REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CONSTITUTIONAL PETITION NO. E2 OF 2020

PROGRESS WELFARE ASSOCIATION OF MALINDI &

3 OTHERS..PETITIONERS

VERSUS

COUNTY GOVERNMENT OF KILIFI

& 4 OTHERS...RESPONDENTS

CORAM: Hon. Justice R. Nyakundi

Ole Kina and Atiang Advocates for the petitioners

Munyao, Muthama & Kashindi Advocates for the respondents

RULING

The petitioners herein filed a petition together with a notice of motion application dated 02.09.2020 and later amended on 28.09.2020 and filed on 09.10.2020. Their application moved the Court for orders:

(i). Spent

(ii). Pending the hearing and determination of this application, this Court be pleased to issue a conservatory order against the respondents by way of staying the performance and project works as captured under bill nos. 5, 8, 11,12,14,15 and 16 of the addendum tender document of tender number KCG/MM/791257-1/2019/2020 of the Barclays/Mtangani Road Section between A7 (Barclays) to Paradise Hotel within Malindi Municipality or in any manner continuing with the construction of the project.

(iii). Pending the hearing and determination of this application, this Court be pleased to issue a conservatory order against the respondents by way of staying the performance and project works as captured under bill nos. 5, 8, 11, 12, 14, 15 and 16 of the addendum tender document of tender number KC/MM/791257-1/2019/2020 of the Barclays/Mtangani Road Section between A7 (Barclays) to Paradise Hotel within Malindi Municipality or in any manner continuing with the construction of the project.

(iv). That costs of this application be in the cause.

The application was grounded upon the grounds espoused therein and by the sworn affidavit of **Katherine Mwikali alias Kate Mwikali** dated 28.09.2020. The respondents response was by way of an affidavit sworn by **Moses Gunda Munga** dated 06.10.2020. On 15.10.2020, the petitioners filed a further affidavit sworn by **Katherine Mwikali alias Kate Mwikali** in reply to the affidavit by the respondents.

The crux of the matter is that the 1st respondent failed to carry out enough public participation before deciding to upgrade the Barclays/Mtangani road to bitumen standards instead of cabro finish.

The application was certified urgent and when the matter came up for interparty hearing the Court directed the respondents to not finish the bitumen works as that would render the petition nugatory.

The petitioners' case

The petitioners herein describe themselves as stakeholder organizations of the People of Malindi established under the Society's Act Cap 108 Laws of Kenya with registered offices in Malindi Municipality, a body corporate with perpetual succession and with power to sue and be

sued in their corporate name. The 1st respondent (hereinafter referred to as "the County Government") is established under Article 176 of the Constitution and is among the 47 County Governments in Kenya. The 2nd respondent is appointed under Section 35 of the County Government Act 2012. The 3rd and 4th respondents are established under Section 13,14 and 28. The petitioners' allege that they became aware of the decision by the respondents to upgrade the Absa/Mtanagani road, which road was to have a cabro finish. They allege that they were surprised to learn of a decision made by the respondents to change the finish of the road to bitumen. They are aggrieved by the failure of the respondents to observe the provisions of Article 10,35,184, 184, 187, 201 and 232 of the Constitution of Kenya 2010, Section 87, 104 and 115 of the County Government's Act 2012. They allege that the respondents have contravened Sections 11 (b), (c), (d) and (e), 12, 13, 14, 20, 21, 22 and 24 of the Urban Areas and Cities Act, No. 13 of 2011 Laws of Kenya.

The petitioners allege that when the 1st respondent sought to have the subject road upgraded, the 4th respondent initiated a procurement of a tender for upgrading to cabro standards on 25.03.2020. However, when the tender was floated the road finish had changed from cabro to bitumen standards. They further allege that in a meeting convened by the 3rd respondent, held on 17.04.2020 it was resolved that the previous tender be cancelled and be re-advertised and changed from bitumen to cabro standards which was never done.

Submissions

In his submissions dated 21.10.2020 and filed on an even date, **Mr. Ole Kina advocate** for the petitioners submitted that the whole process leading to the procurement, award of the tender to the 5th respondent and the implementation of the impugned decision to change the finish from cabro to bitumen standards was done without public participation in violation of the provisions of Article 10, 35, 184, 187, 201 and 232 of the Constitution of Kenya 2010, Sections 87, 104 and 115 of the County Government's Act 2012. They further submitted that the decision by the 1st respondent to upstage the 3rd and 4th respondents by revising the implementation of a previously delegated responsibility violates Part III of the Urban Areas and Cities Act No. 13 of 2011 in particular Sections 11 (1) b, c, d, and e, 12, 13, 14, 20, 21, 22 and 24 and contravenes paragraph 1 and 2 of the Second Schedule of the Urban Areas and Cities Act No. 13 of 2011 Laws of Kenya.

