



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

PETITION NO 3 OF 2019

HON. MOITALEL OLE KENTA & 45 OTHERS.....PETITIONERS

VERSUS

THE COUNTY GOVERNMENT OF NAROK.....1ST RESPONDENT

HIS EXCELLENCY THE GOVERNOR

OF NAROK COUNTY.....2ND RESPONDENT

THE SPEAKER NAROK COUNTY ASSEMBLY.....3RD RESPONDENT

RULING

INTRODUCTION

1. The petitioners filed their notice of motion on 6th 9th August 2019 under certificate of urgency seeking, inter alia, a temporary injunction and orders of prohibition restraining or prohibiting the respondents from implementing the municipal charter for both Narok and Kilgoris towns or instituting municipal boards for each town, and/or interfering with the status of the two towns, pending *the inter partes* hearing and determination of the instant application.
2. During the pendency of the notice of motion, the petitioners filed their petition on 9th August 2019.
3. The respondents opposed their application, on the basis that they had complied with the procedural relevant laws.

THE PETITIONERS' CASE

GROUND IN SUPPORT OF THE MOTION

4. The case for the petitioners is that the process of conferment of the municipal status on the two towns should be restrained pending the *inter partes* hearing and determination of the instant application and the petition. Their application is supported by four grounds that are set out on the face of the notice of motion and the 24 paragraphs supporting affidavit of Keleini Ole Nchoe. The major grounds are that pending the hearing and determination of both the application and the petition, the respondents should be restrained and prohibited from implementing the municipality charter in respect of both Narok and Kilgoris towns. Additionally, they should be stopped from instituting municipal boards for them.

5. Furthermore, the respondents conferred upon the two towns municipal status on 4th July 2019, by way of a charter that was passed by the County Assembly. In doing so, the County Assembly acted contrary to the Constitution and the Urban Areas and Cities Act of 2011 as amended in 2019. The said conferment of the municipal status will have the effect of increased payment of rates on the properties of the citizens of Narok County and other levies associated with such conferment. The petitioners have also stated that the public participation was not sufficient. And that the conferment of a municipal status upon Narok town is a nullity as the town does not meet the criteria and standards, by law that a town has to fulfill before it is elevated into a municipality.

6. That the purported municipal charter purports to come up with a municipal board that has power to make by-laws, which is against the principle of separation of powers and as such is an illegality. Unless the orders sought are granted the petition will be rendered nugatory and that the applicants and the residents of Narok are at risk of being slapped with new tariffs and levies in the form of taxes, so as to sustain the huge budget that comes with a municipality all to their detriment and loss. Finally, the respondents will not suffer any harm or loss if the

prayers sought are granted.

THE PETITIONERS' SUPPORTING AFFIDAVIT

7. In addition to the foregoing, the application is supported by a 24 paragraphs supporting affidavit of Keleina Ole Nchoe, sworn on behalf of the petitioners. The major averments in that affidavit are as follows. He is a registered voter and a resident of Narok, who has been authorized to swear the affidavit on behalf of the other petitioners. On 1st July 2019, the respondents advertised in the Star Newspaper that there was going to be a public participation exercise to be conducted on 3rd July 2019 in different areas within the county. The said newspaper does not have wide circulation to serve as sufficient notice to the residents about the exercise. The respondents held separate meetings on the same date, in total disregard of the rules governing the conduct of meaning and proper public participation.

8. After learning of the suspicious conduct of the respondents, the petitioners instructed their advocate to write to the Speaker of the County Assembly to call for a stakeholders meeting to have the issues addressed before passing the charter. This plea was ignored by the respondents, who then proceeded to impose the charter. After one day, that is, on 4th July 2019 the same motion was tabled in the county assembly and was passed without the input of the area residents as required by the Urban Areas and Cities Act of 2011 as amended in 2019. On 5th July 2019, the respondents took the charter to the Government printer, which was then published in the Kenya Gazette of 12th July 2019.

