



Imani Contactor and General Supplies Limited & 12 others v County Government of Nyandarua & another (Constitutional Petition 3 of 2023) [2023] KEHC 26709 (KLR) (20 December 2023) (Ruling)

Neutral citation: [2023] KEHC 26709 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CONSTITUTIONAL PETITION 3 OF 2023
CM KARIUKI, J
DECEMBER 20, 2023
IN THE MATTER OF ARTICLES
1,2,3,10,20,21,22,23,27,35,48,73,159,165,174,185,196,118,209, AND 258 OF THE
CONSTITUTION OF KENYA
AND
IN THE MATTER OF SECTIONS 3,87,104 AND 115 OF THE COUNTY
GOVERNMENT ACT
AND
IN THE MATTER OF CODES
1000,1001,1002,1003,1004,1005,1006,1007,1008,1009,1010 AND 1256 OF THE
NYANDARUA COUNTY FINANCE ACT**

**BETWEEN
IMANI CONTACTOR AND GENERAL SUPPLIES LIMITED & 12
OTHERS PETITIONER
AND
THE COUNTY GOVERNMENT OF NYANDARUA 1ST RESPONDENT
THE COUNTY ASSEMBLY OF NYANDARUA 2ND RESPONDENT**

RULING

1. Before the Court is an application dated 28 March 2023 by the Respondents seeking orders that:-
 - I. Spent.



- II. That pending the hearing and determination of this application inter-partes, the Court be pleased to issue an interim conservatory order suspending the enforcement and or implementation of the Nyandarua Finance Act and, in particular, Code 1000-1010 and Code 1256, including but not limited to collecting the newly introduced cess fees and levies purportedly increased in the legislation mentioned above for all quarry products within and outside Nyandarua county.
 - III. That pending the hearing and determination of this Petition, the Court be pleased to issue an interim conservatory order suspending the enforcement and or implementation of the Nyandarua Finance Act and, in particular, Code 1000 -1010 and Code 1256, including but not limited to collecting the newly introduced cess fees and levies purportedly increased in the legislation as mentioned earlier for all quarry products within and outside Nyandarua county.
2. The 1st and 2nd Respondent filed their replying affidavit dated 4 April 2023 and 24 April 2023, respectively, opposing the application. Furthermore, the Petitioners filed a supplementary affidavit dated 27 May 2023 and written submissions dated 29 May 2023. On the other hand, the 1st and 2nd Respondents filed written submissions dated
 3. The Petitioners submitted that the Respondents, through the Nyandarua County Finance Act 2023, the Impugned Act herein introduced and or increased new cess fees and levies under Code 1000-1010 and 1256 of the Impugned Act concerning quarry businesses. They asserted that there was no public participation and consultation in coming up with the Impugned Act. The Respondents have continued to issue demand notices for the implementation of the illegal and unconstitutional levies without adequate knowledge of the number of stones sold, and instead, their calculations are based on assumptions and guesswork.
 4. It was averred that the illegal increment has negatively affected quarry business within Nyandarua County as the Respondents failed to consider the prevailing harsh economic conditions and the adverse effects of Covid 19 pandemic and the just concluded elections. Their actions violate the principles of constitutionalism and the rule of law; if allowed to stand, the actions will occasion great injustice to the quarry business community at large. They stated that the Respondents acted contrary to the law with impunity to impose the illegal fees against the constitutional requirement of public participation being the fulcrum of decision-making, governance, and the constitutional and statutory right to access information.
 5. Contrarily, the 2nd Respondent submitted that Finance Bill, 2022 was published on 12 October 2022, read for the first time on 25 October 2022, and committed to the sectoral committee on Finance, Economics, Planning, and ICT on 5 December 2022. The committee was tasked with coming up with appropriate revenue-raising measures for the county government, and as such, there was a proposal on all the sectors that had been omitted or neglected before and others that needed to be revised either upwards or downwards to cater for the county and the business thereof.
 6. According to Article 196 of *the Constitution* of Kenya and Standing Order No. 126 (3) of the Nyandarua County Assembly Standing Orders, the Clerk of the County Assembly invited members of the public and relevant stakeholders to the public participation exercise that was conducted by the committee between 14 November 2022 and 18 November 2022. The schedule for public participation (on the sub-county level) and the proposed bill were uploaded onto the Nyandarua County Assembly Website and advertised on print media. Despite the placement of the advert in print media and the request for comments on the bill from the members of the public and relevant stakeholders, the committee did not receive any memoranda in support or otherwise.



7. The 2nd Respondent asserted that the Impugned Act was enacted with notable changes per the public participation exercise. However, the Petitioners herein did not participate in the exercise and brought the Petition to Court, citing illegally and accusing the Respondents of failing to perform a public participation exercise and thus failing to consider their views.