They further submitted that the respondents violated Article 35 of the Constitution when they failed to provide information on the contract and on the bills of quantities and as a result it was impossible for the petitioners to know whether they are being shortchanged on the project also making it impossible to supervise the said project. They argue that failure by the 3rd and 4th respondent's failure to provide the sought information including minutes of the 3rd respondent approving the construction of the road, the correspondence between the respondents leading to the issue of the tender, as well as the approval, which are essential for the determination of the transparency of the process, was unlawful. They submitted that the values and principles of public service a state organ once required to provide information requested for and that the respondents have no valid reason for not releasing the information.

They submitted that once the Court is satisfied that a primafacie case has been established then it is entitled to issue conservatory orders. They submitted that the application and petition had been brought in public interest. They further submit that the tender was floated without public participation thus illegal, and that there was consensus at the board level that there was indeed no public participation on the decision to change the finish from cabro to bitumen, that from the three engineers only one alluded to the bitumen finish, and it was the decision of the 3rd respondent that the tender be recalled and the road be finished to cabro standards. Further they submitted that on the cost overruns raised by the respondents were answered in the zoom platform meeting held on 17.04.2020 that showed it would be better value for money in the long run if the road was finished with cabro instead of bitumen as it would be easier to maintain, and any additional cost would be a direct result of the failure by the 1st respondent to follow the Law when implementing the project.

They submitted that the notion that the 3rd respondent as the representative of the people of Malindi was involved in the approval of the bitumen finish and as such there was no need for further public participation is flawed and does not make up for the lack of public participation. Consequently, they argue that it was a valid issue for further investigations by the Court. They submitted that Section 22 of the Urban and Cities Act read together with the second schedule required the 3rd respondent to engage the citizenry on proposed development plans and as such they must show that they indeed involved the residents in the decision making process. They further submit that it is not enough to say that they held two meetings with the people and responded to letters as the responses only stated that they had changed the road finish from cabro finish to bitumen.

They further submitted that once the 1st respondent delegates a function to the 3rd respondent it is unlawful for the 1st respondent to purport to interfere with the said function. For these submissions the petitioners relied on the cases of: **Mui Coal Basin Local Community & 15 others v Permanent Secretary of Energy & 17 others {2015} eKLR, Petition 278 of 2011 Nairobi Law Monthly Limited v Kenya Electricity Generating Company {eKLR}, Simeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others {2018} eKLR and Diani Business Welfare Association & others v County Government of Kwale {2015} eKLR.**

The respondents' case

The respondents opposed the grant of the orders sought and argue that the action is fatally defective and that there was public participation in the decision to develop the road and they argue that once it had been ascertained that the road was to be upgraded the nature of how it was to be done was left to the technical experts employed by the respondents.

They stated that the idea upgrading the subject road was born when the citizenry petitioned the county government to upgrade the road by tarmacking for ease of accessibility as it was in deplorable condition. They allege that the same was placed before the Malindi Municipal Annual Investment Plan Budget and the Malindi Municipal Board for consideration. The proposal also received overwhelming support from the public and thereafter was adopted by the Municipal Board. They further allege that it was the residents who petitioned for the road to be upgraded by tarmacking (bitumen) as such there was no legal or practical need to subject the technical specifications of how the road was to be upgraded to public participation.

They argue that the project was implemented based on a report of the resident registered engineer who gave a more favourable view of the

bitumen upgrade as opposed to a cabro finished. They further argue that there was no need to a further public participation in the implementation of the project as the 3rd respondent approved the project in her capacity as a representative of the residents.

They further argue that the costs of conversion from bitumen to cabro will be very high and being donor funds they are apprehensive that unless the project is implemented they risk losing future finding. They further allege that the petitioners are not genuine and are merely pursuing a private claim on behalf of the former chairman of the board who was fired as a result of the conflict of interest allegedly arising from his desire to have the subject road finished with cabro so that he would supply the cabro.

Submissions

In his submissions dated 21.10.2020 **Mr. Ngoya** advocate for the respondents submitted that in the appreciation of the need to conduct extensive public participation the County Government made sure that the upgrade of the subject road was supported by the citizenry. He further submitted that the citizenry themselves had petitioned for the upgrading of the subject road by being tarmacked for ease of accessibility to reduce the perennial deplorable state of the road.

