



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

PETITION NO. 7 OF 2020

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF ARTICLES 1, 2, 3, 4(2), 10, 19, 21, 22, 23, 35, 47, 56, 63, 73, 165, 174, 176, 177, 180, 184, 196, 232, 258, 259 AND 260 OF THE CONSTITUTION

IN THE MATTER OF COUNTY GOVERNMENT ACT, 2012

AND

IN THE MATTER THE URBAN AREAS AND CITIES ACT, 2011

AND

IN THE MATTER OF ESTABLISHMENT OF ELWAK MUNICIPALITY AS PUBLISHED IN THE GAZETTE NOTICE NO. 3540 OF 15/5/2020

AND

IN THE MATTER OF THE RECRUITMENT, ADVERTISING, NOMINATING, VETTING AND APPOINTMENT OF ELWAK MUNICIPALITY BY THE COUNTY GOVERNMENT OF MANDERA

BETWEEN

MUHUMED HASSAN DEISOW.....1ST PETITIONER

ABDI MAHAMUD OSMAN.....2ND PETITIONER

SAID HAJIR SHEIKH.....3RD PETITIONER

AND

THE COUNTY GOVERNOR OF MANDERA.....1ST RESPONDENT

THE COUNTY GOVERNMENT OF MANDERA.....2ND RESPONDENT

THE COUNTY ASSEMBLY OF MANDERA.....3RD RESPONDENT

THE MANDERA COUNTY PUBLIC SERVICE BOARD.....4TH RESPONDENT

RULING

Introduction:

1. The petitioners herein, who describe themselves as the residents of Mandera County filed a petition on 5th June, 2020 before this Court and simultaneously also filed an application by way of Notice of Motion of the same date under certificate of urgency. The Petitioners in

their petition are challenging the Respondents decision intended to convert Elwak into a Municipality, alleging that the Respondent decision was undertaken outside the Law.

2. The Petitioners contend that the 1st Respondent vide a gazette Notice No. 3540 of 15th May, 2020 granted a charter for the establishment of the Municipality of Elwak, which determined the boundaries to be Elwak South Ward and Elwak North Ward of Mandera South Constituency, which they allege does not meet the provisions of section 9(3) of the Urban Areas and Cities Act of 2011, and more specifically the population, which they argue is below the 70,000 people required for a municipality.

3. Additionally, the Petitioners are alleging that Elwak North Ward which has been included as part of Elwak Municipality is not an existing town, but is largely a vast land that is used as a grazing field; thus, it does not meet the provisions of section 9(3) of the Urban Areas and Cities Act.

4. Further, the petitioners contend that the 4th Respondent on 30th May, 2020 put up an advertisement declaring vacancies in the municipality of Elwak, inviting applicants to apply for various positions, an act they contend violates their rights specifically the National values and Principles of governance and specifically Articles 4(2) and 10 of the Constitution, equality and freedom from discrimination as provided for under Article 27, responsibilities of leadership and conduct of state officers and values and principles of public service.

5. Furthermore, the Petitioners also allege that the Respondents did not allow for public participation as provided for under article 174, 196, 221 and 232 of the Constitution and the Urban Areas and Cities Act in their quest to convert Elwak into a Municipality.

6. The Petitioner sought various prayers in their Petition, namely, a declaration that the Kenya Gazette Notice No. 3540 of 15th May, 2020 issued by the 1st Respondent granting charter for the establishment of the municipality of Elwak is unconstitutional, illegal, null and void for all intent and purpose, a declaration that the advertisement by the 4th Respondent dated 30th May, 2020 inviting applicants for various positions in the municipality of Elwak is unconstitutional, illegal, null and void, an order of certiorari to remove to the High Court and quash the Kenya gazette Notice No. 3540 of 15th May, 2020 issued by the 1st Respondent granting a charter for the establishment of the Municipality of Elwak, an Order of Certiorari to remove to the High Court and quash the advertisement by the 4th Respondent dated 30th May, 2020 inviting applicants for various positions in the municipality.

7. In addition, the Petitioners are seeking the following prayers in their application:

1) THAT this application be certified as urgent and be heard ex parte and service thereof be dispensed with in the first instance.