9. Furthermore, the petitioner has deposed that following legal advice from his advocate, which he believed, for a town to be conferred with a municipal status, it has to have a population of a minimum population of 50,000 people. The census report of 2009, shows that the urban population for the entire Narok County is 44,778 people, while the entire population for Transmara, wherein Kilgoris town is situated, is 13,716 people. Again following advice from his advocate, which he believed, there are two procedural ways in which the process may be started before a town is conferred with municipal status. First, the process may be started by the cabinet secretary responsible for matters relating to urban areas and cities. Second, it may also be initiated by the County Government by a written request to the cabinet secretary to appoint an *ad hoc* committee, which will then give its recommendations on the proposal. The recommendations must be in accordance with the provisions of the Urban Areas and Cities Act of 2011 as amended in 2019.

10. In that regard, the petitioner avers that no such *ad hoc* committee was ever constituted nor were its recommendations made public for purposes of public debate and deliberations. This will have enabled members of the public to give their views on the proposal of converting Narok town into a municipality. The petitioner has also averred that even if the charter met all the procedural threshold, the charter contravenes the constitution for it gives the Governor powers to amend it at will and it purports to confer upon the municipal board legislative powers, which in itself contravenes the principle of separation of powers.

11. The petitioner has averred that this suit has been filed in his own behalf and on behalf of Kenyans, who want both the County Assembly and the Executive through the respondents to keep fidelity to the rule of law and constitutionalism.

THE PETITIONERS' FURTHER SUPPORTING AFFIDAVIT

12. The petitioner has deposed to the following major matters in his further undated 14 paragraphs supporting affidavit. First, that in response to paragraph 4 of the replying affidavit of the first and second respondent, a single petitioner can move the court for the enforcement of his or her constitutional rights. Second, in response to paragraph 7 of the replying affidavit of the first and second respondent, the respondents have to exercise their powers in accordance with the law as stipulated in section 9 of the Urban Areas and Cities Act and the Constitution. Additionally, the respondents must follow due process. The petitioner has averred in response to paragraphs 8 to 25 of the replying affidavit that the issues raised in those paragraphs are the same issues that triggered the petitioners to file the earlier withdrawn petition No. 11 of 2019, which was withdrawn following the motion of the County Assembly that withdraw the motion in respect of the charter. The withdrawal by the assembly was accompanied with "*a promise that they would start the process afresh by engaging the residents before re-introducing the charter back to the Assembly.*"

13. Furthermore, the petitioner in response to paragraph 4 of the supplementary affidavit has averred that the respondents are keen to mislead the court that several other forums for public participation were conducted in February 2019, since the respondents have not annexed a copy of the advertisement inviting members of the public to attend the forum. Additionally, the petitioners have no proof that they made payments to the local radio stations to make public announcements to the public to attend the forum and they have not annexed the minutes of those meetings.

14. The petitioner has also averred that the respondents went ahead and appointed the municipal manager in total disregard of the court's directive and undertaking.

THE SUBMISSIONS OF THE PETITIONERS

15. Counsel for the petitioner, Mr. Meing'ati, submitted that the conferment of municipality status on the towns will have massive effects on the citizens of Narok county with increased rates on their property and other levies associated with the said conferment. He also submitted that there was no sufficient public participation. He has further submitted that Narok town does not meet the demographic requirements to enable it to be conferred with a municipal status.

16. Furthermore, counsel has submitted that no *ad hoc* committee was formed by the county Government to consider the recommendations of Narok town to be converted into a municipality.

17. Additionally, counsel has submitted that the municipal charter vests legislative power upon the boards with power to pass by-laws, which is illegal and offends the principle of separation of powers.

18. Counsel has also submitted that under article 22 of the Constitution of Kenya every person has a right to file court proceedings, where a right of fundamental right has been denied, violated or infringed, or is threatened. He therefore submits that the petitioners' rights were violated and were therefore entitled to file a case in court.

19. Counsel cited the case of *Gitarau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR* in which the issue of conservatory orders was considered by the Supreme Court. That court in part stated that: "*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 cause*".

20. Counsel has therefore urged the court to grant the orders sought, since the petitioners and the people of Narok will suffer grave injustice and irreparable loss and damage, if the orders are not granted.