They also submitted that the petition was done through the office of the member of the County Assembly for Malindi Town Ward which is the official office is mandated with representing the citizens at ward level and ensuring the citizenry is heard at the county level. The same petition dated 20.01.2020 had been accompanied by petitioning residents duly executed.

They also submitted that as per the Municipal Charter that establishes the Municipal Board and vide Gazette Notice that set out its functions and mandate and as such the construction, upgrading and maintenance of roads within Malindi Municipality is not one of the functions of the board. They also submitted that the Municipality board’s mandate is limited to coming up with and approving the Municipal Annual Investment Plan under which projects like the rehabilitation of roads fall. They submitted that as per the requirements of public participation the Malindi Municipality Investment Plan underwent rigorous qualitative and quantitative public participation for a including one on 6.11.2019 at Nidhamia Hall-Shela Ward and 6.12.2019 at Kakuyuni Social Hall at which time there was no opposition from the citizenry who attended the said fora. The same was adopted during a special board meeting held on 3.03.2020 as such cannot have been a secret nor done without public participation as alleged by the petitioners. They submitted that the petitioners were mainly unhappy that their proposal to use cabro instead of bitumen was not adopted. They also submitted that the yardstick for public participation is that reasonable opportunity was given.

Determination

I have considered the application which is the subject of this ruling, the various responses thereto, the submissions made on behalf of the parties hereto and the authorities cited. I am duly guided that this Court, vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165 (3) of the Constitution, has the duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In that regard, the invitation to do so is most welcome as that is one of the core mandates of this Court.

It is however, unfortunate that the parties did not definitively address the main issue at this interlocutory stage but rather delved into the realm of the main petition and seem to have focused entirely on the issue of whether sufficient public participation was done. This I find rather unassuming as that is tantamount to pre-emptying the main petition and the advocates on record with all due respect should have known better. Having said that, I shall now put my mind to the main issue at hand which is:

Whether the conservatory orders should issue pending the determination of the main petition?

The guiding principles upon which Kenyan Courts make findings on interlocutory applications for conservatory orders within the framework of Article 23 of the Constitution are now fully settled. The Law is that, in considering an application for conservatory orders, the Court is not called upon and is indeed not required to make any definitive finding either of fact or Law as that is the province of the Court that will ultimately hear the petition.

The Law

The jurisdiction of the Court at this point is limited to examining and evaluating the material placed before it, to determine whether the applicant has made out a primafacie case to warrant grant of conservatory orders.

The Court is also required to evaluate the pleadings and determine whether denial of conservatory orders will prejudice the applicant as was stated in the case of the **Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General, Nairobi High Court Petition No. 16 of 2011; {2011} eKLR**:

> ***“At this stage, a party seeking a conservatory order only requires to demonstrate that he has a primafacie 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.”***

The issue in contention in this application is whether the applicant has established a strong primafacie case that warrants the grant of conservatory orders. As it has been held in various decisions, a primafacie case 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 serious and arguable constitutional issues to be tried or a case alleging violation of rights. In this regard, I am comforted that the Judgment of **Odunga J** in **Kevin K. Mwiti & Others v Kenya School of Law & Others stated:**

"the first issue for determination is whether the petitioner has established a primafacie case. A primafacie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which discloses arguable issues and in this case arguable constitutional issues. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the Court that will ultimately hear the petition. At this stage <u>the applicant is only required to establish a primafacie case with a likelihood of success</u>."(emphasis is mine)

Furthermore, the Court in **Kenya Association of Manufacturers & 2 others v Cabinet Secretary – Ministry of Environment and Natural Resources & 3 others {2017} eKLR** had this to say about the grant of conservatory orders:

"in an application for a conservatory order, the Court is not invited to make any definite or conclusive findings of fact or Law on the dispute before it because that duty falls within the jurisdiction of the Court which will ultimately hear the substantive dispute. The jurisdiction of the Court at this point is limited to examining and evaluating the materials placed before it, to determine <u>whether the applicant has made out a primafacie case to warrant grant of a conservatory order</u>. The Court is also required to evaluate the materials and determine whether, if the conservatory order is not granted, the applicant will suffer prejudice. Thirdly, it is to be borne in mind that conservatory orders in public Law litigation are meant to facilitate ordered functioning within the public sector and to uphold the adjudicatory authority of the court in the public interest."(emphasis is mine)

It is this Court's view, for the petitioners to raise a primafacie case with a probability of success, they need at least to demonstrate that the decision to upgrade the Absa/Barclays-Mtangani road to bitumen violated the Constitution and their human rights.