2) THAT pending the hearing and determination of this application, this Honourable Court be pleased to issue a conservatory order staying and or suspending the Kenya Gazette Notice No. 3540 of 15th May, 2020 issued by the 1st Respondent granting a charter for the Establishment of the Municipality of Elwak and the consequential declaration of vacancies in the municipality of Elwak as contained in the advertisement dated 30th May, 2020 by the 4th Respondent.

3) THAT pending the hearing and determination of this petition, this Honourable Court be pleased to issue a conservatory order staying and or suspending the Kenya Gazette Notice No. 3540 of 15th May, 2020 issued by the 1st Respondent granting a charter for the Establishment of the Municipality of Elwak and the consequential declaration of vacancies in the municipality of Elwak as contained in the advertisement dated 30th May, 2020 by the 4th Respondent.

4) THAT this Honourable Court be pleased to allow for the hearing of the petition on a priority basis due to the urgency and the immense public interest of the matter before the court.

5) THAT this Honourable Court be pleased to issue such further or other orders(s) as it may deem just and expedient for the ends of justice.

6) THAT cost of this application be provided for.

8. This court granted interim orders pending the hearing of the application. It directed that the status quo prevailing be maintained.

9. In response to the applicant's petitioners' application, the 1st and 2nd Respondents filed a Notice of motion application on 9th June, 2020 basically seeking orders that this court sets aside, vacate, discharge and/or vary its interim orders issued on 5th June, 2020 pending the hearing and determination of this application and the petition. Additionally, they filed their response vide a replying affidavit and a further affidavit opposing the application and the Petition.

10. The 3rd Respondent also entered appearance and filed a response through a replying affidavit sworn by Hassan Abdulahi Abdikadir opposing the instant application and the petition.

11. The petitioners also filed a response vide a replying affidavit opposing the 1st and 2nd Respondents application.

12. Both parties who had entered appearance filed their respective submissions in respect to the two applications and the matter came up for highlighting of submissions on 11th June, 2020, when Counsels for the Petitioners, the 1st, 2nd and 3rd Respondents highlighted their respective submissions.

Applicants' Case:

13. The summary of the applicants' case is that they allege that they are residents of Mandera County, and that they are challenging the 1st Respondent Gazette Notice dated 15th May, 2020 granting a charter for the establishment of Elwak Municipality. Additionally, they seek this court to stop vide a conservatory order the 4th Respondent from filling vacancies allegedly arising from the said upgrade of Elwak to a municipality, as they had since invited applications for the said position with a deadline of 12th June, 2020.
14. Counsel Mr. Khaemba for the applicants submitted that the court at this stage ought not to go deep into the petition but only to establish as to whether the applicants have a prima facie case with chances of success. He raised various grounds in support of their instant application.
15. The first ground advanced by the applicants is the allegations that the Respondents action establishing Elwak as a municipality was undertaken devoid of public participations, thus infringing Articles 10(2)(b), 174(c) and 196 of the Constitution as well as paragraph 2 of the second Schedule of the Urban Areas and Cities Act.
16. Counsel alleges that the Respondents alleged public participation forum did not meet the legal requirements as the notice produced in support was issued on 20/11/2019 which invited the public to the public participation forum and the forum itself was conducted on 25th and 26th November, 2020.
17. In this regard, they urged the court to take judicial notice of the fact that it takes four days for a newspaper to reach Mandera and Elwak and therefore it cannot be argued that the residents of Mandera were informed of the said public participation forum in time for anyone interested to attend, including the petitioners, who deny being notified and aver that they never attended.
18. Additionally, they contend that the Respondents only produced names and signatures of attendees but not minutes and agenda as well as the views of those who attended. Further, they allege that the said list indicates that it was an attendance of residence of Elwak South and Elwak North County and not the residents of the entire Mandera County.
19. The second ground addressed by Counsel for the Petitioners, is the submission that the Respondents action of elevating Elwak into a Municipality does not meet the requirements set out under section 4A, 8, 9 and 28 of the Urban Areas and Cities Act.
20. In that there was no application by a town committee to the County Executive following a resolution by the town committee, which in this case they allege is non-existent as there is no committee in place for Elwak town, that is Elwak North and Elwak South, in which the intended Elwak Municipality is to cover as per the Respondents intention.
21. Additionally, they contend that the 1st Respondent breached section 4A of the Urban Areas and Cities Act by delineating Elwak Municipal to include Elwak South Ward and North, which they argue is a bushy mass with no urban unit to constitute an urban or peri urban population capable of being conferred a municipality status.
22. Further, the applicants allege that the population of the area referred to as Elwak town has a population of 16,000 people and therefore it does not meet the threshold of 70,000 people provided for under the Urban Areas and Cities Act. They allege that the documents exhibited alleging the existence of elwak town committee is apparently meant to correct the gaps by working in reverse.
23. The third issue addressed by the Petitioners is the allegation that there is no Integrated Development Plan for Elwak Town as envisaged under section 9(3)(b) of the Urban Areas and Cities Act, which is a pre-condition for the conferment of a Municipality status.
24. Counsel submitted that the Integral Development Plan for the area was stayed by Justice Cheroni in ELC JR NO. 1 of 2020 a matter pending before the Garissa ELC Court, which court order stays the implementation of the plan, and submitted that allowing the Respondent to continue with their actions would be tantamount to disobeying the orders therein.
25. The final issue addressed by the applicants in their submissions is the issue of the law in respect to the issuance of conservatory orders. And in this regard they submitted that this court has the power to issue a conservatory order pursuant to Article 23(3) (c) of the Constitution and Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013.
26. It is their submissions that based on the missteps undertaken by the Respondents in establishment of Elwak Municipality above, they urged the court to find that they have established a prima facie case.
27. In this regard they rely in the case of **Raphael Makokha Were vs Governor Bungoma County & 7 others [2019] eKLR** and also the case of **Michael Osundwa Sakwa vs Chief Justice and President of the Supreme Court of Kenya & Another (2016) eKLR**.
28. In addition, the applicants submitted that if this court does not issue the sought conservatory orders, the instant petition would be rendered nugatory as the Respondents have commenced the process of converting Elwak into a Municipality with the 4th Respondent already in the process of filling positions in the municipality. They therefore urged the court to issue the orders in view of the same.
29. Further, they submitted that the court ought to issue the sought conservatory orders as a matter of public interest, as the principle of public interest according to the constitution and the law and does not take refuge in the breach of the law. In this regard they rely in the case of **Gatirau Peter Munya vs Dickson Mwenda Githinji & 2 others [2014] eKLR**.

30. In sum, it is their case that they have established a prima facie case and urged the court to allow their application and issue the sought conservatory Orders.

1nd and 2nd Respondents case:

31. The 1st and 2nd Respondent vehemently opposed the instant application. They filed a replying affidavit in response to the petition and additionally filed an application dated 9th June, 2020 seeking to set aside the interim orders issued herein alleging that the petitioners are guilty of material non-disclosure.

32. The gist of their case is that the 1st and 2nd Respondent duly complied with the Constitution and the law in conferring Elwak town the municipality status, denying the applicants assertions that there was breach of the law.

33. Counsel C. Kamende highlighted the 1st and 2nd Respondents submissions. They identified four issues for determination. The first issue is as to whether there was public participation prior to the conferment of Elwak as a Municipality as contemplated by Article 196(1) of the Constitution.

34. They submitted that there was compliance and that section 87, 91 and 115 of the County Government Act only requires facilitation of reasonable public participation, which in this case was availed as the 1st and 2nd Respondent issued notices to the members of public inviting them to a public participation forum, which was conducted on 25th and 26th November, 2019, where no objection of grant of municipality status to Elwak was raised.

35. In addition, they submitted that the applicants herein are not residents' of Elwak and therefore are not stakeholders, and even if they are, they neglected and or refused to attend the public participation forum as called. In this regard they submit that based on the produced evidence it is apparent that public participation was undertaken.

36. They rely in the cases of **Nairobi Metropolitan PSV SACCOS Union Limited & 25 Others vs County Government of Nairobi & 3 Others [2013] eKLR**, **The Institute of Social Accountability & Another vs The National Assembly & 3 Others (2015) eKLR**, **Diani Business Welfare Association and Others vs County Government of Kwale[2015] eKLR**, **Republic vs County Government of Kiambu Ex-Parte Robert Gakuru & Another(2016) eKLR** and **Raphael Makokha Were vs Governor Bungoma County & 7 others[2019] eKLR**.