The 1st and 2nd RESPONDENTS' CASE

21. The first, second and the third respondents have opposed the application. The 1st and 2nd respondent have filed a 38 replying affidavit (through James Wamugo) and written submissions in opposition to the application. In his deposition, James Wamugo, has deposed to the following major matters. He has deposed that he is the legal advisor to the first and second respondents and that the petitioners have misstated and contrived the allegations of fact. He also has deposed that whereas the petition is purportedly filed by 46 petitioners, only 14 petitioners are listed by their full names with the rest 32 whose identities are unknown for litigation purposes. The respondents aver that the petitioners claim to have filed the suit on behalf of the residents of Narok under the guise of public interest, when its true purport is in fact intended to serve the economic interests of a section of individuals; whilst stunting the economic growth and development of Narok town.

22. Furthermore, on 19th June 2018 the 2nd respondent in consultation with the County Executive Committee forwarded to the County Assembly a draft proposal seeking to convert Narok town into a municipality, pursuant to the provisions of section 9 of the Urban Areas and Cities Act of 2011; which vests the 2nd respondent with power to confer municipality status on any town within its jurisdiction, provided it meets the criteria set out in the act.

23. Thereafter, the municipal charter was tabled before the Narok County Assembly on the 21st June 2018, in which the 3rd respondent forwarded it to its Committee on Planning, Trade, Tourism and Co-operatives Development in order to subject the said draft Municipal Charter to public participation in conformity with article 196 of the Constitution of Kenya. On 28th June 2018, the Planning Committee invited all stakeholders of the proposed Narok Municipality and the members of the general public to present their views on the Charter. In the meeting that was held at Narok Youth Empowerment Center members of the public were taken through the charter and they presented their submissions. Annex marked "JW-1(a)" are true copies of the invitation notice and minutes of that meeting. Following this meeting the Planning Committee wrote its initial report, which report was presented to the floor of the Assembly by the chairperson of the Committee on 29th June 2018, namely Hon. Kirrorkor Tipapa. The report is marked as annex "JW-2". The report proposed specific amendments to the charter. The report also noted complaints by the public that they had been accorded limited opportunity to make their views known.

24. Furthermore, "*in the midst of the debate, a section of members of the County Assembly, some of whom were members of the Planning Committee, opted to engage in an intense debate on the content of the draft charter with the consequence that they opposed the report in its entirety. The mood of the house being tense, it was resolved that the debate of the charter would be deferred to 3rd July 2018. (Annex marked "JW-3" is a true copy of the Official Hansard Report for proceedings of 29th June 2018 of the Narok County Assembly.*" On 2nd July 2018 members of the Planning Committee met at the Lexington Hotel in a bid to build consensus by allowing members who were opposed to the committee's report to outline their grievances. In that meeting it became clear that the issues in contention revolved around the proposed municipal boundaries, land rates and levies, handling of agricultural lands and the selection of municipal members. As a result, it was resolved that the Planning Committee would facilitate the exercise of further public participation through meetings. It was also resolved that the information concerning the charter would be availed to stakeholders and the public through members of the Planning Committee and the local radio stations. That as a result of these resolutions, the Chairperson of the Planning Committee moved a motion of withdrawal on the floor of the Assembly on 3rd July 2018 to effectively retract the Planning Committee's initial report to allow further public participation. The motion for withdrawal was put up for a vote by acclamation and eventually passed.

25. In addition to the foregoing, the Planning Committee wrote a letter to the Clerk of Kajiado County Assembly requesting for a bench marking visit in order to draw lessons on how they managed to establish its municipalities, set-up operations and compare the benefits and impact its municipalities have had on the county. As a result of lessons learned from the public participation in Kajiado County in resolving the hurdles that county faced; the Planning Committee issued a public notice on 17th July 2018 inviting members of the public to public participation forums. The 3rd respondent also issued a communication to all members of the Assembly notifying them of the intended public participation exercises.

26. Despite the above endeavours the 3rd to 14th petitioners and some individuals filed *Narok Constitutional Petition No. 11 of 2018, Rimoine Ole Sordo & 19 others v County Government of Narok & 2 others*, in which they sought to bar the 3rd respondent from presiding over any debates to confer municipal status on Narok town and also to prohibit the second respondent from conferring municipal status upon Narok town. The petitioner was withdrawn on 30th April 2019 after the court was informed that a withdrawal motion in respect of conferring municipal status upon Narok town had been passed in the Assembly.