The petitioners have demonstrated through the minutes of the 3rd respondent that there was a decision to upgrade subject road to cabro standard which was letter changed to bitumen standard. From a reading of the application and the petition, it is evident that the issue of contention is whether there was need to conduct further public participation before respondents opted to upgrade the road with bitumen. This issue cannot be decided at this interlocutory stage as the Court need to interrogate the principles of public participation which can only be aptly decided at the hearing of the main petition.

This position is also fortified in **Barton v Reid Canada Ltd & Alfresh Beverages Canada Corp {2001} OJNO4116** thus:

"A strong primafacie case requirement has been interpreted to mean that the plaintiff must not only satisfy the Court there is a serious issue to be tried but also it is clearly right and utmost certain to be successful at trial."

For matters aforesaid and averred in the affidavits for and against the notice of motion there are conditions precedent to say the least that disentitles the applicants' equity considerations for a conservatory order.

The Supreme Court in **Gitaru Peter Munya v Dickson Mwenda Kithinji & 2 others {2014} eKLR** expressed itself on the matter 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 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. Conservatory orders consequently, should be granted on <u>the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes,</u> and priority levels attributable to the relevant causes …. 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 ….. 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…. That it is in the public interest that the order of stay be granted. This third condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that run through the Constitution."

In considering whether or not to grant conservatory order, it is my view that the principle of proportionality plays a very central position. Dealing with the circumstances under which the Court would grant conservatory orders the Supreme Court in **Munya's case (supra)** expressed itself as follows:

"Bearing in mind the nature of the competing claims, against the background of the public cause, we have focused our perception on the <u>public interest</u>, and the <u>concept of good governance, that runs in tandem with the conscientious deployment of the scarce resources drawn from the public.</u> Proper husbandry over public monetary and other resources, we take judicial notice, is a major challenge to all active institutions and processes of governance; and the Courts, by their established attribute of line-drawing, must ever have an interest in contributing to the safeguarding of such resources…. By our sense of responsibility, the Court's contribution to good governance in that context, takes the form of an expedited hearing for the appeal. Just that."
(emphasis is mine)

As was held in **Centre for Rights Education and Awareness (CREAW) & 7 Others (supra)** a party seeking a conservatory 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.

What amounts to real danger was dealt with by **Mwongo J** in **Martin Nyaga Wambora v Speaker of The County of Assembly of Embu & 3 others {2014} eKLR,** where expressed himself as follows:

"To those erudite words I would only highlight the importance of demonstration of "real danger." The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the Court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court's attention."

Therefore, the burden is on the applicant to show that there is danger which is imminent and evident, true and actual and fictitious and which danger deserves immediate remedial attention or redress by the Court. A remote danger will not do. In other words, the applicant must show that the probability as opposed to mere possibility of the danger occurring is real and imminent.

Consequently, the question that arises is whether in the circumstances of this case that burden has been discharged. A remote danger will not do. In other words, the applicant must show that the probability as opposed to mere possibility of the danger occurring is real and imminent. However, this must be weighed against the public interest. The question that arises is whether in the circumstances of this case that burden has been discharged.

As is clear from the affidavits sworn by the parties herein there is completely no allusion as to that imminent danger. In fact, apart from showing that they have a case that merits further investigation, there is no iota of evidence tending to show any prejudice or danger that the applicants face in the event that the road is completed. Being a crucial component and condition for the grant of conservatory orders such an averment is required to be made on oath as it cannot be a matter for submissions. As has been held time and again parties must understand that if they bring actions for which the burden of proof is on them, it is for them to prove the same.

Furthermore, there was inordinate delay on the part of the petitioners in approaching the Courts as expressed in **Okiya Omtatah Okoiti v Kenya University Teaching, Referral & Research Hospital & 2 others; Kenyatta University Council & 2 others (interested parties) {2019} eKLR Korir J.** held:

"37. How about the allegation by the opposing parties that the petition has been filed after inordinate delay? By July 2019, the petitioner had already indicated that he intended to file another suit on issues that the E & LR Court had no jurisdiction to deal with. He never did so. The email that talked of the launch of the Hospital is dated 1st October, 2019. It is presumed that the petitioner knew about it on that day. He waited until the eleventh hour on 11th October, 2019, a Friday before moving for orders. In my view, there was inordinate delay in the circumstances of this case…. 40. In any case, the petitioner approached the Court too late in the day because the Hospital had taken advanced steps towards operationalization by recruiting employees and entering into agreements with service providers."