37. The second issue addressed by the 1st and 2nd Respondent is on whether they followed the laid down procedures and relevant Laws before gazettment of Elwak Municipality charter.

38. In this regard they submitted that they fully adhered to the law, arguing that they conducted public participation as required, complied with section 9 and 10 of the Urban Areas and Cities Act as the population of Elwak is 84,115 people and therefore past the 70,000 people required, that Elwak has an Integrated Development Plan compliant with the County Development Plan, as the town is the second largest town in Mandera County.

39. Additionally, they submitted that they complied with all the statutory instruments and law including the Mandera Town Act, 2014 and urged the court to find that they acted within the law and dismiss the applicants' assertions. In this they relied in the case of **Daniel Owino vs Secretary, County Public Service Board & 2 Others [2017] eKLR**.

40. The third Issue addressed by the 1st and 2nd Respondent is on whether the Petitioners have established a case to warrant the grant of the reliefs sought in their application dated 5th June, 2020. In this respect they submitted that having established that public participation was conducted, they argued that the application is misplaced and laced with misapprehension of the law and urged the court to dismiss the same.

41. In addition, they submitted that there is no breach of the law and urged the court to refrain from interfering with another arm of Government and instead respect separation of powers. In this regard they rely in the case **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others (2013)** and **Simon Wachira Kagiri vs County Assembly of Nyeri & 2 Others[2013] eKLR**.

42. The final issue addressed by the 1st and 2nd Respondent is on whether they are entitled to the reliefs sought in their application dated 9th June, 2020. In this regard they submitted that they have adequately laid the ground for issuance of the sought reliefs as they have established that public participation was undertaken.

43. That the law on conversion of municipalities was adhered to the letter and that the applicants are guilty of material nondisclosure and therefore the court ought to vacate the interim orders issued herein by allowing their application dated 9th June, 2020.

44. In this they relied in the case **GOTV vs Royal Media Services Limited & 2 others (2015) eKLR** and **Geoffrey Kinja vs Gilbert Kabeerre M'mbijiwe & 2 others (2015) eKLR**.

45. In sum they urged court to dismiss the petitioner's application and instead allow their application dated 9th June, 2020.

3rd Respondent Case:

46. The 3rd Respondent opposed the instant application, and through an affidavit sworn by Hassan Abdullahi Abdikadir the Deputy Clerk,

they averred that the procedure undertaken by the 1st Respondent was in compliance with the Law and the Constitution.

47. It is their case that the 1st Respondent presented a draft municipality charter before it, and the same was tabled on 13th November, 2019 and was committed to the County Assembly Lands, Housing and Physical Planning Committee, which committee pursuant to Article 196 of the Constitution and section 87 of the County Government Act, 2012 conducted public participation on 25th and 26th November, 2019.

48. Where of the members of the public gave their views, and that as a consequence Elwak Town which comprises of Elwak North Ward and Elwak South Ward within Mandera County was established.

49. Additionally, it is their case that the conferment of municipality status to Elwak meets the legal threshold enunciated in the Urban Areas and Municipalities Act as it has a population of 84, 115 people as per the final gazetted results of the 2019 population census.

50. That Elwak town has an integrated development plan, it has demonstrated revenue collection potential and has structural facilities capable of serving a municipality. And as a result a report was placed before it and the approval done by the county assembly of Mandera.

51. Vide their filed submissions and highlighted by Counsel Mr. Somo, the 3rd Respondent adopted the 1st and 2nd Respondents submissions and urged the court at this stage not to interrogate the issue of fact or law conclusively. They identified one issue for determination in this regard, that is as to whether the petitioners' applicants have satisfied the threshold for grant of a conservatory order.

52. They submitted that pursuant to Article 23(3) (c) of the Constitution this court is clothed with the authority to issue a conservatory order vide an application and petition filed under Article 22 of the Constitution. In this regard they rely in the case of **Center for Rights Education and Awareness (CREW) & 7 Others vs Attorney General [2011] eKLR**.