27. Furthermore, at about this time it became apparent that it was necessary to confer municipal status upon Kilgoris town. As a result, a draft charter was drawn for Kilgoris town, which was also to be subjected to public participation.

28. On 1st July 2019 the Clerk of the Narok County Assembly issued a communication to all members of the public through an advertisement in the Star Newspaper and Radio announcements on Mayian FM and Sidai FM notifying them of the intended public participation forums, that were to be conducted at various venues within the county on 3rd July 2019.

29. The public participation exercises proceeded smoothly on the said date in respect of the charters for both Narok and Kilgoris towns. The views of the public were considered.

30. Following the public participation exercises, both charters were tabled before the Narok County Assembly on 4th July 2019 and after debate the matter was put up to a vote and the Assembly voted and approved municipal status for both Narok and Kilgoris towns. After securing the concurrence of the County Assembly, the 1st and 2nd respondents caused the charters to be published in the Kenya Gazette. Following the concurrence of the County Assembly, the 1st and 2nd respondents caused the charters to be published in the Kenya Gazette of 12th July 2019 in accordance with section 9 (1) of the Urban Areas and Cities Act.

31. Following advice from their advocates the respondents believe to be true that it is trite law that that public participation does not dictate that the views of every one must be taken as dispositive. *“To have such a standard would be to give a virtual veto power to each individual in a community to determine collective affairs.”*

32. In response to the petitioners’ assertions that that there was no *ad hoc* committee that was constituted by the County Government to consider recommendations to the cabinet secretary responsible for matters relating to urban areas and cities, of conferring municipality status on Narok and Kilgoris towns, the legal advisor upon advice by his advocate, believes that there is no such requirement under section 9 of the Urban Areas and Cities Act. The provisions of that section do not require the creation of an *ad hoc* committee prior to the conferment of municipality status on any town. Furthermore, in response to the allegations of the petitioners that the conferment of municipality status upon Narok and Kilgoris, will automatically result in increased rates on properties and levies, the respondents has deposed as follows. The determination of rates is not arbitrary, for it is guided by the provisions of the Valuation for Rating Act (Cap 266) Laws of Kenya and the Rating Act (Cap 267) Laws of Kenya. Before any levies or any form of tax are imposed on the residents of the towns, the prescribed legislative process is undertaken in strict conformity with the law, wherein the proposed levies and taxes are discussed in public participation forums and eventually incorporated into the annual County Finance Act for approval by the members of the County Assembly.

33. Furthermore, the boards which are appointed pursuant to sections 12 and 14 of the Urban Areas and Cities Act are to collect, settle and implement tariffs, rates, taxes, levies, duties, fees and surcharges on fees as may be levied by the 1st respondent from time to time. The advisor has deposed that the petitioners’ assertion that the passing of bye-laws in the municipalities would amount to usurping of legislative powers is flawed as the said municipal boards are only empowered by section 20 (1) of the Urban Areas and Cities Act to execute the following, amongst other functions. 1. Implement applicable national and county legislation. 2. Formulate and implement an integrated development plan. 3. Control land use, land sub-division, land development and zoning by public and private sectors. 4. Developing and adopting policies, plans, strategies and programmes and may set targets for delivery of services. 5. Facilitate and regulate public transport.

1ST AND 2ND RESPONDENTS’ SUPPLEMENTARY AFFIDAVIT

34. In addition to his supporting affidavit, the advisor to the two respondents has deposed to the following major matters in his supplementary affidavit. He has deposed to the details concerning the meetings conducted by the Narok County Government in respect of public participation on the issue of conferring municipal charter on Narok and Kilgoris towns. On 13th August 2019 public forums were convened at Kilgoris (at Kilgoris Social Hall) Dikirr, at Emurua Dikirr (at Dikirr AGC), at Narok Youth Empowerment Centre (at Narok), at Nairegia Enkare Catholic Church (in Narok East), Youth Empowerment Centre at Ololulunga and at CDF Lemek (at Narok west).