Issues Analysis and Determination

8. The issues that arise for determination in the application herein include the Petitioners have established entitlement to reliefs; That pending the hearing and determination of this application inter-partes, the Court be pleased to issue an interim conservatory order suspending the enforcement and or implementation of the Nyandarua Finance Act and, in particular, Code 1000-1010 and Code 1256, including but not limited to collecting the newly introduced cess fees and levies purportedly increased in the legislation above for all quarry products within and outside Nyandarua county. That pending the hearing and determination of this Petition, the Court be pleased to issue an interim conservatory order suspending the enforcement and or implementation of the Nyandarua Finance Act and, in particular, Code 1000 -1010 and Code 1256, including but not limited to collecting the newly introduced cess fees and levies purportedly increased in the legislation above for all quarry products within and outside Nyandarua county.
9. Conservatory orders aim to preserve the substratum of the matter pending the determination of the main issues in dispute. Given the interlocutory nature of conservatory orders, it is argued that there is a need for a Court to exercise caution when dealing with any request for such prayers. In *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others [2014]* eKLR, the Supreme Court discussed, in paragraph 86, the nature of conservatory orders as follows: - [86] "Conservatory orders" bear a more decided public-law connotation, for these are orders to facilitate ordered functioning within public agencies and 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.
10. The Court in Nairobi Civil Appeal 151 of 2011 *Invesco Assurance Co. Ltd vs. MW (Minor suing thro' next friend and mother (HW) [2016]* eKLR defined a conservatory order as follows: -

A conservatory order is a judicial remedy granted by the Court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of *status quo* to preserve the subject matter.
11. (See also *Judicial Service Commission vs. Speaker of the National Assembly & Another [2013]* eKLR)
12. the principles for consideration by a Court in exercising its discretion on whether to grant conservatory orders have been developed by Courts over time. They are now well settled.
13. The locus classicus on the principles for consideration by a Court in exercising its discretion on whether to grant conservatory orders is the Supreme Court decision in *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others [supra]*, where the Court stated as follows: -

“..... 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.”



14. In *Board of Management of Uburu Secondary School vs. City County Director of Education & 2 Others [2015]* eKLR, the Court summarized the principles for grant of conservatory orders as: -
- i. The Applicant must demonstrate an arguable prima facie case with a likelihood of success and 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 the Petition or its substratum will be rendered nugatory if an interim conservatory order is not granted.
 - iv. Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.
15. Accordingly, the Petitioners must demonstrate that they have established a prima facie case with a likelihood of success. In the case of *Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General [2011]* eKLR, it was held that:
- “It is important to point out that the arguments that counsel advanced and that I will take into account in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the Petitioner’s Application and not the Petition. I will not, therefore, delve into a detailed analysis of facts and law. At this stage, a party seeking a conservatory order is only required to 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*.”
16. (See also *Godfrey Mutahi Ngunyi –v- The Director of Public Prosecution & 4 Others NBI HCCP No. 428 of 2015* and also *Muslims for Human Rights and Others –v- Attorney General & Others HCCP No. 7 of 2011*.)
17. In deciding whether the Petitioners have made a case for the grant of conservatory orders as prayed, the Court is tasked with remaining cognizant of the allure of delving into and determining the substantive issues raised in the Petition. There is a need for a Court to exercise caution when dealing with any request for such prayers. I agree with that proposition for the reason that matters which are the preserve of the primary Petition ought not to be dealt with finality at the interlocutory stage.
18. In *Muslim for Human Rights & 2 Others vs Attorney General & 2 Others [2011]* eKLR, the Court correctly stated as follows: -
- The Court must be careful not to reach a conclusion and make final findings. By the time the application is decided, all the parties must still have the ability and flexibility to prosecute their cases or present their defenses without prejudice. There must be no conclusive or finality arising that will or may operate adversely vis-a-vis the case of either party. The principle is similar to temporary or interlocutory injunctive in civil matters. This is a cardinal principle and happily makes my functions and work here much easier despite walking a tight legal rope that I could quickly lose balance with the slightest slip due to any laxity or being carried away by the passion or zeal of persuasion of any one side.
19. The Petitioners submitted that they have a prima facie case because the actions by the Respondents are unlawful and unconstitutional and disregard the rule of law. The Petitioners are on the verge of losing their businesses as a result of the actions of the Respondents, who failed to engage them by



way of public participation before passing the Impugned Act. Further, the Petitioner stated that the Respondents introduced new fees, i.e., Code 1000-1010 in the Impugned Act, that had not been provided for under the Nyandarua County Finance Bill, 2022.