53. In addition, they submitted that the applicants/ petitioners though have argued that there was no public participation undertaken and that there was no integrated plan for Elwak, they seem to have reneged on their position through their affidavit sworn by Muhumed Hassan Deisow and instead attacked the attendances and made reference to an existing court order barring the implementation of the Integrated Plan in Garissa ELC JR No. 1 of 2020.

54. Therefore, indicating that indeed there was some semblance of compliance which is admitted by the petitioners and therefore the orders in place ought to be set aside.

55. Further, they submitted that there is no prejudice that can be occasioned to the applicant's petitioners if the sought conservatory orders are not issued. They rely in the case of **Peter Kyalo vs Alfred Mutua & 6 Others [2018] eKLR**. In sum, they urged the court to vacate the interim orders in place and dismiss the instant application with costs.

Determination:

56. I have carefully considered the parties' pleadings, their respective submissions, and it is clear to me that the main issue for determination at this stage of the proceedings is as to whether this court ought to issue the conservatory or interim orders sought by the applicants herein.

57. However, before determining that, the court is to set things straight on its jurisdiction on the matter. And especially on separation of power as alluded to by the 1st and 2nd respondents counsel. I start by observing that this Court respects the principle of separation of powers that is clearly spelt out in our Constitution.

58. It provides for the separation of powers between the three arms of government by spelling out at Article 1 the respective mandates of the Legislature, the Executive, and the Judiciary.

59. Indeed ordinarily separation of power implies that the Legislature makes the law, the Executive implements them and the Judiciary determines whether, in light of the Constitution and the law, the conduct is lawful or unlawful: See the **Malaysian case of Lob Kooi Choon vs Government of Malaysia 1977 2MLJ 187, [Paragraph 38] and Doctors for Life International vs Speaker of the National Assembly and Others (CCT 12/05) [2006] ZACC 11**.

60. I am in agreement with the reasoning of the learned judges in the above cited authorities. I must reiterate that the Constitution is the supreme law of this land. It states at Article 2 that: (1) This Constitution is the Supreme law of the Republic and binds all persons and all State organs at both levels of government. (2) No person may claim or exercise State authority except as authorized under this Constitution.

61. (3)...(4) Any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.(5) ...127.

62. This position has been reaffirmed over and over by our courts: See **R vs Kenya Roads Board ex Parte John Harun Mwau Petition No 65 of 2011 and Commission for the Implementation of the Constitution v Parliament of Kenya and 5 Others, Petition No. 496 of 2013 among others**.

63. The supremacy of the Constitution has also been acknowledged by courts in other jurisdictions. See **Speaker of the National Assembly vs De Lille & Another 1999 (4) SA 863 (SCA)**.

64. To my mind, the doctrine of separation of powers does not stop this court from examining the acts of the Legislature or the Executive. Under Article 165(3)(d) of the Constitution, the Judiciary is charged with the mandate of interpreting the Constitution;

65. And has the further mandate to determine the constitutionality of acts done under the authority of the Constitution as was held in **Re The Matter of the Interim Independent Electoral Commission Advisory Opinion No. 2 of 2011** in which the Supreme Court expressed itself as follows:

“The effect of the constitution's detailed provision for the rule of law in the process of governance, is that the legality of executive or administrative actions is to be determined by the Courts, which are independent of the executive branch. The essence of separation of powers, in this context, is that the totality of governance powers is shared out among different organs of government, and that these organs play mutually countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation.”

66. I am duly guided by the principles enunciated in the above authorities, and it is clear that the doctrine of separation of powers does not prevent this court from exercising its jurisdiction under Article 165(3)(d).

67. I hasten to add that contrary to submissions of Counsel for Respondents 1 and 2 that in hearing and determining this petition we shall be limiting County government authority on its mandate, it is apparent from the foregoing brief analysis and the doctrine of constitutional supremacy that it is not the Courts which limit county government authority but the Constitution itself.

68. It also sets constitutional limits on the acts of the three arms of government while giving the Court the jurisdiction to interpret the constitutionality of any act said to be done under the authority of the Constitution.

