



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CONSTITUTIONAL PETITION NO. E2 OF 2020

GABRIEL OTIENDE.....1ST PETITIONER/APPLICANT

EVANS ONYANGO.....2ND PETITIONER/APPLICANT

ELIJAH ODINGO OSADHO.....3RD PETITIONER/APPLICANT

DICKSON ORUKO WASONGA.....4TH PETITIONER/APPLICANT

RICHARD ATITO ORONDO.....5TH PETITIONER/APPLICANT

VERSUS

COUNTY COMMISSIONER – SIAYA COUNTY.....1ST RESPONDENT

CABINET SECRETARY

MINISTRY OF INTERIOR & CO-ORDINATION.....2ND RESPONDENT

OF NATIONAL GOVERNMENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. This ruling pertains the application dated 8th October 2020 in which the applicants seek the following orders;

“1. Spent

2. Spent

3. There be temporary Order of Stay of the implementation of Gazette Notice Number 4571 Vol. CXXII No. 128 of 3rd July 2020 together with all its inter alia consequential Administrative effects, purporting to transfer Gem Yala Sub-County Headquarters from Sawagongo to Yala Township until the hearing and determination of this Constitutional Petition.

4. Costs of this Application.”

2. It is the petitioners’ case that the respondents herein unilaterally vide Gazette Notice Number 4571 Vol. CXXII No. 128 of 3rd July 2020 transferred Gem Yala Sub-County Headquarters from Sawagongo to Yala Township without undertaking the requisite Public Participation envisaged under Article 10(2) (a) of the Constitution of Kenya, 2010.

3. Despite service, the respondents have not entered appearance or filed any pleadings in the instant case. The application was disposed by way of written submissions.

Petitioners/Applicants Submissions

4. It wa submitted that this is an interlocutory Application and as such the petitioners/applicants would avoid the temptation of delving into

and extensively elaborating issues which are better off handled in the main Petition as was held in the case of **Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & Another [2016] eKLR.**

5. The petitioners/applicants submitted that Article 23(3) (c) of the Constitution laid basis for the grant of a Conservatory Order, and that the Petition herein was meant to uphold the Constitution and Constitutionalism, particularly the principle of Public Participation.

6. It was further submitted that the Petition disclosed a prima facie case with a likelihood to succeed as the purported Public Participation was undertaken on 14/8/2020, well after the Gazette Notice illegally transferred the headquarters to Yala Town on 3/7/2020 and that this was an afterthought meant to cover up the misdeeds of the respondents.

7. It was submitted that there is a clear infringement of the Constitution, particularly the Petitioners right to Public Participation as the launch of the headquarters has not been done, and even though the Respondents alleged that the Sub-County offices have moved to Yala and already in operation, the petitioners were not being informed when this happened. Further it does not in any way clean up the unconstitutional manoeuvre.

8. The petitioners/applicants further submitted that the issues herein are of great Public Interest and deeply resonate with the protection of the Constitutional National Values as per Article 10(2) (a) of the Constitution.

9. The respondents despite being served with the petition and the application for conservatory orders, did not file any response to the application herein. Neither did they file any submissions opposing the application.

Analysis & Determination

10. In considering an application for conservatory orders, the court is not required to undertake a deep analysis of the law and the facts. This was the holding of the court in **Platinum Distillers Limited v Kenya Revenue Authority [2019] eKLR.**

11. At this stage, the Applicant is only required to establish a prima facie case with a likelihood of success and the prejudice to be suffered if the orders sought are not granted. Musinga, J (as he then was) clearly explained this 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** when he stated that:

“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.”

12. As it has been held in various decisions, a prima facie case is not necessarily a case that 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.

13. In this case, it is asserted that the decision or action taken by the Respondents to transfer the Gem Yala Sub-County Headquarters from Sawagongo to Yala Township flies in the face of the constitutional provisions in particular Articles 10(2) (a) of the Constitution. Without saying more, it is clear that this petition discloses prima facie arguable issues for trial. In other words, it cannot be said that the petition is wholly frivolous or unarguable.

14. Having passed the first hurdle, the second issue is whether the Applicant has satisfied the provisions of Article 23(3)(c) of the Constitution. 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. However, this must be weighed against the public interest.

15. The Applicants deposed in their supporting affidavit that the transfer of the Sub-County headquarters shall claw back the socio-economic gains materialized by the presence of the offices in Sawagongo, marginalize the region hence defeating the objects of devolution as envisaged in Article 174 (C-H) of the Constitution, rendering the existing facilities into a wasted investment and lead to over-concentration of government services away from majority of the populace.

16. Accordingly, it is my humble view that the application dated 8th October 2020 is meritorious and is in the best public interest to allow the conservatory orders sought to avoid rendering the instant petition nugatory.

17. In the end, I allow the prayer number 3 of the application and order as follows:

That there be temporary Order of Stay of the implementation of Gazette Notice Number 4571 Vol. CXXII No. 128 of 3rd July 2020 together with all its inter alia consequential Administrative effects, purporting to transfer Gem Yala Sub-County Headquarters from Sawagongo to Yala Township until the hearing and determination of this Constitutional Petition. Costs shall be in the main petition.

18. Orders accordingly.

Dated, Signed and Delivered at Siaya this 16th Day of December, 2020

R.E.ABURILI

JUDGE