20. It was stated that the Respondent's new cess fees regarding transportation of quarry products under code 1256 amount to tax and royalties payable to the National Government under the Mineral Act, 2016, and levying of taxes or charges on natural resources and minerals. Accordingly, code 1256 also introduced the head transport of building stones in and out of the county of Kshs. 3/- per piece of quarry stone extracted was not provided for under the Nyandarua County Finance Bill, 2022, but appears in the Impugned Act.
21. On the other hand, the 2nd Respondent asserted that the Petitioner's application is marred by falsehoods that seek to play on the Court's sympathy and discretion, omitting the fact that the Petitioners are the ones who failed to take any initiative and failed to utilize the opportunity afforded to the ones who failed to take any initiative and failed to utilize the opportunity afforded to them by the Respondents. The Petitioners have not proven the illegality of the process, nor have they shown the Respondents' failures. Further, they asserted that the county undertook all its processes legally and under *the Constitution* and laws of the land.
22. In determining whether a matter disclosed a prima facie case, the Court has to look at the case as a whole. It has to weigh, albeit preliminarily, the pleadings, the factual basis, the respective parties' positions, the remedies sought, and the law. A constitutional court was guided by Articles 22(1) and 258(1) of *the Constitution*, which provisions were on the right to institute court proceedings whenever a right or fundamental freedom in the Bill of Rights had been denied, violated, or infringed, or was threatened or the when *the Constitution* had been contravened or was threatened with contravention.
23. The Petitioners' central argument is on the issue of whether there was adequate public participation as per *the Constitution's* requirements surrounding the enactment and enforcement of the Impugned Act. The fees introduced regarding cess and levies concerning quarry stone dealers were also questioned. The Petitioners asserted that contrary to the Respondent's assertion, an opportunity had been availed to send in their views. However, they did not receive any memoranda, there were discrepancies on when these adverts and/or notices were issued, and the information in the alleged adverts and the schedules of the public participation exercises was also disputed by the Petitioner.
24. In my view, the argument asserted by the Petitioner is arguable and presents a serious question to be heard and determined in the main hearing, although the same does not reflect the Court's position on the final disposition of the Petition.
25. Secondly, the Petitioner asserted that they have continued to pay their taxes at Kshs. 80,500/- without knowledge that the new tax reduction to Kshs. 50,000/-. They only realized after there were new transportation fees following the demand notices from the Respondents of the increased fees without the Petitioners being involved in passing the Impugned Act. They asserted that the Nyandarua County Government, whereas as per Article 209 of *the Constitution*, the taxpayer is not gaining from the new charge imposed without their public participation.
26. The Petitioner has not demonstrated that irremediable injury could occur without the Conservatory orders. I am not convinced that the Petitioner will suffer irreparable harm if the orders sought are not granted because should their Petition succeed, it is my opinion that the county government is capable of adequately compensating them through a refund of a quantifiable amount by the RespondentS and any other remedies available before this Court.



27. Furthermore, the orders sought to touch on the delicate issue of county finances, which dictate the operations of the County Government of Nyandarua and its ability to serve the people of Nyandarua; thus, it would be presumptuous for the Court to suspend these operations without having had the full benefit of the substantive arguments of the parties. In granting conservatory orders, the Court must also consider the principle of proportionality. I agree with Ojwang, AJ (as he then was) in *Suleiman vs. Amboseli Resort Limited* [2004] 2 KLR 589, where the Court stated that in responding to prayers, one should always opt for the lower rather than the higher risk of injustice. The learned Judge expressed himself as follows:

"...Although the Court cannot say that the Applicant has a prima facie case with a probability of success, the Court is quite convinced that it will cause the Applicant irreparable harm if his prayers for injunctive relief are not granted. In these circumstances, the balance of convenience lies in favor of the Applicant rather than the Respondent. There would be a much larger risk of injustice if the Court found in favor of the defendant than if it determined this application in favor of the Applicant."

28. Consequently, and as I have previously held, it is my view that it is in the broader interests of justice to avoid a situation where Nyandarua County Government operations are paralyzed, in turn affecting Nyandarua County residents by lack of funding from revenue collection if the conservatory orders are issued. There are critical county functions that cannot run without funding, and the withholding of the funds will cripple them, which is against public interest. I believe that public interest discourages the suspension of the Impugned Act since, should the Petitioners succeed, the 1st Respondent may be directed to refund whatever shall have been collected.

29. The upshot is that the Court makes the orders;

- i. The application is without merits, and therefore, it is dismissed.
- ii. The costs of the application shall be abide by the outcome of the Petition.

DATED, SIGNED, AND DELIVERED AT NYANDARUA THIS 20TH DAY OF DECEMBER 2023

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C KARIUKI

JUDGE