69. It is to be rightfully noted by the Respondents herein, Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, provides that despite any provision to the contrary a judge before whom a petition under rule 4 is presented shall hear and determine an application for conservatory or interim orders.

70. The instant application is basically an application for conservatory or interim order. In this regard the Supreme Court in the case of **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others [2014] eKLR** pronounced itself as follows: -

“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.

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.

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.”

71. Indeed, and as noted by Counsels herein, the Court in considering an application for conservatory or interim orders, is not required to undertake a deep analysis of the law and the facts. This was clearly captured by Musinga, J (as he then was) in the case of **Centre for Rights and Awareness (CREAW) & 7 others vs Attorney General, Nairobi High Court Petition No 16 of 2011** where he stated as follows:-

“It is important to point out that the arguments that were advanced by counsel 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 only requires 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 real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”

72. Taking the above legal positions on the issue of Conservatory Orders, the question therefore is whether the Applicants have met the conditions for the grant of the orders sought. The applicants have advanced several grounds in substantiating their case in support of their instant application. The most notable is the issue of lack of public participation and breach of the laws *to wit* the Constitution and the Urban Areas and Cities Act.

73. On the issue of public participation which is now deeply entrenched in our 2010 Constitution, the applicants are alleging that there was no public participation that was open to the residents of Mandera County to air their views on the elevation of Elwak town into a

municipality.

74. They urged the court to take Judicial Notice of the fact that the notice produced by the Respondents evidencing public participation indicates that the said notice for the alleged public participation forum was issued on 20th November, 2019.

75. The alleged public participation forum was held on 25th and 26th November, 2019, a period of 5 days a part, yet it actually takes almost 4 days for a newspaper to get to Mandera County, and therefore implying that the residents of Mandera County were not duly informed or availed a proper opportunity to air their views.

76. In **Nairobi Metropolitan PSV SACCOS Union Limited & 25 Others vs County Government of Nairobi & 3 Others** (supra) **Lenaola J** in this regard stated as follows:-

“The essence of the duty for the public to participate in legislative process is to my mind an aspect of the right to political participation in the affairs of the State. In this aspect, the Constitutional Court of South Africa in the case of Doctors for Life International v The Speaker National Assembly (supra) explained the importance of public participation as follows;

“The international law right to political participation encompasses a general right to participate in the conduct of public affairs and a more specific right to vote and or be elected into public office. The general right to participate in the conduct of public affairs includes engaging in public debate and dialogue with elected representatives at public hearings. But that is not all, it includes the duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to air their view.”

77. Consequently, the individual members of the public have a general right to participate in the conduct of public affairs, which includes engaging in public debate and dialogue at public hearings and forums and it is the duty of those responsible and holding public offices to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to air their views.

78. **Odunga, J** in the case of **Robert N. Gakuru & Others vs Governor Kiambu County & 3 Others [2014] eKLR** in defining what public participation entails expressed the following opinion:

“In my view, public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purpose of fulfillment of the Constitutional dictates. It is my view that it behooves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply “tweet” messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many forum as possible such as churches, mosques, temples, public barazas, national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action.”

79. **Lenaola J** as he was then, in Nairobi **METROPOLITAN PSV SACCOS UNION LIMITED & 25 OTHERS VS. COUNTY OF NAIROBI GOVERNMENT & 3 OTHERS (2013) eKLR** also opined on public participation that, ***“...it does not matter how the public participation was effected. What is needed, in my view, is that the public was accorded some reasonable level of participation and I must therefore agree with the sentiments of Sachs J in Minister of Health v New Clicks South Africa (PTY) Ltd (supra) where he expressed himself as follows;***

“The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case?”

80. In this case the applicants contend that no public participation was undertaken, something which this court will be able to wholly interrogate during the hearing of the petition. The court specifically will look into 5 days’ notice issued via local daily, the scope of the invitees and the circumstances of the case, and therefore at this stage it is this court’s view that, an arguable issue is manifest that establishes a prima facie case for the petitioners’ case on public participation.

81. In regard to the alleged breach of the law and more specifically the relevant sections of the Urban Areas and Cities Act, the applicants contend that the respondents actions herein are in breach of section 8 and 9 of the Urban Areas and Cities Act, as the population of Elwak town is below the 70,000 minimum provided for .

