and what is pending is submission of the Report to its creator, the 1st Respondent. That being the case, the prayer for suspension of the Taskforce is not viable as the taskforce has concluded its work and even submitted an interim Report on December 29, 2022 as pleaded by the petitioner.
48. Secondly, it has not been demonstrated at this stage to the satisfaction of this court that the Auditor General, the Internal Audit Committee for the County are the only bodies that have the sole mandate of questioning actions or deeds of the past leadership of the County Government.
49. Thirdly, it has not been demonstrated that the Petitioners’ rights are violated or are threatened to be violated if the conservatory orders are declined as the allegations of use of public funds is a spent issue as public funds have already been spent and therefore it is not correct to state that the Petition shall be rendered nugatory if the conservatory orders are not granted, or that public funds shall be expended for a process that is unconstitutional.
50. In addition, the Petitioner has not demonstrated what prejudice she will suffer if the conservatory order is declared and the Report is handed over to the 1st Respondent who, before implementing the



- recommendations contained in the report, must first table the recommendations before the second Respondent for debate consideration and as to what mechanisms will be put in place to implement the recommendations must accord with the law.
51. Although the 2nd Respondent County Assembly supported the application, it remains the Respondent and it was not demonstrated to the satisfaction of this court that the Taskforce Report usurps its oversight Role as there are mechanisms in law and policy for implementation of Taskforce Reports which it has not demonstrated to the satisfaction of this court at this stage that the 1st Respondent has violated.
52. On whether the 2nd Respondent should be prevented from receiving the Taskforce report, I find that it has not been demonstrated that it is unconstitutional or contrary to any law for the 1st Respondent to submit the Report to the County Assembly for debate or discussion and further, it has not been established as to how that submission or intended debate of the said report will be in violation of the Petitioner's rights or render the petition nugatory as the court will still hear and determine the alleged unconstitutionality of the establishment of the Taskforce and the product thereof being the Report as released to the 1st Respondent.
53. It is not lost to this court that the petitioner can still challenge the recommendations and or the implementation of the recommendations contained in the said Report. This is because should the Court find that the Taskforce has no legal standing, having accomplished its work, or that it had no legal mandate to act as it did, there is no demonstration that this court cannot quash the report or specific recommendations contained in the report.
54. This court has not been shown any harm that cannot be undone if the court declines to issue conservatory orders and later finds that the Taskforce was unlawfully established. There are remedies available in law where courts have found that entities are illegally established.
55. On whether public interest lies in granting the orders sought by the Petitioner/ Applicant. *Black's Law Dictionary*, defines "public interest" as:
"The general welfare of the public that warrants recognition and protection; or something in which the public as a whole has a stake especially an interest that justifies governmental regulation."
56. In *Gatirau Peter Munya v Dickson Mwenda Kitbinji and 2 others*, Petition No 2 of 2014 (eKLR) 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."
57. As was held in *Progress Welfare Association of Malindi & 3 others vs County Government of Malindi & 4 others* Petition E 2 of 2020, the applicant must aver and prove that they are facing imminent and actual danger, and that they will suffer as a result of the violation of the *Constitution*. The Court emphasized that the applicant must show that the probability as opposed to mere possibility of the danger occurring is real and imminent.
58. The question is, what imminent danger has been shown that the applicant will suffer if the report is submitted to the 1st respondent and or the 1st respondent submits the said report to the 2nd respondent which oversees the work of the executive? I see none.



59. The Taskforce having expended public funds, it must tell the public and it is in the public interest that that report is made public so that the public may appreciate its contents and how the recommendations affect them. This is because the 1st respondent exercises power donated by the people and is accountable to the people who elected him into office. Whatever actions he takes must be in the public interest and not for self-edification.
60. There is also no evidence of violation or threatened violation of the rights of the Petitioner or her being prejudiced by the submission of the report to the 1st respondent or to the 2nd respondent.
61. As earlier stated, the petitioner will have the opportunity to demonstrate to court the alleged unconstitutionality of the Taskforce at the main hearing of the main petition. I therefore find that it has not been demonstrated that unless the conservatory orders sought are granted, then the petition will be rendered nugatory.
62. In the end, I find that the application for conservatory orders is not merited at this stage. The application for conservatory orders is hereby dismissed.
63. Each party to bear their own costs.
64. The court to give directions forthwith on the disposal of the main Petition.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 19TH DAY OF JANUARY, 2023

R.E. ABURILI

JUDGE

