



REUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CONSTITUTIONAL PETITIONS NO 8 OF 2020

**IN THE MATTER OF ARTICLES, NO 3 (1), 10, 20, 21, 23, 27 (1) & (2), 40(1),
43 (1), 47, 50, 60, 232 (2) & 260 OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF SECTION 4 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF SECTION 70 OF THE KENYA ROADS ACT NO 2 OF 2007

AND

IN THE MATTER OF SECTION 3 OF THE COUNTY GOVERMENTS ACT, 2012

BETWEEN

SCOOPY ENTERPRISES LTD.....PETITIONER

VERSUS

KENYA URBAN ROADS AUTHORITY.....1ST RESPONDENT

COUNTY GOVERNMENT OF KISII.....2ND RESPONDENT

RULING

1. The petitioner herein filed a petition together with a Notice of Motion application dated 17th June 2020 and moves the Court for orders:

- 1. Spent
- 2. Spent
- 3. Spent

4. THAT PENDING the hearing and determination of this Petition, there be conservatory orders restraining and/ or prohibiting the respondents from implementing the decision of “Maximum Load 10 Tonnes limit” restricting and/or outlawing the usage of Rehabilitated Kisii Main Stage – Getare Road to M/ vehicles of over 10 tonnes.

5. THAT in the alternative, PENDING the hearing and determination of this Petition herein, there be conservatory order restraining and/or prohibiting the Respondents, their agents, servants and traffic police officers from arresting drivers of M/vehicles of over 10 tonnes using the Rehabilitated Kisii Main Stage – Getare Road and in particular drivers of M/vehicles delivering goods to the Petitioner’s go downs situate on Plot LR CENTRAL/KITUTU/MWAMOSIOMA/2758 along the Rehabilitated Kisii Main Stage – Getare Road.

2. The petitioner in its supporting affidavit and further affidavit deposed that prior to 2014 the Petitioner's place of business was along Sansora Road but because there was need to expand their business they purchased a portion of parcel of land LR CENTRAL KITUTU/MWAMOSIOMA/352 and upon transfer became the proprietor of LR CENTRAL KITUTU/MWAMOSIOMA/2758. After the registration they obtained the requisite approval and constructed go downs and rental units valued at Kshs 430,000,000/-. The respondents commenced rehabilitation of Kisii Main Stage – Getare Road ('road') without consulting the plaintiff and that during the rehabilitation up to its completion the plaintiff carried on its business without any load limit. It is only in March 2020 that the respondents erected a notice outlawing usage of the road to motor vehicles with over 10 tonnes loads. He averred that in effecting the respondents' caution, the police officers arrested the driver of motor vehicle KCE 644P which had carried products from Bidco Oil Refiners Ltd set to deliver goods at the petitioner's go down and took the vehicle to the police station. The said vehicle was released on 11th June 2020. The petitioner advanced that it will suffer great loss if it or its suppliers are not able to offload goods to its go downs which is along the road. Not only will it lay off its 150 employees, the go downs valued at Kshs 430,000,000/- would be rendered valueless and of little economic value. According to the petitioner the decision to restrict usage of the road for motor vehicles with over 10 tonnes capacity is malicious, unlawful, unconstitutional and un-procedural. The respondent being constitutional and statutory bodies are obliged to discharge their mandate as described in the constitution and statute by following the laid down procedure. According to the petitioner having demonstrated a prima facie case, it is entitled to conservatory orders.

3. The petitioner in its submissions advanced that the only issue for determination is whether they are entitled to conservatory orders. In support of their submissions that they had established a prima facie case with probability of success, they cited **Centre for Rights Education and Awareness and 7 others v the Attorney General and Patrick Musimba v the National Lands Commission & 4 Others (2015) eKLR**. They advanced that if an interim conservatory order is not granted, the petition and its substratum will be rendered nugatory. They also cited the Supreme Court decision in **Gatirau Peter Munya v Dickson Mwendu Githinji & 2 Others (2014) eKLR** where the court observed that a court issuing conservatory orders must do so in the face of the public interest dogma. It was submitted that pursuant to the provisions of Article 22 as read with Articles 258 and 259 confer on the petitioner the right to institute a petition in his private interest whenever there is a violation of his right.