82. And that the figure of 84,115 flouted by the respondents is actually for a wider area which covers vast lands used as a grassland, that is Elwak South Ward and Elwak North Wards, and that the actual population of Elwak town is 16,000 as per the gazette 2019 census results.

83. The county secretary Abdinur Maalim Hussein in his further affidavit sworn on 11.6.020 annexes 2 documents namely what he calls strategic integrated plan of Elwak Town AMH2 on page 2 para 2 shows the towns area is 91km squared and covers 13% (51 km) squared of Elwak south ward and 10% (40km squared) Elwak north ward.

84. On page 24 it indicates that the whole Elwak area in 2009 had population of 41,009 and was projected to be 62,865 in 2020. In affidavit of the Deputy clerk of 2nd respondent sworn on 9.6.20 ANNEXURE HAA 3 KP n HC dated December 2019 indicates that the whole Elwak area population was 84,115 and the entire Mandera central population was 157,220.

85. On the breakdown of the same, it was as follows; Elwak Town 26,681 then it is repeated after Dawder and El-Adi as Elwak town now with population of 16,166.

86. Then Elwak south ward population is stated as 36,188 and for the Elwak north ward is also 36,188. The total population of the 2 wards is 72,376. It would therefore appear that the town which is 23 % of the 2 wards and lying within the 2 wards would be having larger population than the 2 wards if we go by the respondent's arguments that the Elwak town population is 84,115.

87. The figures in this uncertified photocopy of a document are not adding up. It creates an impression that the document may not be genuine or the respondents are deliberately misleading the court or both. Where is the threshold population of 70,000 for Elwak town?

88. A *prima facie* case as has been held in various decisions is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, an applicant has to show that he or she has a case which discloses arguable issues and in a case alleging violation of rights, arguable constitutional issues.

89. The contention in this case is that the decision or action taken by the Respondent flies in the face of the constitutional provisions in particular articles 4, 10, 174, 196, 221 and 232 of the Constitution and the Urban Areas and Cities Act.

90. In view of the above, it is apparent to this court that the instant petition discloses *prima facie* arguable issues for trial. The Petitioners applicants' issues as raised are plausible and therefore their petition cannot be said to be wholly frivolous or unarguable.

91. The next issue for me to consider at this stage is as to whether the Applicant have satisfied the provisions of Article 23(3)(c) of the Constitution.

92. As was held in **Centre for Rights Education and Awareness (CREAW) & 7 Others (supra)** a party seeking a conservatory or interim order only requires to demonstrate 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.

93. However, this must be weighed against the public interest. The 1st and 2nd Respondent Counsel argued against the aspect of the petition being nugatory urging the court to disallow the application.

94. The applicants are arguing that if this court does not issue the said conservatory orders the petition would be rendered nugatory as the respondents have begun the process of implementation of the municipality charter for Elwak town and more notably that they are in the process of filling position for Elwak Municipality vide an advert which was calling for application with a deadline of 12th April, 2020.

95. Therefore weighing the above against the public interest, which is paramount as captured by the Supreme Court in **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others** (supra), it is apparent to me that in view of the circumstances in this case, the best case scenario is to issue the sought conservatory /interim orders as it would be more destructive to allow the Respondents to proceed and implement the municipality charter for Elwak only for the petition to succeed and cause the nullification of the entire process occasioning more wastage of public funds.

Conclusion:

96. In view of the foregoing it is my considered view that the applicants have established a *prima facie* case warranting this court to hold that the motion seeking conservatory/interim orders has merit. However, the court will issue orders for a limited period to enable expeditious hearing of the case without occasioning hardships or prejudice to any of the parties.

97. Thus court makes the following orders;

i) Interim order staying and or suspending the Kenya Gazette Notice No. 3540 of 15th May, 2020 issued by the 1st Respondent granting a charter for the Establishment of the Municipality of Elwak be and is hereby issued to remain in force for 45 days from the date of this ruling.

ii) The petition to be heard and determined before the lapse of the aforesaid orders in (i) above.

iii) Costs in the main cause.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 19TH DAY OF JUNE, 2020.

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C. KARIUKI

JUDGE