35. On 11th May 2019 a similar forum was held at Matatu Sacco in Narok town and on 16th May 2019 and a similar forum was held at Narok town with the Plot Owners’ Association in Narok town. In all these forums views and proposals in respect of the municipal charter were received and were taken into account. The deponent has deposed that the creation of the municipalities envisaged in the charter is an implementation of The Urban Areas and Cities Act No 13 of 2011 and the process is being undertaken with the support of the National Government as well as the World Bank.

36. Furthermore, the deponent has deposed that over the last two years, a number of counties have promulgated municipal charters and have been approved by their respective county assemblies. Narok County has been left behind owing to the litigation filed by the petitioners in *Narok High Court Petition No. 11 of 2018, Rimoine Ole Sordo and 19 others v The County Government of Narok and 2 others*.

37. Additionally, the deponent has deposed that he is aware that the pace of implementation of this project has been a source of concern for the World Bank, who have expressed disappointment and have also threatened to withdraw funding in view of the slow pace of implementation. Finally, the deponent has deposed that contrary to the petitioners’ assertions both Narok and Kilgoris towns meet the minimum criteria under the law to qualify to be elevated to municipal status.

THE SUBMISSIONS OF THE 1ST AND 2ND RESPONDENTS.

38. Mr. Kemboy, counsel for the respondents submitted that the applicants are not entitled to conservatory orders, for they have failed to meet the threshold for the grant of the same. The following are the reasons in support of the counsel’s position. First, the municipal charters under contest were passed by the Narok Assembly on 5th July 2019 and were gazetted thereafter on 8th July 2019. The application to challenge them was filed one month later. This according to counsel shows there was no urgency or need for a conservatory order.

39. Second, the municipal charters were promulgated pursuant to the provisions of Article 176 and 184 of the Constitution of Kenya, the Urban Areas and Cities Act as amended as well as section 104 and 111 of the County Government Act No. 17 of 2012. He further submitted that the petitioners who include a Member of Parliament and Members of the County Assembly had ample time opportunity to challenge these provisions in their respective legislative organs. If they failed to do so, because they were in a minority, they should not now use the judicial process to defeat the democratic processes in Parliament and the County Assembly.

40. Third, the petitioners relied on the 2009 census report to submit that both Narok and Kilgoris towns do not meet the population threshold

required to be granted municipal status. They did not back this assertion with any evidence. He submitted that these towns have witnessed an influx of significant migrants over the last ten years.

41. Fourth, under section 9 (4) of the Urban Areas and Cities Act No. 13 of 2011, the county governor is vested with power to confer municipal status upon a town if that town is the headquarters of the county. Since Narok town is the headquarters of the county, it need not meet the population threshold.

42. Furthermore, counsel submitted that the respondents complied with law in respect of public participation and the legislative processes in the Narok Assembly. Counsel further submitted that the public participation, should not be used as a veto power by individual members society, which is not contemplated by the Constitution.

43. In response to the petitioners' submissions that the municipal charters are a threat to their properties as the municipalities will levy excessive rates and charges on their properties, counsel has submitted that the municipal boards will be exercising a delegated legislative function of the County Government. In terms of section 31 (1) (d) of the charter, the quantum of rates, levies, taxes, duties, fees and surcharges on fees are submitted as recommendations to the County Assembly for approval. Currently, these charges are collected by the county in terms of 61 of the Urban Areas and Cities Act. It therefore follows that the municipality boards will not embark on wanton and erratic imposition of new rates, levies, taxes, duties, fees and surcharges on fees. The respondents have cited a number of authorities. He therefore urged the court to dismiss the application.

THE CASE FOR THE 3RD RESPONDENT

44. The 3rd respondent did not file any supporting affidavit.

Its counsel, however, filed written submissions in opposition to the petition. He also raises a preliminary objection.

Counsel submitted that the petitioners sought to rely on article 23 of the 2010 Constitution of Kenya in seeking conservatory orders. He relied on *Simeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others [2018] eKLR*, in which the court stated that article 23 does not bar the court from granting conservatory orders, wherein the constitutionality of legislation is challenged. He submitted that courts ought to be cautious in striking down a statute. The court's power to do so ought to be exercised sparingly; where the court is satisfied that the power ought to be exercised.