In the present case the petitioners stated that the tender was advertised on 25th March 2020 on the 1st respondent's website. The website is open to the public and is forum where the respondents advertise their tenders. Any person can access the website and see the specifications of the tender and what it entails. The petitioners cannot feign ignorance that they did not know about it and in any case as rightly pointed out the road upgrading was done in public and not in secret, the petitioners being residents of Malindi should have had notice of the works and raised queries. In any case the petitioners decided to engage the respondents while the works continued. It would have been prudent if they approached the Court immediately they realized that the tender was for upgrading to bitumen standard instead of cabro. Instead they sat on their rights until 17.09.2020 when they filed the current application under a certificate of urgency by which time the tender had already been issued and the contracted had begun works and to an advanced stage.

In **James Marienga Obonyo & 2 others v Fund Manager Suna West National Government Constituency Development Fund Committee & another {2020} eKLR** where the petitioners sought to stop the disbursements of funds meant for CDF due to mismanagement, **Mrima J** when considering whether it was in the public good held that:

"25. The Suna West CDF is a public entity. It is regulated by Law. The nature of that Fund is to receive monies allocated to the Constituency from the Second respondent and undertake development projects within the constituency.

26. In the event the application is allowed then the Suna West CDF will not only not receive its allocation from the second respondent but will also not be able to utilize the funds already allocated and disbursed to it. As a settled government and financial policy such monies will revert to the Treasury at the end of a financial year if not utilized.

27. In the course of undertaking its mandate in Law the Suna West CDF usually enters into contracts with third parties. Those contracts are likely to be adversely affected if the application is allowed. That will expose the Suna West CDF to liabilities which must at the end of the day be paid from the funds allocated to the Suna West CDF for development projects. The people of Suna West constituency will definitely suffer loss.

28. There is also the issue of the employees of the Suna West CDF. If the application is allowed, then some of the employees will be adversely affected. I say so because some of the employees oversee the implementation of the projects. If the projects are stalled, then it means that the salaries of the employees charged with the oversight of those development projects will not be able to discharge their duties.

The effect thereof will be that the salaries of those employees be reviewed downwards otherwise the Suna West CDF will not get value for its monies.

29. The net effect of allowing the application will therefore be against the grain of public interest. The constituents of Suna West stand to suffer irreparably.

30. Whereas the petitioners are litigating in public interest and they demonstrated a primafacie case I find that the unique nature of the application calls for restraint. Allowing the application will avail a greater harm to the public that the intended public

good."

I hasten to add that rights must be looked at in context as they are not always the same and that not every social economic rights must be achieved immediately. That in deciding public interest the Court looks further at the greater good. In **Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 8 others (interested parties); Centre For Intellectual Property & Information Technology (Proposed Amicus Curiae) {2019} eKLR** the three Judge bench stated thus:

> ***"106. We take the view that it is in the public interest to have an efficient and organized system of registration of persons, and the responsible use of resources in the process, in light of the socio-economic gains of the system that have been illustrated by the respondents…."***

In **Okiya Omtatah Okoiti v Kenya University Teaching, Referral & Research Hospital & 2 others; Kenyatta University Council & 2 others (Interested parties) (supra) Korir J.** stated that:

> ***"41. Where does the public interest lie? The interest of the public lies in allowing the Hospital to start operations. The bigger picture in this case is to allow Kenyans access medical services from a brand new facility. That will reduce the strain on other medical facilities in the county. The public interest therefore frowns upon the petitioner's application."***

In the present case, the applicants have not proved to the Court that the bitumen finish will adversely affect the economic status of the residents. The residents of Malindi are required to have ease of transport and movement on a daily basis for their personal and commercial use. This is achieved by ensuring that they have roads and that such roads are accessible which is further achieved by ensuring the roads are maintained and where need be upgraded.

Therefore, as the applicants have failed to aver and prove, that they face imminent, evident, true and actual danger that they will suffer prejudice and that it is in the public good, as a result of the violation or threatened violation of the Constitution, the applicants have failed the test for the grant of conservatory order.

In the alternative, can the Court order the petitioners to give an undertaking of damages in the event they lose the petition considering it has been brought under the guise of public interest in the same was as issued when granting an injunction?