2ND RESPONDENT'S CASE

4. The application was opposed by the 2nd respondent. The County Attorney Kennedy Chweya Onsembe in his replying affidavit averred that the road was initially constructed by Ministry of Local Government's Urban Department as a low volume road but with time it became dilapidated because of usage by the heavy load vehicles. Despite the road being transferred to the 1st respondent, the 2nd respondent received several pleas from the locals and stakeholders that it should rehabilitate the road. After consultations the 2nd respondent stepped in to rehabilitate the road. It was advanced that the maintenance of roads is not subject to public participation and the core mandate of the respondent is to ensure sustainability.

5. It was advanced that the prayers sought are to protect the petitioner's personal interest against the interest of the public which is to ensure that the road is preserved. The durability of the road depends on usage and the caution serves the purpose of protecting the road from preventable damage and enhances its sustainability. He averred that road construction is an expensive venture both for the government and the citizens. It was averred that the petitioner has not satisfied the conditions for conservatory orders and that that the orders sought will have adverse effect on the 2nd respondent's mandate envisioned under Article 174 of the Constitution.

6. The 2nd respondent argued that the court should consider preservation of the road in the interest of the public against the petitioner's individual interest. They cited the case of **Gatirau Peter Munya v Dickson Mwendu Githinji & 2 Others (supra) and Kevin K. Mwiti Others v Kenya School of Law & Others [2015] eKLR**. The 2nd respondent advanced that the application is frivolous and the petitioner has not established a prima facie case and that the application raises no key constitutional questions. They cited the case of **Satrose Ayuma & 11 Others v Registered Trustee of Kenta Railways Staff Benefit Scheme [2011] eKLR** where the court observed that the grant or denial of conservatory relief ought to enhance constitutional values and objects.

ANALYSIS AND DETERMINATION

7. The only issue for consideration is whether the petitioner has established a case for the orders sought. What then must this court consider before it grants conservatory orders? In the case of **Judicial Service Commission vs. Speaker of the National Assembly & Another [2013] eKLR** this Court expressed itself as follows:

“Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore such remedies are remedies in rem as opposed to remedies in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”

8. In the case of **Board of Management of Uhuru Secondary School v City County Director of Education & 2 others [2015] eKLR** where it was stated that:-

“25. Foremost, the applicant ought to demonstrate a prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice....

26. It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The prima facie case ought to be beyond a speculative basis....

28. Once the applicant has established to the court's satisfaction a prima facie case with a likelihood of success the court is then to

decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of the specific right or freedom in the Bill of rights....

29. Thirdly, flowing from the first two principles, is whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. It is indeed the business of the court to ensure and secure so far as possible that any transitional motions before the court do not render nugatory the ultimate end of justice....”

9. The element of public interest must also be considered. In **Gatirau Peter Munya v Dickson Mwenda Kithinji & Others SCOK Application No. 5 of 2014 [2014]eKLR**, the Supreme Court observed that:

“[86] Conservatory orders bear a decided public law commutation for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the courts, 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 case or high probability of success in the applicant’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 cases.”

10. It is not necessary for a prima facie case to succeed at the main hearing, but it should not be frivolous. In this case, the petitioner must show that it has a claim that poses arguable questions, including constitutional issues.

11. Although the applicant has made its case on the need of public participation on the face of the respondent’s failing to adduce evidence of the same, it is my considered view that the petition will be rendered nugatory.

12. It was also not contested that the road had been washed away and with the rehabilitated road both the petitioners and the members of the public are enjoying the same.

13. In the end, I find that the petitioner has failed to establish all grounds for grant of conservatory orders and the notice of motion application dated 17th June 2020 is dismissed. Costs be in the cause.

Dated, Signed and Delivered at KISII this 16th day of APRIL, 2021.

R. E. OUGO

JUDGE

In the presence:

Petitioner Absent

Mr. Ongiti For the 1st & 2nd Respondent

Ms Rael Court Assistant