45. He further submitted that the petitioners are not entitled to the conservatory orders; since they have failed to meet the threshold for the grant of those orders. Such orders are granted to preserve the subject matter of the suit at the interlocutory stage or to prevent further breach pending the determination of the cause or application.

46. It was also his further submission that if indeed there was imminent danger, then the petitioners ought to have pleaded the same from the start. He cited *Bishop Joseph Kimani & Others v Attorney General & Others, Mombasa High Court, Petition No 669 Of 2009*, in which that court approved a cautious and prudent approach where the court is called upon to suspend the operation of a statute at the interlocutory stage. The court opined that an applicant for such a prayer must show that the operation of the legislative provisions is a danger to life and limb at that very moment.

He therefore urged the court not to grant the application.

ISSUES FOR DETERMINATION

47. I have considered the affidavit evidence of the parties, their rival submissions and the authorities cited. As a result, I find the following to be the issues for determination.

1. whether or not the petitioners have met the threshold for the grant of conservatory orders.
2. Who should bear the costs of this application?

ISSUE 1

48. Conservatory orders are granted to preserve the subject matter of the cause or application from damage or loss, pending the final determination of the cause or application. The burden of establishing that the orders sought should be granted lies squarely on the shoulders of the petitioners. The petitioner may discharge this burden by producing evidence either orally or by affidavit. At this interlocutory stage, the court is only concerned with whether the petitioners have produced evidence of real danger to the subject matter of the petition, that may warrant intervention by the court through the issuance of conservatory orders.

49. I have perused the petitioners' affidavit evidence, and I find that the evidence of the petitioners is that the conferment of municipal status to both Narok and Kilgoris towns was not preceded by meaning public participation. It is the evidence of the petitioners that the conferment of municipal status upon those two towns, will increase monetary expenses in the form of paying rates, taxes, levies, surcharges of fees to support those municipalities. Closely related with this is the assertion by the petitioners that those municipalities will pass by-laws, which they submit is against the principle of separation of governmental powers; which matter is a province of the legislature. The petitioners also contended that the towns do not meet the population criteria for conferment of municipality status, which is fifty thousand (50,000) people for each town.

50. Mr. Meing'ati, counsel for the petitioners submitted that based on the foregoing evidence and the applicable law, the petitioners have made out a case for the grant of conservatory orders.

51. Mr. Kemboy for the first and second respondents, submitted that they complied with all laws. He further submitted that the petitioners have not demonstrated the existence of a real danger to warrant this court to grant them conservatory orders. He further submitted that the submissions of the petitioners are speculative in nature.

52. Mr. Ng'aruiya for the third respondent, supported the position taken by the first and second respondents.

I find that the issues raised by the petitioners singly or collectively, are not in themselves evidence of real danger to the citizens of Narok county, that warrant the issuance of conservatory orders. The issue of real danger is a matter of evidence to be decided on a case to case basis. There is no fixed rule about it.

53. For the petitioners to assert that the conferment of municipal status on the two towns will have massive effect in the form of increased rates and levies associated with such conferment amounts to speculation, which is not allowed by law.

54. I further find that the issues raised by the petitioners do challenge the constitutionality of the conferment of municipality status upon the two towns of Narok and Kilgoris. These are matters to be raised and canvassed during the *inter partes* hearing, which is the final stage of this litigation in this court.

55. The upshot of the foregoing is that the petitioners have not discharged the burden of demonstrating that there is real danger that warrants this court to intervene through the issuance of conservatory orders.

ISSUE 2

56. This petition is at the interlocutory stage. It is therefore in the interests of justice that the costs of this application be costs in cause and I so order.

57. This application is dismissed with costs to be in cause.

Ruling signed, dated and delivered in open court at Narok this 26th day of September, 2019 in the absence of Mr. Meing'ati for the petitioners and Mr. Kemboy for the 1st and 2nd respondents and in the absence of Mr. Ng'aruiya for the 3rd respondent.

J. M. Bwonwong'a

Judge

26/9/2019