The object of an undertaking for damages while issuing injunctions were held out in **Chatur Radio Service v Phonogram Ltd {1994} KLR 114** where it was held that:-

> ***"the object in insisting upon an undertaking as to damages is that if by misadventure through the Judge not knowing all the facts, such as being misled by the affidavit evidence before him or by the arguments of counsel, an injunction is granted on an interlocutory application which ought not to have been granted, then the defendant is entitled to some remedy in damages; thus, the defendant becomes protected against the damage he may suffer by the wrongful issue of the injunction so that the whole purpose of such injunction, which is to preserve matters in status quo until the issue to be investigated in the suit can finally be disposed of, is not rendered nugatory. Save therefore in exceptional circumstances, an undertaking as to damages is required when an interlocutory injunction is granted in order that the Court granting such injunction may be able to do justice if the injunction was wrongly granted."***

It is apparent that there is a difference between an injunction and conservatory order as both remedies are provided for in Article 23 (3) (b) and (c) of the Constitution respectively. The principles for awarding a conservatory orders are somewhat different from injunctions as conservatory orders have a public interest connotation while injunctions deal with private party issues as was held in **Munya's case (supra).**

The purposes of an injunction was stated in **Ochola Kamili Holding Limited v Guardian Bank Limited {2018} eKLR** the Court stated that: -

> ***"…..The orders of injunction are mainly intended to preserve the subject matter with a view to have expeditious determination but not to oppress another party not should an injunction be used to economically oppress the other party….."*** *(emphasis mine).*

While on the purpose of conservatory orders this Court in **Judicial Service Commission v Speaker of the National Assembly & Another {2013} eKLR,** expressed that:

> ***"Conservatory orders are in my view 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 why only attach to a particular person may."*** *(emphasis mine)*

In the instant case, the budget was allocated and made public, the tender asked for bitumen, bids were evaluated and finally awarded, the subject road is now almost 75% finished. The applicants are silent on why final award etc all talked about the bitumen road, they should have stopped it as soon as it began by coming to Court to seek these same orders at that time. The road is currently at the 5th bill a position that both parties agree is true.

Consequently, who shall bear the cost that shall accompany the conversion to a cabro finish at this point? It must be noted that this is a public road for public use at the expense of the citizenry. It is also important to note that public interest as well as public resources have been used

throughout the process starting with the budget, allocation of funds, public tendering, evaluation, final award which is not a trivial matter. The applicants should have sought a remedy at the time of the advert and the tendering process.

I hasten to add that rights must be looked at in context as they are distinct to each other and that not every social economic rights must be achieved in the immediate term. Therefore, the applicants have not discharged the burden to prove the Court that the bitumen finish will adversely affect the economic rights of the residents. However, the Court does not lose sight of the significance of Article 10 on national values and principles of governance. It is not in dispute the respondents went through the tendering process, awarded the tender to a successful bidder. Thereafter, the contract instrument was signed between the first respondent with the fifth respondent. The contractual rights had already accrued for him to exercise his rights and obligations under the terms of the tender and due execution commenced along laid down in the contract deed. The rights to third parties which have already crystalized are also protected under the Law.

"In matters of this nature it is a known principle that equity does not come to the rescue of the indolent but the vigilant."

There is also a need for petitioners to be diligent and to initiate a constitutional right of this nature as soon as the infringement, threats to or violation for enforcement and the interpretation of the Constitution. The question is where would be the greater risk of justice lie. On this I am of the considered view that the public advantage and the interest outweighs issuance of conservatory orders against the ongoing construction of the bitumen road.

Therefore, as the applicants have failed to aver and prove, that they face imminent, evident and real actual danger. Further, that by refusal of conservatory orders they will suffer prejudice as a result of the violation or threatened violation of the Constitution. With respect the applicants have failed the test for the grant of conservatory order.

In the alternative, if the petitioners feel very strongly about preservation of the subject matter and given the nature of the issue at hand, the declaration thereto is for the petitioners to give an undertaking of damages in the event they lose the petition.

In other words, it does not necessarily follow that in every petition that the petitioner discloses a primafacie case, conservatory orders must be issued as a matter of course. Whereas I cannot at this stage make definite findings on the fate of the petition, it is clear to me that the petitioners have not made out a case for the grant of the conservatory orders sought.

The upshot in this is that the notice of motion dated 2nd September as amended on 28th September 2020 is hereby lost for lack of merit. The costs of it shall be in the pending petition.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF NOVEMBER 2020

....

R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Ole Kina and Mr. Atiang advocates for the petitioners

2. Ms. Gitari holding brief for Mr. Ngoya advocate for the respondent